MANEKA GANDHI

v.

UNION OF INDIA

January 25, 1978

[M. H. BEG, C. J., Y. V. CHANDRACHUD, P. N. BHAGWATI, V. R. KRISHNA IYER, N. L. UNTWALIA, S. MURTAZA FAZAL ALI, AND P. S. KAILASAM, JJ.]

Constitution of India Articles 14, 19 (1) (*a*) *and* 21—*Personal liberty—Whether right to go abroad is part of personal liberty—Whether a law which complies with Article* 21 *has still to meet the challenge of Article* 19—*Nature and ambit of Article* 14—*Judging validity with reference to direct and inevitable effect—Whether the right under Article* 19(1) (*a*) *has any geographical limitation.*

Passports Act, 1967—*Ss.* 3,5,6,10(3)(c), 10(5)—*Whether* s.10(3)(c) *is violative of Articles* 14, 19(1) (a) (b) & 21—*Grounds for refusing to grant passport—Whether the power to impound passport arbitrary—"in general public interest" if vague.*

Principles of Natural Justice—Whether applies only to quasi judicial orders or applies to administrative orders affecting rights of citizens—When statute silent whether can be implied—Duty to act judicially whether can be spelt out—In urgent cases whether principles of natural justice can apply.

The petitioner was issued a passport on June 1, 1976 under the Passport Act, 1967. On the 4th of July 1977, the petitioner received a letter dated 2nd July, 1977, from the Regional Passport Officer Delhi intimating to her that it was decided by the Government of India to impound her passport under s. 10(3)(c) of the Act "in public interest". The petitioner was required to surrender her passport within 7 days from the receipt of that letter. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in s.10(5). A reply was sent by the Government of India, Ministry of External Affairs on 6th July 1977 stating *inter alia* that the Government decided "in the interest of the general public" not to furnish her copy of the statement of reasons for the making of the order. The petitioner thereupon filed the present Writ Petition challenging action of the Government in impounding her passport and declining to give reasons for doing so. The Act was enacted on 24-4-67 in view of the decision of this Court in *Satwant Singh Sawhney's* case. The position which obtained prior to the coming into force of the Act was that there was no law regulating the issue of passports for leaving the shores of India and going abroad. The issue of passport was entirely within the unguided and unchannelled discretion of the Executive. In *Satwant Singh's* case, this Court held by a majority that the expression 'personal liberty' in Article 21 takes in, the right of locomotion and travel abroad and under Art. 21 no person can be deprived of his right to go abroad except according to the procedure established by law. This decision was accepted by the Parliament and the infirmity pointed out by it was set right by the enactment of the Passports Act, 1967. The preamble of the Act shows that it was enacted to provide for the issue of passport and travel documents to regulate the departure from India of citizens of India and other persons and for incidental and ancillary matters. Section 3 provides that no person shall depart from or attempt to depart from India unless he holds in this behalf a valid passport or travel document. Section 5(1) provides for making of an application for issue of a passport or travel document for visiting foreign country. Sub-section (2) of section 5 says that on receipt of such application the Passport Authority, after making such enquiry, if any, as it may consider necessary, shall, by order in writing, issue or refuse to issue the passport or travel document or make or refuse to make that passport or travel document endorsement in

A respect of one or more of the foreign countries specified in the application. Sub-section (3) requires the Passport Authority where it refuses to issue the passport or travel document or to make any endorsement to record in writing a brief statement of its reasons for making such order. Section 6(1) lays down the grounds on which the Passport Authority shall refuse to make an endorsement for visiting any foreign country and provides that on no other ground the endorsement shall be refused. Section 6(2) specifies the grounds on which alone and on no other grounds the Passport Authority shall refuse to issue the Passport or B travel document for visiting any foreign country and amongst various grounds set out there the last is that in the opinion of the Central Government the issue of passport or travel document to the applicant will not be in the public interest Sub-section (1) of section 10 empowers the Passport Authority to vary or cancel the endorsement on a passport or travel document or to vary or cancel it or the conditions subject to which a passport or travel document has been issued having regard to, *inter alia*, the provisions of s. 6(1) or any notification under s. 19. Sub-section (2) confers powers on the Passport Authority to vary or cancel the conditions of the passport or travel document on the application of C the holder of the passport or travel document and with the previous approval of the Central Government. Sub-section (3) provides that the Passport Authority may impound or cause to be impounded or revoke a passport or travel document on the grounds set out in cl. (a) to (h). The order impounding the passport in the present, case, was made by the Central Government under cl. (c) which reads as follows :—

> "(c) If the passport authority deems it necessary so to do in the interest of the sovereignty and integrity of India, the security of India, D friendly relations of India with the foreign country, or in the interests of the general public."

Sub-section (5) requires the Passport Authority impounding or revoking a passport or travel document or varying or cancelling an endorsement made upon it to record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same, unless, in any case, the Passport Authority is of the opinion that it E will not be in the interest of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interest of the general public to furnish such a copy. The Central Government declined to furnish a copy of this statement of reasons for impounding the passport of the petitioner on the ground that it was not in the interest of the general public to furnish such copy to the petitioner.

The petitioner contended.

F 1. The right to go abroad is part of "personal liberty" within the meaning of that expression as used in Art. 21 and no one can be deprived of this right except according to the procedure prescribed by law. There is no procedure prescribed by the Passport Act, for impounding or revoking a Passport. Even if some procedure can be traced in the said Act it is unreasonable and arbitrary in as much as it does not provide for giving an opportunity to the holder of the Passport to be heard against the making of the order.

G 2. Section 10(3)(c) is violative of fundamental rights guaranteed under Articles 14, 19(1) (a) and (g) and 21.

3. The impugned order is made in contravention of the rules of natural justice and is, therefore, null and void. The impugned order has effect of placing an unreasonable restriction on the right of free speech and expression guaranteed to the petitioner under Article 19(1)(a) as also on the right to carry on the profession of a journalist conferred under Art. 19(1)(g).

H 4. The impugned order could not consistently with Articles 19(1)(a) and (g) be passed on a mere information of the Central Government that the presence of the petitioner is likely to be required in connection with the proceedings before the Commission of Inquiry.

5. In order that a passport may be impounded under s. 10(3)(c), public interest must actually exist in present and mere likelihood of public interest arising in future would be no ground for impounding the passport. A

6. It was not correct to say that the petitioner was likely to be required for giving evidence before the Shah Commission.

The respondents denied the contentions raised by the petitioner.

B

BEG, C. J., (Concurring with Bhagwati, J.)

1. The right of travel and to go outside the country is included in the right to personal liberty. [643 G]

Satwant Singh Sawhney v. *D. Ramarathnam Assistant Passport Officer, Government of India, New Delhi & Ors.* [1967] 3 SCR 525 and *Kharak Singh* v. *State of U.P. & Ors.* [1964] 1 SCR 332 relied on.

C

2. Article 21 though framed as to appear as a shield operating negatively against executive encroachment over something covered by that shield, is the legal recognition of both the protection or the shield as well as of what it protects which lies beneath that shield. [644 B]

A. K. Gopalan v. *State of Madras*, [1950] SCR 88 and *Additional District Magistrate, Jabalpur* v. *S. S. Shukla* [1976] Suppl. SCR 172 @ 327 referred to.

D

Haradhan Saha v. *The State of West Bengal & Ors.* [1975] 1 SCR 778, *Shambhu Nath Sarkar* v. *State of West Bengal* [1973] 1 S.C.R. 856 and *R. C. Cooper* v. *Union of India* [1973] 3 SCR 530 referred to.

3. The view that Articles 19 and 21 constitute watertight compartments has been rightly over-ruled. The doctrine that Articles 19 and 21 protect or regulate flows in different channels, was laid down in *A. K. Gopalan's* case in a context which was very different from that in which that approach was displaced by the counter view that the constitution must be read as an integral whole, with possible overlappings of the subject matter of what is sought to be protected by its various provisions, particularly by articles relating to fundamental rights. The observations in *A. K. Gopalan's* case that due process with regard to law relating to preventive detention are to be found in Art. 22 of the Constitution because it is a self-contained code for laws. That observation was the real *ratio decidendi* of *Gopalan's* case. Other observations relating to the separability of the subject matters of Art. 21 and 19 were mere *obiter dicta*. This Court has already held in *A. D. M. Jabalpur's* case by reference to the decision from *Gopalan's* case that the ambit of personal liberty protected by Art. 21 is wide and comprehensive. The questions relating to either deprivation or restrictions of personal liberty, concerning laws falling outside Art. 22 remain really unanswered by the *Gopalan's* case. The field of 'due process' for cases of preventive detention is fully covered by Art. 22 but other parts of that field not covered by Art. 22 are 'unoccupied' by its specific provisions. In what may be called unoccupied portions of the vast sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Arts. 14 and 19 of the Constitution. [646 E-H, 647 B-D, 648 A-B] E F G

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual and the unity of the nation) H

A which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat very objects of such protection. [648 B-D]

Blackstone's theory of natural rights cannot be rejected as totally irrelevant. If we have advanced today towards higher civilization and in a more enlightened era we cannot lag behind what, at any rate, was the meaning given to 'personal liberty' long ago by Blackstone. Both the rights of personal security and perso-
B nal liberty recognised by what Blackstone termed 'natural law' are embodied in Art. 21 of the Constitution. [649 A-C, 650 H, 651 A-B]

A. D. M. Jabalpur vs. *S. S. Shukla* [1976] Supp. S.C.R. 172 relied on.

The natural law rights were meant to be converted into our constitutionally recognised fundamental rights so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our constitutional law. A divorce between natural law and our consti-
C tutional law would be disastrous. It would defeat one of the basic purposes of our Constitution. [652 B-C]

The total effect and not the mere form of a restriction would determine which fundamental right is really involved in a particular case and whether a restriction upon its exercise is reasonably permissible on the facts and circumstances of that case. [652 H, 653A]

D If rights under Art. 19 are rights which inhere in Indian citizens, individuals carry these inherent fundamental constitutional rights with them wherever they go, in so far as our law applies to them, because they are part of the Indian National just as Indian ships, flying the Indian flag are deemed in international law to be floating parts of Indian territory. This analogy, however, could not be pushed too far because Indian citizens, on foreign territory, are only entitled by virtue of their Indian Nationality and Passports to the protection of the Indian Republic and the assistance of its Diplomatic Missions abroad. They cannot claim to be governed abroad by their own constitutional or personal
E laws which do not operate outside India. [653 A-C]

In order to apply the test contained in Arts. 14 and 19 of the Constitution we have to consider the objects for which the exercise of inherent rights recognised by Art. 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed, both substantive and procedural laws and actions taken under them will have to pass the test imposed by Arts. 14 and 19, whenever facts justifying the invocation of either of these Articles may be disclosed, for example, an international singer or dancer may well be able to
F complain of an unjustifiable restriction on professional activity by denial of a passport. In such a case, violation of both Arts. 21 and 19(1)(g) may be put forward making it necessary for the authorities concerned to justify the restriction imposed by showing satisfaction of tests of validity contemplated by each of these two Articles. [653 F-H]

The tests of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The discretion left to the authority to impound a passport in public interest cannot invalidate the law itself. We cannot, out of
G fear, that such power will be misused, refuse to permit Parliament to entrust even such power to executive authorities as may be absolutely necessary to carry out the purposes of a validly exercisable power. In matters such as, grant, suspension, impounding or cancellation of passports, the possible dealing of an individual with nationals and authorities of other States have to be considered. The contemplated or possible activities abroad of the individual may have to be taken into account. There may be quesions of national safety and welfare which transcend the importance of the individual's inherent right to go where he
H or she pleases to go. Therefore, the grant of wide discretionary power to the executive authorities cannot be considered as unreasonable yet there must be procedural safeguards to ensure that the power will not be used for purposes extraneous to the grant of the power. The procedural proprieties must be insisted upon. [654 A-E]

A bare look at the provisions of s. 10(3) shows that each of the orders which could be passed under s. 10(3)(a) and (b) requires a satisfaction of the Passport Authority on certain objective conditions which must exist in a case before it passes an order to impound a passport or a travel document. Impounding or revocation are placed side by side on the same footing in the provisions. [654 G-H]

It is clear from the provisions of the Act that there is a statutory right also acquired, on fulfilment of the prescribed conditions by the holder of a passport, that it should continue to be effective for the specified period so long as no ground has come into existence for either its revocation or for impounding it which amounts to a suspension of it for the time being. It is true that in a proceeding under Art. 32, the Court is concerned only with the enforcement of fundamental constitutional rights and not with any statutory rights apart from fundamental rights. Article 21, however, makes it clear that violation of all law whether statutory or of any other kind is itself an infringement of the guaranteed fundamental right. [655 B-D]

The orders under s. 10(3) must be based upon some material even if tha material concerns in some cases of reasonable suspicion arising from certain credible assertions made by reliable individuals. In an emergent situation, the impounding of a passport may become necessary without even giving an opportunity to be heard against such a step which could be reversed after an opportunity is given to the holder of the passport to show why the step was unnecessary. However, ordinarily no passport could be reasonably either impounded or revoked without giving a prior opportunity to its holder to show cause against the proposed action. [655 D-E]

It is well-settled that even when there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. [655 G]

State of Orissa v. *Dr. (Miss) Binapani Dei & Ors.* AIR [1967] SC 1269 @ 1271 relied on.

Cooper v. *Wandsworth Board of Works,* [1863] 14 C.B. (N. S.) 180 quoted with approval.

An order impounding a passport must be made quasi-judicially. This was not done in the present case. It cannot be said that a good enough reason has been shown to exist for impounding the passport of the petitioner. The petitioner had no opportunity of showing that the ground for impounding it given in this Court either does not exist or has no bearing on public interest or that the public interest can be better served in some other manner. The order should be quashed and the respondent should be directed to give an opportunity to the petitioner to show cause against any proposed action on such grounds as may be available. [656 E-G]

There were no pressing grounds with regard to the petitioner that the immediate action of impounding her passport was called for. The rather cavalier fashion in which the disclosure of any reason for impounding of her passport was denied to the petitioner despite the fact that the only reason said to exist is the possiblity of her being called to give evidence before a Commission of Inquiry. Such a ground is not such as to be reasonably deemed to necessitate its concealment in public interest. [656 G-H]

Even executive authorities when taking administrative action which involves any deprivation of or restriction on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice. [657 A-B]

A As the undertaking given by the Attorney General amounts to an offer to deal with the petitioner justly and fairly after informing her of any ground that may exist for impounding her passport, no further action by this Court is necessary. [657 C-D]

The impugned order must be quashed and Passport Authorities be directed to return the passport to the petitioner. Petition allowed with costs. [657 D]

B *Chandrachud, J.* (concurring with Bhagwati, J.)

The power to refuse to disclose the reasons for impounding a passport is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation. The reasons if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would also be open to the scrutiny of the court; or else the wholesome power of a dispas-
C sionate judicial examination of executive orders could with impunity be set at nought by an obdurate determination to suppress the reasons. The disclosure made under the stress of the Writ Petition that the petiioner's passport was impounded because, her presence was likely to be required in connction with the proceedings before a Commission of Inquiry, could easily have been made when the petitioner called upon the Government to let her know the reasons why her passport was impounded. [658 A-D]

D In *Satwant Singh Sawhney's* case this Court ruled, by majority, that the expression personal liberty which occurs in Art. 21 of the Constitution includes the right to travel abroad and that no person can be deprived of that right except according to procedure established by law. The mere prescription of some kind of procedure cannot even meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by law which curtails or takes away the personal liberty guaranteed by Art. 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the
E provision for a full-dressed hearing as in a court room trial but in the contest, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Art. 21 is not the journey's end because a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty granted by Art. 21 has still to meet a possible challenge under the other provisions of the Constitution. In the *Bank Nationalisation* case the majority held
F that the assumption in *A. K. Gopalan's* case that certain Articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the *Bank Nationalisation* case was concerned with the inter-relationship of Arts. 31 and 19 and not of Arts. 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in *Gopalan's* case. [658 D-G, 659 A-B]

G The test of directness of the impugned law as contrasted with its consequence was thought in *A. K. Gopalan* and *Ram Singh's* case to be the true approach for determining whether a fundamental right was infringed. A significant application of that test may be perceived in *Naresh S. Mirajkar's* case where an order passed by the Bombay High Court prohibiting the publication of a witness's evidence in a defamation case was upheld by this Court on the ground that it was passed with the object of affording protection to the witness in order to obtain true evidence and its impact on the right of free speech and expression guaranteed by Art. 19(1)(a) was incidental. N. H. Bhagwati J. in *Express Newspapers* Case struck a modified note by evolving the test of proximate effect and operation of
H the Statute. That test saw its fruition in *Sakal Paper's* case where the Court giving precedence to the direct and immediate effect of the order over the form and object, struck down the Daily Newspapers (Price and Page) Order, 1960, on the ground that it violated Article 19(1)(a) of the Constitution. The culmi-

nation of this thought process was reached in the *Bank Nationalisation* case where it was held by the majority, speaking through Shah J, that the extent of protection against the impairment of a fundamental right is determined by the direct operation of an action upon the individual's rights and not by the object of the Legislature or by the form of the action. In *Bennett Coleman's* case the Court reiterated the same position. It struck down the newsprint policy restricting the number of pages of newspapers without the option to reduce the circulation as offending against the provisions of Art. 19(1)(a). [659 F-H, 660 A-C] A B

Article 19(1)(a) guarantees to Indian Citizens the right to freedom of speech and expression. It does not delimit the grant of that right in any manner and there is no reason arising either out of interpretational dogmas or pragmatic considerations why courts should strain the language of the Article to cut down amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose regardless of geographical considerations. [661 A-D]

The Constitution does not confer any power on the executive to prevent the exercise by an Indian citizen of the right of free speech and expression on foreign soil. The Constitution guarantees certain fundamental freedoms except where their exercise is limited by territorial considerations. Those freedoms may be exercised wheresoever one chooses subject to the exceptions or qualifications mentioned in Art. 19 itself. The right to go out of India is not an integral part of the right of free speech and expression. The analogy of the freedom of press being included in the right of free speech and expression is wholly misplaced because the right of free expression incontrovertibly includes the right of freedom of press. The right to go abroad on one hand and the right of free speech and expression on the other are made up basically of constituents so different that one cannot be comprehended in the other. The presence of the due process clause in the 5th and 14th amendments of the American Constitution makes significant difference to the approach of American Judges to the definition and evaluation of constitutional guarantees. This Court rejected the contention that the freedom to form associations or unions contained in Article 19(1)(c) carried with it the right that a workers' union could do all that was necessary to make that right effective in order to achieve the purpose for which the union was formed. [See the decision in All India Bank Employees Association]. [661 F, H, 662 A-B, E] C D E

Bhagwati, J. (for himself Untwalia and Murtaza Fazal Ali, JJ)

The fundamental rights in Part III of the Constitution represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. But these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of another. In a well ordered civilised society, freedom can only be regulated freedom. It is obvious that Article 21 though couched in negative language confers fundamental right to life and personal liberty. The question that arises for consideration on the language of Art. 21 is as to what is the meaning and content of the words 'personal liberty' as used in this Article. In *A. K. Gopalan's* case a narrow interpretation was placed on the words 'personal liberty.' But there was no definite pronouncement made on this point since the question before the court was not so much the interpretation of the words 'personal liberty' as the interrelation between Arts. 19 and 21. [667 G-H, 668 D-E, G, H, 669 A] F G

A. K. Gopalan v. *State of Madras* [1950] SCR 88 and *Kharak Singh* v. *State of U. P. & Ors.* [1964] 1 SCR 332 referred to.

In Kharak Singh's case the majority of this Court held that 'personal liberty' is used in the Article as a compendious term to include within itself all varieties of rights which go to make up the personal liberties of man other than those dealt with in several clauses of Article 19(1). The minority however took the view that the expression personal liberty is a comprehensive one and the right to move freely is an attribute of personal liberty. The minority observed that it was not right to exclude any attribute of personal liberty from the scope H

A and ambit of Art, 21 on the ground that it was covered by Art. 19(1). It was pointed out by the minority that both Articles 19(1) and 21 are independent fundamental rights though there is a certain amount of overlapping and there is no question of one being carved out of another. The minority view was upheld as correct and it was pointed out that it would not be right to read the expression 'personal liberty' in Art. 21 in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Art. 19(1). The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and B content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by the Court in *R. C. Cooper's* case and the approach of the Court in the interpretation of the fundamental rights must now be in tune with this wave length. The expression 'personal liberty' in Art. 21 is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19(1). Thus Articles 19(1) and C 21 are not mutually exclusive. [669 B-670 A-H]

R. C. Cooper v. *Union of India* [1973] 3 SCR 530 relied on.

Shambhu Nath Sarkar v. *The State of West Bengal & Ors.* applied.

Haradhan Saha v. *The State of West Bengal & Ors.* followed.

D This Court held in case of *Satwant Singh* that personal liberty within the meaning of Art. 21 includes with its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Obviously, the procedure cannot be arbitary, unfair or unreasonable. The observations in *A. K. Gopalan's* case support this view and apart from these observations, even on principle, the concept of reasonableness must be projected in the procedure contemplated by Art. 21, having regard to the impact of Art. 14 on Art. 21. [671 A, D, G-H]

E The decision of the majority in *A. K. Gopalan's* case proceeded on the assumption that certain Articles in the Constitution exclusively deal with specific matters and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that Article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was overruled by a majority of the Court in *R. C. Cooper's* case. The ratio of the majority judgment in *R. C. Cooper's* case was explained in clear and categorical terms in *Shambhu Nath Sarkar's* case and followed in *Haradhan* F *Saha's* case and *Khudi Ram Das's* case. [672 B-C, G, 673 A]

Shambhu Nath Sarkar v. *State of West Bengal* [1973] 1 SCR 856 referred to.

Haradhan Saha v. *State of West Bengal & Ors.* [1975] 1 SCR 778 and *Khudiram Das* v. *The State of West Bengal & Ors.* [1975] 2 SCR 832 relied on.

G The law must therefore be now taken to be well-settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing procedure for depriving a person of personal liberty and there is consequently no infringement of the fundamental right conferred by Art. 21, such law in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that Article. Equally such law would be liable to be tested with reference to Art. 14 and the procedure prescribed by it would have to answer the requirement of that Article. [673 A-G]

H *The State of West Bengal* v. *Anwar Ali Sarkar* [1952] SCR 284 and *Kathi Raning Rawat* v. *The State of Saurashtra* [1952] SCR 435 referred to.

Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it

must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.. [673 H, 674 A] A

E. P. Royappa v. *State of Tamil Nadu & Another* [1974] 2 SCR 348 applied.

Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive. [674 B-C] B

C

It is true that the Passports Act does not provide for giving reasonable opportunity to the holder of the passport to be heard in advance before impounding a passport. But that is not conclusive of the question. If the statute make itself clear on this point, then no more question arises but even when statute is silent the law may in a given case make an implication and apply the principle. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. [674 F-G, 675 A-B] D

Wiseman v. *Borneman* [1971] A.C. 297 approved.

Schmidt v. *Secretary of State for Home Affairs* [1968] 112 Solicitor General 690 approved.

There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial enquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial enquiry and not to administrative enquiry. It must logically apply to both. It cannot be said that the requirements of fairplay in action is any the less in an administrative enquiry than in a quasi-judicial one. Sometimes an unjust decision in an administrative enquiry may have far more serious consequences than a decision in a quasi-judicial enquiry and hence rules of natural justice must apply, equally in an administrative enquiry which entails civil consequences. [676 G-H, 677 A] E F

Rex v. *Electricity Commissioners* [1924] 1 K.B. 171 referred to.

Rex v. *Legislative Committee of the Church Assembly* [1928] 1 K. B. 411 and *Ridge* v. *Baldwin* [1964] A. C. 40 referred to.

Associated Cement Companies Ltd. v. *P. N. Sharma & Anr.* [1965] 2 SCR 366, *State of Orissa* v. *Dr. Binapani* [1967] 2 SCR 625 and *A. K. Kraipak & Ors.* v. *Union of India & Ors.* [1970] 1 SCR 457 relied. G

The duty to act judicially need not be superadded but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected and where it is found to exist the rules of natural justice would be attracted. Fairplay in action requires that in administrative proceedings also the doctrine of natural justice must be held to be applicable. [678 B-C]

In re : H. K. (An Infant) [1967] 2 Q.B. 617 and *Schmidt* v. *Secretary of State for Home Affairs* referred to. H

D. F. O. South Kheri v. *Ram Sanehi Singh* [1973] 3 S.C.C. 864 relied on

A The law is not well settled that even in an administrative proceeding which involves civil consequences the doctrine of natural justice must be held to be applicable. [680 A]

The power conferred on the Passport Authority is to impound a passport and the consequence of impounding a passport would be to impair the constitutional right of the holder of the passport to go abroad during the time that the passport is impounded. The passport can be impounded only on certain specified grounds set out in section 10(3) and the Passport Authority would have to apply B its mind to the facts and circumstances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport. The authority is also required by s. 10(5) to record in writing a brief statement of the reasons for making the order impounding a passport and save in certain exceptional situations, the authority is obliged to furnish a copy of the statement of reasons to the holder of the passport. Where the Passport Authority which has impounded a passport is other than the Central Government a right of appeal against the order impounding the passport is given by section 11. Thus, the C power conferred on the Passport Authority to impound a passport is a quasi-judicial power. The rules of natural justice would in the circumstances be applicable in the exercise of the power of impounding a passport even on the orthodox view which prevailed prior to *A. K. Kraipak's* case. The same result must follow in view of the decision in *A. K. Kraipak's* case, even if the power to impound a passport were regarded as administrative in character, because it seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences. The argument of the Attorney General however was that having regard to the nature of the action involved D in the impounding of a passport, the *audi alteram partem* rule must be held to be excluded because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded he might immediately on the strength of the passport make good his exit from the country and the object of impounding etc., would be frustrated. Now it is true that there may be cases where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action may warrant E exclusion of the *audi alteram partem* rule. Indeed, there are certain well-recognised exceptions to the *audi alteram partem* rule established by judicial decisions. These exceptions, do not in any way militate against the principle which requires fair play in administrative action. The word exception is really a misnomer because in these exceptional cases the *audi alteram partem* rule is held inapplicable not by way of an exception to fairplay in action but because nothing unfair can be inferred by not conferring an opportunity to present or meet a case. The life of the law is not logic but experience. Therefore, every legal proposition must in the ultimate analysis be tested on the F touch-stone of pragmatic realism. [680 B-F, H, 681 C-F]

The *audi alteram partem* rule may, therefore, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But, at the same time, it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule G of law and the Court should not be too ready to eschew it in its application to a given case. The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. It would, not therefore, be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound H a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding

the passport is made, an opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the Passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act. If such a provision were held to be incorporated in the Passport's Act by necessary implication the procedure prescribed by the Act for impounding a passport would be right, fair and just and would not suffer from arbitrariness or unreasonableness. Therefore, the procedure established by the Passport Act for impounding a passport must be held to be in conformity with the requirement of Art. 21 and does not fall foul of that Article. [681 G-H, 682 A-C, E-H, 683 A-B]

In the present case, however, the Central Government not only did not give an opportunity of hearing of the petitioner after making the impugned order impounding her passport but even declined to furnish to the petitioner the reasons for impounding her passport despite requests made by her. The Central Government was wholly unjustified in withholding the reasons for impounding the passport and this was not only in breach of the statutory provisions but it also amounted to denial of opportunity of hearing to the petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem* and was not in conformity with the procedure prescribed by the Act. The learned Attorney General, however, made a statement on behalf of the Government of India that the Government was agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter, and that the representation would be dealt with expeditiously in accordance with law. This statement removes the vice from the order impounding the passport and it can no longer be assailed on the ground that it does not comply with the *audi alteram partem* rule or is not in accord with the procedure prescribed by the Act. [683 C-G]

The law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of the power, it would be affected by the vice of discrimination since it would leave it open to the authority to discriminate between persons and things similarly situated. However, it is difficult to say that the discretion conferred on the passport authority is arbitrary or unfettered. There are four grounds set out in section 10(3)(c) which would justify the making of an order impounding a passport. [684 C-D]

The words "in the interest of the general public" cannot be characterised as vague or undefined. The expression "in the interest of the general public" has clearly a well defined meaning and the Courts have often been called upon to decide whether a particular action is in the interest of general public or in public interest and no difficulty has been experienced by the Courts in carrying out this exercise. These words are in fact borrowed *ipsissima verba* from Art 19(5) and it would be nothing short of heresay to accuse the constitution makers of vague and loose thinking. Sufficient guidelines are provided by the Act itself and the power conferred on the Passport Authority to impound a passport cannot be said to be unguided or unfettered. Moreover the exercise of this power is not made dependent on the subjective opinion of the Passport Authority as regards the necessity of exercising it on one or more grounds stated in S.10(3)(c), but the Passport Authority is required to record in writing a brief statement of reasons for impounding the passport and save in certain exceptional circumstances, supply a copy of such statement of reasons to the person affected so that the person concerned can challenge the decision of the Passport Authority in appeal and the Appellate Authority can examine whether the reasons given by the Passport Autho-

A rity are correct and if so whether they justify the making of the order impounding the passport. It is true that when the order impounding the passport is made by the Central Government there is no appeal against it. But it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Govt. will exercise the power in a reasonable and responsible manner. When power is vested in a high authority like the Central Government abuse of power cannot be lightly assumed and in any event, if there is abuse of the power B the arms of the Court are long enough to reach it and to strike it down. The power conferred on the Passport Authority to impound a passport under section 10(3)(c) cannot be regarded as discriminatory. [684-D-H, 685 A-C]

The law on the point viz. the proper test or yard-stick to be applied for determining whether a statute infringes a particular fundamental right, while adjudging the constitutionality of a statute on the touchstone of fundamental rights has undergone radical changes since the days of *A.K. Gopalan's* case [1950] SCR 88, which was followed in *Ram Singh and Ors.* v. *State of Delhi* C [1951] SCR 451 and applied in *Naresh Shridhar Mirajikar & Ors.* v. *State of Maharashtra & Anr.* [1966] 3 SCR 744. [685 D-G, 686-B]

According to these decisions, the theory was that the object and form of state action determine the extent of protection which may be claimed by an individual and the validity of such action has to be judged by considering whether it is "directly in respect of the subject covered by any particular article of the Constitution or touches the said article only incidentally or indirectly". The test to be applied for determining the constitutional validity D of state action with fundamental right therefore was: what is the object of the authority in taking the action: What is the subject matter of the action and to which fundamental right does it relate? This theory that "the extent of protection of important guarantees, such as the liberty of persons and right to property, depend upon the form and object of the state action not upon its direct operation upon the individual's freedom" held sway, in spite of three decisions of the Supreme Court in *Dwarkadass Srinivas* v. *The Sholapur Weaving Co. Ltd.* [1954] SCR 674; *Express Newspaper (P) Ltd. & Anr.* v. *Union of India* [1959] SCR 12; and *Sakal Papers (P) Ltd. & Ors.* v. E *Union of India* [1962] 3 SCR 842 formulating the test of direct and inevitable effect or the doctrine of intended and real effect for the purpose of adjudging whether a statute offends a particular fundamental right. However, it was only in *R.C. Cooper* v. *Union of India* [1973] 3 SCR 530 that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant as laid down in *Gopalan's* case was finally rejected. This doctrine is in substance and reality nothing else than the test of pith and substance which is applied F for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State legislatures with reference to legislative lists. [685 H, 686 A-B, D-H, 687 A-E, F-G]

The test applied since *R.C. Cooper's* case was as to what is the direct and inevitable consequence or effect of the impugned state action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and G in that case, the state action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject matter of the state action, but in testing the validity of the state action with reference to fundamenal rights, what the Courts must consider is the direct and inevitable consequence of the State action. Otherwise the protection of the fundamental rights would subtly but surely eroded. [690 B-D]

A. K. Gopalan v. *State of Madras* [1950] 2 SCR 88; *Ram Singh & Ors.* H *v. State of Delhi* [1951] SCR 451; *Naresh Sridhar Mirajkar & Ors.* v. *State of Maharashtra & Anr.* [1966] 3 SCR 744 referred to. *R. C. Cooper* v. *Union of India* [1973] 3 SCR 530; *Dwarakadass Srinivas* v. *the Sholapur and Weaving Co. Ltd.* [1954] SCR 674; *Express Newspaper (P) Ltd. & Anr.* v. *Union of India*, [1959] S.C.R. 12 and *Sakal Papers (P) Ltd. & Ors.* v. *Union of*

India [1962] 3 SCR 842; quoted with approval, *Bennet Coleman & Co.* v. *Union of India* [1973] 2 SCR 757 applied. A

The test formulated in *R. C. Cooper's* case merely refers to "direct operation" or "direct consequence and effect" of the State action on the fundamental right of the petitioner and does not use the word "inevitable" in this connection. If the test were merely of direct or indirect effect, it would be an open-ended concept and in the absence of operational criteria for judging "directness" it would give the Court an unquestionable discretion to decide whether in a given case a consequence or effect is direct or not. Some other B concept—vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of "inevitable" consequence or effect adumbrated in the *Express Newspaper* case [1959] SCR 12. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right. Now, if the effect of State action on a fundamental right is direct and inevitable, then *a fortiorari* it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect is described aptly as the doctrine of intended and real effect. This is the test C which must be applied for the purpose of determining whether section 10(3)(c), or the impugned order made under it is violated of Art. 19(1)(a) or (g). [698 C-F]

Prima facie, the right which is sought to be restricted by s. 10(3)(c) and the impugned order is the right to go abroad and that is not named as a fundamental right or included in so many words in Art. 19(1)(a) of the Constitution. The right to go abroad, as held in *Satwant Singh Sawhney's* case [1967] 3 SCR 525, is included in "personal liberty" within the meaning D of Art. 21 and is thus a fundamental right protected by that Article. This clearly shows that there is no underlying principle in the Constitution which limits the fundamental right in their operation to the territory of India. If a fundamental right under Art. 21 can be exercisable outside India, there is no reason why freedom of speech and expression conferred under 19(1)(a) cannot be so exercisable. [690 H, 694 C-D]

Satwant Singh Sawhney v. *D. Ramarathnam, Asstt. Possport Officer, Govt. of India, New Delhi* & Ors., [1967] 3 SCR 525; *Best* v. *United States*: 184 E Federal Reporter (ed) p 131, referred to. *Dr. S. S. Sadashiva Rao* v. *Union of India* [1965] Mysore Law Journal p. 605 approved.

There are no geographical limitations to freedom of speech and expression guaranteed under Art. 19(1) (a) and this freedom is exercisable not only in India but also outside and if State action sets up barriers to its citizens' freedom of expression in any country in the world, it would violate Art. 19(1) (a) as much as if it inhibited such expression within the country. This conclusion would on a parity of reasoning apply equally in relation to F fundamental right to practise any profession or to carry on any occupation, trade or business, guaranteed under Art. 19(1)(g). [694 G-H, 695 A]

Freedom to go abroad incorporates the important function of an *ultimum refunium liberatis* when other basic freedoms are refused. Freedom to go abroad has much social value and represents a basic human right of great significance. It is in fact incorporated as in alienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Art. 19(1) of the Constitution. [696 C-D] G

Kent v. *Dulles*, 357 US 116 : 2 L.ed 2d, 1204 referred to.

Even if a right is not specifically named in Art. 19(1) it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence, is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates H the exercise of a named fundamental right is not necessarily comprehended in that fundamental right, nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right.

A What is necessary to be seem is and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression. [697 D-G]

B *Kent* v. *Dulles*, 357 US. 116. 2 L.ed 2d. 1204 : *Express Newspapers (P) Ltd. & Anr.* v. *Union of India & Ors.* [1959] SCR 12; *Sakal Papers (P) Ltd. & Ors.* v. *Union of India* [1962] 3 SCR 842; *Bennet Coleman & Co. & Ors.* v. *Union of India* [1973] 2 SCR 757; *Ramesh Thappar* v. *State of Madras* [1950] SCR 594 referred to. *Aptheker* v. *Secretary of State* 378 *US* 500 : 12 L.ed 2d 992; *Zamei* v. *Rusk* 381 US 1 : 14 L.ed 2d 179 explained.

The theory that a peripheral or concomitant right which facilitates the C exercise of a named fundamental right or gives its meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right cannot be accepted. [701 B-C]

All India Bank Employees' Association v. *National Industrial Tribunal* [1962] 3 SCR 269 applied.

The right to go abroad cannot therefore be regarded as included in free- D dom of speech and expression guaranteed under Art. 19(1)(a) on the theory of peripheral or concomitant right. The right to go abroad cannot be treated as part of the right to carry on trade, business or profession or calling guaranteed under Art. 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1) and Section 10(3)(c) which authorises imposition of restrictions on the right to go abroad by impounding of passport cannot be held as void as offending Article 19(1)(a) or (g), as its direct and inevitable impact is on the right to go abroad and *not* on the right of free speech and expression or the right to carry on trade, business, E profession or calling. [702 C-E]

But that does not mean that an order made under s. 10(3)(c) may not violate Article 19(1)(a) or (g). Where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may be void. Therefore, even though section 10(3)(c) is valid, the question would always remain whether an order made under F it is invalid as contravening a fundamental right. The direct and inevitable effect of an order impounding a passport may, in a given case, be to abridge or take away freedom of speech and expression or the right to carry on a profession and where such is the case, the order would be invalid, unless saved by Article 19(2) or Article 19(6). [702 F-H]

Narendra Kumar & Ors. v. *Union of India & Ors.*, [1960] 2 SCR 375 referred to.

G Though the impugned order may be within the terms of s. 10(3)(c), it must nevertheless not contravene any fundamental right and if it does, it would be void. Now, even if an order impounding a passport is made in the interests of public order decency or morality, the restriction imposed by it may be so wide, excessive disproportionate to the mischief or evil sought to be averted that it may be considered unreasonable and in that event, if the direct and inevitable consequence of the order is to abridge or take away freedom of speech and expression, it would be violative of Article 19(1)(a) and would not be protected by Article 19(2) and the same would be the H position where the order is in the interests of the general public but it infringes directly and inevitably on the freedom to carry on a profession in which case it would contravene Article 19(1) (g) without being saved by the provision enacted in Article 19(6). [705 D-E]

The impugned order, in the present case does not violate either Art. 19(1)(a) or Art. 19(1)(g). What the impugned order does is to impound the passport of the petitioner and thereby prevent her from going abroad and at the date, when impugned order was made, there is nothing to show that the petitioner was intending to go abroad for the purpose of exercising her freedom or speech and expression or her right to carry on her profession as a journalist. The direct and inevitable consequence of the impugned order was to impede the exercise of her right to go abroad and not to interfere with her freedom of speech and expression or her right to carry on her profession. [706 F-G]

The petitioner is not justified in seeking to limit the expression "interests of the general public" to matters relating to foreign affairs. The argument that the said expression could not cover a situation where the presence of a person is required to give evidence before a commission of Inquiry is plainly erroneous as it seeks to cut down the width and amplitude of the expression "interests of the general public," an expression which has a well recognised legal connotation and which is found in Article 19(5) as well as Article 19(6). It is true that that there is always a perspective within which a statute is intended to operate, but that does not justify reading of a statutory provision in a manner not warranted by the language or narrowing down its scope and meaning by introducing a limitation which has no basis either in the language or in the context of a statutory provision. Clauses (d), (e) and (h) of S. 10(3) make it clear that there are several grounds in this section which do not relate to foreign affairs. [709 B-F]

Moreover the present case is not one where the maxim "*expressio unius exclusio alterius* has any application at all. [710-B-C]

Rohtas Industries Ltd. v. *S. O. Agarwal & Anr.*, [1969] 3 SCR 108 @ 128 referred to.

OBSERVATION

It is true that the power under s. 10(3)(c) is rather a drastic power to interfere with a basic human right, but this power has been conferred by the legislature in public interest and there is no doubt that it will be sparingly used and that too, with great care and circumspection and as far as possible, the passport of a person will not be impounded merely on the ground of his being required in connection with a proceeding, unless the case is brought within s. 10(3)(e) or sec. 10(3)(h). [710 G-H]

Ghani v. *Jones* [1970] 1 Q. B 693 quoted with approval.

An order impounding a passport can be made by the Passport Authority only if it is actually in the interests of the general public to do so and it is not enough that the interests of the general public may be likely to be served in future by the making of the order. In the present case, it was not merely on the future likelihood of the interests of the general public being advanced that the impugned order was made by the Central Govrnment. The impugned order was made because, in the opinion of the Central Govt. the presence of the petitioner was necessary for giving evidence before the Commission of Inquiry and according to the report received by the Central Government she was likely to leave India and that might frustrate or impede to some extent the inquiries which were being conducted by the Commissions of Inquiry. [711-C-D]

Krishna Iyer, J. (concurring with Bhagwati, J.)

British Raj has frowned on foreign travels by Indian patriotic suspects and instances from the British Indian Chapter may abound. In many countries the

A passport and visa system has been used as potent paper curtain to inhibit illustrious writers, outstanding statesmen, humanist churchmen and renowned scientists, if they are dissenters, from leaving their national frontiers. Things have changed, global awareness has dawned. The European Convention on Human Rights and bilateral understandings have made headway to widen freedom of travel abroad as integral to liberty of the person. And the universal Declaration of Human Rights has proclaimed in Article 13, that every one has the right to leave any country including his own, and to return to his country. This B human planet is our single home, though geographically variegated, culturally diverse, politically pluralist, in science and technology competitive and cooperative, in arts and life-styles a lovely mosaic and, above all, suffused with a cosmic consciousness of unity and inter-dependence. [717 B, C, D, E-F]

Viewed from another angle, travel abroad is a cultural enrichment which enables one's understanding of one's own country in better light. Thus it serves national interest to have its citizenry see other countries and judge one's country on a comparative scale. [718 B]

C

The right of free movement is a vital element of personal liberty. The right of free movement includes right to travel abroad. Among the great guaranteed rights life and liberty are the first among equals, carrying a universal connotation cardinal to a decent human order and protected by constitutional armour. Truncate liberty in Art. 21 traumatically and the several other freedoms fade out automatically. [720 A-B]

Personal liberty makes for the worth of the human person. Travel makes D liberty worthwhile. Life is a terrestrial opportunity for unfolding personality rising to a higher scale moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment, not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Art. 21 Absent liberty, other freedoms are frozen. [721 C-F]

Procedure which deals with the modalities of regulating, restricting or even E rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus, understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word "establish" which means 'settled firmly', not wantonly or whimsically. [722 H, 723 A-B]

Procedure in Article 21 means fair, not formal procedure. Law is reason- F able law, not any enacted piece. As Art. 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detention should conform to Art. 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Art. 21 are available. Otherwise, as the procedural safeguards contained in Art. 22 will be available only in cases of preventive and punitive detention the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard, save such as a legislature's mood chooses. [723 F-H]

G

Kochunni's case (AIR 1960 SC 1080, 1093) referred.

Liberty of locomotion into alien territory cannot be unjustly forbidden by the Establishment and passport legislation must take processual provisions which accord with fair norms, free from extraneous pressure and, by and large, complying with natural justice. Unilateral arbitrariness, police dossiers, faceless affiants, behind-the-back materials oblique motives and the inscrutable face of an H official sphinx do not fill the 'fairness,' bill. [726 D-E]

Article 21 clubs life with liberty and when we interpret the colour and content of 'procedure established by law', we must be alive to the deadly peril of

life being deprived without minimal processual justice, legislative callousness despising hearing and fair opportunities of defence. [726 F] A

Sections 5, 6 and 10 of the impugned legislation must be tested even under Art. 21 on canons of processual justice to the people outlined above. Hearing is obligatory—meaningful hearing, flexible and realistic, according to circumstances, but not ritualistic and wooden. In exceptional cases and emergency situations, interim measures may be taken, to avoid the mischief of the passportee becoming an escapee before the hearing begins. "Bolt the stables after the horse has been stolen" is not a command of natural justice. But soon after the provisional seizure, a reasonable hearing must follow, to minimise procedural prejudice. And when a prompt final order is made against the applicant or passport holder the reasons must be disclosed to him almost invariably save in those dangerous cases, where irreparable injury will ensue to the State. A government which revels in secrecy in the field of people's liberty not only acts against democratic decency but busies itself with its own burial. That is the writing on the wall if history were teacher, memory our mentor and decline of liberty *not* our unwitting endeavour. Public power must rarely hide its heart in an open society and system. B C [727 F-H]

Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness. [728 A]

As far as question of extra-territorial jurisdiction in foreign lands is concerned, it is a misconception. Nobody contends that India should interfere with other countries and their sovereignty to ensure free movement of Indians in those countries. What is meant is that the Government of India should not prevent by any sanctions it has over its citizens from moving within in any other country if that other country has no objection to their travelling within its territory. [728 C] D

In *Gopalan's* case it was held that Art. 22 is a self-contained Code, however, this has suffered supersession at the hands of *R. C. Cooper*. [728 D]

Sakal Newspapers [1962] 3 SCR 842, *Cooper* [1973] 3 SCR 530, *Bennet Coleman* [1973] 2 SCR 759 *and Shambu Nath Sarkar* [1973] 1 SCR 856 referred to. E

The law is now settled that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man *human* have a synthesis. The proposition is indubitable that Art. 21 does not, in a given situation exclude Art. 19 if both rights are breached. It is a salutary thought that the summit court should not interpret constitutional rights enshrined in Part III to choke its life-breath or chill its elan vital by processes of legalism, overruling the enduring values burning in the bosoms of those who won our independence and drew up our founding document. F [728 F-G, 729 A-B]

High constitutional policy has harmonised individual freedoms with holistic community good by inscribing exceptions to Art. 19(1) in Art 19(2) to (6). Even so, what is fundamental is the freedom, not the exception. More importantly, restraints are permissible only to the extent they have nexus with the approved object. No verbal labels but real values are the governing considerations in the exploration and adjudication of constitutional prescriptions and proscriptions. Governments come and go, but the fundamental rights of the people cannot be subject to the wishful value-sets of political regimes of the passing day. [729 C-D, 730 F] G

Locomotion in some situation is necessarily involved in the exercise of the specified fundamental rights as an associated or integrated right. Travel, *simpliciter*, is peripheral to and not necessarily fundamental in Art. 19 Free speech is feasible without movement beyond country. [731 B] H

The delicate, yet difficult, phase of the controversy arrives where free speech and free practice of profession are inextricably interwoven with travel abroad.

A One has to view the proximate and real consequence of thwarting transnational travel through the power of the State exercised under s. 3 of the Passport Act read with ss. 5 and 6. Associated rights totally integrated with fundamental rights must enjoy the same immunity. Three sets of cases might arise. First, where the legislative provision or executive order expressly forbids exercise in foreign lands of the fundamental right while granting passport. Secondly, there may be cases where even if the order is innocent on its face, the refusal of permission to go to a foreign country may, with certainty and immediacy, spell denial of free speech and professional practice or business. Thirdly, the fundamental right may itself enwomb locomotion regardless of national frontiers. The second and third often are blurred in their edges and may overlap. [732 H, 733 A-C]

Spies, traitors, smugglers, saboteurs of the health, wealth and survival or sovereignty of the nation shall not be passported into hostile soil to work their vicious plan fruitfully. But when applying the Passports Act, Over-breadth, hyper-anxiety, regimentation complex, and political mistrust shall not sub-consciously exaggerate, into morbid or neurotic refusal or unlimited impending or final revocation of passport, facts which, objectively assessed, may prove tremendous trifles. That is why the provisions have to be read down into constitutionality, tailored to fit the reasonableness test and humanised by natural justice. The Act will survive but the order shall perish for reasons so fully set out by Shri Justice Bhagwati. And on this construction, the conscience of the Constitution triumphs over vagarious governmental orders. [734 E-G-H]

Kailasam, J. (Dissenting)

The preamble to the Constitution provides that the people of India have solemnly resolved to constitute India into a sovereign, socialist, secular and democratic republic and to secure to all its citizens, justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity. Article 12 defines the State as including the Government and Parliament of India and the Government and the Legislature of each of the States and of local or other authorities within the territory of India or under the control of the Government of India." Article 13 provides that laws that are inconsistent with or in derogation of fundamental rights are to that extent void. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation. In England section 3 of the Statute of Westminster declares that Parliament has full power to make laws having extra territorial operation. The followine are the principles to determine whether the provisions of a Constitution or a Statute have extra territorial application.

(a) An Act unless it provides otherwise applies only to the country concerned.

(b) An Act of a Legislature will bind the subjects of the realm both within and without if that is the intention of the Legislature, which must be gathered from the language of the Act in question.

(c) Legislature normally restricts operation of legislation to its own territories. However, on occasions legislation controlling the activities of its own citizens when they are abroad may be passed.

Niboyet v. *Niboyet* 48 L.J.P.I. at p. 10 and *Queen* v. *Jameson and Others* [1896] 2 Q.B. Division 425 at 430 referred to.

(d) In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter or history of the enactment, the presumption is that Parliament does not design its statute to operate beyond the territorial limit of the country.

[738-E-F-H, 739 A, B, E, G-H, 740 A, B, G-H.]

Governor-General in Council v. *Raleigh Investment Co. Ltd.* A.I.R. (31) [1944] Federal Court 51, referred to.

Wallace Brothers & Co. Ltd. v. *Commissioner of Income-Tax, Bombay, Sind and Baluchistan* [1945] F.C.R. 65 and *Mohammad Mohy-ud-din* v. *The King Emperor* [1946] F.C.R. 94 referred to.

The application of Article 14 is expressly limited to the territory of India. Articles 15, 16, 17, 18, 20 and 22 by their very nature are confined to the territory of India. Articles 23 to 28 are applicable only to the territory of India. At any rate, there is no intention in these Articles indicating extra-territorial application. So also Articles 29 and 30 which deal with cultural and educational rights are applicable only within the territory of India. Article 31 does not expressly or impliedly have any extra-territorial application. It is possible that the right conferred by Article 19(1)(a) may have extra-territorial application. It is not likely, however, that the framers of the Constitution intended the right to assemble peaceably and without arms or to form associations or unions or to acquire, hold and dispose of property, or to practise any profession or to carry on any occupation, trade or business, to have any extra-territorial application for such rights would not be enforced by the State outside the Indian territory. The rights conferred under Article 19 are fundamental rights and Arts. 32 & 226 provide that those rights are guaranteed and can be enforced by the aggrieved person by approaching this Court or the High Courts. These rights cannot be protected by the State outside its territory and, therefore, there is a presumption that the constitution makers would not have intended to guarantee any rights which the State cannot enforce. [742 H, 743 A-D-E-F]

Virendra v. *The State of Punjab and Another*, [1958] SCR 308 referred to.

It is most unlikely that before the declaration of human rights was promulgated the framers of the Constitution decided to declare that the fundamental rights conferred on the citizens would be available even outside India. Even in the American Constitution there is no mention of right to freedom of speech or expression as being available outside America. The law made under Article 19(2) to 19(6) imposes restrictions on the exercise of right of freedom of speech and expression etc. The restrictions thus imposed normally would apply only within the territory of India unless the legislation expressly or by necessary implication provides for extra-territorial operation. In the penal code, section 3 and 4 specifically provides that crimes committed by citizens of India outside India are punishable. In Article 19, however, there is no such provision expressly or by necessary implication. Secondly, a citizen cannot enforce his fundamental rights outside the territory of India even if it is taken that such rights are available outside the country. Therefore, the contention of the petitioners that by denying the passport the petitioner's fundamental rights guaranteed by Article 19 are infringed cannot be accepted. [744 H, 745 A-D, 746 F-G, H, 747 A]

The important question which arises, is whether an Act passed under Article 21 should also satisfy requirements of Article 19. It has been decided by this Court in *Gopalan's* case that the punitive detention for offences under the Penal Code cannot be challenged on the ground that it infringes fundamental rights under Article 19. [747 E-F]

The rights guaranteed under Article 19(1) are subject to restrictions that may be placed by Articles 19(2) to 19(6). The right not to be deprived of life and personal liberty is subject to its deprivation by procedure established by law. In *Gopalan's* case it was held that Article 19 dealt with the rights of the citizens when he was free and would not apply to person who had ceased to be free and has been either under punitive or preventive detention. It was further held that Article 19 only applied where a legislation directly hit the rights enumerated in the Article and not where the loss of rights mentioned in the Article was a result of the operation of legislation relating to punitive or preventive detention. The aforesaid ratio of *Gopalan's* case has been confirmed by this Court in *Ram Singh* v. *State of Delhi*. The view was again confirmed in the *State of Bihar* v. *Kameshwar Singh*. [749 C,750 B-G]

Ram Singh v. *State of Delhi* [1951] SCR 451 and *State of Bihar* v. *Kameshwar Singh* [1952] SCR 889 relied on.

In *Express Newspapers*, the test laid down was that there must be a direct or inevitable consequences of the measure enacted in the impugned Act and that

A it would not be possible to strike down the legislation as having that effect and operation. [751 B-C]

Express Newspapers (P) Ltd. and another v. *The Union of India & Ors.* [1959] 1 SCR 135 referred to.

B In *Hamdard Dawakhana's* case it was held that it is not the form or incidental infringement that determines the constitutionality of a statute but the reality or the substance. [751 D]

Hamdard Dawakhana (Wakf) Lal Kuan v. *Union of India* [1960] 2 SCR 671 at page 691 and *Kochunni* v. *The State of Madras* [1960] 3 SCR 887 referred to. *Sakal Papers (P) Ltd. and Ors.* v. *The Union of India* [1962] 3 SCR 842 distinguished.

C

In *Sakal Paper's* Case the Court held that the order was void as it violated Article 19(1)(a) and was not saved by Article 19(2). In that case the impact of legislation under Article 21 on the rights guaranteed under Article 19(1) was not in issue. [752 C-D]

D *Kharak Singh* [1964] 1 SCR 332 relied on; *Bank Nationalisation* [1970] 3 SCR 530 and *Bennet Coleman* [1973] 2 SCR 757 distinguished.

In *Bank Nationalisation* case the Court was only considering the decisions that took the view that Articles 19(1)(f) and 31(2) were mutually exclusive. The basis for the conclusion in *Bank Nationalisation* case is that Articles 19 and 31 are parts of a single pattern and while Article 19(1)(f) enjoins the right to E acquire, hold and dispose of property, clause 5 of Article 19 authorises imposition of restrictions upon the right. There must be a reasonable restriction and Article 31 assures the right to property and grants protection against the exercise of the authority of the State and clause 5 of Article 19 and clauses 1 and 2 of Article 31 prescribe restrictions upon the said action, subject to which the right to property may be exercised. The case specifically over-ruled the view taken in *Gopalan's* case that the approach and form of the State action alone need to be considered and the fact of loss of fundamental rights of the individual in general will be ignored. The entire discussion in *Bank Nationalisation* case related to the inter-relation between Article 31(2) and Article 19(1)(f). Certain passing observations have been made about the liberty of persons. However, there is no justification for holding that the case is an authority for the proposition that the legislation under Article 21 should also satisfy all the fundamental rights guaranteed under Article 19(1). Article 21 is related to deprivation of life and personal liberty and it has been held that it is not one of the rights enumerated in Article 19(1). That the decision in *Bank Nationalisation* case so far as it relates to Articles 19(1) and 21 is in the G nature of *obiter dicta*. The Court had not applied its mind and decided the specific question. The observations were general and casual observations on a point not calling for decision and not obviously argued before it cannot be taken as an authority on the proposition in question. The Court cannot be said to have declared the law on the subject when no occasion arose for it to consider and decide the question. The judgment proceeded on some erroneous assumptions. It was assumed by the judgment that the majority of the Court in *Gopalan's* case held that Article 22 being a complete code relating to preventive detention the validity of an order of detention must be determined H directly according to the terms within the four corners of that Article. The said statement is not borne out from the record of the judgment in *Gopalan's* case. If the *obiter dicta* based on the wrong assumption is to be taken as the correct position in law it would lead to strange results. If Articles

19(1)(a) to (e) and (g) are attracted in the case of deprivation of personal liberty under Article 21, a punitive detention for an offence committed under I.P.C., such as theft, cheating or assault would be illegal, for the reasonable restrictions in the interest of public order would not cover the said offences. There can be no distinction between the punitive detention and preventive detention. Observation in *Bank Nationalisation* case that a legislation under Article 21 should also satisfy the requirements of Article 19 cannot be taken as correct law. [754 G-H, 756 D-E, 757 C-E, G-H, 758 A-B, C, 759 A, E-F]

Chiranjit Lal Chowdhuri [1950] SCR 869, *The State of West Bengal* v. *Subodh Gopal* [1954] SCR 587, *State of Bombay* v. *Bhanji Munji* [1953] 1 SCR 777, *Dahu Barkya Thakur* v. *State of Bombay*, [1961] 1 SCR 128, *Smt. Sitabati Debi & Anr.* v. *State of West Bengal* [1967] 2 SCR 940 and *K. K. Kochunni* [1968] 3 SCR 887 referred to.

In *S. N. Sarkar's* case also, the majority held that Article 22 was a self-contained Code. The view taken in this case also suffers from the same infirmities referred to in the *Bank Nationalisation* case. In *Khudi Ram's* case also this Court erroneously stated that *Gopalan's* case has taken the view that Article 22 was a complete code. [759 F-H, 760 A-B]

In *Additional District Magistrate, Jabalpur*, Chief Justice Ray held that Article 21 is the rule of law regarding life and liberty and no other rule of law can have separate existence as a distinct right. Justice Beg observed that *Gopalan's* case was merely cited in *Cooper's* case for illustrating a line of reasoning which was held to be incorrect in determining validity of law. The question under consideration was whether Articles 19(1)(f) and 31(2) were mutually exclusive. The learned Judge did not understand the *Cooper's* case as holding that effect of deprivation of rights outside Article 21 will also have to be considered. [760 D-F-H]

In *Bennet Coleman's* case, the Court held that though Article 19(1) does not mention the freedom of press it is settled view of the court that freedom of speech and expression includes freedom of press and circulation. In that case also the question whether Articles 21 and 19 are mutually exclusive did not arise for consideration. *Bennet Coleman's* case, *Express Newspapers* Case, and *Sakal Newspapers* case were all concerned with the right to freedom of the press which is held to form part of the freedom of speech and expression. [761 G-H]

Commonwealth of Australia v. *Bank of New South Wales* [1950] A.C. 235 referred to.

The Passport Act provides for issue of passports and travel documents for regulating the departure from India of citizens of India and other person. Since the said Act complies with the requirements of Article 21 *i.e.* compliance with procedure established by law, its validity cannot be challenged. If incidentally the Act infringes on the rights of a citizen under Article 19(1) of the Act, it cannot be found to be invalid. The pith and substance rule will have to be applied and unless the rights are directly affected, the challenge will fail. [763 A-B]

The procedure established by law does not mean procedure, however, fantastic and oppressive or arbitrary which in truth and reality is no procedure at all. Section 5 of the Act provides for applying for passports or travel documents etc. and the procedure for passing orders thereon. The authority can either grant passport or can refuse it. In case the authority refuses to grant it; it is required to record in writing a brief statement of his reasons which are to be furnished to the person concerned unless the authority for reasons specified in sub-section (3) refuses to furnish a copy. Section 6 provides that the refusal to give an endorsement shall be on one or other grounds mentioned in sub-sections (2) to (6). Section 10 enables the Passport authority to vary or cancel the endorsement on a passport. Section 10(3)

A provides the reasons for which a passport may be impounded. Again reasons are required to be furnished to the person concerned on demand, except if the Passport Authority is of the opinion that it will not be in the interest of sovereignty and integrity of India, security of India, friendly relations of India with any foreign country or in the interest of the general public to furnish such a copy. Section 11 provides for an appeal except when the order is passed by the Central Government. [764 C-E, 765 A-G]

B

The Legislature by making an express provision may deny a person the right to be heard. Rules of natural justice cannot be equated with the fundamental rights. Their aim is to secure justice and to prevent miscarriage of justice. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice the court C should do so but if a statutory provision that specifically or by necessary implication excludes the application of any rules of natural justice this Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the Passport D Authority or the Government to revoke or impound the passport but that itself would not justify denial of an opportunity to the holder of the passport to state his case before the final order is passed. The legislature has not by express provision excluded the right to be heard. [768 F-H, 769 A-B]

Purtabpur v. *Cane Commissioner, Bihar* [1969] 2 SCR 807 *and Schmidt* v. *Secretary of State, Home Affairs* [1969] 2 Ch. 149 referred to.

E

A passport may be impounded without notice but before any final order is passed, the rule of *audi alteram partem*, would apply and the holder of the passport will have to be heard. The petitioner has a right to be heard before a final order under section 10(3)(e) is passed. Earlier, the courts had taken a view that the principle of natural justice is inapplicable to adminis- F trative orders. However, subsequently, there is a change in the judicial opinion. The frontier between judicial and quasi-judicial determinatjon on the one hand and an executive or administrative determination on the other has become blurred. The rigid view that principles of natural justice apply only to judicial and quasi-judicial acts and not to administrative acts no longer holds the field. The court is not intended to sit in appeal over the decision of the Government. The decision of the Government under section 10(3)(c) is G subject to a limited judicial scrutiny. [770 A-F, H, 771 A, 772 B-D]

H. K. (An infant) [1967] 2 Q.B. 617 at p. 630 *Barium Chemicals Ltd.* v. *Company Law Board* [1966] Supp. SCR 311, *Rohtas Industries Ltd.* v. *S. D. Agarwal*, [1969] 3 SCR 103 and *U.P. Electric Co.* v. *State of U.P.* [1969] 3 SCR 865 followed.

H

The provision empowering the Government not to disclose the reasons for impounding etc. is valid. The Government is bound to give opportunity to the holder of the passport before finally revoking it or impounding it. The

cases in which the authority declines to furnish reasons for making an order would be extremely rare. In case where the Government itself passes an order it should be presumed that it would have made the order after careful scrutiny. If an order is passed by the Passport Authority an appeal is provided. In the present case, there is no reason in declining to furnish to the petitioner statement of reasons for impounding the passport.

[772 H, 773 A-D, H, 774 A]

In view of the statement of the Attorney General that the petitioner might make a representation in respect of the impounding of passport and that the representations would be dealt with expeditiously and that even if the imounding of the passport is confirmed it will not exceed a period of 6 months, it is not necessary to go into the merits of the case any further. [776 B-C]

ORIGINAL JURISDICTION : Writ Petition No. 231 of 1977.

(Under Article 32 of the Constitution of India).

Madan Bhatia and *D. Goburdhan* for the Petitioner.

S. V. Gupte, Attorney General, *Soli J. Sorabjee*, Additional Sol. Genl. of India, *R. N. Sachthey* and *K. N. Bhatt* for the Respondents.

Ram Panjwani, Vijay Panjwani, Raj Panjwani, S. K. Bagga & Mrs. S. Bagga for the Intervener.

The following Judgments were delivered :

BEG, C.J. The case before us involves questions relating to basic human rights. On such questions I believe that multiplicity of views giving the approach of each member of this Court is not a disadvantage if it clarifies our not infrequently differing approaches. It should enable all interested to appreciate better the significance of our Constitution.

As I am in general agreement with my learned brethren Bhagwati and Krishna Iyer. I will endeavour to confine my observations to an indication of my own approach on some matters for consideration now before us. This seems to me to be particularly necessary as my learned brother Kailasam, who has also given us the benefit of his separate opinion, has a somewhat different approach. I have had the advantage of going through the opinions of each of my three learned brethren.

It seems to me that there can be little doubt that the right to travel and to go outside the country, which orders regulating issue, suspension or impounding, and cancellation of passports directly affect, must be included in rights to "personal liberty" on the strength of decisions of this Court giving a very wide ambit to the right to personal liberty (see : *Satwant Singh Sawhney* v. *D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi & Ors.*,(1) *Kharak Singh* v. *State of U.P. & Ors.*(2).

(1) [1967] 3 S.C.R. 525.
(2) [1964] 1 S.C.R. 332.

A Article 21 of the Constitution reads as follows :

> "Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law".

B It is evident that Article 21, though so framed as to appear as a shield operating negatively against executive encroachment over something covered by that shield, is the legal recognition of both the protection or the shield as well as of what it protects which lies beneath that shield. It has been so interpreted as long ago as in *A. K. Gopalan* v. *State of Madras*,(1) where, as pointed out by me in *Additional District Magistrate, Jabalpur* v. *S. S. Shukla and others*(2) with C the help of quotations from judgments of Patanjli Sastri, J. (from p. 195 to 196), Mahajan J. (p. 229-230), Das J. (295 and 306-307). I may add to the passages I cited there some from the judgment of Kania Chief Justice who also, while distinguishing the objects and natures of articles 21 and 19, gave a wide enough scope to Art. 21.

D Kania CJ said (at p. 106-107) :

> "Deprivation (total loss) of personal liberty, which *inter alia* includes the right to eat or sleep when one likes or to work or not to work as and when one pleases and several such rights sought to be protected by the expression 'per- E sonal liberty' in article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by article 19(1)(d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. This is made clear when the provisions of the Criminal Procedure Code in Chapter VIII relating to F security of peace or maintenance of public order are read. Therefore article 19(5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope 'restriction' when interpreting article 21. Article 22 envisages the law of preventive detention. So does article 246 read with Schedule Seven, List I, Entry 9, and List III, G Entry 3. Therefore, when the subject of preventive detention is specifically dealt with in the Chapter on Fundamental Rights I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in article 19(1). Article 19(1) does not purport to cover all aspects of liberty or of personal liberty. In

H

(1) [1950] SCR 88.

(2) [1976] Suppl. SCR 172 at 327.

that article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given under article 19(1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If article 19 is considered to be the only article safeguarding personal liberty several well-recognised rights, as for instance, the right to eat or drink, the right to work, play, swim and numerous other rights and activities and even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read article 19 as dealing with the same subject as article 21. Article 19 gives the rights specified therein only to the citizens of India while article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover, the protection given by article 21 is very general. It is of 'law'—whatever that expression is interpreted to mean. The legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in article 19. In my opinion therefore article 19 should be read as a separate complete article".

In that case, Mukherjea J., after conceding that the rights given by article 19(1)(d) would be incidentally contravened by an order of preventive detention (see p. 261) and expressing the opinion that a wider significance was given by Blackstone to the term "personal liberty", which may include the right to locomotion, as Mr. Nambiar, learned Counsel for A. K. Gopalan, wanted the Court to infer, gave a narrower connotation to "personal liberty", as "freedom from physical constraint or coercion" only. Mukherjea, J., cited Dicey for his more restrictive view that "personal liberty" would mean : "a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification". He then said :

"It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory".

After referring to the views of the Drafting Committee of our Constitution Mukherjea, J., said : (p. 263) :

"It is enough to say at this stage that if the report of the Drafting Committee is an appropriate material upon which the interpretation of the words of the Constitution could be based, it certainly goes against the contention of the applicant and it shows that the words used in article 19(1)(d) of the Constitution do not mean the same thing as the expression

A personal liberty' in article 21 does. It is well known that the word 'liberty' standing by itself has been given a very wide meaning by the Supreme Court of the United States of America. It includes not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into free contractual relations. In the Indian Constitution, on the other hand, the expression 'per-
B sonal liberty' has been deliberately used to restrict it to freedom from physical restraint of person by incarceration or otherwise".

Fazal Ali, J., however, said (at p. 148) :

"To my mind, the scheme of the Chapter dealing with
C the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under article 20 and 21 and also under article 22 so far as his arrest and detention in custody
D before trial are concerned. Preventive detention, which is dealt with in article 22, also amounts to deprivation of personal liberty which is referred to in article 21, and is a violation of the right of freedom of movement dealt with in article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to article 19(1)(f) and article 31 both of which deal with
E the right to property and to some extent overlap each other".

As has been pointed out by my learned brother Bhagwati, by detailed references to cases, such as *Haradhan Saha* v. *The State of West Bengal & Ors*(1) and *Shambhu Nath Sarkar* v. *State of West Bengal*(2), the view that Articles 19 and 21 constitute water tight compartments, so that all aspects of personal liberty could be excluded
F from Article 19 of the Constitution, had to be abandoned as a result of what was held, by a larger bench of this Court in *R. C. Cooper* v. *Union of India*(3), to be the sounder view. Therefore, we could neither revive that overruled doctrine nor could we now hold that impounding or cancellation of a passport does not impinge upon and affect fundamental rights guaranteed by the Constitution. I may point out that the doctrine that Articles 19 and 21 protect or regulate
G flows in different channels, which certainly appears to have found favour in this Court in *A. K. Gopalan's case* (supra), was laid down in a context which was very different from that in which that approach was displaced by the sounder view that the Constitution must be read as an integral whole, with possible over-lappings of the subject matter of what is sought to be protected by its various provisions particularly by articles relating to fundamental rights.

H (1) [1975] 1 SCR 778.
(2) [1973] 1 SCR 856.
(3) [1973] 3 SCR 530.

In *A. K. Gopalan's* case (supra), what was at issue was whether the tests of valid procedure for deprivation of personal liberty by preventive detention must be found exclusively in Article 22 of the Constitution or could we gather from outside it also elements of any "due process of law" and use them to test the validity of a law dealing with preventive detention. Our Constitution-makers, while accepting a departure from ordinary norms, by permitting making of laws for preventive detention without trial for special reasons in exceptional situations also provided quite elaborately, in Article 22 of the Constitution itself, what requirements such law, relating to preventive detention, must satisfy. The procedural requirements of such laws separately formed parts of the guaranteed fundamental rights. Therefore, when this Court was called upon to judge the validity of provisions relating to preventive detention it laid down, in *Gopalan's case* (supra), that the tests of "due process", with regard to such laws, are to be found in Article 22 of the Constitution exclusively because this article constitutes a self-contained code for laws of this description. That was, in my view, the real *ratio decidendi* of *Gopalan's case* (supra). It appears to me, with great respect, that other observations relating to the separability of the subject matters of Articles 21 and 19 were mere *obiter dicta*. They may have appeared to the majority of learned Judges in *Gopalan's case* to be extensions of the logic they adopted with regard to the relationship between Article 21 and 22 of the Constitution. But, the real issue there was whether, in the face of Article 22 of the Constitution, which provides all the tests of procedural validity of a law regulating preventive detention, other tests could be imported from Article 19 of the Constitution or elsewhere into "procedure established by law". The majority view was that this could not be done. I think, if I may venture to conjecture what opinions learned Judges of this Court would have expressed on that occasion had other types of law or other aspects of personal liberty, such as those which confronted this Court in either *Satwant Singh's* case (supra) or *Kharak Singh's* case (supra) were before them, the same approach or the same language would not have been adopted by them. It seems to me that this aspect of *Gopalan's case* (supra) is important to remember if we are to correctly understand what was laid down in that case.

I have already referred to the passages I cited in *A. D. M. Jabalpur's case* (supra) to show that, even in *Gopalan's* case (supra), the majority of judges of this Court took the view that (the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and the procedure provided for their deprivation. One can, however, say that no question of "due process of law" can really arise, apart from procedural requirements of preventive detention laid down by Article 22, in a case such as the one this Court considered in *Gopalan's case* (supra). The clear meaning of Article 22 is that the requirements of "due process of law", in cases of preventive detention, are satisfied by what is provided by Article 22 of the Constitution itself. This article indicates the pattern of "the procedure established by law" for cases of preventive detention.

A Questions, however, relating to either deprivation or restrictions of personal liberty, concerning laws falling outside Article 22 remained really unanswered, strictly speaking, by *Gopalan's* case. If one may so put it, the field of "due process" for cases of preventive detention is fully covered by Article 22, but other parts of that field, not covered by Article 22, are "unoccupied" by its specific provisions. I have no doubt that, in what may be called "unoccupied" portions of the vast B sphere of personal liberty, the substantive as well as procedural laws made to cover them must satisfy the requirements of both Articles 14 and 19 of the Constitution.

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of C an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring D dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

We have to remember that the fundamental rights protected by E Part III of the Constitution, out of which Articles 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny. We cannot disable Article 14 or 19 from so functioning and hold those executive and legislative actions to which they could apply as unquestionable even when there is no emergency to shield actions of doubtful legality. These tests are, in my opinion, F available to us now to determine the constitutional validity of Section 10(3)(c) of the Act as well as of the impugned order of 7th July, 1977, passed against the petitioner impounding her passport "in the interest of general public" and stating that the Government had decided not to furnish her with a copy of reasons and claiming immunity from such disclosure under section 10(5) of the Act.

G I have already mentioned some of the authorities relied upon by me in *A. D. M. Jabalpur* v. *S. Shukla* (Supra), while discussing the scope of Article 21 of the Constitution, to hold that its ambit is very wide. I will now indicate why, in my view, the particular rights claimed by the petitioner could fall within Articles 19 and 21 and the nature and origin of such rights.

H Mukerji J., in *Gopalan's* case (supra) referred to the celebrated commentaries of Blackstone on the Laws of England. It is instructive to reproduce passages from there even though juristic reasoning may have travelled today beyond the stage reached by it when Blackstone

wrote. Our basic concepts on such matters, stated there, have provided the foundations on which subsequent superstructures were raised. Some of these foundations, fortunately, remain intact. Blackstone said :

> "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times : no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

The identification of natural law with Divine will or dictates of God may have, quite understandably, vanished at a time when men see God, if they see one anywhere at all, in the highest qualities inherent in the nature of Man himself. But the idea of a natural law as a morally inescapable postulate of a just order, recognizing the inalienable and inherent rights of all men (which term includes women) as equals before the law persists. It is, I think, embedded in our own Constitution. I do not think that we can reject Blackstone's theory of natural rights as totally irrelevant for us today.

Blackstone propounded his philosophy of natural or absolute rights in the following terms :

> "The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that will and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.

A The absolute rights of every Englishman, (which, taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of Government; though subject at times to fluctuate and change; their establishment (excellent as it is) being still human.

B * * * And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion, or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, involate, may justly be said to in-
C clude the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

D II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as
E upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.

III. The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, en-
F joyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries; but certainly the modifications under which we at present find it, the method of con-
G serving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty."

I have reproduced from Blackstone whose ideas may appear somewhat quaint in an age of irreverence because, although, I know
H that modern jurisprudence conceives of all rights as relative or as products of particular socio-economic orders, yet, the idea that man, as man, morally has certain inherent natural primordial inalienable human rights goes back to the very origins of human jurisprudence.

It is found in Greek philosophy. If we have advanced today towards what we believe to be a higher civilisation and a more enlightened era, we cannot fall behind what, at any rate, was the meaning given to "personal liberty" long ago by Blackstone. As indicated above, it included "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law". I think that both the rights of "personal security" and of "personal liberty", recognised by what Blackstone termed "natural law", are embodied in Article 21 of the Constitution. For this proposition, I relied, in *A. D. M. Jabalpur* v. *S. S. Shukla* (supra), and I do so again here, on a passage from Subba Rao C.J., speaking for five Judges of this Court in *I. C. Golaknath* v. *State of Punjab*(1) when he said (at p. 789) :

> "Now, what are the fundamental rights? They are embodied in Part III of the Constitution and they may be classified thus: (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property, and (vii) right to constitutional remedies. They are the rights of the people preserved by our Constitution, 'Fundamental rights' are the modern name for what have been traditionally known as 'natural rights'. As one author puts it : 'they are moral rights which every human being everywhere at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral'. They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such right".

Hidayatullah, J., in the same case said (at p. 877) :

> "What I have said does not mean that Fundamental Rights are not subject to change or modification. In the most inalienable of such rights a distinction must be made between possession of a right and its exercise. The first is fixed and the latter controlled by justice and necessity. Take for example Article 21 :
>
> 'No person shall be deprived of his life or personal liberty except according to procedure established by law".
>
> Of all the rights, the right to one's life is the most valuable. This article of the Constitution, therefore, makes the right fundamental. But the inalienable right is curtailed by a murderer's conduct as viewed under law. The deprivation, when it takes place, is not of the right which was immutable but of the continued exercised of the right."

(1) [1967] 2 SCR 762.

A It is, therefore, clear that six out of eleven Judges in *Golak Nath's* case declared that fundamental rights are natural rights embodied in the Constitution itself. This view was affirmed by the majority Judges of this Court in *Shukla's* case. It was explained by me there at some length. Khanna, J., took a somewhat different view. Detailed reasons were given by me in *Shukla's* case (supra) for taking what I found to be and still find as the only view I could B possibly take if I were not to disregard, as I could not properly do, what had been held by larger benches and what I myself consider to be the correct view: that natural law rights were meant to be converted into our Constitutionally recognised fundamental rights, atleast so far as they are expressly mentioned, so that they are to be found within it and not outside it. To take a contrary view would involve a conflict between natural law and our Constitutional law. C I am emphatically of opinion that a divorce between natural law and our Constitutional law will be disastrous. It will defeat one of the basic purposes of our Constitution.

The implication of what I have indicated above is that Article 21 is also a recognition and declaration of rights which inhere in every individual. Their existence does not depend on the location of the D individual. Indeed, it could be argued that what so inheres is inalienable and cannot be taken away at all. This may seem theoretically correct and logical. But, in fact, we are often met with denials of what is, in theory, inalienable or "irrefragible". Hence, we speak of "deprivations" or "restrictions" which are really impediments to the exercise of the "inalienable" rights. Such deprivations or restrictions or regulations of rights may take place, within pres- E cribed limits, by means of either statutory law or purported actions under that law. The degree to which the theoretically recognised or abstract right is concretised is thus determined by the balancing of principles on which an inherent right is based against those on which a restrictive law or orders under it could be imposed upon its exercise. We have to decide in each specific case, as it arises before us, what the result of such a balancing is.

F

In judging the validity of either legislative or executive state action for conflict with any of the fundamental rights of individuals, whether they be of citizens or non-citizens, the question as to where the rights are to be exercised is not always material or even relevant. If the persons concerned, on whom the law or purported action under G it is to operate, are outside the territorial jurisdiction of our country, the action taken may be ineffective. But, the validity of the law must be determined on considerations other than this. The tests of validity of restrictions imposed upon the rights covered by article 19(1) will be found in clauses (2) to (6) of Article 19. There is nothing there to suggest that restrictions on rights the exercise of which may involve going out of the country or some activities abroad H are excluded from the purview of tests contemplated by articles 19(2) to (6). I agree with my learned brother Bhagwati, for reasons detailed by him, that the total effect and not the mere form of a restriction will determine which fundamental right is really involved in a

particular case and whether a restriction upon its exercise is reasonably permissible on the facts and circumstances of that case. A

If rights under article 19 are rights which inhere in Indian citizens, individuals concerned carry these inherent fundamental constitutional rights with them wherever they go, in so far as our law applies to them, because they are parts of the Indian nation just as Indian ships, flying the Indian flag, are deemed, in International law, to be floating parts of Indian territory. This analogy, however, could not be pushed too far because Indian citizens on foreign territory, are only entitled, by virtue of their Indian nationality and passports, to the protection of the Indian Republic and the assistance of its diplomatic missions abroad. They cannot claim to be governed abroad by their own Constitutional or personal laws which do not operate outside India. But, that is not the position in the case before us. So far as the impugned action in the case before us is concerned, it took place in India and against an Indian citizen residing in India. B C

In India, at any rate, we are all certainly governed by our Constitution. The fact that the affected petitioner may not, as a result of a particular order, be able to do something intended to be done by her abroad cannot possibly make the Governmental action in India either ineffective or immune from judicial scrutiny or from an attack made on the ground of a violation of a fundamental right which inheres in an Indian citizen. The consequences or effects upon the petitioner's possible actions or future activities in other countries may be a factor which may be weighed, where relevant, with other relevant facts in a particular case in judging the merits of the restriction imposed. It will be relevant in so far as it can be shown to have some connection with public or national interests when determining the merits of an order passed. It may show how she has become a "person aggrieved" with a cause of action, by a particular order involving her personal freedom. But, such considerations cannot curtail or impair the scope or operation of fundamental rights of citizens as protections against unjustifiable actions of their own Government. Nor can they, by their own force, protect legally unjustifiable actions of the Government of our country against attacks in our own Courts. D E F

In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by articles 14 and 19 whenever facts justifying the invocation of either of these articles may be disclosed. For example, an international singer or dancer may well be able to complain of an unjustifiable restriction on professional activity by a denial of a passport. In such a case, violations of both articles 21 and 19(1)(g) may both be put forward making it necessary for the authorities concerned to justify the restriction imposed, by showing satisfaction of tests of validity contemplated by each of these two articles. G H

A The tests of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic. Otherwise, they would cease to be reasonable. Thus, I think that a discretion left to the authority to impound a passport in public interest cannot invalidate the law itself. We cannot, out of fear that such power will be misused, refuse to permit Parliament to entrust even such power to executive authorities as may be absolutely necessary to carry out the purposes of a validly exercisable power. I think it has to be necessarily left to executive discretion to decide whether, on the facts and circumstances of a particular case, public interest will or will not be served by a particular order to be passed under a valid law subject, as it always is, to judicial supervision. In matters such as grant, suspension, impounding or cancellation of passports, the possible dealings of an individual with nationals and authorities of other States have to be considered. The contemplated or possible activities abroad of the individual may have to be taken into account. There may be questions of national safety and welfare which transcend the importance of the individual's inherent right to go where he or she pleases to go. Therefore, although we may not deny the grant of wide discretionary power to the executive authorities as unreasonable in such cases, yet, I think we must look for and find procedural safeguards to ensure that the power will not be used for purposes extraneous to the grant of the power before we uphold the validity of the power conferred. We have to insist on procedural proprieties the observance of which could show that such a power is being used only to serve what can reasonably and justly be regarded as a public or national interest capable of overriding the individual's inherent right of movement or travel to wherever he or she pleases in the modern world of closer integration in every sphere between the peoples of the world and the shrunk time-space relationships.

The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution. Their actual exercise, however, is regulated and conditioned largely by statutory law. Persons upon whom these basic rights are conferred can exercise them so long as there is no justifiable reason under the law enabling deprivations or restrictions of such rights. But, once the valid reason is found to be there and the deprivation or restriction takes place for that valid reason in a procedurally valid manner, the action which results in a deprivation or restriction becomes unassailable. If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed.

A bare look at the provisions of S. 10, sub.s.(3) of the Act will show that each of the orders which could be passed under section 10, sub.s. (3)(a) to (h) requires a "satisfaction" by the Passport Authority on certain objective conditions which must exist in a case before it passes an order to impound a passport or a travel document. Impounding or revocation are placed side by side on the same footing in the provision. Section 11 of the Act provides an appeal to the Central Government

from every order passed under section 10, sub.s. (3) of the Act. Hence, section 10, subs. s. (5) makes it obligatory upon the Passport Authority to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless in any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy". A B

It seems to me, from the provisions of section 5, 7 and 8 of the Act, read with other provisions, that there is a statutory right also acquired, on fulfilment of prescribed conditions by the holder of a passport, that it should continue to be effective for the specified period so long as no ground has come into existence for either its revocation or for impounding it which amounts to a suspension of it for the time being. It is true that in a proceeding under article 32 of the Constitution, we are only concerned with the enforcement of fundamental Constitutional rights and not with any statutory rights apart from fundamental rights. Article 21, however, makes it clear that violation of a law, whether statutory or if any other kind, is itself an infringement of the guaranteed fundamental right. The basic right is not to be denied the protection of "law" irrespective of variety of that law. It need only be a right "established by law". C D

There can be no doubt whatsoever that the orders under section 10(3) must be based upon some material even if that material consists, in some cases, of reasonable suspicion arising from certain credible assertions made by reliable individuals. It may be that, in an emergent situation, the impounding of a passport may become necessary without even giving an opportunity to be heard against such a step, which could be reversed after an opportunity given to the holder of the passport to show why the step was unnecessary, but, ordinarily, no passport could be reasonably either impounded or revoked without giving a prior opportunity to its holder to show cause against the proposed action. The impounding as well revocation of a passport, seem to constitute action in the nature of a punishment necessitated on one of the grounds specified in the Act. Hence, ordinarily, an opportunity to be heard in defence after a show cause notice should be given to the holder of a passport even before impounding it. E F

It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principle was laid down by this Court in the *State of Orissa* v. *Dr. (Miss) Binapani Dei & Ors.*(1) in the following words : G

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to H

(1) AIR 1967 S.C. 1269 at 1271.

A judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed, it need not be shown to be superadded. If there B is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a Person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

C In England, the rule was thus expressed by Byles J. in *Cooper* v. *Wandsworth Board of Works*(1) :

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam D before he was called upon to make his defence. "Adam (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also."

I find no difficulty whatsoever in holding, on the strength of these E well recognised principles, that an order impounding a passport must be made quasi-judicially. This was not done in the case before us.

In my estimation, the findings arrived at by my learned brethren after an examination of the facts of the case before us, with which I concur, indicate that it cannot be said that a good enough reason has been shown to exist for impounding the passport of the petitioner by F the order dated 7th July, 1977. Furthermore, the petitioner has had no opportunity of showing that the ground for impounding it finally given in this Court either does not exist or has no bearing on public interest or that public interest cannot be better served in some other manner. Therefore, speaking for myself, I would quash the order and direct the opposite parties to give an opportunity to the petitioner to show cause against any proposed action on such grounds as may be available.

G

I am not satisfied that there were present any such pressing grounds with regard to the petitioner before us that the immediate action of impounding her passport was called for. Furthermore, the rather cavalier fashion in which disclosure of any reason for impounding her passport was denied to her, despite the fact that the only reason said to exist the possibility of her being called to give evidence before a com- H mission of inquiry and stated in the counter-affidavit filed in this Court, is not such as to be reasonably deemed to necessitate its concealment in

(1) 1863 (14) C.B. (N.S.) 180.

public interest, may indicate the existence of some undue prejudice against the petitioner. She has to be protected against even the appearance of such prejudice or bias. A

It appears to me that even executive authorities when taking administrative action which involves any deprivations of or restrictions on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness or unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice. B

The attitude adopted by the Attorney General however, shows that Passport authorities realize fully that the petitioner's case has not been justly or reasonably dealt with. As the undertaking given by the Attorney General amounts to an offer to deal with it justly and fairly after informing the petitioner of any ground that may exist for impounding her passport, it seems that no further action by this Court may be necessary. In view, however, of what is practically an admission that the order actually passed on 7th July, 1977, is neither fair nor procedurally proper, I would, speaking for myself, quash this order and direct the return of the impounded passport to the petitioner. I also think that the petitioner is entitled to her costs. C D

CHANDRACHUD, J.—The petitioner's passport dated June 1, 1976 having been impounded "in public interest" by an order dated July 2, 1977 and the Government of India having declined "in the interest of general public" to furnish to her the reasons for its decision, she has filed this writ petition under article 32 of the Constitution to challenge that order. The challenge is founded on the following grounds : E

(1) To the extent to which section 10(3)(c) of the Passport Act, 1967 authorises the passport authority to impound a passport "in the interests of the general public", it is violative of article 14 of the Constitution since it confers vague and undefined power on the passport authority; F

(2) Section 10(3)(c) is void as conferring an arbitrary power since it does not provide for a hearing to the holder of the passport before the passport is impounded;

(3) Section 10(3)(c) is violative of article 21 of the Constitution since it does not prescribe 'procedure' within the meaning of that article and since the procedure which it prescribes is arbitrary and unreasonable; and G

(4) Section 10(3)(c) offends against articles 19(1)(a) and 19(1)(g) since it permits restrictions to be imposed on the rights guaranteed by these articles even though such restrictions cannot be imposed under articles 19(2) and 19(6). H

A At first, the passport authority exercising its power under section 10(5) of the Act refused to furnish to the petitioner the reason for which it was considered necessary in the interests of general public to impound her passport. But those reasons were disclosed later in the counter-affidavit filed on behalf of the Government of India in answer to the writ petition. The disclosure made under the stress of the writ petition that the petitioner's passport was impounded because, her presence B was likely to be required in connection with the proceedings before a Commission of Inquiry, could easily have been made when the petitioner called upon the Government to let her know the reasons why her passport was impounded. The power to refuse to disclose the reasons for impounding a passport is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation. The reasons, if disclosed C being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to D keep the reasons away from judicial scrutiny.

In *Satwant Singh Sawhney* v. *D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi & Ors.*(1) this Court ruled by majority that the expression "personal liberty" which occurs in article 21 of the Constitution includes the right to travel abroad and that no person can be deprived of that right except according to proce- E dure established by law. The Passport Act which was enacted by Parliament in 1967 in order to comply with that decision prescribes the procedure whereby an application for a passport may be granted fully or partially, with or without any endorsement, and a passport once granted may later be revoked or impounded. But the mere prescription of some kind of procedure cannot ever meet the mandate of article 21. The procedure prescribed by law has to be fair, just F and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Court-room trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are G charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of aritcle 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, articles 14 and 19. If the holding in *A. K. Gopalan* v. *State of* H *Madras*(2) that the freedoms guaranteed by the Constitution are

(1) [1967] 3 SCR 525
(2) [1950] SCR 88.

mutually exclusive were still good law, the right to travel abroad which is part of the right of personal liberty under article 21 could only be found and located in that article and in no other. But in the Bank Nationalisation Case (*R. C. Cooper* v. *Union of India*)(1) the majority held that the assumption in *A. K. Gopalan*(2) that certain articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the *Bank Nationalisation case*(1) was concerned with the inter-relationship of article 31 and 19 and not of articles 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in *A. K. Gopalan* (supra) as incorrect. That is how a seven-Judge Bench in *Shambhu Nath Sarkar* v. *State of West Bengal & Ors.*(3) assessed the true impact of the ratio of the *Bank Nationalisation Case* (supra) on the decision in *A. K. Gopalan* (supra) in *Shambhu Nath Sarkar*(3) it was accordingly held that a law of preventive detention has to meet the challenge not only of articles 21 and 22 but also of article 19(1)(d). Later, a five-Judge Bench in *Haradhan Saha* v. *State of West Bengal & Ors.*(4) adopted the same approach and considered the question whether the Maintenance of Internal Security Act, 1971 violated the right guaranteed by article 19(1)(d). Thus, the inquiry whether the right to travel abroad forms a part of any of the freedoms mentioned in article 19(1) is not to be shut out at the threshold merely because that right is a part of the guarantee of personal liberty under article 21. I am in entire agreement with Brother Bhagwati when he says :

> "The law must, therefore, now be taken to be well settled that article 21 does not exclude article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by article 21, such law, in so far as it abridges or takes away any fundamental right under article 19 would have to meet the challenge of that article."

The interplay of diverse articles of the Constitution guaranteeing various freedoms has gone through vicissitudes which have been elaborately traced by Brother Bhagwati. The test of directness of the impugned law as contrasted with its consequences was thought in *A. K. Gopalan* (supra) and *Ram Singh*(5) to be the true approach for determining whether a fundamental right was infringed. A significant application of that test may be perceived in *Naresh S. Mirajkar*(6) where an order passed by the Bombay High Court prohibiting the publication of a witness's evidence in a defamation case was upheld by this Court on the ground that it was passed with the object of affording protection to the witness in order to obtain true evidence

(1) [1973] 3 SCR 530.
(2) [1950] SCR 88
(3) [1973] 1 SCR 856.
(4) [1975] 1 SCR 778.
(5) [1951] SCR 451.
(6) [1966] 3 SCR 744.

A and its impact on the right of free speech and expression guaranteed by article 19(1)(a) was incidental. N. H. Bhagwati J. in *Express Newspapers*(1) struck a modified note by evolving the test of proximate effect and operation of the statute. That test saw its fruition in *Sakal Papers*(2) where the Court, giving precedence to the direct and immediate effect of the order over its form and object, struck down the Daily Newspapers (Price and Page) Order, 1960 on the ground B that it violated article 19(1)(a) of the Constitution. The culmination of this thought process came in the *Bank Nationalisation Case* (supra) where it was held by the majority, speaking through Shah J., that the extent of protection against impairment of a fundamental right is determined by the direct operation of an action upon the individual's rights and not by the object of the legislature or by the form of the action. In *Bennett Coleman*(3) the Court, by a majority, reiterated C the same position by saying that the direct operation of the Act upon the rights forms the real test. It struck down the newsprint policy, restricting the number of pages of newspapers without the option to reduce the circulation, as offending against the provisions of article 19(1)(a). "The action may have a direct effect on a fundamental right although its direct subject matter may be different" observed the Court, citing an effective instance of a law dealing with the Defence D of India or with defamation and yet having a direct effect on the freedom of speech and expression. The measure of directness, as held by Brother Bhagwati, is the 'inevitable' consequence of the impugned statute. These then are the guidelines with the help of which one has to ascertain whether section 10(3)(c) of the Passport Act which authorizes the passport authority to impound a passport or the impugned order passed thereunder violates the guarantee of free speech and E expression conferred by article 19(1)(a).

The learned Attorney General answered the petitioner's contention in this behalf by saying firstly, that the right to go abroad cannot be comprehended within the right of free speech and expression since the latter right is exercisable by the Indian citizens within the geographical limits of India only. Secondly, he contends, the right to go F abroad is altogether of a different genre from the right of free speech and expression and is therefore not a part of it.

The first of these contentions raises a question of great importance but the form in which the contention is couched is, in my opinion, apt to befog the true issue. Article 19 confers certain freedoms on Indian citizens, some of which by their very language and nature are limited G in their exercise by geographical considerations. The right to move freely throughout the 'territory of India' and the right to reside and settle in any part of the 'territory of India' which are contained in clauses (d) and (e) of article 19(1) are of this nature. The two clauses expressly restrict the operation of the rights mentioned therein to the territorial limits of India. Besides, by the very object and nature of those rights, their exercise is limited to Indian territory. H

(1) [1959] SCR 12.
(2) [1962] 3 SCR 842.
(3) [1973] 2 SCR 757.

Those rights are intended to bring in sharp focus the unity and integrity of the country and its quasi-federal structure. Their drive is directed against the fissiparous theory that 'sons of the soil' alone shall thrive, the 'soil' being conditioned by regional and sub-regional considerations. The other freedoms which article 19(1) confers are not so restricted by their terms but that again is not conclusive of the question under consideration. Nor indeed does the fact that restraints on the freedoms guaranteed by Article 19(1) can be imposed under Articles 19(2) to 19(6) by the State furnish any clue to that question. The State can undoubtedly impose reasonable restrictions on fundamental freedoms under clauses (2) to (6) of Article 19 and those restrictions, generally, have a territorial operation. But the ambit of a freedom cannot be measured by the right of a State to pass laws imposing restrictions on that freedom which, in the generality of cases, have a geographical limitation.

Article 19(1)(a) guarantees to Indian citizens the right to freedom of speech and expression. It does not delimit that right in any manner and there is no reason, arising either out of interpretational dogmas or pragmatic considerations, why the courts should strain the language of the Article to cut down the amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose, regardless of geographical considerations, subject of course to the operation of any existing law or the power of the State to make a law imposing reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, as provided in article 19(2). The exercise of the right of free speech and expression beyond the limits of Indian territory will, of course, also be subject to the laws of the country in which the freedom is of is intended to be exercised. I am quite clear that the Constitution does not confer any power on the executive to prevent the exercise by an Indian citizen of the right of free speech and expression on foreign soil, subject to what I have just stated. In fact, that seems to me to be the crux of the matter, for which reason I said, though with respect, that the form in which the learned Attorney General stated his proposition was likely to cloud the true issue. The Constitution guarantees certain fundamental freedoms and except where their exercise is limited by territorial considerations, those freedoms may be exercised wheresoever one chooses, subject to the exceptions or qualifications mentioned above.

The next question is whether the right to go out of India is an integral part of the right of free speech and expression and is comprehended within it. It seems to me impossible to answer this question in the affirmative as is contended by the petitioner's counsel, Shri Madan Bhatia. It is possible to predicate of many a right that its exercise would be more meaningful if the right is extended to comprehended an extraneous facility. But such extensions do not form part of the right conferred by the Constitution. The analogy of the freedom of press being included in the right of free speech and expression

A is wholly misplaced because the right of free expression incontrovertibly includes the right of freedom of the press. The right to go abroad on one hand and the right of free speech and expression on the other are made up of basically different constituents, so different indeed that one cannot be comprehended in the other.

Brother Bhagwati has, on this aspect considered at length certain B American decisions like *Kent*(1), *Apthekar*(2) *and Zemel*(3) and illuminating though his analysis is, I am inclined to think that the presence of the due process clause in the 5th and 14th Amendments of the American Constitution makes significant difference to the approach of American Judges to the definition and evaluation of constitutional guarantees. The content which has been meaningfully and imaginatively poured into "due process of law" may, in my view, constitute an impor- C tant point of distinction between the American Constitution and ours which studiously avoided the use of that expression. In the Centennial Volume. "The Fourteenth Amendment" edited by Bernard Schwartz, is contained in an article on 'Landmarks of Legal Liberty' by Justice William J. Brennan in which the learned Judge quoting from Yeat's play has this to say : In the service of the age-old dream for recognition of the equal and inalienable rights of man, D the 14th Amendment though 100 years old, can never be old-

> "Like the poor old women in Yeat's play,
>
> "Did you see an old woman going down the path?" asked Bridget. "I did not," replied Patrick, who had come into the house after the old woman left it, "But I saw a young girl and she had the walk of a queen."

E

Our Constitution too strides in its majesty but, may it be remembered, without the due process clause, I prefer to be content with a decision directly in point, *All India Bank Employees' Association*(4) in which this Court rejected the contention that the freedom to form associations or unions contained in article 19(1)(c) carried with it the right that a workers' union could do all that was necessary to make that right F effective, in order to achieve the purpose for which the union was formed. One right leading to another and that another to still other, and so on, was described in the abovementioned decision as productive of a "grotesque result".

I have nothing more to add to what Brother Bhagwati has said on the other points in the case. I share his opinion that though the G right to go abroad is not included in the right contained in article 19(1)(a), if an order made under section 10(3)(c) of the Act does in fact violate the right of free speech and expression, such an order could be struck down as unconstitutional. It is well-settled that a statute may pass the test of constitutionality and yet an order passed under it may be unconstitutional. But of that I will say no more

H (1) 2 L. ed. 2d 1204.
(2) 12 L. ed. 2d 992.
(3) 14 L. ed. 2d 179.
(4) [1962] 3 SCR 269.

because in this branch, one says no more than the facts warrant and decides nothing that does not call for a decision. The fact that the petitioner was not heard before or soon after the impounding of her passport would have introduced a serious infirmity in the order but for the statement of the Attorney General that the Government was willing to hear the petitioner and further to limit the operation of the order to a period of six months from the date of the fresh decision, if the decision was adverse to the petitioner. The order, I agree, does not in fact offend against article 19(1)(a) or 19(1)(g).

I, therefore, agree with the order proposed by Brother Bhagwati.

BHAGWATI, J.—The Petitioner is the holder of the passport issued to her on 1st June, 1976 under the Passport Act, 1967. On 4th July, 1977 the Petitioner received a letter dated 2nd July, 1977 from the Regional Passport Officer, Delhi intimating to her that it has been decided by the Government of India to impound her passport under section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in section 10(5) to which a reply was sent by the Government of India, Ministry of External Affairs on 6th July, 1977 stating *inter alia* that the Government has decided "in the interest of the general public" not to furnish her a copy of the statement of reasons for making of the order. The Petitioner thereupon filed the present petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so. The action of the Government was impugned *inter alia* on the ground that it was *mala fide*, but this challenge was not pressed before us at the time of the hearing of the arguments and hence it is not necessary to state any facts bearing on that question. The principal challenge set out in the petition against the legality of the action of the Government was based mainly on the ground that section 10(3)(c), in so far as it empowers the Passport Authority to impound a passport "in the interests of the general public" is violative of the equality clause contained in Art. 14 of the Constitution, since the condition denoted by the words "in the interests of the general public" limiting the exercise of the power is vague and undefined and the power conferred by this provision is, therefore, excessive and suffers from the vice of "over-breath." The petition also contained a challenge that an order under section 10(3)(c) impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and since in the present case, the passport was impounded by the Government without affording an opportunity of hearing to the petitioner, the order was null and void, and, in the alternative, if section 10(3)(c) were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be void as offending Article 14. These were the only grounds taken in the Petition as originally filed and on 20th July, 1977 the petition was admitted and rule issued by this Court and an interim order was made directing

A that the passport of the petitioner should continue to remain deposited with the Registrar of this Court pending the hearing and final disposal of the Petition.

The hearing of the petition was fixed on 30th August 1977, but before that, the petitioner filed an application for urging additional grounds and by this application, two further grounds were sought to B be urged by her. One ground was that section 10(3)(c) is *ultra vires* Article 21 since it provides for impounding of passport without any procedure as required by that Article, or, in any event, even if it could be said that there is some procedure prescribed under the passport Act, 1967, it is wholly arbitrary and unreasonable and, therefore, not in compliance with the requirement of that article. The other ground urged on behalf of the petitioner was that section 10(3)(c) is violaC tive of Articles 19(1)(a) and 19(1)(g) inasmuch as it authorises imposition of restrictions on freedom of Speech and expression guaranteed under Article 19(1)(a) and freedom to practise any profession or to carry on any occupation, or business guaranteed under Article 19(1)(g) and these restrictions are impermissible under Article 19(2) and Article 19(6) respectively. The application for urging these two additional grounds was granted by this Court and ultimately at the D hearing of the petition these were the two principal grounds which were pressed on behalf of the petitioner.

Before we examine the rival arguments urged on behalf of the parties in regard to the various questions arising in this petition, it would be convenient to set out the relevant provisions of the Passport Act, 1967. This Act was enacted on 24th June, 1967 in view of the E decision of this Court in *Satwant Singh Sawhney* v. *D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi & Ors.*(1) The position which obtained prior to the coming into force of this Act was that there was no law regulating the issue of passports for leaving the shores of India and going abroad. The issue of passports was entirely within the discretion of the executive and this discretion was unguided and unchannelled. This Court, by a majority, held that F the expression "personal liberty" in Article 21 takes in the right of locomotion and travel abroad and under Article 21 no person can be deprived of his right to go abroad except according to the procedure established by law and since no law had been made by the State regulating or prohibiting the exercise of such right, the refusal of passport was in violation of Article 21 and moreover the discretion with the executive in the matter of issuing or refusing passport being unG channelled and arbitrary, it was plainly violative of Article 14 and hence the order refusing passport to the petitioner was also invalid under that Article. This decision was accepted by Parliament and the infirmity pointed out by it was set right by the enactment of the Passports Act, 1967. This Act, as its preamble shows, was enacted to provide for the issue of passports and travel documents to regulate the departure from India of citizens of India and other persons and for H incidental and ancillary matters. Section 3 provides that no person shall depart from or attempt to depart from India unless he holds in

(1) [1967] 3 SCR 525.

this behalf a valid passport or travel document. What are the different classes of passports and travel documents which can be issued under the Act is laid down in section 4. Section 5, sub-section (1) provides for making of an application for issue of a passport or travel document or for endorsement on such passport or travel document for visiting foreign country or countries and sub-section (2) says that on receipt of such application, the passport authority, after making such inquiry, if any, as it may consider necessary, shall, by order in writing, issue or refuse to issue the passport or travel document or make or refuse to make on the passport or travel document endorsement in respect of one or more of the foreign countries specified in the application. Sub-section (3) requires the passport authority, where it refuses to issue the passport or travel document or to make any endorsement on the passport or travel document, to record in writing a brief statement of its reasons for making such order. Section 6, sub-section (1) lays down the grounds on which the passport authority shall refuse to make an endorsement for visiting any foreign country and provides that on no other ground the endorsement shall be refused. There are four grounds set out in this sub-section and of them, the last is that, in the opinion of the Central Government, the presence of the applicant in such foreign country is not in the public interest. Similarly sub-section (2) of section 6 specifies the grounds on which alone and on no other grounds the passport authority shall refuse to issue passport or travel document for visiting any foreign country and amongst various grounds set out there, the last is that, in the opinion of the Central Government the issue of passport or travel document to the applicant will not be in the public interest. Then we come to section 10 which is the material section which falls for consideration. Sub-section (1) of that section empowers the passport authority to vary or cancel the endorsement of a passport or travel document or to vary or cancel the conditions subject to which a passport or travel document has been issued, having regard, *inter alia*, to the provisions of sub-section (1) of section 6 or any notification under section 19, Sub-section (2) confers powers on the passport authority to vary or cancel the conditions of the passport or travel document on application of the holder of the passport or travel document and with the previous approval of the Central Government. Sub-section (3) provides that the passport authority may impound or cause to be impounded or revoke a passport or travel document on the grounds set out in clauses (a) to (h). The order impounding the passport in the present case was made by the Central Government under clause (c) which reads as follows :—

> "(c) if the passport authority deems it necessary so to do in the interest of the Sovereignty and Integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;"

The particular ground relied upon for making the order was that set out in the last part of clause (c), namely, that the Central Government deems it necessary to impound the passport "in the interests of the general public." Then follows sub-section (5) which requires the

A passport authority impounding or revoking a passport or travel document or varying or cancelling an endorsement made upon it to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless, in any case, the passport authority is of the opinion that it will not be in the interests of the soveriegnty and integrity of India, the security of India, friendly relations of India with B any foreign country or in the interests of the general public to furnish such a copy." It was in virtue of the provision contained in the latter part of this sub-section that the Central Government declined to furnish a copy of the statement of reasons for impounding the passport of the petitioner on the ground that it was not in the interests of the general public to furnish such copy to the petitioner. It is indeed a matter of regret that the Central Government should have taken up this attitude C in reply to the request of the petitioner to be supplied a copy of the statement of reasons, because ultimately, when the petition came to be filed, the Central Government did disclose the reasons in the affidavit in reply to the petition which shows that it was not really contrary to public interest and if we look at the reasons given in the affidavit in reply, it will be clear that no reasonable person could possibly have taken the view that the interests of the general public would be pre- D judiced by the disclosure of the reasons. This is an instance showing how power conferred on a statutory authority to act in the interests of the general public can sometimes be improperly exercised. If the petitioner had not filed the petition, she would perhaps never have been able to find out what were the reasons for which her passport was impounded and she was deprived of her right to go abroad. The necessity of giving reasons has obviously been introduced in sub-sec- E tion (5) so that it may act as a healthy check against abuse or misuse of power. If the reasons given are not relevant and there is no nexus between the reasons and the ground on which the passport has been impounded, it would be open to the holder of the passport to challenge the order impounding it in a court of law and if the court is satisfied that the reasons are extraneous or irrelvant, the court would strike down the order. This liability to be exposed to judicial F scrutiny would by itself act as a safeguard against improper or *mala fide* exercise of power. The court would, therefore, be very slow to accept, without close scrutiny, the claim of the passport authority that it would not be in the interests of the general public to disclose the reasons. The passport authority would have to satisfy the court by placing proper material that the giving of reasons would be clearly and indubitably against the interests of the general public and if the G Court is not so satisfied, the Court may require the passport authority to disclose the reasons, subject to any valid and lawful claim for privilege which may be set up on behalf of the Government. Here in the present case, as we have already pointed out, the Central Government did initially claim that it would be against the interests of the general public to disclose the reasons for impounding the passport, but when it came to filing the affidavit in reply, the Central Government very H properly abandoned this unsustainable claim and disclosed the reasons. The question whether these reasons have any nexus with the interests of the general public or they are extraneous and irrelevant is a matter

which we shall examine when we deal with the arguments of the parties. Meanwhile, proceeding further with the resume of the relevant provisions, reference may be made to section 11 which provides for an appeal *inter alia* against the order impounding or revoking a passport or travel document under sub-section (3) of section 10. But there is a proviso to this section which says that if the order impounding or revoking a passport or travel document is passed by the Central Government, there shall be no right to appeal. These are the relevant provisions of the Act in the light of which we have to consider the constitutionality of sub-section (3)(c) of section 10 and the validity of the order impounding the passport of the petitioner.

Meaning and content of personal liberty in article 21

The first contention urged on behalf of the petitioner in support of the petition was that the right to go abroad is part of 'personal liberty' within the meaning of that expression as used in Article 21 and no one can be deprived of this right except according to the procedure prescribed by law. There is no procedure prescribed by the Passport Act, 1967 for impounding or revoking a passport and thereby preventing the holder of the passport from going abroad and in any event, even if some procedure can be traced in the relevant provisions of the Act, it is unreasonable and arbitrary, inasmuch as it does not provide for giving an opportunity to the holder of the passport to be heard against the making of the order and hence the action of the Central Government in impounding the passport of the petitioner is in violation of Article 21. This contention of the petitioner raises a question as to the true interpretation of Article 21, what is the nature and extent of the protection afforded by this article? What is the meaning of 'personal liberty': does it include the right to go abroad so that this right cannot be abridged or taken away except in accordance with the procedure prescribed by law? What is the inter-relation between Art. 14 and Article 21? Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in '*The Indian Constitution-Cornerstone of a Nation*', "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". They were indelibly written in the sub-conscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental rights represent the basic values cherished by the people of this country since the *Vedic* times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a "pattern of guarantees on the basic-structure of human rights" and impose negative obligations on the State not to encroach on indi-

A vidual liberty in its various dimensions. It is apparent from the enunciation of these rights that the respect for the individual and his capacity for individual volition which finds expression there is not a self fulfilling prophecy. Its purpose is to help the individual to find his own liability, to give expression to his creativity and to prevent governmental and other forces from 'alienating' the individual from his creative impulses. These rights are wide ranging and comprehensive
B and they fall under seven heads, namely, right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. Articles 14 to 18 occur under the heading 'Right to Equality', and of them, by far the most important is Article 14 which confers a fundamental right by injuncting the State not to "deny to any person equality before the law or the equal protection of the laws with-
C in the territory of India". Articles 19 to 22, which find place under the heading "Right to freedom" provide for different aspects of freedom. Clause (1) of Article 19 enshrines what may be described as the seven lamps of freedom. It provides that all citizens shall have the right—(a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle
D in any part of the territory of India; (f) to acquire, hold and dispose of property and (g) to practise any profession or to carry on any occupation, trade or business. But these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of another and in a well-ordered, civilised society, freedom can only be regulated freedom. Therefore, clauses (2) to (6) of Art. 19 permit reasonable restrictions to be imposed on
E the exercise of the fundamental rights guaranteed under clause (1) of that article. Article 20 need not detain us as that is not material for the determination of the controversy between the parties. Then comes Article 21 which provides :

> "21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

F

Article 22 confers protection against arrest and detention in certain cases and provides *inter alia* safeguards in case of preventive detention. The other fundamental rights are not relevant to the present discussion and we need not refer to them.

It is obvious that Article 21, though couched in negative language,
G confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words 'personal liberty' as used in this article ? This question incidently came up for discussion in some of the judgments
H in *A. K. Gopalan* v. *State of Madras*(1) and the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine

(1) [1950] S.C.R. 88.

the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Article 19 and 21. It was in *Kharak Singh* v. *State of U.P. & Ors.*(1) that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words : "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned". There can be no doubt that in view of the decision of this Court in *R. C. Cooper* v. *Union of India*(2) the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in *R. C. Cooper's* case a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in *A. K. Gopalan's* (supra) case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive—each article enacting a code relating to the protection of distinct rights, but this theory was over-turned in *R. C. Cooper's* case (supra) where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in *A. K.*

(1) [1964] 1 S.C.R. 332.
(2) [1973] 3 S.C.R. 530.

A *Gopalan's* case that certain articles in the Constitution exclusively deal with specific matters cannot be accepted as correct". It was held in *R. C. Cooper's* case and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C. J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J., and S. R. Das, J., in *A. K. Gopalan's* case that even where a person is detained in accordance with the pro-
B cedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedom under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21
C having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Art. 21 would not require to be tested on the touchstone of clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges of this Court in *Shambhu Nath Sarkar* v. *The State of West Bengal & Ors.*(1)
D that such a law would have to satisfy the requirement *inter alia* of Article 19(1), clause (d) and in *Haradhan Saha* v. *The State of West Bengal & Ors.*,(2) which was a decision given by a Bench of five judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee
E embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are spacifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the court should
F be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave length for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R. C. Cooper's* case and our approach in the interpretation of the fundamental rights must now be in tune with this wave length. We may point out even at the cost of repetition that this Court has said in so many terms in
G *R. C. Cooper's* case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some
H of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been

(1) [1973] 1 SCR 856.
(2) [1975] 1 S.C.R. 778.

held by this Court in *Satwant Singh's* case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in *Satwant Singh's* case was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State Law'. *Vide A. K. Gopalan's* case. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that is lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in *A. K. Gopalan's* case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazal Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willi's book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J. did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law." Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in *A. K. Gopalan's* case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

The inter-relationship between articles 14, 19 *and* 21

We may at this stage consider the inter-relation between Article 21 on the one hand and Articles 14 and 19 on the other. We have already pointed out that the view taken by the majority in *A. K. Gopalan's* case was that so long as a law of preventive detention satisfies the requirements of Article 22, it would be within the terms of Article 21 and it would not be required to meet the challenge of Article 19. This view proceeded on the assumption that "certain articles in the constitution exclusively deal with specific matters" and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in *R. C. Cooper's* case and it was over-ruled by a majority of the Full Court, only Ray, J., as he then was, dissenting. The majority judges held that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in *R. C. Cooper's* case was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven judges of this Court in *Shambhu Nath Sarkar* v. *State of West Bengal*(1). The learned Judge there said :

> "In *Gopalan's* case (supra) the majority court had held that Article 22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirement of Articles 19, 14 and 21. The view of Fazal Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(1)(d) and that a law providing for preventive detention had to be subject to such judicial review as is obtained under clause (5) of that Article. In *R. C. Cooper* v. *Union of India*, (supra) the aforesaid premise of the majority in *Gopalan's* case (supra) was disapproved and therefore it no longer holds the field. Though *Cooper's case* (supra) dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in *Gopalan's* case (supra) to be incorrect."

Subsequently, in *Haradhan Saha* v. *State of West Bengal & Ors.*(2) also, a Bench of five Judges of this Court, after referring to the decisions in *A. K. Gopalan's* case and *R. C. Cooper's* case, agreed that the Maintenance of Internal Security Act, 1971, which is a law of preventive detention, has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in *R. C. Cooper's* case and *Shambhu Nath Sarkar's* case and proceeded to consider the challenge of Article 19 to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate any of the constitutional guarantees enshrined in Art. 19. The same view was affirmed once again by a Bench of four

(1) [1973] 1 S.C.R. 856.
(1) [1975] 1 S.C.R. 778.

judges of this Court in *Khudiram Das* v. *The State of West Bengal & Ors.*(1). Interestingly, even prior to these decisions, as pointed out by Dr. Rajive Dhawan, in his book : "The Supreme Court of India :" at page 235, reference was made by this court in *Mohd. Sabir* v. *State of Jammu and Kashmir*(2) to article 19(2) to justify preventive detention. The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in *R. C. Cooper's* case, *Shambhu Nath Sarkar's* case and *Haradhan Saha's* case. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, *ex hypothesi* it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukharjea, J., in *A. K. Gopalan's* case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, *The State of West Bengal* v. *Anwar Ali Sarkar*(3) and *Kathi Raning Rawat* v. *The State of Saurashtra*(4) where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, *Kathi Raning Rawat's* case, the validity was upheld and in the other, namely, *Anwar Ali Sarkar's* case, it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14.

The nature and requirement of the procedure under article 21.

Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which

(1) [1975] 2 S.C.R. 832.
(2) A.I.R. 1971 S.C. 1713.
(3) [1952] S.C.R. 284.
(4) [1952] S.C.R. 435.

A rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority B in *E. P. Royappa* v. *State of Tamil Nadu & Another*(1) namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is abritrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbi- C trariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no D procedure at all and the requirement of Article 21 would not be satisfied.

How far natural justice is an essential element of procedure established by law.

The question immediately arises : does the procedure prescribed by the Passports Act, 1967 for impounding a passport meet the test of E this requirement ? Is it 'right or fair or just' ? The argument of the petitioner was that it is not, because it provides for impounding of a passport without affording reasonable opportunity to the holder of the passport to be heard in defence. To impound the passport of a person, said the petitioner, is a serious matter, since it prevents him from exercising his constitutional right to go abroad and such a drastic consequence cannot in fairness be visited without observing the princi- F ple of *audi alteram partem*. Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21. Now, it is true that there is no express provision in the Passports Act, 1967 which requires that the *audi alteram partem* rule should be followed before impounding a passport, but that is not G conclusive of the question. If the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Byles, J., in *Cooper* v. *Wandsworth Board of Works*(2). "A long course of decisions, beginning with *Dr. Bentley's* case and ending with some very recent cases, establish that, although there are no positive words in the statute requiring that the party shall H be heard, yet the justice of the common law will supply the omission of

(1) [1974] 2 S.C.R. 348.
(2) [1863] 14 C.B.N.S. 180.

the legislature". The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, *Nemo Judex in Sua Causa* and *audi alteram partem*. We are not concerned here with the former, since there is no case of bias urged here. The question is only in regard to the right of hearing which involves the *audi alteram partem* rule. Can it be imported in the procedure for impounding a passport?

We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club :

> "We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair play in action—who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration." (*Current Legal Problems*, 1973, Vol. 26, p. 16)

And then again, in his speech in the House of Lords in *Wiseman* v. *Borneman*(1), the learned Law Lord said in words of inspired felicity :

> "that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are

(1) [1971] A.C. 297.

A to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action." Nor do we wait for directions from Parliament. The common law has abundant riches : there we may find what Byles, J., called "the justice of the common law".

B Thus, the soul of natural justice is ' fair play in action' and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that 'fair play in action' demands that before any prejudicial or adverse action is taken against a person, he C must be given an opportunity to be heard. The rule was stated by Lord Denning, M.R. in these terms in *Schmidt* v. *Secretary of State for Home Affairs*(1) :—where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". The same rule also prevails in other Commonwealth countries like Canada, Australia and D New Zealand. It has even gained access to the United Nations. *Vide American Journal of International Law*, Vol. 67, page 479. Magarry, J., describes natural justice "as a distillate of due process of law". *Vide Fontaine* v. *Chesterton*(2). It is the quintessence of the process of justice inspired and guided by fair play in action'. If we look at the speeches of the various law Lords in *Wiseman's* case, it will be seen that each one of them asked the question "whether in the particular E circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal 'in all the circumstances unfair' ? The test adopted by every law Lord was whether the procedure followed was "fair in all the circumstances" and 'fair play in action' required that an opportunity should be given to the tax payer "to see and reply to the counter-statement of the Commissioners" F before reaching the conclusion that "there is a *prima facie* case against him." The inquiry must, therefore, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected ?

Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function G and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? H Can it be said that the requirement of 'fair play in action' is any the

(1) [1969] 2 Chancery Division 149.
(2) (1968) 112 Solicitor General 690.

less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi-judicial character was spelt out from the following observation of Atkin, L.J. in *Rex* v. *Electricity Commissioners*(1), "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division....". Lord Hewart, C.J., in *Rex* v. *Legislative Committee of the Church Assembly*(2) read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine quesions affecting the rights of subjects"—something super added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to oversubtlety and over-refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in *Ridge* v. *Baldwin*(3), which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed : "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be superadded. This decision broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clar in his article on *'Natural Justice, Substance and Shadow'* in Public Law Journal, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the *Associated Cement Companies Ltd.* v. *P. N. Sharma & Anr*(4) where

(1) [1924] 1 K.B. 171.
(2) [1928] 1 K.B. 411.
(3) [1964] A. C. 40.
(4) [1965] 2 S.C.R. 366.

this Court approvingly referred to the decision in *Ridge* v. *Baldwin* (supra) and, later in *State of Orissa* v. *Dr. Binapani*(1) observed that: "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also pointed out in *A.K. Kraipak & Ors.* v. *Union of India & Ors.*(2) another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said: "The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated, for determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised". The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person effected and where it is found to exist, the rules of natural justice would be attracted.

This was the advance made by the law as a result of the decision in *Ridge* v. *Baldwin* (supra) in England and the decision in *Associated Cement Companies's* case (supra) and other cases following upon it, in India. But that was not to be the end of the development of the law on this subject. The proliferation of administrative law provoked considerable fresh thinking on the subject and soon it came to be recognised that 'fair play in action' required that in administrative proceeding also, the doctrine of natural justice must be held to be applicable. We have already discussed this aspect of the question on principal and shown why no distinction can be made between an administrative and a quasi-judicial proceeding for the purpose of applicability of the doctrine of natural justice. This position was judicially recognised and accepted and the dichotomy between administrative and quasi-judicial proceedings vis-a-vis doctrine of natural justice was finally discarded as unsound by the decisions in *In re : H.K. (An Infant)*(3) and *Schmidt* v. *Secretary of State for Home Affairs* (supra) in England and, so far as India is concerned, by the memorable decision rendered by this Court in *A.K. Kraipak's* case (supra). Lord Parker, C.J. pointed out in the course of his judgment in *In Re : H.K. (An Infant)* (supra) :

> "But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That

(1) [1967] 2 S C.R. 625.
(2) [1970] 1 S.C.R. 457.
(3) [1967] 2 Q. B. 617.

> is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or *bona-fide* decision must, as it seems to me, required not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

This Court, speaking through Hegde, J., in *A. K. Kraipak's* case quoted with approval the above passage from the judgment of Lord Parker, C.J., and proceeded to add :

> "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it——Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George* v. *The University of Kerala and Ors.* (1969)1 S.C.R. 317 the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principles of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case."

A This view was reiterated and re-affirmed in a subsequent decision of this Court in *D.F.O. South Khari* v. *Ram Sanehi Singh*(1). The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable.

B Now, here, the power conferred on the Passport Authority is to impound a passport and the consequence of impounding a passport would be to impair the constitutional right of the holder of the passport to go abroad during the time that the passport is impounded. Moreover, a passport can be impounded by the Passport Authority only on certain specified grounds set out in sub-section (3) of section 10 and the Passport Authority would have to apply its mind to the facts and circumC stances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport. The Passport Authority is also required by sub-section (5) of section 10 to record in writing a brief statement of the reasons for making an order impounding a passport and, save in certain exceptional situations, the Passport Authority is obliged to furnish a copy of the statement of reasons to the holder of the passport. Where the Passport Authority which has imD pounded a passport is other than the Central Government, a right of appeal against the order impounding the passport is given by section 11, and in the appeal, the validity of the reasons given by the Passport Authority for impounding the passport can be canvassed before the Appellate Authority. It is clear on a consideration of these circumstances that the test laid down in the decisions of this Court for distinguishing between a quasi-judicial power and an administrative power is satisfied E and the power conferred on the Passport Authority to impound a passport is quasi-judicial power. The rules of natural justice would, in the circumstances, be applicable in the exercise of the power of impounding a passport even on the orthodox view which prevailed prior to *A. K. Kraipak's* case. The same result must follow in view of the decision in *A. K. Kraipak's* case, even if the power to impound a passport were regarded as administrative in character, because it seriously interferes F with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences.

Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, *nemo debt esse judex propria cause* : no one shall be a judge in his own cause, and *audi alteram partem* : no decision shall be given against a party without affording him a reasonG able hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the *audi alteram partem* rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act as a healthy check on abuse or misuse of power H and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did

(1) [1973] 3 S.C.C. 864.

not suggest that the Court should re-trace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been so act of utter retrogression. But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely that having regard to the nature of the action involved in the impounding of a passport, the *audi alteram partem* rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. The argument was that if the *audi alteram partem* rule were applied, its effect would be to stultify the power of impounding the passport and it would defeat and paralyse the administration of the law and hence the *audi alteram partem* rule cannot in fairness be applied while exercising the power to impound a passport. This argument was sought to be supported by reference to the statement of the law in A.S. de Smith, *Judicial Review of Administrative Action*, 2nd ed., where the learned author says at page 174 that "in administrative law a *prima facie* right to prior notice and opportunity to be heard may be held to be excluded by implication—where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature". Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. There are certain well recognised exceptions to the *audi alteram partem* rule established by judicial decisions and they are summarised by S.A. de Smith in *Judicial Review of Administrative Action*, 2nd ed., at page 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the *audi alteram partem* rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands.

A It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. The court must make every effort to B salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and C the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in *Russel* v. *Duke of Norfolk*(1) that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated fullfledged hearing or it may be D a hearing which is very brief and minimal : it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise. This circumstantial flexibility of the *audi alteram partem* rule was emphasised by Lord Reid in *Wiseman* v. *Sorneman* (supra) when he said that he would be "sorry to see this fundamental E general principle degenerate into a series of hard and fast rules." and Lord Hailsham, L.C., also observed in *Pearl-Berg* v. *Party*(2) that the courts "have taken in increasingly sophisticated view of what is required in individual cases". It would not, therefore, be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and F hearing were to be given to the person concerned before impounding his passport. The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, and opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order G impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving H of such opportunity to the person concerned can and should be read by

(1) [1949] 1 All Eng. Reports 109.
(2) [1971] 1 Weekly Law Reports, 728.

implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article.

But the question then immediately arises whether the Central Government has complied with this procedure in impounding the passport of the Petitioner. Now, it is obvious and indeed this could not be controverted, that the Central Government not only did not give an opportunity of hearing to the petitioner after making the impugned order impounding her passport but even declined to furnish to the petitioner the reasons for impounding her passport despite request made by her. We have already pointed out that the Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this was not only in breach of the statutory provision, but it also amounted to denial of opportunity of hearing to the petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem* and it was not in conformity with the procedure prescribed by the Passports Act, 1967. Realising that this was a fatal defect which would void the order impounding the passport, the learned Attorney-General made a statement on behalf of the Government of India to the following effect :

> "1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case the grounds for impounding the passport are those mentioned in the affidavit in reply dated 18th August, 1977 of Shri Ghosh except those mentioned in para 2(xi).
>
> 2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

This statement removes the voice from the order impounding the passport and it can no longer be assailed on the ground that it does not comply with the *audi alteram partem* rule or is not in accord with the procedure prescribed by the Passports Act, 1967.

Is Section 10(3) (c) *violative of Article* 14 ?

That takes us to the next question whether section 10(3)(c) is violative of any of the fundamental rights guaranteed under Part III of the Constitution. Only two articles of the Constitution are relied upon for this purpose and they are Articles 14 and 19(1)(a) and (g). We will first dispose of the challenge based on Article 14 as it lies in a very narrow compass. The argument under this head of challenge was that

A section 10(3)(c) confers unguided and unfettered power on the Passport Authority to impound a passport and hence it is violative of the equality clause contained in Article 14. It was conceded that under section 10(3)(c) the power to impound a passport can be exercised only upon one or more of the stated grounds, but the complaint was that the ground of "interests of the general public" was too vague and indefinite to afford any real guidance to the Passport Authority and the B Passport Authority could, without in any way violating the terms of the section, impound the passport of one and not of another, at its discretion. Moreover, it was said that when the order impounding a passport is made by the Central Government, there is no appeal or revision provided by the Statute and the decision of the Central Government that it is in public interest to impound a passport is final and conclusive. The discretion vested in the Passport Authority, and particularly in the C Central Government, is thus, unfettered and unrestricted and this is plainly in violation of Article 14. Now, the law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the Authority to discriminate between persons and things similarly D situated. But here it is difficult to say that the discretion conferred on the Passport Authority is arbitrary or unfettered. There are four grounds set out in section 10(3)(c) which would justify the making of an order impounding a passport. We are concerned only with the last ground denoted by the words "in the interests of the general public", for that is the ground which is attacked as vague and indefinite. We fail to see how this ground can, by any stretch of argument, be characE terised as vague or undefined. The words "in the interests of the general public" have a clearly well defined meaning and the courts have often been called upon to decide whether a particular action is "in the interests of the general public" or in "public interest" and no difficulty has been experienced by the Courts in carrying out this exercise. These words are in fact borrowed *ipsissima verba* from Article 19(5) and we think it would be nothing short of heresy to accuse the constitution— F makers of vague and loose thinking. The legislature performed a scissor and paste operation in lifting these words out of Article 19(5) and introducing them in section 10(3) (c) and if these words are not vague and indefinite in Article 19(5), it is difficult to see how they can be condemned to be such when they occur in section 10(3) (c). How can section 10(3)(c) be said to incur any constitutional infirmity on account of these words when they are no wider than the constitutional G provision in Article 19(5) and adhere loyally to the verbal formula adopted in the Constitution? We are clearly of the view that sufficient guidelines are provided by the words "in the interests of the general public" and the power conferred on the Passport Authority to impound a passport cannot be said to be unguided or unfettered. Moreover, it must be remembered that the exercise of this power is not made dependent on the subjective opinion of the Passport Authority as regards H the necessity of exercising it on one or more of the grounds stated in the section, but the Passport Authority is required to record in writing a brief statement of reasons for impounding the passport and, save in cer-

tain exceptional circumstances, to supply a copy of such statement to the person affected, so that the person concerned can challenge the decision of the Passport Authority in appeal and the appellate authority can examine whether the reasons given by the Passport Authority are correct, and if so, whether they justify the making of the order impounding the passport. It is true that when the order impounding a passport is made by the Central Government, there is no appeal aganst it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. When power is vested in a high authority like the Central Government, abuse of power cannot be lightly assumed. And in any event, if there is abuse of power, the arms of the court are long enough to reach it and to strike it down. The power conferred on the Passport Authority to impound a passport under section 10(3) (c) cannot, therefore, be regarded as discriminatory and it does not fall foul of Article 14. But every exercise of such power has to be tested in order to determine whether it is arbitrary or within the guidelines provided in Section 10(3)(c).

Conflicting approaches for locating the fundamental right violated : Direct and inevitable effect test.

We think it would be proper at this stage to consider the approach to be adopted by the Court in adjudging the constitutionality of a statute on the touchstone of fundamental rights. What is the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right? The law on this point has undergone radical change since the days of *A. K. Gopalan's* case. That was the earliest decision of this Court on the subject, following almost immediately upon the commencement of the Constitution. The argument which arose for consideration in this case was that the preventive detention order results in the detention of the applicant in a cell and hence it contravenes the fundamental rights guaranteed under clauses (a), (b), (c), (d), (e) and (g) of Article 19(1). This argument was negatived by Kania, C. J., who pointed out that : "The true approach is only to consider the directness of the legislation and not what will be the result of the detention, otherwise valid, on the mode of the detenu's life—Any other construction put on the article—will be unreasonable". These observations were quoted with approval by Patanjali Sastri, J; speaking on behalf of the majority in *Ram Singh and Ors.* v. *State of Delhi*(1). There, the detention of the petitioner was ordered with a view, to preventing him from making any speeches prejudicial to the maintenance of public order and the argument was that the order of detention was invalid as it infringed the right of free speech and expression guaranteed under Article 19(1)(a). The Court took the view that the direct object of the order was preventive detention and not the infringement of the right of freedom of speech and expression, which was merely consequential upon the detention of the detenu and upheld the validity of the order. The decision in *A. K. Gopalan's* case, followed by *Ram Singh's* case, gave rise to the theory that the object and form of State action determine the extent of protection which may be claimed

(1) [1951] S.C.R. 451.

A by an individual and the validity of such action has to be judged by considering whether it is "directly in respect of the subject covered by any particular article of the Constitution or touches the said article only incidentially or indirectly". The test to be applied for determining the constitutional validity of State action with reference to fundamental rights is : what is the object of the authority in taking the action : what is the subject-matter of the action and to which fundamental right does B it relate ? This theory that "the extent of protection of important guarantees, such as the liberty of person and right to property, depend upon the form and object of the State action and not upon its direct operation upon the individual's freedom" held away for a considerable time and was applied in *Naresh Shridhar Mirajkar & Ors.* v. *State of Maharashtra & Anr.*(1) to sustain an order made by the High Court in a suit for defamation prohibiting the publication of the evidence of a wit- C ness. This Court, after referring to the observation of Kania, C.J., in *A. K. Gopalan's* case and noting that they were approved by the Full Court in *Ram Singh's* case, pointed out that the *object* of the impugned order was to give protection to the witness in order to obtain true evidence in the case with a view to do justice between the parties and if incidentally it operated to prevent the petitioner from reporting the proceedings of the court in the press, it could not be said to contravene D Article 19(1)(a).

But it is interesting to note that despite the observations of Kania, C.J., in *A. K. Gopalan's* case and the approval of these observations in *Ram Singh's* case, there were two decisions given by this Court prior to *Mirajkar's* case, which seemed to deviate and strike a different note. The first was the decision in *Express News Papers (P) Ltd. & Anr.* v. E *The Union of India & Ors.*(2) where N. H. Bhagwati, J., speaking on behalf of the Court, referred to the observations of Kania, C.J., in *A. K. Gopalan's* case and the decision in *Ram Singh's* case, but ultimately formulated the test of direct and inevitable effect for the purpose of adjudging whether a statute offends a particular fundamental right. The learned Judge pointed out that all the consequences suggested on behalf F of the petitioner's as flowing out of the Working Journalists (Conditions of Service) and Miscellaneous Act, 1955, namely, "the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners' freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid, the imposition of penalty on the petitioners' right to choose the instruments for exercising the free- G dom or compelling them to seek alternative media etc.", would be remote and depend upon various factors which may or may not come into play. "Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act", said the learned Judge, "it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the H Legislature while enacting a measure of this type for the benefit of the

(1) [1966] 3 S.C.R. 744.
(2) [1959] S.C.R. 12.

workmen concerned." Then again, the learned Judge observed : "—if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a), it would certainly be liable to be struck down. The real difficulty, however, in the way of the petitioners is that neither the intention nor the effect and operation of the impugned Act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners". Here we find the gern of the doctrine of *direct and inevitable* effect, which necessarily must be effect intended by the legislature, or in other words, what may conveniently and appropriately be described as the doctrine of intended and real effect. So also in *Sakal Papers (P) Ltd. & Ors.* v. *The Union of India*(1) while considering the constitutional validity of the Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960, this Court applied the test of direct and immediate effect. This Court, relying upon the decision in *Dwarkadas Shrinivas* v. *The Sholapur & Weaving Co. Ltd.*(2) pointed out that "it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspect" and "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction." Since "the direct and immediate effect of the order" would be to restrain a newspaper from publishing any number of pages for carrying its news and views, which it has a fundamental right under Article 19(1)(a) to do, unless it raises the selling price as provided in the Schedule to the Order, it was held by this Court that the order was violative of the right of the newspapers guaranteed by Article 19(1)(a). Here again, the emphasis was on the direct and inevitable effect of the impugned action of the State rather than on its object and form or subject-matter.

A B C D E

However, it was only *R. C. Cooper's* case that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, was finally rejected. It may be pointed out that this doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative Lists. The question which is asked in such cases is : what is the pith and substance of the legislations; if it "is within the express powers, then it is not invalidated if incidentally it effects matters which are outside the authorised field". Here also, on the application of this doctrine, the question that is required to be considered is : what is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right.

F G H

(1) [1962] 3 S.C.R. 842.
(2) [1954] S.C.R. 674.

A Mathew, J., in his dissenting judgment in *Bennett Coleman & Co. & Ors.* v. *Union of India & Ors.*(1) recognised the likeness of this doctrine to the pith and substance test and pointed out that "the pith and substance test, although not strictly appropriate, might serve a useful purpose" in determining whether the State action infringes a particular fundamental right. But in *R. C. Cooper's* case, which was a decision given by the Full Court consisting of eleven judges, this doctrine was B thrown overboard and it was pointed out by Shah, J., speaking on behalf of the majority :

> "——it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the juris- C diction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."

D

> "we are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme——"

> "In our judgment, the assumption in *A. K. Gopalan's* E case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

F The decision in *R. C. Cooper's* case thus overturned the view taken in *A. K. Gopalan's* case and, as pointed out by Ray, J., speaking on behalf of the majority in *Bennett Coleman's* case, it laid down two interrelated propositions, namely,

> "First, it is not the object of the authority making the law impairing the right of the citizen nor the form of action G that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the Court to grant relief. The direct operation of the Act upon the rights forms the real test."

The decision in *Bennett Coleman's* case, followed upon *R. C. Cooper's* case and it is an important and significant decision, since it elaborated H and applied the thesis laid down in *R. C. Cooper's* case. The State action which was impugned in *Bennett Coleman's* case was newsprint

(1) [1973] 2 S.C.R. 757.

policy which *inter alia* imposed a maximum limit of ten pages for every newspaper but without permitting the newspaper to increase the number of pages by reducing circulation to meet its requirement even within the admissible quota. These restrictions were said to be violative of the right of free speech and expression guaranteed under Article 19(1)(a) since their direct and inevitable consequence was to limit the number of pages which could be published by a newspaper to ten. The argument of the Government was that the object of the newsprint policy was rationing and equitable distribution of imported newsprint which was scarce commodity and not abridgement of freedom of speech and expression. The subject-matter of the import policy was "rationing of imported commodity and equitable distribution of newsprint" and the newsprint policy did not directly and immediately deal with the right mentioned in Article 19(1)(a) and hence there was no violation of that Article. This argument of the Government was negatived by the majority in the following words :

> "Mr. Palkhivala said that the tests of pith and substance of the subject matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. The true test is whether the effect of the impugned action is to take away or abridge fundamenal rights. If it be assumed that the direct object of the law or action has to be direct abridgement of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject matter may be different. A law dealing directly with the Defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have such law if the restriction is unreasonable even if it is related to matters mentioned therein. Therefore, the word "direct" would go to the quality or character of the effect and not to the subject matter. The object of the law or executive action is irrelevant when it establishes the petitioner's contention about fundamental right. In the present case, the object of the newspaper restrictions has nothing to do with the avilability of newsprint or foreign exchange because these restrictions come into operation after the grant of quota. Therefore the restrictions are to control the number of pages or circulation of dailies or newspapers. These restrictions are clearly outside the ambit of Article 19(2) of the Constitution. It, therefore, confirms that the right of freedom of speech and expression is abridged by these restrictions".

The majority took the view that it was not the object of the newsprint policy or its subject matter which was determinative but its direct consequence or effect upon the rights of the newspapers and since "the effect

A and consequence of the impugned policy upon the newspapers" was direct control and restriction of growth and circulation of newspapers, the newsprint policy infringed freedom of speech and expression and was hence violative of Article 19(1)(a). The pith and substance theory was thus negatived in the clearest terms and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible B that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action, but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the C direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

It may be recalled that the test formulated in *R. C. Cooper's* case merely refers to 'direct operation' or 'direct consequence and effect' of the State action on the fundamental right of the petitioner and does not use the word 'inevitable' in this connection. But there can be no D doubt, on a reading of the relevant observations of Shah, J., that such was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be a open-ended concept and in the absence of operational criteria for judging 'directness', it would give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of E directness or indirectness in order to apply the test. And that is supplied by the criterion of 'inevitable' consequence or effect adumbrated in the *Express Newspaper's* case. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect has been described by some F jurists as the doctrine of intended and real effect. This is the test which must be applied for the purpose of determining whether section 10(3)(c) or the impugned order made under it is violative of Art. 19(1)(a) or (g).

Is Section 10(3)(c) *violative of Article* 19(1)(a) *or* (g) *?*

G We may now examine the challenge based on Article 19(1)(a) in the light of this background. Article 19(1)(a) enshrines one of the most cherished freedoms in a democracy, namely, freedom of speech and expression. The petitioner, being a citizen, has undoubtedly this freedom guaranteed to her, but the question is whether section 10(3)(c) or the impugned Order unconstitutionally takes away or abridges this freedom. Now, *prima facie*, the right, which is sought to be res-H tricted by section 10(3)(c) and the impugned Order, is the right to go abroad and that is not named as a fundamental right or included in so many words in Article 19(1)(a), but the argument of the petitioner was that the right to go abroad is an integral part of the freedom of

speech and expression and whenever State action, be it law or executive fiat, restricts or interferes with the right to go abroad, it necessarily involves curtailment of freedom of speech and expression, and is, therefore required to meet the challenge of Article 19(1)(a). This argument was sought to be answered by the Union of India by a two-fold contention. The first limb of the contention was that the right to go abroad could not possibly be comprehended within freedom of speech and expression, because the right of free speech and expression guaranteed under Article 19(1)(a) was exercisable only within the territory of India and the guarantee of its exercise did not extend outside the country and hence State action restricting or preventing exercise of the right to go abroad could not be said to be violative of freedom of speech and expression and be liable to be condemned as invalid on that account. The second limb of the contention went a little further and challenged the very premise on which the argument of the petitioner was based and under this limb, the argument put forward was that the right to go abroad was not integrally connected with the freedom of speech and expression, nor did it partake of the same basic nature and character and hence it was not included in the right of free speech and expression guaranteed under Article 19(1)(a) and imposition of restriction on it did not involve violation of that Article. These were broadly the rival contentions urged on behalf of the parties and we shall now proceed to consider them.

(A) *Is Freedom of speech and expression confined to the Territory of India?*

The first question that arises for consideration on these contentions is as to what is the scope and ambit of the right of free speech and expression conferred under Article 19(1)(a). Has it any geographical limitations? Is its exercise guaranteed only within the territory of India or does it also extend outside? The Union of India contended that it was a basic postulate of the Constitution that the fundamental rights guaranteed by it were available only within the territory of India, for it could never have been the intention of the constitution-makers to confer rights which the authority of the State could not enforce. The argument was stressed in the form of an interrogation; how could the fundamental rights be intended to be operative outside the territory of India when their exercise in foreign territory could not be protected by the State? Were the fundamental rights intended to be mere platitudes in so far as territory outside India is concerned? What was the object of conferring the guarantee of fundamental rights outside the territory of India, if it could not be carried out by the State? This argument, plausible though it may seem at first blush, is, on closer scrutiny, unsound and must be rejected. When the constitution-makers enacted Part III dealing with fundamental rights, they inscribed in the Constitution certain basic rights which inhere in every human being and which are essential for unfoldment and development of his full personality. These rights represent the basic values of a civilised society and the constitution-makers declared that they shall be given a place of pride in the Constitution and elevated to the status of fundamental rights.

A The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India formed the background against which these rights were enacted and consequently, these rights were conceived by the constitution-makers not in a narrow limited sense but in their widest sweep, for the aim and objective was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged B persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured. The constitution-makers recognised the spiritual dimension of man and they were conscious that he is an embodiment of divinity, what the great Upnishadnic verse describes as "the children of immortality" and his mission in life is to realise the ultimate truth. This obviously he cannot achieve unless he has certain C basic freedoms, such as freedom of thought, freedom of conscience, freedom of speech and expression, personal liberty to move where he likes and so on and so forth. It was this vast conception of man in society and universe that animated the formulation of fundamental rights and it is difficult to believe that when the constitution-makers declared these rights, they intended to confine them only within the territory of India. Take for example, freedom of speech and expres- D sion. Could it have been intended by the constitution-makers that a citizen should have this freedom in India but not outside? Freedom of speech and expression carries with it the right to gather information as also to speak and express oneself at home and abroad and to exchange thoughts and ideas with others not only in India but also outside. On what principle of construction and for what reason can this freedom be confined geographically within the limits of India? The constitution- E makers have not chosen to limit the extent of this freedom by adding the words "in the territory of India" at the end of Article 19(1)(a). They have deliberately refrained from using any words of limitation. Then, are we going to supply these words and narrow down the scope and ambit of a highly cherished fundamental right? Let us not forget that what we are expounding is a constitution and what we are called upon to interpret is a provision conferring a fundamental right. Shall F we expand its reach and ambit or curtail it.? Shall we ignore the high and noble purpose of Part III conferring fundamental rights? Would we not be stultifying the fundamental right of free speech and expression by restricting it by territorial limitation. Moreover, it may be noted that only a short while before the Constitution was brought into force and whilst the constitutional debate was still going on, the Universal G Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948 and most of the fundamental rights which we find included in Part III were recognised and adopted by the United Nations as the inalienable rights of man in the Universal Declaration of Human Rights. Article 19 of the Universal Declaration declared that "every one has a right to freedom of opinion and expression, this right includes freedom to hold opinions without H interference and to seek, receive and import inforimation and ideas through any media and *regardless of frontiers*". (emphasis supplied). This was the glorious declaration of the fundamental freedom of speech and expression noble in conception and universal in scope—which was

before them when the constitution-makers enacted Article 19(1)(a). We have, therefore, no doubt that freedom of speech and expression guaranteed by Article 19(1)(a) is exercisable not only in India but also outside.

It is true that the right of free speech and expression enshrined in Article 19(1)(a) can be enforced only if it sought to be violated by any action of the State and since State action cannot have any extra territorial operation, except perhaps incidentally in case of Parliamentary legislation, it is only violation within the territory of India that can be complained of by an aggrieved person. But that does not mean that the right of free speech and expression is exercisable only in India and not outside. State action taken within the territory of India can prevent or restrict exercise of freedom of speech and expression outside India. What Article 19(1)(a) does is to declare freedom of speech and expression as a fundamental right and to protect it against State action. The State cannot by any legislative or executive action interfere with the exercise of this right, except in so far as permissible under Article 19(2). The State action would necessarily be taken in India but it may impair or restrict the exercise of this right elsewhere. Take for example a case where a journalist is prevented by a law or an executive order from sending his despatch abroad. The law or the executive order would operate on the journalist in India but what it would prevent him from doing is to exercise his freedom of speech and expression abroad. Today in the modern world with vastly developed science and technology and highly improved and sophisticated means of communication, a person may be able to exercise freedom of speech and expression abroad by doing something within the country and if this is published or restricted, his freedom of speech and expression would certainly be impaired and Article 19(1)(a) violated. Therefore, merely because State action is restricted to the territory of India, it does not necessarily follow that the right of free speech and expression is also limited in its operation to the territory of India and does not extend outside.

This thesis can also be substantiated by looking at the question from a slightly different point of view. It is obvious that the right of free speech and expression guaranteed under Article 19(1)(a) can be subjected to restriction permissible under Article 19(2). Such restriction, imposed by a statute or an order made under it, if within the limits provided in Article 19(2), would clearly bind the citizen not only when he is within the country but also when he travels outside. Take for example a case where, either under the Passports Act, 1967 or as a condition in the Passport issued under it, an arbitrary, unreasonable and wholly unjustifiable restriction is placed upon the citizen that he may go abroad, but he should not make any speech there. This would plainly be a restriction which would interfere with his freedom of speech and expression outside the country, for, if valid, it would bind him wherever he may go. He would be entitled to say that such a restriction imposed by State action is impermissible under Article 19(2) and is accordingly void as being violative of Article 19(1)(a)

A It would thus seem clear that freedom of speech and expression guaranteed under Article 19(1)(a) is exercisable not only inside the country, but also outside.

There is also another consideration which leads to the same conclusion. The right to go abroad is, as held in *Satwant Singh Sawhney's* case, included in personal liberty' within the meaning of Article 21 B and is thus a fundamental right protected by that Article. When the State issues a passport and grants endorsement for one country, but refuses for another, the person concerned can certainly go out of India but he is prevented from going to the country for which the endorsement is refused and his right to go to that country is taken away. This cannot be done by the State under Article 21 unless there is a law authorising the State to do so and the action is taken in accordance C with the procedure prescribed by such law. The right to go abroad, and in particular to a specified country, is clearly right to personal liberty exercisable outside India and yet it has been held in *Satwant Singh Sawhney's* case to be a fundamental right protected by Article 21. This clearly shows that there is no underlying principle in the Constitution which limits the fundamental rights in their operation to the territory of India. If a fundamental right under Article 21 can be D exercisable outside India, why can freedom of speech and expression conferred under Article 19(1)(a) be not so exercisable?

This view which we are taking is completely in accord with the thinking on the subject in the United States. There the preponderance of opinion is that the protection of the Bill of Rights is available to United States citizens even in foreign countries. Vide *Best* v. *United* E *States*(1). There is an interesting article on *"The Constitutional Right to Travel"* in 1956 Columbia Law Review where Leonard B. Boudin writes :

> "The final objection to limitation upon the right to travel in that they interfere with the individual's freedom of expression. Travel itself is such a freedom in the view of one scholarly jurist. But we need not go that far; it is enough F that the freedom of speech includes the right of Americans to exercise it anywhere without the interference of their government. There are no geographical limitations to the Bill of Rights. A Government that sets up barriers to its citizens' freedom of expression in any country in the world violates the Constitution as much as if it enjoined such expression in the United States."

G These observations were quoted with approval by Hegde, J., (as he then was) speaking on behalf of a Division Bench of the Karnataka High Court in *Dr. S. S. Sadashiva Rao* v. *Union of India*(2) and the learned Judge there pointed out that "these observations apply in equal force to the conditions prevailing in this country". It is obvious, therefore, that there are no geographical limitations to freedom of H speech and expression guaranteed under Article 19(1)(a) and this freedom is exercisable not only in India but also outside and if State

(1) 184 Federal Reporter (2d) 131.
(2) 1965 Mysore Law Journal, p. 605.

action sets up barriers to its citizen's freedom of expression in any country in the world, it would violate Article 19(1)(a) as much as if it inhibited such expression within the country. This conclusion would on a parity of reasoning apply equally in relation to the fundamental right to practice any profession or to carry any occupation, trade or business guaranteed under Article 19(1)(g). A

(B) *Is the right to go abroad covered by Article* 19(1)(*a*) *or* (*g*) ? B

That takes us to the next question arising out of the second limb of the contention of the Government. Is the right to go abroad an essential part of freedom of speech and expression so that whenever there is violation of the former, there is impairment of the latter involving infraction of Article 19 (1)(a)? The argument of the petitioner was that while it is true that the right to go abroad is not expressly included as a fundamental right in any of the clauses of Article 19(1), its existence is necessary in order to make the express freedoms mentioned in Article 19(1) meaningful and effective. The right of free speech and expression can have meaningful content and its exercise can be effective only if the right to travel abroad is ensured and without it, freedom of speech and expression would be limited by geographical constraints. The impounding of the passport of a person with a view to preventing him from going abroad to communicate his ideas or share his thoughts and views with others or to express himself through song or dance or other forms and media of expression is direct interference with freedom of speech and expression. It is clear, so ran the argument, that in a complex and developing society, where fast modes of transport and communication have narrowed down distances and brought people living in different parts of the world together, the right to associate with like minded persons in other parts of the globe for the purpose of advancing social, political or other ideas and policies is indispensable and that is part of freedom of speech and expression which cannot be effectively implemented without the right to go abroad. The right to go abroad, it was said, is a peripheral right emanating from the right to freedom of speech and expression and is, therefore, covered by Article 19(1)(a). This argument of the petitioner was sought to be supported by reference to some recent decisions of the Supreme Court of the United States. We shall examine these decisions a little later, but let us first consider the question on principle. C D E F

We may begin the discussion of this question by first considering the nature and significance of the right to go abroad. It cannot be disputed that there must exist a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values. This basic freedom of the human being is expressed at various levels and is reflected in various basic rights. Freedom to go abroad is one of such rights, for the nature of man is a free agent necessarily involves free movement on his part. There can be no doubt that if the purpose and the sense of the State is to protect personality and its development, as indeed it should be of any liberal democratic State, freedom to go abroad must be given its due place amongst the basic rights. This right is an important basic G H

A human right for it nourishes independent and self-determining creative character of the individual, not only by extending his freedoms of action, but also by extending the scope of his experience. It is a right which gives intellectual and creative workers in particular the opportunity of extending their spiritual and intellectual horizon through study at foreign universities, through contact with foreign colleagues and through participation in discussions and conferences. The right also B extends to private life : marriage, family and friendship are humanities which can be rarely affected through refusal of freedom to go abroad and clearly show that this freedom is a genuine human right. Moreover, this freedom would be highly valuable right where man finds himself obliged to flee (a) because he is unable to serve his God as he wished at the previous place of residence, (b) because his personal freedom is threatened for reasons which do not constitute a crime in C the usual meaning of the word and many were such cases during the emergency, or (c) because his life is threatened either for religious or political reasons or through the threat to the maintenance of minimum standard of living compatible with human dignity. These reasons suggest that freedom to go abroad incorporates the important function of an *ultimum refunium libertatis* when other basic freedoms are refused. To quote the words of Mr. Justice Douglas in *Kent* v. D *Dulles*(1) freedom to go abroad has much social value and represents a basic human right of great significance. It is in fact incorporated as an inalienable human right in Article 13 of the Universal Declaration of Human Rights. But it is not specifically named as a fundamental right in Article 19(1). Does it mean that on that account it cannot be a fundamental right covered by Article 19(1) ?

E Now, it may be pointed out at the outset that it is not our view that a right which is not specifically mentioned by name can never be a fundamental right within the meaning of Article 19(1). It is possible that a right does not find express mention in any clause of Article 19(1) and yet it may be covered by some clause of that Article. Take for example, by way of illustration, freedom of press. It is a most cherished and valued freedom in a democracy : indeed democracy F cannot survive without a free press. Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. G Manifestly, free debate and open discussion, in the most comprehensive sense, is not possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers—do they reflect diversity of opinions and views, do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or H deify the ruler. The newspapers are the index of the true character of the Government—whether it is democratic or authoritarian. It was

(1) 357 U.S. 116 : 2 L. ed. 2d 1204.

Mr. Justice Potter Stewart who said : "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy and indeed lies at the foundation of democratic organisation and yet it is not enumerated in so many terms as a fundamental right in Article 19(1), though there is a view held by some constitutional jurists that this freedom is too basic and fundamental not to receive express mention in Part III of the Constitution. But it has been held by this Court in several decisions, of which we may mention only three, namely, *Express Newspapers'* case, *Sakal Newspapers* case and *Bennett Coleman & Co's* case, that freedom of the press is part of the right of free speech and expression and is covered by Article 19(1)(a). The reason is that freedom of the press is nothing but an aspect of freedom of speech and expression. It partakes of the same basic nature and character and is indeed an integral part of free speech and expression and perhaps it would not be incorrect to say that it is the same right applicable in relation to the press. So also, freedom of circulation is necessarily involved in freedom of speech and expression and is part of it and hence enjoys the protection of Article 19(1)(a). Vide *Ramesh Thappar v. State of Madras*(1). Similarly, the right to paint or sing or dance or to write poetry or literature is also covered by Article 19(1)(a), because the common basic characteristic in all these activities is freedom of speech and expression, or to put it differently, each of these activities is an exercise of freedom of speech and expression. It would thus be seen that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression. Mr. Justice Douglas said in *Kent* v. *Dulles* that "freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats,

(1) [1950] S.C.R. 594.

A or wears, or reads. Freedom of movement is basic in our scheme of values." And what the learned Judge said in regard to freedom of movement in his country holds good in our country as well. Freedom of movement has been a part of our ancient tradition which always upheld the dignity of man and saw in him the embodiment of the Divine. The Vedic seers knew no limitations either in the locomotion of the human body or in the flight of the soul to higher planes of cons-
B ciousness. Even in the post-Upnishadic period, followed by the Buddhistic era and the early centuries after Christ, the people of this country went to foreign lands in pursuit of trade and business or in search of knowledge or with a view to shedding on others the light of knowledge imparted to them by their ancient sages and seers. India expanded outside her borders: her ships crossed the ocean and the fine superfluity of her wealth brimmed over to the East as well as to the
C West. He cultural messengers and envoys spread her arts and epics in South East Asia and her religious conquered China and Japan and other Far Eastern countries and spread westward as far as Palestine and Alexendria. Even at the end of the last and the beginning of the present century, our people sailed across the seas to settle down in the African countries. Freedom of movement at home and abroad is a part of our heritage and, as already pointed out, it is a highly cherished
D right essential to the growth and development of the human personality and its importance cannot be over emphasised. But it cannot be said to be part of the right of free speech and expression. It is not of the same basic nature and character as freedom of speech and expression. When a person goes abroad, he may do so for a variety of reasons and it may not necessarily and always be for exercise of freedom of speech and expression. Every travel abroad is not an exercise of right of free
E speech and expression and it would not be correct to say that whenever there is a restriction on the right to go abroad, *ex necessitae* it involves violation of freedom of speech and expression. It is no doubt true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression. Every activity
F that may be necessary for exercise of freedom of speech and expression or that may facilitate such exercise or make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech and expression. Otherwise, practically every activity would become part of some fundamental right or the other and the object of making certain rights only as fundamental rights with different permissible restrictions would be
G frustrated.

The petitioner, however, placed very strong reliance on certain decisions of the United States Supreme Court. The first was the decision in *Kent* v. *Dulles* (supra). The Supreme Court laid down in this case that the right to travel is guaranteed by the Fifth Amendment and held that the denial of passport by the Secretary of State was invalid
H because the Congress had not, under the Passport Act, 1926, authorised the Secretary of State to refuse passport on the ground of association with the communist party and refusal to file an affidavit relating to that affiliation and such legislation was necessary before the Secretary of

State could refuse passport on those grounds. This decision was not concerned with the validity of any legislation regulating issue of passports nor did it recognise the right to travel as founded on the first Amendment which protects freedom of speech, petition and assembly. We fail to see how this decision can be of any help to the petitioner. A

The second decision on which reliance was placed on behalf of the petitioner was *Apthekar* v. *Secretary of State*(1). The question which arose for determination in this case related to the constitutional validity of section 6 of the Subversive Activities Control Act, 1950. This section prohibited the use of passports by communists following a final registration order by the Subversive Activities Control Board under section 7 and following the mandate of this section, the State Department revoked the existing passports of the appellants. After exhausting all administrative remedies, the appellants sued for declarative and injunctive relief before the District Court which upheld the validity of the section. On direct appeal, the Supreme Court reversed the judgment by a majority of six against three and held the section to be invalid. The Supreme Court noted first that the right to travel abroad is an important aspect of the citizens' liberty guaranteed by the Due Process Clause of the Fifth Amendment and section 6 substantially restricts that right and then proceeded to apply the strict standard of judicial review which it had till then applied only in cases involving the so-called preferred freedoms of the first Amendment, namely, that "a governmental purpose—may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". The Supreme Court found on application of this test that the section was "overly broad and unconstitutional on its face" since it omitted any requirement that the individual should have knowledge of the organisational purpose to establish a communist totaliatarian dictatorship and it made no attempt to relate the restriction on travel to the individual's purpose of the trip or to the security-sensitivity of the area to be visited. This decision again has no relevance to the present argument except for one observation made by the Court that "freedom of travel is a constitutional liberty closely related to rights of free speech and association". But this observation also cannot help because the right to foreign travel was held to be a right arising not out of the first Amendment but inferentially out of the liberty guaranteed in the Fifth Amendment and this observation was meant only to support the extension of the strict First Amendment test to a case involving the right to go abroad. B G D E F

The last decision cited by the petitioner was *Zemel* v. *Rusk*(2). This case raised the question whether the Secretary of State was statutorily authorised to refuse to validate the passports of United States citizens for travel to Cuba and if so, whether the exercise of such authority was constitutionally permissible. The Court, by a majority of six against three, held that the ban on travel to Cuba was authorised by the broad language of the Passport Act, 1926 and that such a restriction was constitutional. Chief Justice Warren speaking on behalf of G H

(1) 378 U. S. 500 : 12 L. ed. 2d 992.
(2) 381 U. S. 1 : 14 L. ed. 2d 179.

A the majority observed that having regard to administrative practice both before and after 1926, area restrictions were statutorily authorised and that necessitated consideration of Zemel's constitutional objections. The majority took the view that freedom of movement was a right protected by the 'liberty' clause of the Fifth Amendment and that the Secretary of State was justified in attempting to avoid serious international incidents by restricting travel to Cuba and summa-
B rily rejected Zemel's contention that the passport denial infringed his First Amendment rights by preventing him from gathering first hand knowledge about Cuban situation. *Kent* v. *Dulles* and *Aptheker* v. *Secretary of State* were distinguished on the ground that "the refusal to validate appellant's passport does not result from any expression or association on his part : appellant is not being forced to choose be-
C tween membership of an organisation and freedom to travel". Justices Douglas, Goldberg and Black dissented in separate opinions. Since reliance was placed only on the opinion of Justice Douglas, we may confine our attention to that opinion. Justice Douglas followed the approach employed in *Kent* v. *Dulles* and refused to interpret the Passport Act, 1926 as permitting the Secretary of State to restrict travel to Cuba. While doing so, the learned Judge stressed the relationship of the right to travel to First Amendment rights. He pointed out : "The
D right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without these contacts First Amendment rights suffer", and added that freedom to travel abroad is a right "peripheral to the enjoyment of the First Amendment guarantees". He concluded by observing that "the right to travel is at the periphery of the First
E Amendment" and therefore "restrictions on the right to travel in times of peace should be so particularised that a First Amendment right is not thereby precluded". Now, obviously, the majority decision is of no help to the petitioner. The majority rightly pointed out that in *Kent* v. *Dulles* and *Aptheker* v. *Secretary of State* there was direct interference with freedom of association by refusal to validate the passport, since the ap-
F pellant was required to give up membership of the organisation if he wanted validation of the passport. Such was not the case in *Zemel* v. *Rusk* and that is why, said the majority it was not a First Amendment right which was involved. It appeared clearly to be the view of the majority that if the denial of passport directly affects a First Amendment right such as freedom of expression or association as in *Kent* v. *Dulles* and *Aptheker* v. *Secretary of State*, it would be constitutionally invalid.
G The majority did not accept the contention that the right to travel for gathering information is in itself a First Amendment right. Justice Douglas also did not regard the right to travel abroad as a First Amendment right but held that it is peripheral to the enjoyment of First Amendment guarantees because it gives meaning and substance to the First Amendment rights and without it, these rights would suffer. That is why he observed towards the end that restrictions on the right to
H travel should be so particularised that a First Amendment right is not precluded or in other words there is no direct infringement of a First Amendment right. If there is, the restrictions would be constitutionally invalid, but not otherwise. It is clear that Justice Douglas never

meant to lay down that a right which is at the periphery of the First right under the First Amendment. The learned Judge did not hold the right to travel abroad to be a First Amendment right. Both according to the majority as also Justice Douglas, the question to be asked in each case is : is the restriction on the right to travel such that it directly interferes with a First Amendment right. And that is the same test which is applied by this Court in determining infringement of a fundamental right.

We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right. This much is clear as a matter of plain construction, but apart from that, there is a decision of this Court which clearly and in so many terms supports this conclusion. That is the decision in *All India Bank Employees' Association* v. *National Industrial Tribunal*(1). The legislation which was challenged in that case was section 34A of the Banking Companies Act and it was assailed as violative of Article 19(1)-(c). The effect of section 34A was that no tribunal could compel the production and inspection of any books of account or other documents or require a bank to furnish or disclose any statement or information if the Banking Company claimed such document or statement or information to be of a confidential nature relating to secret reserves or to provision for bad and doubtful debts. If a dispute was pending and a question was raised whether any amount from the reserves or other provisions should be taken into account by a tribunal, the tribunal could refer the matter to the Reserve Bank of India whose certificate as to the amount which could be taken into account, was made final and conclusive. Now, it was conceded that section 34A did not prevent the workmen from forming unions or place any impediments in their doing so, but it was contended that the right to form association protected under Article 19(1)(c) carried with it a guarantee that the association shall effectively achieve the purpose for which it was formed without interference by law except on grounds relevant to the preservation of public order or morality set out in Article 19(4). In other words, the argument was that the freedom to form unions carried with it the concomitant right that such unions should be able to fulfil the object for which they were formed. This argument was negatived by a unanimous Bench of this Court. The Court said that unions were not restricted to workmen, that employers' unions may be formed in order to earn profit and that a guarantee for the effective functioning of the unions would lead to the conclusion that restrictions on their right to earn profit could be put only in the interests of public order or morality. Such a construction would run basically counter to the scheme of Article 19 and to the provisions of Article 19(1)(c) and (6). The restrictions which could be imposed on the right to form an association were limited to restrictions in the interest of public order and morality. The restrictions which could be imposed on the right to carry on any trade, business, profession or calling were reasonable res-

(1) [1962] 3 S.C.R. 269.

A trictions in the public interest and if the guarantee for the effective functioning of an association was a part of the right, then restrictions could not be imposed in the public interest on the business of an association. Again, an association of workmen may claim the right of collective bargaining and the right to strike, yet the right to strike could not by implication be treated as part of the right to form association, for, if it were so treated, it would not be possible to put restrictions on that B right in the public interest as is done by the Industrial Disputes Act, which restrictions would be permissible under Article 19(6), but not under Article 19(4). The Court, therefore, held that the right to form unions guaranteed by Article 19(1)(c) does not carry with it a concomitant right that the unions so formed should be able to achieve the purpose for which they are brought into existence, so that any interference with such achievement by law would be unconstitutional unless C the same could be justified under Article 19(4).

The right to go abroad cannot, therefore, be regarded as included in freedom of speech and expression guaranteed under Article 19(1)-(a) on the theory of peripheral or concomitant right. This theory has been firmly rejected in the *All India Bank Employees Association's* case and we cannot countenance any attempt to revive it, as that would D completely upset the scheme of Article 19(1) and to quote the words of Rajagopala Ayyanger, J., speaking on behalf of the Court in *All India Bank Employees Association's* case "by a series of ever expending concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grostesque result". So also, for the same reasons, the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under E Article 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1) and section 10(3)(c) which authorises imposition of restrictions on the right to go abroad by impounding of passport cannot be held to be void as offending Article 19(1)(a) or (g), as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business profession or calling. F

Constitutional requirement of an order under Section 10(3)(c).

But that does not mean that an order made under section 10(3)(c) may not violate Article 19(1)(a) or (g). While discussing the constitutional validity of the impugned order impounding the passport of G the petitioner, we shall have occasion to point out that even where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may be void. Therefore, even though section 10(3)(c) is valid, the question would always remain whether an order made under it is invalid as contravening a fundamental right. The direct and inevitable H effect of an order impounding a passport may, in a given case, be to abridge or take away freedom of speech and expression or the right to carry on a profession and where such is the case, the order would be invalid, unless saved by Article 19(2) or Article 19(6). Take for

example, a pilot with international flying licence. International flying is his profession and if his passport is impounded, it would directly interfere with his right to carry on his profession and unless the order can be justified on the ground of public interest under Article 19(6) it would be void as offending Article 19(1)(g). Another example may be taken of an evangelist who has made it a mission of his life to preach his faith to people all over the world and for that purpose, set up institutions in different countries. If an order is made impounding his passport, it would directly affect his freedom of speech and expression and the challenge to the validity of the order under Article 19(1)(a) would be unanswerable unless it is saved by article 19(2). We have taken these two examples only by way of illustration. There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is denied or impounded, it would directly interfere with his freedom of speech and expression. If a correspondent of a newspaper is given a foreign assignment and he is refused passport or his passport is impounded, it would be direct interference with his freedom to carry on his profession. Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a fundamental right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession so as to contravene Article 19(1)(a) or 19(1)(g). In such a case, refusal or impounding of passport would be invalid unless it is justified under Article 19(2) or Article 19(6), as the case may be. Now, passport can be impounded under section 10(3)(c) if the Passport Authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public. The first three categories are the same as those in Article 19(2) and each of them, though separately mentioned, is a species within the broad genus of "interests of the general public". The expression "interests of the general public" is a wide expression which covers within its broad sweep all kinds of interests of the general public including interests of the sovereignty and integrity of India, security of India and friendly relations of India with foreign States. Therefore, when an order is made under section 10(3)(c), which is in conformity with the terms of that provision, it would be in the interests of the general public and even if it restricts freedom to carry on a profession, it would be protected by Article 19(6). But if an order made under section 10(3)(c) restricts freedom of speech and expression, it would not be enough that it is made in the interests of the general public. It must fall within the terms of Article 19(2) in order to earn the protection of that Article. If it is made in the interests of the sovereignty and integrity of India or in the interests of the security of India or in the interests of friendly relations of India with any foreign country, it would satisfy the requirement of Article 19(2). But if it is made for any other interests of the general public save the interests of "public order, decency or morality",

it would not enjoy the protection of Article 19(2). There can be no doubt that the interests of public order, decency or morality are "interests of the general public" and they would be covered by section 10(3)(c), but the expression "interests of the general public" is, as already pointed out, a much wider expression and, therefore, in order that an order made under section 10(3)(c) restricting freedom of speech and expression, may not fall foul of Article 19(1)(a), it is necessary that in relation to such order, the expression "interests of the general public" in section 10(3)(c) must be read down so as to be limited to interests of public order, decency or morality. If an order made under section 10(3)(c) restricts freedom of speech and expression, it must be made not in the interests of the general public in a wider sense, but in the interests of public order, decency or morality, apart from the other three categories, namely, interests of the sovereignty and integrity of India, the security of India and friendly relations of India with any foreign country. If the order cannot be shown to have been made in the interests of public order, decency or morality, it would not only contravene Article 19(1)(a), but would also be outside the authority conferred by section 10(3)(c).

Constitutional validity of the impugned Order :

We may now consider, in the light of this discussion, whether the impugned Order made by the Central Government impounding the passport of the petitioner under section 10(3)(c) suffers from any constitutional or legal infirmity. The first ground of attack against the validity of the impugned Order was that it was made in contravention of the rule of natural justice embodied in the maxim *audi alteram partem* and was, therefore, null and void. We have already examined this ground while discussing the constitutional validity of section 10(3)(c) with reference to Article 21 and shown how the statement made by the learned Attorney General on behalf of the Government of India has cured the impugned Order of the vice of non-compliance with the *audi alteram partem* rule. It is not necessary to say anything more about it. Another ground of challenge urged on behalf of the petitioner was that the impugned Order has the effect of placing an unreasonable restriction on the right of free speech and expression guaranteed to the petitioner under Article 19(1)(a) as also on the right to carry on the profession of a journalist conferred under Article 19(1)(g), in as much as it seeks to impound the passport of the petitioner indefinitely, without any limit of time, on the mere likelihood of her being required in connection with the Commission of Inquiry headed by Mr. Justice J. C. Shah. It was not competent to the Central Government, it was argued, to express an opinion as to whether the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry. That would be a matter within the judgment of the Commission of Inquiry and it would be entirely for the Commission of Inquiry to decide whether or not her presence is necessary in the proceeding before it. The impugned Order impounding the passport of the petitioner on the basis of a mere opinion by the Central Government that the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry was, in the circumstances, clearly unreasonable and hence violative of Article

19(1)(a) and (g). This ground of challenge was vehemently pressed on behalf of the petitioner and supplemented on behalf of Adil Sahariar who intervened at the hearing of the writ petition, but we do not think there is any substance in it. It is true, and we must straightaway concede it, that merely because a statutory provision empowering an authority take action in specified circumstances is constitutionally valid as not being in conflict with any fundamental rights, it does not give a *carte blanche* to the authority to make any order it likes so long as it is within the parameters laid down by the statutory provision. Every order made under a statutory provision must not only be within the authority conferred by the statutory provision, but must also stand the test of fundamental rights. Parliament cannot be presumed to have intended to confer power on an authority to act in contravention of fundamental rights. It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of any fundamental rights. This would seem to be elementary and no authority is necessary in support of it, but if any were needed, it may be found in the decision of this Court in *Narendra Kumar & Ors.* v. *The Union of India & Ors.*(1). The question which arose in that case was whether clauses (3) and (4) of the Non-ferrous Metal Control Order, 1958 made under section 3 of the Essential Commodities Act, 1955 were constitutionally valid. The argument urged on behalf of the petitioners was that these clauses imposed unreasonable restrictions of the fundamental rights guaranteed under Articles 19(1)(f) and (g) and in answer to this argument, apart from merits, a contention of a preliminary nature was advanced on behalf of the Government that "as the petitioners have not challenged the validity of the Essential Commodities Act and have admitted the power of the Central Government to make an order in exercise of the powers conferred by section 3 of the Act, it is not open to the Court to consider whether the law made by the Government in making the non-ferrous metal control order—violates any of the fundamental rights under the Constitution". It was urged that so long as the Order does not go beyond the provisions in section 3 of the Act, it "must be held to be good and the consideration of any question of infringement of fundamental rights under the Constitution is wholly beside the point". This argument was characterised by Das Gupta, J., speaking on behalf of the Court as "an extravagant argument" and it was said that "such an extravagant argument has merely to be mentioned to deserve rejection". The learned Judge proceeded to state the reasons for rejecting this argument in the following words :

> "If there was any reason to think that section 3 of the Act confers on the Central Government power to do anything which is in conflict with the constitution—anything which violates any of the fundamental rights conferred by the Constitution, that fact alone would be sufficient and unassailable ground for holding that the section itself is void being *ultra vires* the Constitution. When, as in this case, no challenge is made that section 3 of the Act is *ultra vires* the Constitu-

(1) [1960] 2 S.C.R. 375.

A tion, it is on the assumption that the powers granted thereby do not violate the Constitution and do not empower the Central Government to do anything which the Constitution prohibits. It is fair and proper to presume that in passing this Act the Parliament could not possibly have intended the words used by it, *viz.*, "may by order provide for regulating or prohibiting the production, supply and distribution thereof, B and trade and commerce in", to include a power to make such provisions even though they may be in contravention of the Constitution. The fact that the words "in accordance with the provisions of the articles of the Constitution" are not used in the section is of no consequence. Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitu- C tion came into force. It is clear therefore that when section 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition do not violate any fundamental rights granted by the Constitution of India."

D It would thus be clear that though the impugned Order may be within the terms of section 10(3)(c), it must nevertheless not contravene any fundamental rights and if it does, it would be void. Now, even if an order impounding a passport is made in the interests of public order, decency or morality, the restriction imposed by it may be so wide, excessive or disproportionate to the mischief or evil sought to be averted that E it may be considered unreasonable and in that event, if the direct and inevitable consequence of the Order is to abridge or take away freedom of speech and expression, it would be violative of Article 19(1)(a) and would not be protected by Article 19(2) and the same would be the position where the order is in the interests of the general public but it impinges directly and inevitably on the freedom to carry on a profession in which case it would contravene Article 19(1)(g) with- F out being saved by the provision enacted in Article 19(6).

But we do not think that the impugned Order in the present case violates either Article 19(1)(a) or Article 19(1)(g). What the impugned Order does is to impound the passport of the petitioner and thereby prevent her from going abroad and at the date when the impugned order was made there is nothing to show that the petitioner G was intending to go abroad for the purpose of exercising her freedom of speech and expression or her right to carry on her profession as a journalist. The direct and inevitable consequence of the impugned order was to impede the exercise of her right to go abroad and not to interfere with her freedom of speech and expression or her right to carry on her profession. But we must hasten to point out that if at any time in the future the petitioner wants to go abroad for the purpose of H exercising her freedom of speech and expression or for carrying on her profession as a journalist and she applies to the Central Government to release the passport, the question would definitely arise whether the refusal to release or in other words, continuance of the impounding of

the passport is in the interests of public order, decency or morality in the first case, and in the interests of the general public in the second, and the restriction thus imposed is reasonable so as to come within the protection of Article 19(2) or Article 19(6). That is, however, not the question before us at present.

We may observe that if the impugned Order impounding the passport of the petitioner were violative of her right to freedom of speech and expression or her right to carry on her profession as a journalist, it would not be saved by Article 19(2) or Article 19(6), because the impounding of the passport for an indefinite length of time would clearly constitute an unreasonable restriction. The Union contended that though the period for which the impugned Order was to operate was not specified in so many terms, it was clear that it was intended to be co-terminous with the duration of the Commission of Inquiry, since the reason for impounding was that the presence of the petitioner was likely to be required in connection with the proceedings before the Commission of Inquiry and the term of the Commission of Inquiry being limited upto 31st December, 1977, the impoundig of the passport could not continue beyond that date and hence it would not be said that the impugned Order was to operate for an indefinite period of time. Now, it is true that the passport of the petitioner was impounded on the ground that her presence was likely to be required in connection with the proceeding before the Commission of Inquiry and the initial time limit fixed for the Commission of Inquiry to submit its report was 31st December, 1977, but the time limit could always be extended by the Government and the experience of several Commissions of Inquiry set up in this country over the last twenty-five years shows that hardly any Commission of Inquiry has been able to complete its report within the originally appointed time. Whatever might have been the expectation in regard to the duration of the Commission of Inquiry headed by Mr. Justice Shah at the time when the impugned Order was made, it is now clear that it has not been possible for it to complete its labours by 31st December, 1977 which was the time limit originally fixed and in fact its term has been extended upto 31st May, 1978. The period for which the passport is impounded cannot, in the circumstances, be said to be definite and certain and it may extend to an indefinite point of time. This would clearly make the impugned order unreasonable and the learned Attorney General appearing on behalf of the Central Government, therefore, made a statement that in case the decision to impound the passport of the petitioner is confirmed by the Central Government after hearing the petitioner, "the duration of the impounding will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation". It must be said in fairness to the Central Government that this was a very reasonable stand to adopt, because in a democratic society governed by the rule of law, it is expected of the Government that it should act not only constitutional and legally but also fairly and justly towards the citizen. We hope and trust that in future also whenever the passport of any person is impounded under section 10(3)(c), the impounding would be for a specified period of time which is not unreasonably long, even though no contravention of any fundamental right may be involved.

A The last argument that the impugned Order could not, consistently with Article 19(1)(a) and (g), be based on a mere opinion of the Central Government that the presence of the petitioner is likely to be required in connection with the proceeding before the Commission of Inquiry is also without force. It is true that ultimately it is for the Commission of Inquiry to decide whether the presence of the petitioner B is required in order to assist it in its fact finding mission, but the Central Government which has constituted the Commission of Inquiry and laid down its terms of reference would certainly be able to say with reasonable anticipation whether she is likely to be required by the Commission of Inquiry. Whether she is actually required would be for the Commission of Inquiry to decide, but whether she is *likely* to be required can certainly be judged by the Central Government. When the C Central Government appoints a Commission of Inquiry, it does not act in a vacuum. It is bound to have some material before it on the basis of which it comes ot a decision that there is a definite matter of public importance which needs t obe inquired into and appoints a Commission of Inquiry for that purpose. The Central Government would, therefore, be in a position to say whether the petitioner is *likely* to be required in connection with the proceeding before the Commission of D Inquiry. It is possible that ultimately when the Commission of Inquiry proceeds further with the probe, it may find that the presence of the petitioner is not required, but before that it would only be in the stage of likelihood and that can legitimately be left to the judgment of the Central Government. The validity of the impugned Order cannot, therefore, be assailed on this ground, nad the challenge based on Article 19(1)(a) and (g) must fail.

E *Whether the impugned Order is inter vires sec.* 10(3)(c) ?

The last question which remains to be considered is whether the impugned Order is within the authority conferred by section 10(3)(c). The impugned Order is plainly, on the face of it, purported to be made in public interest, i.e., in the interests of the general public, and therefore, its validity must be judged on that footing. Now it is obvious F that on a plain natural construction of section 10(3)(c), it is left to the Passport Authority to determine whether it is necessary to impound a passport in the interests of the general public. But an order made by the Passport Authority impounding a passport is subject to judicial review on the ground that the order is *mala fide*, or that the reasons for making the order are extraneous or they have no relevance to the interests of the general public or they cannot possibly support the G making of the order in the interests of the general public. It was not disputed on behalf of the Union, and indeed it could not be in view of section 10, sub-section (5) that, save in certain exceptional cases, of which this was admittedly not one, the Passport Authority is bound to give reasons for making an order impounding a passport and though in the present case, the Central Government initially declined to give reasons claiming that it was not in the interests of the general public to do H so, it realised the utter untenability of this position when it came to file the affidavit in reply and disclosed the reasons which were recorded at the time when the impugned order was passed. These reasons were that, according to the Central Government, the petitioner was involved

in matters coming within the purview of the Commissions of Inquiry constituted by the Government of India to inquire into excesses committed during the emergency and in respect of matters concerning Maruti and its associate companies and the Central Government was of the view that the petitioner should be available in India to give evidence before these Commissions of Inquiry and she should have an opportunity to present her views before them and according to a report received by the Central Government on that day, there was likelihood of her leaving India. The argument of the petitioner was that these reasons did not justify the making of the impugned Order in the interests of the general public, since these reasons had no reasonable nexus with the interests of the general public within the meaning of that expression as used in section 10(3)(c). The petitioner contended that the expression "interests of the general public" must be construed in the context of the perspective of the statute and since the power to issue a passport is a power related to foreign affairs, the "interests of the general public" must be understood as referable only to a matter having some nexus with foreign affairs and it would not be given a wider meaning. So read, the expression "interests of the general public" could not cover a situation where the presence of a person required to give evidence before a Commission of Inquiry. This argument is plainly erroneous as it seeks to cut down the width and amplitude of the expression "interests of the general public", an expression which has a well recognised legal connotation and which is to be found in Article 19(5) as well as article 19(6). It is true, as pointed out by this Court in *Rohtas Industries Ltd.* v. *S. D. Agarwal & Anr.*(1), that "there is always a perspective within which a statute is intended to operate", but that does not justify reading of a statutory provision in a manner not warranted by its language or narrowing down its scope and meaning by introducing a limitation which has no basis either in the language or in the context of the statutory provision. Moreover, it is evident from clauses (d), (e) and (h) of section 10(3) that there are several grounds in this section which do not relate to foreign affairs. Hence we do not think the petitioner is justified in seeking to limit the expression "interests of the general public" to matters relating to foreign affairs.

The petitioner then contended that the requirement that she should be available for giving evidence before the Commissions of Inquiry did not warrant the making of the impugned Order "in the interests of the general public". Section 10(3), according to the petitioner, contained clauses (e) and (h) dealing specifically with cases where a person is required in connection with a legal proceeding and the enactment of these two specific provisions clearly indicated the legislative intent that the general power in section 10(3)(c) under the ground "interests of the general public" was not meant to be exercised for impounding a passport in cases where a person is required in connection with a legal proceeding. The Central Government was, therefore, not entitled to resort to this general power under section 10(3)(c) for the purpose of impounding the passport of the petitioner on the ground that she was

(1) [1969] 3 S.C.R. 108 at 128.

A required to give evidence before the Commissions of Inquiry. The power to impound the passport of the petitioner in such a case was either to be found in section 10(3)(h) or it did not exist at all. This argument is also unsustainable and must be rejected. It seeks to rely on the maxim *expressio unius exclusio ulterius* and proceeds on the basis that clauses (e) and (h) of section 10(3) are exhaustive of cases where a person is required in connection with a proceeding, whether before a court or a Commission of Inquiry, and no resort can be had to the general power under section 10(3)(c) in cases where a person is required in connection with a proceeding before a Commission of Inquiry. But it must be noted that this is not a case where the maxim *expressio unius exclusio ulterius* has any application at all. Section 10(3)(e) deals with a case where proceedings are pending before a criminal court while section 10(3)(h) contemplates a situation where a warrant or summons for the appearance or a warrant for the arrest, of the holder of a passport has been issued by a court or an order prohibiting the departure from India of the holder of the passport has been made by any such court. Neither of these two provisions deals with a case where a proceeding is pending before a Commission of Inquiry and the Commission has not yet issued a summons or warrant for the attendance of the holder of the passport. We may assume for the purpose of argument that a Commission of Inquiry is a 'court' for the purpose of section 10(3)(h), but even so, a case of this kind would not be covered by section 10(3)(h) and section 10(3)(e) would in any case not have application. Such a case would clearly fall within the general power under section 10(3)(c) if it can be shown that the requirement of the holder of the passport in connection with the proceeding before the Commission of Inquiry is in the interests of the general public. It is, of course, open to the Central Government to apply to the Commission of Inquiry for issuing a summons or warrant, as the case may be, for the attendance of the holder of the passport before the Commission and if a summons or warrant is so issued, it is possible that the Central Government may be entitled to impound the passport under section 10(3)(h). But that does not mean that before the stage of issuing a summons or warrant has arrived, the Central Government cannot impound the passport of a person, if otherwise it can be shown to be in the interests of the general public to do so. Section 10(3)(e) and (h) deal only with two specific kinds of situations, but there may be a myriad other situations, not possible to anticipate or categorise, where public interests may require that the passport should be impounded and such situation would be taken care of under the general provision enacted in section 10(3)(c). It is true that this is a rather drastic power to interfere with a basic human right, but it must be remembered that this power has been conferred by the legislature in public interest and we have no doubt that it will be sparingly used and that too, with great care and circumspection and as far as possible, the passport of a person will not be impounded merely on the ground of his being required in connection with a proceeding, unless the case is brought within section 10(3)(e) or section 10(3)(h). We may echo the sentiment in Lord Denning's closing remarks in *Ghani* v. *Jones*(1)

B C D E F G H

(1) [1970] 1 Q. B. 693.

where the learned Master of the Rolls said : "A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the severest grounds". This liberty is prized equally high in our country and we are sure that a Government committed to basic human values will respect it.

We must also deal with one other contention of the petitioner, though we must confess that it was a little difficult for us to appreciate it. The petitioner urged that in order that a passport may be impounded under section 10(3)(c), public interest must actually exist *in praesenti* and mere likelihood of public interest arising in future would be no ground for impoundig a passport. We entirely agree with the petitioner that an order impounding a passport can be made by the Passport Authority only if it is actually in the interests of the general public to do so and it is not enough that the interests of the general public may be likely to be served in future by the making of the order. But here in the present case, it was not merely on the future likelihood of the interests of the general public advanced that the impugned order was made by the Central Government. The impugned Order was made because, in the opinion of the Central Government, the presence of the petitioner was necessary for giving evidence before the Commissions of Inquiry and according to the report received by the Central Government, she was likely to leave India and that might frustrate or impede to some extent the inquiries which were being conducted by the Commissions of Inquiry.

Then it was contended on behalf of the petitioner that the Minister for External Affairs, who made the impugned Order on behalf of the Central Government, did not apply his mind and hence the impugned Order was bad. We find no basis or justification for this contention. It has been stated in the affidavit in reply that the Minister for External Affairs applied his mind to the relevant material and also to the confidential information received from the intelligence sources that there was likelihood of the petitioner attempting to leave the country and then only he made the impugned Order. In fact, the Ministry of Home Affairs had forwarded to the Ministry of External Affairs as far back as 9th May, 1977 a list of persons whose presence, in view of their involvement or connection or position or past antecedents, was likely to be required in connection with inquiries to be carried out by the Commissions of Inquiry and the name of the petitioner was included in this list. The Home Ministry had also intimated to the Ministry of External Affairs that since the inquiries were being held by the Commissions of Inquiry in public interest, consideration of public interest would justify recourse to section 10(3) (c) for impounding the passports of the persons mentioned in this list. This note of the Ministry of Home Affairs was considered by the Minister for External Affairs and despite the suggestion made in this note, the passports of only eleven persons, out of those mentioned in the list, were ordered to be impounded and no action was taken in regard to the passport of the petitioner. It is only on 1st July, 1977 when the Minister for External Affairs received confidential information that the petitioner was likely to attempt to leave the country that, after applying his mind to the relevant material and taking into account confidential information,

A he made the impugned Order. It is, therefore, not possible to say that the Minister for External Affairs did not apply his mind and mechanically made the impugned Order.

The petitioner lastly contended that it was not correct to say that the petitioner was likely to be required for giving evidence before the Commissions of Inquiry. The petitioner, it was said, had nothing to B do with any emergency excesses nor was she connected in any manner with Maruti or its associate concerns, and, therefore, she could not possibly have any evidence to give before the Commissions of Inquiry. But this is not a matter which the court can be called upon to investigate. It is not for the court to decide whether the presence of the petitioner is likely to be required for giving evidence before the Commissions of Inquiry. The Government, which has instituted the Com- C missions of Inquiry, would be best in a position to know, having regard to the material before it, whether the presence of the petitioner is likely to be required. It may be that her presence may ultimately not be required at all, but at the present stage, the question is only whether her presence is likely to be required and so far that is concerned, we do not think that the view taken by the Government can be regarded as so unreasonable or perverse that we would strike down the D impugned Order based upon it as an arbitrary exercise of power.

We do not, therefore, see any reason to interfere with the impugned Order made by the Central Government. We, however, wish to utter a word of caution to the Passport Authority while exercising the power of refusing or impounding or cancelling a passport. The Passport Authority would do well to remember that it is a basic human right E recognised in Article 13 of the Universal Declaration of Human Rights with which the Passport Authority, is interfering when it refuses or impounds or cancels a passport. It is a highly valuable right which is a part of personal liberty, an aspect of the spiritual dimension of man, and it should not be lightly interfered with. Cases are not unknown where people have not been allowed to go abroad because of the views held, opinions expressed or political beliefs or economic F ideologies entertained by them. It is hoped that such cases will not recur under a Government constitutionally committed to uphold freedom and liberty but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surety corrode the foundations of liberty.

G In view of the statement made by the learned Attorney-General to which reference has already been made in the judgment we do not think it necessary to formally interfere with the impugned order. We, accordingly, dispose of the Writ Petition without passing any formal order. There will be no order as to costs.

KRISHNA IYER, J.—My concurrence with the argumentation and H conclusion contained in the judgment of my learned brother Bhagwati J. is sufficient to regard this supplementary, in one sense, a mere redundancy. But in another sense not, where the *vires* of a law, which arms the Central Executive with wide powers of potentially imperilling some

of the life-giving liberties of the people in a pluralist system like ours, is under challenge; and more so, when the ground is virgin, and the subject is of growing importance to more numbers as Indians acquire habits of trans-national travel and realise the fruits of foreign tours, reviving in modern terms, what our forbears effectively did to put Bharat on the cosmic cultural and commercial map. India is *India* because Indians, our ancients, had journeyed through the wide world for commerce, spiritual and material, regardless of physical or mental frontiers. And when this precious heritage of free trade in ideas and goods, association and expression, migration and home-coming, now crystallised in Fundamental Human Rights, is alleged to be hamstrung by hubristic authority, my sensitivity lifts the veil of silence. Such is my justification for breaking judicial lock-jaw to express sharply the juristic perspective and philosophy behind the practical necessities and possible dangers that society and citizenry may face if the clauses of our Constitution are not bestirred into court action when a charge of unjustified handcuffs on free speech and unreasonable fetters on right of exit is made through the executive power of passport impoundment. Even so, in my separate opinion, I propose only to paint the back-drop with a broad brush, project the high points with bold lines and touch up the portrait drawn so well by brother Bhagwati J, if I may colourfully, yet respectfully, endorse his judgment.

Remember, even democracies have experienced executive lawlessness and eclipse of liberty on the one hand and 'subversive' use of freedoms by tycoons and saboteurs on the other, and then the summons to judges comes from the Constitution, over-riding the necessary deference to government and seeing in perspective, and overseeing in effective operation the enjoyment of the 'great rights'. This Court lays down the law not *pro tempore* but lastingly.

Before us is a legislation regulating travel abroad. Is it void in part or over-wide in terms ? 'Lawful' illegality becomes the rule, if 'lawless' legislation be not removed. In our jural order if a statute is void, must the Constitution and its sentinels sit by silently, or should the lines of legality be declared with clarity so that adherence to valid norms becomes easy and precise ?

We are directly concerned, as fully brought out in Shri Justice Bhagwati's judgment, with the indefinite immobilisation of the petitioner's passport, the reason for the action being strangely veiled from the victim and the right to voice an answer being suspiciously withheld from her, the surprising secrecy being labelled, 'public interest'. Paper curtains wear ill on good governments. And, cutely to side one's grounds under colour of statute, is too sphinx-like an art for an open society and popular regime. As we saw the reasons which the learned Attorney General so unhesitatingly disclosed, the question arises : 'wherefore are these things hid ?'. The catch-all expression 'public interest' is sometimes the easy temptation to cover up from the public which they have a right to know, which appeals in the short run but avenges in the long run ! Since the only passport to this Court's jurisdiction in this branch of passport law is the breach of a basic freedom, what is the nexus between a passport and a Part III right ? What are

A the ambience and amplitude, the desired effect and direct object of the key provisions of the Passports Act, 1967 ? Do they crib or cut down unconstitutionally, any of the guarantees under Arts. 21, 19 and 14 ? Is the impugned section 10, especially s. 10 (3)(c), capable of circumscription to make it accord with the Constitution ? Is any part *ultra vires,* and why ? Finally, granting the Act to be good, is the impounding order bad ? Such, in the Writ Petition, is the range of issues regaled
B at the bar, profound, far-reaching, animated by comparative scholarship and fertilised by decisional erudition. The frontiers and funeral of freedom, the necessities and stresses of national integrity, security and sovereignty, the interests of the general public, public order and the like figure on occasions as forensic issues. And, in such situations, the contentious quiet of the court is the storm-centre of the nation. Verily, while hard cases tend to make bad law, bad cases tend to blur great
C law and courts must beware.

The centre of the stage in a legal debate on life and liberty must ordinarily be occupied by Art. 21 of our Paramount Parchment which, with emphatic brevity and accent on legality, states the mandate thus :

"21. *Protection of life and personal liberty.*—

D No person shall be deprived of his life or personal liberty except according to procedure established by law."

Micro-phrases used in National Charters spread into macro-meanings with the lambent light of basic law. For our purposes, the key concepts are 'personal liberty' and 'procedure established by law'. Let us grasp the permissible restraints on personal liberty, one of the facets of which
E is the right of exit beyond one's country. The sublime sweep of the subject of personal liberty must come within our ken if we are to do justice to the constitutional limitations which may, legitimately, be imposed on its exercise. Speaking briefly, the architects of our Founding Document, (and their fore-runners) many of whom were front-line fighters for national freedom, were lofty humanists who were profoundly spiritual and deeply secular, enriched by vintage values and revolu-
F tionary urges and, above all, experientially conscious of the deadening impact of the colonial screening of Indians going abroad and historically sensitive to the struggle for liberation being waged from foreign lands. And their testament is our asset.

What is the history, enlivened by philosophy, of the law of travel ? The roots of our past reach down to travels laden with our culture and
G commerce and its spread-out beyond the oceans and the mountains, so much so our history unravels exchange between India and the wider world. This legacy, epitomised as 'the glory that was Ind', was partly the product of travels into India and out of India. It was the two-way traffic of which there is testimony inside in Nalanda, and outside, even in Ulan Bator. Our literature and arts bear immortal testimony to our thirst for travel and even our law, over two thousand years ago, had
H canalised travels abroad. For instance, in the days of *Kautilya* (BC 321-296) there was a Superientendent of Passports 'to issue passes at the rate of a masha a pass'. Further details on passport law are found in *Kautilya's Arthasastra.*

Indeed, viewing the subject from the angle of geo-cultural and legal anthropology and current history, freedom of movement and its offshoot—the institution of passport—have been there through the Hellenic, Roman, Israelite, Chinese, Persian and other civilisations. Socrates, in his dialogue with Crito, spoke of personal liberty. He regarded the right of everyone to save his country as an attribute of personal liberty. He made the laws speak thus :

> "We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he please and take his goods with him. None of our laws will forbid him, or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city may go where he likes, retaining his property."
>
> (Plato, *Dialogues*)

The Magna Carta, way back in 1215 A.D. on the greens of Runnymede, affirmed the freedom to move beyond the borders of the kingdom and, by the time of Blackstone, 'by the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave'. Lord Diplock in *D.P.P.* v. *Shagwan*(1) stated that 'Prior to....1962.....' a British subject had the right at common law to enter the United Kingdom without let or hindrance when and where he pleased and to remain there as long as he liked' (International & Comparative Law Quarterly, Vol. 23, July 1974, p. 646). As late as *Ghani* v. *Jones*(2) Lord Denning asserted : 'A man's liberty of movement is regarded so highly by the Law of England that it is not to be hindered or prevented except on the surest grounds' (I & C. L. Qrly, ibid. p. 646). In 'Freedom under the Law' Lord Denning has observed under the sub-head 'Personal Freedom' :

> "Let me first define my terms. By personal freedom I mean the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons. Despite all the great changes that have come about in the other freedoms, this freedom has in our country remained intact."

In 'Freedom, The Individual and the Law', Prof. Street has expressed a like view. Prof. H.W.R. Wade and Prof. Hood Philips echo this liberal view. (See Int. & Comp. L.Q. ibid 646). And Justice Douglas, in the last decade, refined and re-stated, in classic diction, the basics of travel jurisprudence in *Apthekar*(3).

> "The freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful

(1) [1972] A.C. 60.
(2) [1970] 1 Q. B. 693, 709.
3) 378 U. S. 500.

A —knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

America is of course sovereign, but her sovereignty is woven in an international web that makes her one of the B family of nations. The ties with all the continents are close—commercially as well as culturally. Our concerns are planetary beyond sunrises and sunsets. Citizenship implicates us in those problems and paraplexities, as well as in domestic ones. We cannot exercise and enjoy citizenship in World perspective without the right to travel abroad."

C And, in India, *Satwant*(1) set the same high tone through Shri Justice Subba Rao although *A. K. Gopalan*(2) and a stream of judicial thought since then, had felt impelled to underscore personal liberty as embracing right to travel abroad. Tambe CJ in *A. G. Kazi*(3) speaking for a Division Bench, made a comprehensive survey of the law and vivified the concept thus :

"In our opinion, the language used in the Article (Art. D 21) also indicates that the expression 'Personal liberty' is not confined only to freedom from physical restraint, *i.e.* but includes a full range of conduct which an individual is free to pursue within law, for instance, eat and drink what he likes, mix with people whom he likes, read what he likes, sleep when and as long as he likes, *travel wherever he likes, go wherever he likes*, follow profession, vocation or business he E likes, of course, in the manner and to the extent permitted by law."

(P. 240)

The legal vicissitudes of the passport story in the United States bear out the fluctuating fortunes of fine men being denied this great right to go abroad—Linus Pauling, the Nobel Prize-winner, Charles Chaplin, the screen super genius, Paul Robesen, the world singer, Arthur Miller, F the great author and even Williams L. Clark, former Chief Justice of the United States Courts in occupied Germany, among other greats. Judge Clark commented on this passport affair and the ambassador's role :

"It is preposterous to say that Dr. Conant can exercise some sort of censorship on persons whom he wishes or does G not wish to come to the country to which he is accredited. This has never been held to be the function of an Ambassador."

(P. 275, 20 Clav. St. L.R. 2 May 1971)

Men suspected of communist leanings had poor chance of passport at one time; and politicians in power in that country have gone to the H extreme extent of stigmatising one of the greatest Chief Justices of their

(1) [1967] 3 S.C.R. 525.
(2) [1950] S.C.R. 88.
(3) A.I.R. 1967 Bom. 235.

country as near communist. Earl Warren has, in his autobiography, recorded : A

> "Senator Joseph McCarthy once said on the floor of the Senate, 'I will not say that Earl Warren is a Communist, but I will say he is the best friend of Communism in the United States."

There has been built up lovely American legal literature on passport history to which I will later refer. British Raj has frowned on foreign travels by Indian patriotic suspects and instances from the British Indian Chapter may abound. B

Likewise, the Establishment, in many countries has used the passport and visa system as potent paper curtain to inhibit illustrious writers, outstanding statesmen, humanist churchmen and renowned scientists, if they are dissenters', from leaving their national frontiers. C Absent forensic sentinels, it is not unusual for *people* to be suppressed by power in the name of the people. The politics of passports has often tried to bend the jurisprudence of personal locomotion to serve its interests. The twilight of liberty must affect the thoughtways of judges.

Things have changed, global awareness, in grey hues, has dawned. D The European Convention on Human Rights and bilateral understandings have made headway to widen freedom of travel abroad as integral to liberty of the person (Fourth Protocol). And the Universal Declaration of Human Rights has proclaimed in Art. 13 :

> "(1) Everyone has the right to freedom of movement and residence within the borders of each State.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country." E

This right is yet inchoate and only lays the base. But, hopefully, the loftiest towers rise from the ground. And despite destructive wars and exploitative trade, racial hatreds and credal quarrels, colonial subjections and authoritarian spells, the world has advanced because of gregarious men adventuring forth, taking with them their thoughts and F feelings on a trans-national scale. This human planet is our single home, though geographically variegated, culturally diverse, politically pluralist, in science and technology competitive and cooperative, in arts and life-styles a lovely mosaic and, above all, suffused with a cosmic consciousness of unity and inter-dependence. This Grand Canyon has been the slow product of the perennial process of cultural interaction, intellectual cross-fertilization, ideological and religious confrontations and meeting and mating of social systems; and the well- G spring is the wanderlust of man and his wondrous spirit moving towards a united human order founded on human rights. Human advance has been promoted through periods of pre-history and history by the flow of fellowmen, and the world owes much to exiles and emigres for liberation, revolution, scientific exploration and excellence in arts. Stop this creative mobility by totalitarian decree and whole communities and H cultures will stagnate and international awakening so vital for the survival of *homo sapiens* wither away. To argue for arbitrary inhibition of travel rights under executive directive or legislative tag is to invite

A and accelerate future shock. This broader setting is necessary if we are to view the larger import of the right to passport in its fundamental bearings. It is not law alone but life's leaven. It is not a casual facility but the core of liberty.

Viewed from another angle, travel abroad is a cultural enrich-
B ment which enables one's understanding of one's own country in better light. Thus it serves national interest to have its citizenry see other countries and judge one's country on a comparative scale. Rudyard Kipling, though with an imperial ring, has aptly said :

"Winds of the World, give answer
They are whimpering to and fro
And what should they know of England
C Who only England know ?"

(The English Flag)

Why is the right to travel all over the world and into the beyond a human right and a constitutional freedom ? Were it not so, the human heritage would have been more hapless, the human family
D more divided, the human order more unstable and the human future more murky.

The Indian panorama from the migrant yore to tourist flow is an expression of the will to explore the Infinite, to promote understanding of the universe, to export human expertise and development of every resource. Thus humble pride of patriotic heritage would have been
E pre-empted had the ancient kings and mediaval rulers banished foreign travel as our imperial masters nearly did. And to look at the little letters of the text of Part III *de hors* the Discovery of India and the Destiny of Bharat or the divinity of the soul and the dignity of the person highlighted in the Preamble unduly obsessed with individual aberrations of yesteryears or vague hunches leading to current fears, is a parsimonious exercise in constitutional perception.

F

Thus, the inspirational background, cosmic perspective and inherited ethos of the pragmatic visionaries and jurist-statesmen who draw up the great Title Deed of our Republic must illumine the *sutras* of Articles 21, 19 and 14. The fascist horror of World War II burnt into our leaders the urgency of inscribing indelibly into our Constitution those values *sans* which the dignity of man suffers total eclipse. The Uni-
G versal Declaration of Human Rights, the resurgence of international fellowship, the vulnerability of freedoms even in democracies and the rapid development of an integrated and intimately interacting 'one world' poised for peaceful and progressive intercourse conditioned their thought processes. The bitter feeling of the British Raj trampling undet foot *swaraj* —the birth-right of every Indian— affected their celebrations. The hidden divinity in every human entity creatively impacted upon our
H founding fathers' mentations. The mystic chords of ancient memory and the modern strands of the earth's indivisibility, the pathology of provincialism, feudal backwardness, glaring inequality and bleeding communalism, the promotion of tourism, of giving and taking know-

how, of studying abroad, and inviting scholars from afar—these and other realistic considerations gave tongue to those hallowed human rights fortified by the impregnable provisions of Part III. Swami Vivekananda, that saintly revolutionary who spanned East and West, exhorted, dwelling on the nation's fall of the last century :

> "My idea as to the key-note of our national downfall is that we do not mix with other nations—that is the one and sole cause. We never had the opportunity to compare notes. We were *Kupa-Mandukas (frogs in a well)*."

x x x x

> One of the great causes of India's misery and downfall has been that she narrowed herself, went into her shell, as the oyster does, and refused to give her jewels and her treasures to the other races of mankind, refused to give the life giving truth to thirsting nations outside the Aryan fold. That has been the one great cause, that we did not go out, that we did not compare notes with other nations—that has been the one great cause of our downfall, and every one of you knows that that little stir, the little life you see in India, begins from the day when Raja Rammohan Roy broke through the walls of this exclusiveness. Since that day, history in India has taken another turn and now it is growing with accelerated motion. If we have had little rivulets in the past, deluges are coming, and none can resist them. Therefore, we must go out, and the secret of life is to give and take. Are we to take always, to sit at the feet of the westerners to learn everything, even religion ? We can learn mechanism from them. We can learn many other things. But we have to teach them something.... Therefore we must go out, exchange our spirituality for anything they have to give us; for the marvels of the region of spirit we will exchange the marvels of the region of matter.... There cannot be friendship without equality, and there cannot be equality when one party is always the teacher and the other party sits always at his feet....If you want to become equal with the Englishman or the American, you will have to teach as well as to learn, and you have plenty yet to teach to the world for centuries to come."

From the point of view of comparative law too, the position is well established. For, one of the essential attributes of citizenship, says Prof. Schwartz, is freedom of movement. The right of free movement is a vital element of personal liberty. The right of free movement includes the right to travel abroad. So much is simple textbook teaching in Indian, as in Anglo-American law. Passport legality, affecting as it does, freedoms that are 'delicate and vulnerable, as well as supremely precious in our society', cannot but excite judicial vigilance to obviate fragile dependency for exercise of fundamental rights upon executive clemency. So important is this subject that the watershed between a police state and a government by the people may partly turn on the prevailing passport policy. Conscious, though I am, that such prolix

A elaboration of environmental aspects is otiose, the Emergency provisions of our Constitution, the extremes of rigour the nation has experienced (or may) and the proneness of Power to stoop to conquer make necessitous the hammering home of vital values expressed in terse constitutional vocabulary.

Among the great guaranteed rights, life and liberty are the first B among equals, carrying a universal connotation cardinal to a decent human order and protected by constitutional armour. Truncate liberty in Art. 21 traumatically and the several other freedoms fade out automatically. Justice Douglas, that most distinguished and perhaps most travelled judge in the world, has in poetic prose and with imaginative realism projected the functional essentiality of the right to travel as part of liberty. I may quote for emphasis, what is a woe bit repetitive :

C

> "The right to travel is a part of 'liberty' of which the citizen cannot be deprived without due process of law under the fifth Amendment.....In Anglo Saxon law that right was emerging at least as early as the Magna Carta..... Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values."
> (*Kent v. Dulles* : 357 US 116—2 L. Ed. 2d. 1204 1958).

D

> "Freedom of movement also has large social values. As Chafoe put it : 'Foreign correspondents on lectures on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons chose to the core of personal life—marriage reuniting families, spending hours with old friends. Finally travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our Government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home....

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F

> Freedom to travel is, indeed, an important aspect of the citizen's liberty".
>
> (*Kent* v. *Dulles*)

G

> "Freedom of movement at home and abroad, is important for job and business opportunities—for cultural, political and social activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them and

H

> against restraint, knowing that the risk of abusing liberty so as to give right to punishable conduct is part of the price we pay for this free society.

(*Apthekar* v. *Secretary of State* : 378 US 500—12 L.Ed. 2d 992 (1964).

Judge Wyzanski has said :

> 'This travel does not differ from any other exercise of the manifold freedoms of expression..... from the right to speak, to write, to use the mails, to public, to assemble, to petition."
>
> (Wyzanski, Freedom to Travel, Atlantic Montaly. Oct. 1952, p. 66 at 68).

The American Courts have, in a sense, blazed the constitutional trail on that facet of liberty which relates to untrammelled travel. *Kent, Apthekar* and *Zemel* are the landmark cases and American jurisprudence today holds as a fundamental part of liberty (V Amendment) that a citizen has freedom to move across the frontiers without passport restrictions subject, of course, to well-defined necessitous exceptions. Basically, Blackstone is still current coin :

> "Personal liberty consists in the power of locomotion, of changing direction or moving one's person to whatever place one's own inclination may desire."

To sum up, personal liberty makes for the worth of the human person. Travel makes liberty worthwhile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out to reality which makes our earthly journey a true fulfilment—not a tale told by an idiot full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Art. 21. Absent liberty, other freedoms are frozen.

While the issue is legal and sounds in the constitutional, its appreciation gains in human depth given a planetary perspective and understanding of the expanding range of travel between the 'inner space' of Man and the 'outer space' around Mother Earth.

To conclude this Chapter of the discussion on the concept of personal liberty, as a sweeping supplement to the specific treatment by brother Bhagwati J., the Jurists' Conference in Bangalore, concluded in 1969, made a sound statement of the Indian Law subject, of course, to savings and exceptions carved out of the generality of that conclusion :

> "Freedom of movement of the individual within or in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, education, trade or employment, or to escape from an environment in

A which his other liberties are suppressed or threatened. Moreover, in an inter-dependent world requiring for its future peace and progress an ever-growing measure of international understanding, it is desirable to facilitate individual contacts between peoples and to remove all unjustifiable restraints on their movement which may hamper such contacts."

B So much for personal liberty and its travel facet. Now to 'procedure established by law', the manacle clause in Art. 21, first generally, and next, with reference to *A. K. Gopalan* (supra) and after. Again, I observe relative brevity because I go the whole hog with brother Bhagwati, J.

If Article 21 includes the freedom of foreign travel, can its exercise C be fettered or forbidden by procedure established by law ? Yes, indeed. So, what is 'procedure' ? What do we mean by 'established' ? And What is law ? Anything, formal, legislatively processed, albeit absurd or arbitrary ? Reverence for life and liberty must over power this *reductio an absurdem.*' Legal interpretation, in the last analysis, is value judgment. The high seriousness of the subject matter—life and liberty—desiderates the need for law, not fiat. Law is law when D it is legitimated by the conscience and consent of the community generally. Not any capricious compthe but reasonable mode ordinarily regarded by the cream of society as *dharma* or law, approximating broadly to other standard measures regulating criminal or like procedure in the country. Often, it is a legislative act, but it must be functional, not fatuous.

E This line of logic alone will make the two clauses of Art. 21 concordant, the procedural machinery not destroying the substantive fundamentally. The compulsion of constitutional humanism and the assumpion of full faih in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority, by three quick readings of a bill with the requisite quorum; can prescribe any unreasonable modality and thereby sterilise the F grandiloquent mandate. 'Procedure established by law', with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not *ex necessitate* import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, G was launched be sapped by formalistic and phariscic prescriptions, regardless of essential standards ? An enacted apperition is a constitutional illusion. Processual justice is writ patently on Art. 21. It is too grave to be circumvented by a black letter ritual processed through the legislature.

So I am convinced that to frustrate Art. 21 by relying on any H formal adjectival statute, however, filmsy or fantastic its provisions be, is to rob what the constitution treasures. Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art. 21 has to be fair, not foolish, carefully

designed to effectuate, not to subvert, the substantive right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes. You cannot claim that it is a legal procedure if the passport is granted or refused by taking loss, ordeal of fire or by other strange or mystical methods. Nor is it tenable if life is taken by a crude or summary process of enquiry. What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established which means 'settled firmly' not wantonly whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'Law' leaves little doubt that it is normae, regarded as just since law is the means and justice is the end.

Is there supportive judicial thought for this reasoning. We go back to the vintage words of the learned Judges in *A. K. Gopalan* (supra) and zigzag through *R. C. Cooper* to *S. N. Sarkar* and discern attestation of this conclusion. And the elaborate constitutional procedure in Art. 22 itself fortifies the argument that 'life and liberty' in Art. 21 could not have been left to illusory legislatorial happenstance. Even as relevant reasonableness informs art. 14 and 19, the component of fairness is implicit in Art. 21. A close-up of the *Gopalan case* (supra) is necessitous at this stage to underscore the quality of procedure relevant to personal liberty.

Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is large the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as had politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ 'Community Consciousness and the Indian Constitution' is a fascinating subject of sociological relevance in many areas.

To sum up, 'procedure' in Art. 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Art. 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Art. 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Art. 21 are available. Otherwise, as the procedural safeguards contained in Art. 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses. In *Kochunni*(1) the Court, doubting the correctness of the *Gopalan* decision on this aspect, said :

(1) A. I. R. 1960 S. C. 1080, 1093.

A "Had the question been *res integra*, some of us would have been inclined to agree with the dissenting view expressed by Fazal Ali, J."

Gopalan does contain some luscent thought on 'procedure established by law'. Patanjali Sastri, J. approximated it to the prevalent norms of criminal procedure regarded for a long time by Indo-Anglian B criminal law as conscionable. The learned Judge observed :

"On the other hand, the interpretation suggested by the Attorney General on behalf of the intervener that the expression means nothing more than procedure prescribed by any law made by a competent legislature is hardly more acceptable. 'Established', according to him, means prescribed, and C if Parliament or the Legislature of a State enacted a procedure, however novel and ineffective for affording the accused person a fair opportunity of defending himself, it would be sufficient for depriving a person of his life of personal liberty."

(pp. 201—203)

D *"The main difficulty I feel in accepting the construction suggested by the Attorney General is that it completely stultifies article* 13(2) *and, indeed, the very conception of a fundamental right.....could it then have been the intention of the framers of the Constitution that the most important fundamental rights to life and personal liberty should be at the mercy of legislative majorities as, in effect, they would if 'established' were to mean merely* prescribed'? In E other words, as an American Judge said in a similar context, does the constitutional prohibition in article 13(3) amount to no more than 'your shall not take away life or personal freedom unless you choose to take it away', which F is more verbiage.....It is said that article 21 affords no protection against competent legislative action in the field of substantive criminal law, for there is no provision for judicial review, on the ground of reasonableness or otherwise, of such laws, as in the case of the rights enumerated in article 19. Even assuming it to be so the construction of the learned Attorney General would have the effect of rendering wholly ineffective and illusory even the procedural pro- G tection which the article was undoubtedly designed to afford."

(p. 202) (emphasis, added)

"After giving the matter my most careful and anxious consideration, I have come to the conclusion that there are H only two possible solutions of the problem. In the first place, a satisfactory via media between the two extreme positions contended for on either side may be found by stressing the word 'established' which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. 'Procedure esta-

> blished by' may well be taken to mean what the Privy Council referred to in *King Emperor* v. *Bengori Lal Sharma* as 'the ordinary and well established criminal procedure', that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of Criminal procedure in the country.
>
> (p. 205)

Fazal Ali, J. frowned on emasculating the procedural substantiality of Art. 21 and read into it those essentials of natural justice which made processual law humane : The learned Judge argued :

> "It seems to me that there is nothing revolutionary in the doctrine that the words 'procedure established by law' must include the four principles set out in Professor Willis' book, which, as I have already stated, are different aspects of the same principle and which have no vagueness or uncertainty about them. These principles, as the learned author points out and as the authorities show, are not absolutely rigid principles but are adaptable to the circumstances of each case within certain limits. I have only to add, that it has not been seriously controverted that 'law' means *certain definite rules of proceeding and not something which is a mere pretence for procedure.*
>
> (emphasis, added)

In short, fair adjectival law is the very life of the life-liberty fundamental right (Art. 21), not 'autocratic supremacy of the legislature'. Mahajan J. struck a concordant note :

> "Article 21 in my opinion, lays down substantive law as giving protection to life and liberty in as much as it says that they cannot be deprived except according to the procedure established by law; in other words, it means that before a person can be deprived of his life or liberty as a condition precedent there should exist some substantive law conferring authority for doing so and the law should further provide for a mode of procedure for such deprivation. This article gives complete immunity against the exercise of despotic power by the executive. It further gives immunity against invalid laws which contravene the Constitution. It gives also further guarantee that in its true concept there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty. *It negatives the idea of a fantastic, arbitrary and oppressive form of proceedings.*"
>
> (emphasis, added)

In sum, Fazal Ali, J. struck the chord which does accord with a just processual system where liberty is likely to be the victim. May be, the learned Judge stretched it a little beyond the line but in essence his norms claim my concurrence.

A In *John* v. *Rees*(1) the true rule, as implicit in any law, is set down :

> "If there is any doubt, the applicability of the principles will be given the benefit of doubt."

And Lord Denning, on the theme of liberty, observed in *Schmidt* v. *Secretary of State*(2) :

B

> "Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without hearing."

Human rights :

C It is a mark of interpretative respect for the higher norms our founding fathers held dear in affecting the dearest rights of life and liberty so to read Art. 21 as to result in a human order lined with human justice. And running right through Arts. 19 and 14 is present this principle of reasonable procedure in different shades. A certain normative harmony among the articles is thus attained, and I hold Art. 21 bears in its bosom the construction of fair procedure legis-
D latively sanctioned. No Passport Officer shall be mini-Caesar nor Minister incarnate Caesar in a system where the rule of law reigns supreme.

My clear conclusion on Art. 21 is that liberty of locomotion into alien territory cannot be unjustly forbidden by the Establishment and passport legislation must take processual provisions which accord with
E fair norms, free from extraneous pressure and, by and large, complying with natural justice. Unilateral arbitrariness, police dossiers, faceless affiants, behind-the-back materials, oblique motives and the inscrutable face of an official sphinx do not fill the 'fairness' bill-subject, of course, to just exceptions and critical contexts. This minimum once abandoned, the Police State slowly builds up which saps the finer substance
F of our constitutional jurisprudence. Not party but principle and policy are the key-stone of our Republic.

Let us not forget that Art. 21 clubs life with liberty and when we interpret the colour and content of 'procedure established by law' we must be alive to the deadly peril of life being deprived without minimal processual justice, legislative callousness despising 'hearing'
G and fair opportunities of defence. And this realization once sanctioned, its exercise will swell till the basic freedom is flooded out. Hark back to Art. 10 of the Universal Declaration to realize that human rights have but a verbal hollow if the protective armour of *audi alteram partem* is deleted. When such pleas are urged in the familiar name of pragmatism public interest or national security, courts are on trial and must prove that civil liberties are not mere rhetorical
H material for lip service but the obligatory essence of our hard-won

(1) [1969] 2 All E. R. 274.
(2) [1969] 2 Ch. 149.

freedom. A Republic—if you Can Keep It—is the caveat for counsel and court. And Tom Paine, in his Dissertation on First Principles of Government, sounded the tossin :

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."

Phoney freedom is not worth the word and this ruling of ours is not confined to the petitioner but to the hungry job-seeker, nun and nurse, mason and carpenter, welder and fitter and, above all, political dissenter. The last category, detested as unreasonable, defies the Establishment's tendency to enforce through conformity but is the resource of social change. "The reasonable man", says G. B. Shaw;

> "adapts himself to the word; the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man." (George Bernard Shaw in 'Maxims for Revolutionists').

'Passport' peevishness is a suppressive possibility, and so the words of Justice Jackson (U.S. Supreme Court) may be apposite :

> "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."
>
> (*West Virginia State Board of Education v. Barnetto* 319 US 624 (1943).

Under our constitutional order, the price of daring dissent shall not be passport forfeit.

The impugned legislation, ss. 5, 6 and 10 especially, must be tested even under Art. 21 on canons of processual justice to the people outlined above. Hearing is obligatory—meaningful hearing, flexible and realistic, according to circumstances, but not ritualistic and wooden. In exceptional cases and emergency situations, interim measures may be taken, to avoid the mischief of the passportee becoming an escapee before the hearing begins. 'Bolt the stables after the horse has been stolen' is not a command of natural justice. But soon after the provisional seizure, a reasonable hearing must follow, to minimise procedural prejudice. And when a prompt final order is made against the applicant or passport holder the reasons must be disclosed to him almost invariably save in those dangerous cases where irreparable injury will ensue to the State. A government which reveals in secrecy in the field of people's liberty not only acts against democratic decency but busies itself with its own burial. That is the writing on the wall if history were teacher, memory our mentor and decline of liberty *not* our unwitting endeavour. Public power must rarely hide its heart in an open society and system.

A I now skip Art. 14 since I agree fully with all that my learned brother Bhagwati J. has said. That article has a pervasive processual potency and versatile quality, egalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness and *ex-cathedra ipse dixit* is the ally of demagogic authoritarianism. Only knight-errants of 'executive excesses'—if we may use a current cliche—can fall in love with the Dame of despotism, legislative or administra-
B tive. If this Court gives in here it gives up the ghost. And so it that I insist on the dynamics of limitations on fundamental freedoms as implying the rule of law; Be you ever so high, the law is above you.'

A minor pebble was thrown to produce a little ripple. It was feebly suggested that the right to travel abroad cannot be guaranteed by the State because it has no extra-territorial jurisdiction in foreign lands.
C This is a naive misconception of the point pressed before us. Nobody contends that India should interfere with other countries and their sovereignty to ensure free movement of Indians in those countries. What is meant is that the Government of India should not prevent by any sanctions it has over its citizens from moving within any other country if that other country has no objection to their travelling within
D its territory. It is difficult to understand how one can misunderstand the obvious.

A thorny problem debated recurrently at the bar, turning on Art. 19, demands some juristic response although avoidance of overlap persuades me to drop all other questions canvassed before us. The *Gopalan* (supra) verdict, with the cocooning of Art. 22 into a self con-
E tained code, has suffered supersession at the hands of *R. C. Cooper*(1). By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietariat have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cycloramic review starts from *Gopalan*, moves on to *In re : Kerala Education Bill* and then on to *All India Bank Employees Union*, next to *Sakal Newspapers*, crowning in *Cooper*(1) and followed by *Bennet Coleman*(2) and
F *Sambu Nath Sarkar*(3). Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man *human* have a synthesis. The
G proposition is indubitable that art. 21 does not, in a given situation, exclude Art. 19 if both rights are breached.

We may switch to Art. 19 very briefly and travel along another street for a while. Is freedom of extra-territorial travel to assure which is the primary office of an Indian passport, a facet of the freedom of speech and expression, of profession or vocation under Article 19?
H

(1) [1973] 3 S.C.R. 530.
(2) [1973] 2 S.C.R. 757.
(3) [1973] 1 S.C.R. 856.

My total consensus with Shri Justice Bhagwati jettisons from this judgment the profusion of precedents and the mosaic of many points and confines me to some fundamentals confusion on which, with all the clarity on details, may mar the conclusion. It is a salutary thought that the summit court should not interpret constitutional rights enshrined in Part III to choke its life-breath or chill its elan vital by processes of legalism, overruling the enduring values burning in the bosoms of those who won our Independence and drew up our founding document. We must also remember that when this Court lays down the law, not *ad hoc* tunes but essential notes, not temporary tumult but transcendental truth, must guide the judicial process in translating into authoritative notation the mood music of the Constitution.

While dealing with Art. 19 vis a vis freedom to travel abroad, we have to remember one spinal indicator. True, high constitutional policy has harmonised individual freedoms with holistic community good by inscribing exceptions to Art. 19(1) in Art. 19(2) to (6). Even so, what is fundamental is the freedom, not the exception. More importantly, restraints are permissible only to the extent they have nexus with the approved object. For instance, in a wide sense, 'the interests of the general public' are served by a family planning programme but it may be constitutional impertinence to insist that passports may be refused if sterilisation certificates were not produced. Likewise, it is in public interest to widen streets in cities but monstrous to impound a passport because its holder has declined to demolish his house which projects into the street line. Sure, the security of State is a paramount consideration but can Government, totalitarian fashion, equate Party with country and refuse travel document because, while abroad, he may criticise the conflicting politics of the Party-in-power or the planning economics of the government of the day? Is it conceivable that an Indian will forfeit his right to go abroad because his flowing side-burns or sartorial vagaries offend a high-placed authority's sense of decency? The point is that liberty can be curtailed only if the grounds listed in the saving sub-articles are directly, specifically, substantially and imminently attracted so that the basic right may not be stultified. Restraints are necessary and validly made by statute, but to paint with an over-broad brush a power to blanket-ban travel abroad is to sweep overly and invade illicitly. 'The law of fear' cannot reign where the proportionate danger is containable. It is a balancing process, not over-weighted one way or the other. Even so, the perspective is firm and fair. Courts must not interfere where the order is not perverse, unreasonable, *mala fide* or supported by no material. Under our system, court writs cannot run government, for, then, judicial review may tend to be a judicial coup. But 'lawless' law and executive excess must be halted by judge-power lest the Constitution be subverted by branches deriving credentials from the Constitution. An imperative guideline by which the Court will test the soundness of legislative and executive constraint is, in the language of *V. C. Row*(1) this :

(1) [1952] S.C.R. 597.

A

> "The reasonableness of a restriction depends upon the values of life in a society, the circumstances obtaining at a particular point of time when the restriction is imposed, the degree and the urgency of the evil sought to be controlled and similar others."

What characterises the existence and eclipse of the right of exit? 'Breathes there the man with soul so dead' who, if he leaves, will B not return to his own 'native land'? Then, why restrict? The question, presented so simplistically, may still have overtones of security sensitivity and sovereignty complexity and other internal and external factors, and that is why the case which we are deciding has spread the canvas wide. I must express a pensive reflection, sparked off by submissions at the bar, that, regardless of the 'civil liberty' credentials or otherwise of a particular government and mindless of C the finer phraseology of a restrictive legislation, eternal vigilance by the superior judiciary and the enlightened activists who are the catalysts of the community, is the perpetual price of the preservation of every freedom we cherish. For, if unchecked, 'the greater the power, the more dangerous the abuse.' To deny freedom of travel or exit to one untenably is to deny it to any or many likewise, and the D right to say 'Aye' or 'nay' to any potential traveller should, therefore, not rest with the minions or masters of government without being gently and benignly censored by constitutionally sanctioned legislative norms if the reality of liberty is not be drowned in the hysteria of the hour or the hubris of power. It is never trite to repeat that where laws end, tyranny begins', and law becomes unlaw even if it is legitimated by three legislative readings and one E assent, if it is not in accord with constitutional provisions, beyond abridgement by the two branches of government. In the context of scray expressions like 'security' 'public order', 'public interest' and 'friendly foreign relations', we must warn ourselves that not verbal lables but real values are the governing considerations in the exploration and adjudication of constitutional prescriptions and proscriptions. Governments come and go, but the fundamental F rights of the people cannot be subject to the wishful value-sets of political regimes of the passing day.

The learned Attorney General argued that the right to travel abroad was no part of Art. 19(1)(a), (b), (c), (f) or (g) and so to taboo travel even unreasonably does not touch Art. 19. As a component thereof, as also by way of separate submission, it was G urged that the direct effect of the passport law (and refusal thereunder) was not a blow on freedom of speech, of association or of profession and, therefore, it could not be struck down even if it overflowed Art. 19(2), (4) and (6). This presentation poses the issue, 'What is the profile of our free system?' Is freedom of speech integrally interwoven with locomotion? Is freedom of profession done to death if a professional, by passport refusal without reference H to Art. 19(f), is inhibited from taking up a job offered abroad? Is freedom of association such a hot-house plant that membership of an international professional or political organisation can be cut off on executive-legislative *ipse dixit* without obedience to Art. 19(4)?

This renophatic touch has not been attested by the Constitution and is not discernible in the psyche. An anti-international pathology shall not afflict our National Charter. A Human Tomorrow on Mother Earth is our cosmic constitutional perspective (See Art. 51). A

To my mind, locomotion is, in some situation, necessarily involved in the exercise of the specified fundamental rights as an associated or integrated right. Travel, *simiplicter,* is peripheral to and not necessarily fundamental in Art. 19. *Arguendo,* free speech is feasible without movement beyond the country, although solilequies and solo songs are not the vogue in this ancient land of silent saints and pyrating gurus, bhajans and festivals. Again, travel may ordinarily be 'action' and only incidentally 'expression', to borrow the *Zemel* diction. B

Movement within the territory of India is not tampered with by the impugned order, but that is not all. For, if our notions are *en courrent,* it is common place that the world—the family of nations—vibrates, and men—masses of man-move and 'jet' abroad and abroad, even in Concorde, on a scale unknown to history. Even thoughts, ideologies and habits travel beyond. Tourists crowd out airline services; job-seekers rush to passport offices; lecture tours, cultural exchanges, trans-national evangelical meets, scientific and scholarly studies and workshops and seminars escalate, and international associations abound—all for the good of world peace and human progress, save where are involved high risks to sovereignty, national security and other substantial considerations which Constitutions and Courts have readily recognised. Our free system is not so brittle or timorous as to be scared into tabooing citizens' trips abroad, except conducted tours or approved visits sanctioned by the Central Executive and indifferent to Art. 19. Again, the core question arises: Is movement abroad so much a crucial part of free speech, free practice of profession and the like that denial of the first is a violation of the rest? C D E

I admit that merely because speaking mostly involves some movement, therefore, 'free speech anywhere is dead if free movement everywhere is denied', does not follow. The Constitutional lines must be so drawn that the constellation of fundamental rights does not expose the peace, security and tranquillity of the community to high risk. We cannot over-stretch free speech to make it an inextricable component of travel. F

Thomas Emerson has summed the American Law which rings a bell even in the Indian system: G

> "The values and functions of the freedom of expression in a democratic polity are obvious. Freedom of expression is essentially as a means of assuring individual self-fulfilment. The proper end of man is the realisation of his character and potentialities as a human being. For the achievement of this self-realisation the mind must be free." H

Again

A "Freedom of expression is an essential process for advancing knowledge and discovering truth. So also for participation in decision-making in a democratic society. Indeed free expression furthers stability in the community by reasoning together instead of battling against each other. Such being the value and function of free speech, what are the dynamics of limitation which will fit these values B and functions without retarding social goals or injuring social interest? It is in this background that we have to view the problem of passports and the law woven around it. There are two ways of looking at the question. . . .as a facet of liberty and as an ancient of expression." Thomas Emerson comments on passports from these dual angles :

C Travel abroad should probably be classified as 'action' rather than "expression". In commonsense terms travel is more physical movement than communication of ideas. It is true that travel abroad is frequently instrumental to expression, as when it is undertaken by a reporter to gather news, a scholar to lecture, a student to obtain information or simply an ordinary citizen in order to expand his understanding of D the world. Nevertheless, there are so many other aspects to travel abroad on functionally it requires such different types of regulation that, at last as the general proposition, it would have to be considered "action". As action, it is a 'liberty' protected by the due process clause of the Fifth and Fourteenth Amendments. The first amendment is still relevant in two ways : (1) There are sufficient elements of E expression in travel abroad so that the umbrella effect of the first Amendment comes into play, thereby requiring the courts to apply due process and other constitutional doctrines with special care; (2) conditions imposed on travel abroad based on conduct classified as expression impair freedom of expression and hence raise direct first Amendment questions."

F Travel is more than speech : it is speech bridgded with conduct, in the words of Justice Douglas :

"Restrictions on the right to travel in times of peace should be so particularized that at First Amendment right is not precluded unless some clear countervailing national G interest stands in the way of its assertion."

I do not take this as wholly valid in our Part III scheme but refer to it as kindred reasoning.

The delicate, yet difficult, phase of the controversy arrives where free speech and free practice of profession are inextricably interH woven with travel abroad. The Passport Act, in terms, does not inhibit expression and only regulates action—to borrow the phraseology of Chief Justice Warren in *Zemel*. But we have to view the proximate and real conservance of thwarting trans-national travel through the

power of the State exercised under s. 3 of the Passport Act read with ss. 5, 6 and 10. If a right is not in express terms *fundamental* within the meaning of Part III, does it escape Art. 13, read with the trammels of Art. 19, even if the immediate impact, the substantial effect, the proximate import or the necessary result is prevention of free speech or practice of one's profession? The answer is that associated rights, totally integrated, must enjoy the same immunity. Not otherwise.

Three sets of cases may be thought of. Firstly, where the legislative provision or executive order expressly forbids exercise in foreign lands of the fundamental right while granting passport. Secondly, there may be cases where even if the order is innocent on its face, the refusal of permission to go to a foreign country may, with certainty and immediacy, spell denial of free speech and professional practice or business. Thirdly, the fundamental right may itself enwomb locomotion regardless of national frontiers. The second and third often are blurred in their edges and may overlap.

The first class may be illustrated. If the passport authority specifically conditions the permission with a direction not to address meetings abroad or not to be a journalist or professor in a foreign country, the order violate Art. 19(1)(a) or (f) and stands voided unless Art. 19 (2) and (6) are complied with. The second category may be exemplified and examined after the third which is of less frequent occurrence. If a person is an international pilot, astronaut, Judge of the International Court of Justice, Secretary of the World Peace Council, President of a body of like nature, the particular profession not only calls for its practice travelling outside Indian territory but its core itself is international travel. In such an area, no right of exit, no practice of profession or vocation. Similarly, a cricketer or tennis player recruited on a world tour. Free speech may similarly be hit by restriction on a campaigner for liberation of colonial peoples or against genocide before the United Nations Organisation. Refusal in such cases is hit on the head by negation of a national passport and can be rescued only by compliance with the relevant saving provisions in Art. 19(2), (4) or (6).

So far is plain sailing, as I see it. But the navigation into the penumbral zone of the second category is not easy.

Supposing a lawyer or doctor, expert or exporter, missionary or guru, has to visit a foreign country professionally or on a speaking assignment. He is effectively disabled from discharging his pursuit if passport is refused. There the direct effect, the necessary consequence, the immediate impact of the embargo on grant of passport (or its subsequent impounding or revocation) is the infringement of the right to expression or profession. Such infraction is unconstitutional unless the relevant part of Art. 19 (2) to (6) is complied with. In dealing with fundamental freedom substantial justification alone will bring the law under the exceptions. National security, sovereignty, public order and public interest must be of such a high degree as to offer a great threat. These concepts should not be devalued to suit

A the hyper-sensitivity of the executive or minimal threats to the State. Our nation is not so pusillanimous or precarious as to fall or founder if some miscreants pelt stones at its fair face from foreign countries. The dogs may bark, but the caravan will pass. And the danger to a party in power is not the same as rocking the security or sovereignty of the State. Sometimes, a petulant government which forces silence may act unconstitutionally to forbid criticism from far, even if necessary for
B the good of the State. The perspective of free criticism with its limits for free people everywhere, all true patriots will concur, is eloquently spelt out by Sir Winston Churchill on the historic censure motion in the Commons as Britain was reeling under defeat at the hands of Hitlerite hordes :

> "This long debate has now reached its final stage. What
> C a remarkable example it, has been of the unbridled freedom of our Parliamentary institutions in time of war! Everything that could be thought of or raked up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the Army distrust the backing it is getting from the civil power, to make workmen lose confi-
> D dence in the weapons they are striving so hard to make, to present the Government as a set of non-entities over whom the Prime Minister towers, and then to undermine him in his own heart, and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes! I am in favour of this freedom, which no other
> E country would use, or dare to use, in times of mortal peril such as those through which we are passing."

I wholly agree that spies, traitors, smugglers, saboteurs of the health, wealth and survival or sovereignty of the nation shall not be passported into hostile soil to work their vicious plan fruitfully. But when applying the Passports Act, over-breadth, hyper-anxiety, regimentation
F complex, and political mistrust shall not sub-consciously exaggerate, into morbid or neurotic refusal or unlimited impounding or final revocation of passport, facts which, objectively assessed, may prove tremendous trifles. That is why the provisions have to be read down into constitutionality, tailored to fit the reasonableness test and humanised by natural justice. The Act will survive but the order shall perish for reasons so fully set out by Shri Justice Bhagwati. And,
G on this construction, the conscience of the Constitution triumphs over vagarious governmental orders. And, indeed, the learned Attorney General (and the Additional Solicitor General who appeared with him), with characteristic and commendable grace and perceptive and progressive realism, agreed to the happy resolution of the present dispute in the manner set out in my learned brother's judgment.

H A concluding caveat validating my detour. Our country, with all its hopes, all its tears and all its fears, must never forget that 'freedom is recreated year by year, that freedom is as freedom does', that we have gained a republic 'if we can keep it' and that the water-

shed between a police state and a people's raj is located partly through its passport policy. Today, a poor man in this poor country despaire of getting a passport because of invariable police enquiry, insistance on property requirement and other avoidable procedural obstacles. And if a system of secret informers, police dossiers, faceless whisperers and political tale-bearers conceptualised and institutionalised 'in public interest,' comes to stay, civil liberty is legisidally constitutionalised—a consumption constantly to be resisted. The merits of a particular case apart, the policing of a people's right of exit or entry is fraught with peril to liberty unless policy is precise, operationally respectful of recognised values and harassment proof. Bertrand Russel has called attention to a syndrome the Administration will do well to note :

> "We are all of us a mixture of good and bad impulses that prevail in an excited crowd. There is in most men an impulse to persecute whatever is felt to be 'different'. There is also a hatred of any claim to superiority, which makes the stupid many hostile to the intelligent few. A motive such as fear of communism affords what seems a decent moral excuse for a combination of the heard against everything in any way exceptional. This is a recurrent phenomenon in human history. Wherever it occurs, its results are horrible."
>
> (Foreword by Bertrand Russel to Freedom is as Freedom Does—Civil Liberties Today—by Corliss Lament. New York, 1956)

While interpreting and implementing the words of Art. 14, 19 and 21, we may keep J. B. Preistley's caution :

> "We do not imagine that we are the victims of plots, that bad men are doing all this. It is the machinery of power that is getting out of sane control. Lost in its elaboration, even some men of goodwill begin to forget the essential humanity this machinery should be serving. They are now so busy testing, analysing, and reporting on bath water that they cannot remember having thrown the baby out of the window."
>
> (Introduction by H. H. Wilson, Associate Professor of Political Science, Princeton University to Freedom is as Freedom Does by Corliss Lament, ibid p. xxi.)

I have divagated a great deal into travel constitutionality in the setting of the story of the human journey, even though such a diffusion is partly beyond the strict needs of this case. But judicial travelling, like other travelling, is almost like 'talking with men of other centuries and countries.'

I agree with Sri Justice Bhagwati, notwithstanding this supplementary.

KAILASAM, J.—This petition is filed by Mrs. Maneka Gandhi under Article 32 of the Constitution of India against the Union of India

A and the Regional Passport Officer for a writ of certiorari for calling for the records of the case including in particular the order dated July 2, 1977 made by the Union of India under section 10(3)(c) of the Passports Act, Act 15 of 1967, impounding the passport of the petitioner and for quashing the said order.

The petitioner received a letter dated July 2, 1977 on July 4, B 1977 informing her that it had been decided by the Government of India to impound her passport. The letter read as follows :

> "You may recall that a passport no. K-869668 was issued to you by this office on 1-6-76. It has been decided by the Government of India to impound your above passport under section 10(3)(c) of the Passport Act, 1967 in public interest.
>
> C
>
> You are hereby required to surrender your passport K-869668 to this office within seven days from the date of the receipt of this letter."

On July 5, 1977 the petitioner addressed a letter to the second respondent, Regional Transport Officer, requesting him to furnish her a copy of the statement of the reasons for making the impugned order. D On July 7, 1977 the petitioner received the following communication from the Ministry of External Affairs :

> "The Government has decided to impound your passport in the interest of general public under section 10(3)(c) of the Passport Act, 1967. It has further been decided by the Government in the interest of general public not to furE nish you a copy of statement of reasons for making such orders as provided for under section 10(5) of the Passports Act, 1967."

The petitioner submitted that the order is without jurisdiction and not 'in the interests of general public.' The validity of the order was challenged on various grounds. It was submitted that there was E contravention of Art. 14 of the Constitution, that principles of natural justice were violated; that no opportunity of hearing as implied in section 10(3) of the Act was given and that the with-holding of the reasons for the order under section 10(5) is not justified in law. On July 8, 1977 the petitioner prayed for an *exparte ad interim* order staying the operation of the order of the respondents dated July 2, 1977 and for making the order of stay absolute after hearing the resG pondents. On behalf of the Union of India, Shri N. K. Ghose, I.F.S., Director (P.V.) Ministry of External Affairs, filed a counter affidavit. It was stated in the counter affidavit that on May 11, 1977, the Minister of External Affairs approved the impounding of the passport of 11 persons and on May 19, 1977 an order was passed by the Minister impounding the passports of 8 persons out of 11 persons that on July 1, 1977 the authorities concerned informed the Ministry of ExH ternal Affairs that the petitioner and her husband had arrived at Bombay on the after-noon of July 1, 1977 and that information had been received that there was likelihood of the petitioner leaving the country. The authorities contacted the Ministry of External Affairs

and Minister after going through the relevant papers approved the impounding of the passport of the petitioner on the evening of July 1, 1977 in the interests of general public under Section 10(3)(c) of the Passports Act, 1967. On July 2, 1977 Regional Transport Officer on instructions from the Government of India informed the petitioner about the Central Government's decision to impound her passport in public interest and requested her to surrender her passport. In the counter affidavit various allegations made in the petition were denied and it was stated that the order was perfectly justified and that the petition is without merits and should be dismissed. The rejoinder affidavit was filed by the petitioner on July 16, 1977.

An application Civil Misc. Petition No. 6210 of 1977 was filed by the petitioner for leave to urge additional grounds in support of the writ petition and a counter to this application was filed on behalf of the Ministry of External Affairs on August 18, 1977.

A petition by Adil Shahryar was filed seeking permission to intervene in the writ petition and it was ordered by this Court. During the hearing of the writ petition, Government produced the order disclosing the reasons for impounding the passport. The reasons given are that it was apprehended that the petitioner was attempting or was likely to attempt to leave the country and thereby hamper the functioning of the Commissions of Inquiry. According to the Government, the petitioner being the wife of Shri Sanjay Gandhi, there was likelihood of the petitioner being questioned regarding some aspects of the Commission. In the counter affidavit it was further alleged that there was good deal of evidence abroad and it would be unrealistic to over-look the possibility of tampering with it or making it unavailable to the Commission which can be done more easily and effectively when an interested person is abroad. So far as this allegation was concerned as it was not taken into account in passing the order it was given up during the hearing of the writ petition. The only ground on which the petitioner's passport was impounding was that she was likely to be examined by the Commission of Inquiry and her presence was necessary in India.

Several questions of law were raised. It was submitted that the petitioner was a journalist by profession and that she intended to proceed to West Germany in connection with her professional duties, as a journalist and that by denying her the passport not only was her right to travel abroad denied but her fundamental rights guaranteed under Article 19(1) were infringed. The contention was that before an order passed under Article 21 of the Constitution could be valid, it should not only satisfy the requirements of that article, namely that the order should be according to the procedure established by law, but also should not in any way infringe on her fundamental rights guaranteed under Article 19(1). In other words, the submission was that the right to personal liberty cannot be deprived without satisfying the requirements of not only Art. 21, but also Article 19. In addition the provisions of Section 10(3)(c) were challenged as being *ultra vires* of the powers of the legislature and that in any event

A the order vitiated by the petitioner not having been given an opportunity of being heard before the impugned order was passed. It was contended that the fundamental rights guaranteed under Article 19(1) particularly the right of freedom of speech and the right to practise profession was available to Indian citizens not only within the territory of India but also beyond the Indian territory and by preventing the petitioner from travelling abroad her right to freedom of speech
B and right to practise profession outside the country were also infringed. The plea is that the fundamental rights guaranteed under article 19 are available not only within territory of India but outside the territory of India as well.

The question that arises for consideration is whether the Fundamental Rights conferred under Part III and particularly the rights conferred under Article 19 are available beyond the territory of India.
C The rights conferred under Article 19(1)(a), (b), (c), (f) and (g) are

(a) to freedom of speech and expression;

(b) to assemble peacebly and without arms;

(c) to form associations or unions;

D X X X X

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business;

The rights conferred under Article 19(1) (d) and (e) being limited in its operation to the territory of India the question of their extra-
E territorial application does not arise.

In order to decide this question, I may consider the various provisions of the Constitution, which throw some light on this point. The preamble to the Constitution provides that the people of India have solemnly resolved to constitute India into a Sovereign Socialist Secular Democrative Republic and to secure to all its ciitzens :

F Justice, social, economic and political;

Liberty of thought, expression, belief faith and worship;

Equality of status and of opportunity;

and to promote among them all.

Fraternity assuring the dignity of the individual and the unity of the
G nation.

By the article, India is constituted as a Democratic republic and its citizens secured certain rights. While a reading of the article would indicate that the articles are applicable within the territory of India, the question arises whether they are available beyond the territorial limits of India.

H Article 12 of the Constitution defines "the State" as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorit es within the territory of India or under the control of the Government

of India. Article 13 provides that laws that are inconsistent with or in derogation of Fundamental Rights are to that extent void. Article 13(1) provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. What are the laws in force in the territory of India immediately before the commencement of the Constitution that are referred to in the Article will have to be looked into. Before that Article 13(2) may be noticed which provides that the State shall not make any law which takes away or abridges the rights conferred by Part III, and any law made in contravention of this clause shall, to the extent of the contravention, be void. The word "law" in the Article is defined as :

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; and

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

While the applicability of the custom and usage is restricted to the territory of India "law" may have an extra-territorial application.

In distributing the legislative powers between the Union and the States Article 248 provides that Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Article 245(2) provides that no law made by parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. This article makes it clear that a State law cannot have any extra-territorial operation while that of the parliament can have. The Parliament has undoubted power to enact law having extra-territorial application. In England section 3 of the Statute of Westminster, 1931 (22 Geo. V.C.4) provides :

> "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."

But in determining whether the provisions of a Constitution or a statute have extra-territorial application certain principles are laid down. Maxwell on The Interpretation of Statutes, Twelfth Edition, at p. 169, while dealing with the territorial application of British legislation has stated :

> "It has been said by the Judicial Committee of the Privy Council that : 'An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United

A Kingdom : not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony of possession'."

Lord Denning M. R. has said that the general rule is "that an Act of Parliament only applies to transactions within the United Kingdom and not to transactions outside." These two extracts are from two decisions (1) *Att. Gen. for Alberta* vs. *Huggard Assets, Ltd.*, (1953) B A.C. 420 and *C.E.B. Draper & Son, Ltd.* vs. *Edward Turner & Son. Ltd.* (1964) 3 All. E.R. 148 at p. 150 Maxwell comments on the above passages thus "These statements, however, perhaps oversimplify the position." The decisions cited will be referred to in due course.

C Craies on Statute Law (Sixth Ed.) at p. 447 states that ".... an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such is its intention. But whether any particular Act of parliament purports to bind British subjects abroad will always depend upon the intention of the legislature which must be gathered from the language of the Act in question." Dicey in his Introduction to the Study of the Law of the Constitution (1964 Ed.) at page liii states the position thus : "Parliament normally restricts D the operation of legislation to its own territories. British ships wherever they may be being included in the ambit of territory.—Parliament does on occasions, however, pass legislation controlling the activties of its own citizen when they are abroad." Salmond in his book on Jurisprudence (Twelfth Ed.) distinguishes between the territorial enforcement of law and the territoriality of law itself. At p. 11 the author states : "Since territoriality is not a logically necessary part E of the idea of law, a system of law is readily conceivable, the application of which is limited and determined not by reference to territorial considerations. but by reference to the personal qualifications of the individuals over whom jurisdiction is exercised." According to the text-books above referred to, the position is that a law is normally applicable within the territory, but can be made applicable to its citizens wherever they may be. Whether such extra-territorial F applicability is intended or not will have to be looked for in the legislation.

I will now refer to the decisions of courts on this subject.

In *Niboyet* v. *Niboyet*(1) the Court of Appeal stated: "It is true that the words of the statute are general, but general words in a statute G have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond the territorial authority of the Legislature. All criminal statutes are in their terms general; but they apply only to offences committed within the territory or by British subjects. When the Legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute as in the Merchant Shipping Acts, and in some of the Admiralty Acts." In H *the Queen* v. *Jameson and Others*(2), the Chief Justice Lord Russel

(1) 48 L. J. P. 1 at p. 10.
(2) [1896] 2 Q. B. Division 425 at 430.

stated the position thus : "It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. In *Cooke* v. *The Charles A. Vogeler Company*(1), the House of Lords in dealing with the jurisdiction of the Court of Bankruptcy observed that "English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case; while he is here, while he is trading, even if not actually domiciled, he is liable to be made a bankrupt like a native citizen.....It is limited in its terms to England; and I think it would be impossible to suppose that if the Legislature had intended so broad a jurisdiction as is contended for here, it would not have conferred it by express enactment." In *Tomalin* v. *S. Pearson & Son, Limited*(2) the Court of appeal dealing with the application of the Workmen's Compensation Act, 1906, quoted with approval a passage from Maxwell on Interpretation of Statutes at p. 213 wherein it was stated: "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom". The law that is applicable in the United Kingdom is fairly summed up in the above passage. The presumption is that the statute is not intended to operate beyond the territorial limits unless a contrary intention is expressed or could be inferred from its language. The decision of the Privy Council in *Att.-Gen. for Alberta* v. *Huggard Assets, Ltd.*(3), has already been referred to as a quotation from Maxwell's Interpretation of Statutes. The Privy Council in that case held that "An Act of the Imperial Parliament today unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession." The Court of Appeal in a later decision reported in (1964) 3 All. E.R. p. 148 (*C.E.B. Draper & Son, Ltd.* vs. *Edward Turner & Son, Ltd.*) approved of the proposition laid down in *Att. Gen. for Alberta* vs. *Huggard Assets, Ltd.*, observing "Prima facie an Act of the United Kingdom Parliament, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom".

The cases decided by the Federal Court and the Supreme Court of India may be taken note of. Dealing with the extra-territorial application of the provisions of the Income-tax Act, the Federal Court in *Governor-General in Council* v. *Raleigh Investment Co. Ltd.*(4) after finding that there was no territorial operation of the Act observed that if there was any extra territorial operation it is within the legislative powers given to the Indian Legislature by the Constitution Act. After discussing the case-law on the subject at p. 61 regarding the making of laws for the

(1) [1901] A. C. 102 at p. 107.
(2) [1909] 2 K. B. 61.
(3) [1953] A. C. 420.
(4) A. I. R. (31) 1944 Federal Court 51.

A whole or any part of British India on topics in Lists I and III of Sch. 7 and holding that the Federal Legislature's powers for extra-territorial legislation is not limited to the cases specified in clauses (a) to (e) of sub-section (2) of section 99 of the Government of India Act, 1935, concluded by stating that the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative B powers given to the Indian Legislature by the Constitution Act. Again in *Wallace Brothers & Co. Ltd.* v. *Commissioner of Income-tax, Bombay, Sind and Baluchistan*(1), the Federal Court held that there was no element of extra-territoriality in the impugned provisions of the Indian Income-tax Act, and even if the provisions were in any measure extra-territorial in their effect, that was not a ground for holding them to be *ultra vires* the Indian Legislature. In *Mohammad Mohy-ud-din* v. *The* C *King Emperor*(2), the Federal Court was considering the validity of the Indian Army Act, 1911. In this case a person who was not a British subject but had accepted a commission in the Indian Army was arraigned before a court martial for trial for offences alleged to have been committed by him outside British India. It was held that section 41 of the Indian Army Act, 1911, conferred jurisdiction on the court-martial to try non-British subjects for offences committed by them D beyond British India. On a construction of section 43 of the Act the Court held that the court-martial has powers "over all the native officers and soldiers in the said military service to whatever Presidency such officers and soldiers may belong or wheresoever they may be serving." Repelling the contention that there was a presumption against construing even general words in an Act of Parliament as intended to have extra-territorial effect or authorising extra-territorial legislation the Court E observed: "The passages relied on in this connection from Maxwell's Interpretation of Statutes do not go the length necessary for the appellant's case. It is true that every statute is to be interpreted so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of International Law. Whatever may be the rule of International Law as regards the ordinary citizen, we have not been referred to any rule of International Law or principle of F the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits". The law as laid down by the Courts may now be summarised. Parliament normally restricts the operation of the legislation to its own territories. Parliament may pass legislation controlling the activities of the citizens abroad. An intention to have extra territorial operation should be expressed or necessarily implied G from the language of the Statute. The Statute should be so interpreted as not to be inconsistent with the comity of nations or with the established rules of international law.

It is now necessary to examine the various articles of Part III of the Constitution to find out whether any intention is expressed to make any of the rights available extra-territorially. The application of Article H 14 is expressly limited to the territory of India as it lays down that "The

(1) [1945] F.C.R. 65.
(2) [1946] F.C.R. 94.

State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 15 relates to prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, and Art. 16 deals with equality of opportunity in matters of public employment. By their very nature the two Articles are confined to the territory of India. So also Articles 17 and 18 which deal with abolition of untouchability and abolition of titles. Before dealing with Articles 19 and 21 with which we are now concerned the other articles may be referred to in brief. Articles 20 and 22 can have only territorial application. Articles 23 and 24 which relate to right against exploitation and Articles 25 to 28 which relate to freedom of conscience and free profession, practice and propagation of religion etc. *prima facie* are applicable only to the territory of India At any rate there is no intention in these Articles indicating extra-territorial application. So also articles 29 and 30 which deal with cultural and educational rights are applicable only within the territory of India. Article 31 does not expressly or impliedly have any extra territorial application. In this background it will have to be examined whether any express or implied intention of extra-territorial applicability is discernible in Articles 19 and 21.

Article 19(1)(a) declares the right to freedom of speech and expression. While it is possible that this right may have extra-territorial application, it is not likely that the framers of the Constitution intended the right to assemble peaceably and without arms or to form associations or unions, or to acquire, hold and dispose of property, or to practise any profession, or to carry on any occupation, trade or business, to have any extra territorial application, for such rights could not be enforced by the State outside the Indian territory. The rights conferred under Art. 19 are Fundamental Rights and Articles 32 and 226 provide that these rights are guaranteed and can be enforced by the aggrieved person by approaching the Supreme Court or the High Courts. Admittedly, the rights enumerated in Art. 19(1)(a), (b), (c), (f) and (g) cannot be enforced by the State and in the circumstances there is a presumption that the Constitution-makers would have intended to guarantee any right which the State cannot enforce and would have made a provision guaranteeing the rights and securing them by recourse to the Supreme Court and the High Courts.

The restriction of the right to move freely throughout the territory of India and the right to reside and stay in any part of the territory of India is strongly relied upon as indicating that in the absence of such restrictions the other rights are not confined to the territory of India. The provisions in Art. 19(1)(d) and (e) i.e. the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India have historical significance. In *A. K. Gopalan* vs. *The State of Madras*,(1) Kania C.J., said that in the right "to move freely throughout the territory of India" the emphasis was not on the free movement but on the right to move freely throughout the territory of India. The intention was to avoid any restriction being placed by the States hampering free movement

(1) [1950] S.C.R. 88.

throughout the territory of India. It is a historical fact that there were rivalries between the various States and the imposition of restraint on movement from State to State by some States was not beyond possibility. In the two clauses 19(1)(d) and (e) the right "to move freely throughout the territory of India" and "to reside and settle in any part of the territory of India" the "territory of India" is mentioned with the purpose of preventing the States from imposing any restraint. From the fact that the words "territory of India" are found in these two clauses the contention that the other freedoms are not limited to the territory of India for their operation cannot be accepted. In *Virendra v. The State of Punjab and Another*,(1) S. R. Das, C. J., who spoke on behalf of the Constitution Bench stated : "The point to be kept in view is that several rights of freedom guaranteed to the citizens by Article 19(1) are exercisable by them throughout and in all parts of the territory of India". The view that the rights under Art. 19(1) is exercisable in the territory of India has not been discussed. Far from Art. 19(1) expressing any intention expressly or impliedly of extra territorial operation the context would indicate that its application is intended to be only territorial. The right under Art. 19(b) and (c) to assemble peaceably and without arms and to form associations or unions could not have been intended to have any extra-territorial application as it will not be in accordance with the accepted principles of international law. As the rights under Articles 19(b) and (c) cannot be enforced outside India the inference is that no extra-territorial application was intended. So also regarding the rights conferred under Articles 19(f) and (g) i.e. to acquire, hold and dispose of property; and to practise any profession, or to carry on any occupation, trade or business, would not have been intended to be applicable outside India.

It was submitted that when the Constitution was framed the founding fathers were influenced by the United Nations' Universal Declaration of Human Rights which was made in December, 1948 and they thought it fit to make the Fundamental Rights available to the Indian citizens throughout the world. The history of the conception of human rights may be shortly traced. The main task of the Human Rights' Commission which was set up by the United Nations was to draw an International Bill of Rights. The Commission split this task into two documents : a short declaration of principles and an elaborate treaty or covenant enforcing those principles so far as practicable. The Universal Declaration of Human Rights was not intended to be binding as law but to present the main ideals of human rights and freedoms in order to inspire everybody, whether in or out of governments, to work for their progressive realization. The Commission finished the Declaration and it was promulgated by the UN Assembly on December 10, 1948. The discussion about the Draft Indian Constitution took place between February and October, 1948 and the Articles relating to the Fundamental Rights were discussed in October, 1948, i.e. before the Universal Declaration of Human Rights was promulgated by the UN Assembly on December 10, 1948. It is most unlikely that before the Declaration of Human Rights was promulgated

(1) [1958] S.C.R. 308.

the framers of the Indian Constitution decided to declare that the Fundamental Rights conferred on the citizens would have application even outside India. The Universal Declaration of Human Rights was not binding as law but was only a pious hope for achieving a common standard for all peoples and all nations. Article 13 of the Declaration which is material for our discussion runs as follows : A

Paragraph 1. Everyone has the right to freedom of movement and residence with in the borders of each state. B

Paragraph 2. Everyone has the right to leave any country, including his own, and to return to his country.

Paragraph 1 restricts the right of movement and residence specifically within the borders of the country. The second paragraph aims at securing the right to leave any country including his own and to return to his country. The Declaration at that stage did not have any idea of conferring on the citizens of any country right of movement beyond borders of the State or to freedom of speech or right to assemble outside the country of origin. Even in the American Constitution there is no mention of right to freedom of speech or expression as being available outside America. Regarding the right of movement within the borders of the State it is not mentioned as one of the freedoms guaranteed in the American Constitution but everyone in the country takes it for granted that one can roam at will throughout the United States. C D

The right of a citizen to leave any country and to return to his country is recognised in the United States. While there is no restriction on the citizen to return to his own country the Government of the United States does place certain restrictions for leaving the country, such as obtaining of the passports etc. Even the right to travel outside the United States is not unrestricted. A passport is a request by the Government which grants it to a foreign Government that the bearer of the passport may pass safely and freely. The passport is considered as a licence for leaving a country and an exit permit rather than a letter of introduction. Even in America the State Department when it issues a passport specifies that they are not valid for travel to countries in which the United States have no diplomatic representation as the position of the Government is that it will not facilitate overseas travel where it is unable to afford any protection to the traveller. The American public particularly the news reporters are claiming that they should be allowed to travel wherever they wish if need be without their Government's assurance to protection. The right of the American citizen to travel abroad as narrated above shows that even the right to travel outside the country is not unfettered. E F G

In vain one looks to the American law to find whether the citizens are granted any right of freedom of speech and expression beyond the territory of the United States. The First Amendment provides for freedom of speech and press along with freedom of religion. Liberty of speech and liberty of press are substantially identical. They are freedom to utter words orally and freedom to write, print and circulate words. But this freedom of expression would be meaningless if people were not permitted to gather in groups to discuss mutual H

problems and communicate their feelings and opinions to governmental officers. The First Amendment therefore provides that the people have the right to assemble peaceably and petition the government for redress of grievances. The petition for redress can only be confined to the United States of America. In a recent address on Human Rights Warren Christopher, U.S. Deputy Secretary of State reproduced in Shan, October 1977, stated before the American Bar Association in Chicago that the promotion of human rights has become a fundamental tenet of the foreign policy of the Carter Administration. In explaining the conception of human rights and its practice in America the Deputy Secretary stated that the efforts should be directed to the most fundamental and important human rights all of which are internationally recognised in the Universal Declaration of Human Rights which the United Nations approved in 1948. While emphasing the three categories of human rights (1) the right to be free from the governmental violation of the integrity of the person; (2) the right to fulfilment of such vital needs as food, shelter, health care and education, and (3) the right to enjoy civil and political liberties, he stated that the freedom of thought, of religion, of assembly, of speech, of the press, freedom of movement within the outside one's own country; freedom to take part in government, were liberties which American enjoy so fully, and too often take for granted, are under assault in many places. It may be noted that while freedom of movement is referred to as both within and outside one's own country the other rights such as freedom of thought, of religion, of assembly of speech, of press, are not stated to be available outside one's own country. It is thus seen that except the right to movement outside one's own country other rights are not available extra-territorially even in America.

The fundamental rights under Art. 19(1) of the Constitution are subject to the restrictions that may be placed under Art. 19(2) to (6) of the Constitution. The Fundamental Rights are not absolute but are subect to reasonable restrictions provided for in the Constitution itself. The restrictions imposed are to be by operation of any existing law or making of a law by the Legislature imposing reasonable restrictions. The scheme of the Article, thus it while conferring Fundamental Rights on the citizens is to see that such exercise does not affect the rights of other persons or affect the society in general. The law made under Art. 19(2) to (6), impose restrictions on the exercise of right of freedom of speech and expression, to assemble peaceably without arms etc. The restrictions thus imposed, normally would apply only within the territory of India unless the legislation expressly or by necessary implication provides for extra-territorial operation. In the Penal Code, under sections 3 and 4, the Act is made specifically applicable to crimes that are committed outside India by citizen of India. Neither in Art. 19 of the Constitution nor in any of the enactments restricting the rights under Art. 19(2) is there any provision expressly or by necessary implication providing for extra-territorial application. A citizen cannot enforce his Fundamental Rights outside the territory of India even if it is taken that such rights are available outside the country.

In the view that a citizen is not entitled to the Fundamental Rights guaranteed under Art. 19 outside the territorial limits of India, the contention of the learned counsel for the petition that by denying him the passport to travel outside India, his Fundamental Rights like freedom of speech and expression, to assemble peaceably, to practise profession or to carry on occupation, trade or business are infringed, cannot be accepted. The passport of the petitioner was impounded on the ground that her presence in connection with the Inquiry Commission may be necessary and in the interest of public it was necessary to do so. The impugned order does not place any restrictions on the petitioner while she is away from India. Hence the question whether the State could impose such restraint does not arise in this case. As the contention was that by impounding the passport the petitioner's fundamental right of freedom of speech etc. outside the country was infringed, it became necessary to consider whether the citizen had any such right.

It was strenuously contended that the Legislature by involving powers under Art. 21 cannot deprive the Fundamental Rights guaranteed under Art. 19 at any rate within the territory of India. It will now be considered whether an Act passed under Art. 21 should also satisfy the requirements of Art. 19.

The submission was that Art. 19 applies to laws made under Articles 20, 21 and 22 and the citizen is entitled to challenge the validity of an Act made under Art. 21 on the ground that it affects the rights secured to him under cl. (1) of Art. 19. Article 20(1) provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Article 22 deals with protection against arrest and detention in certain cases, that is, in respect of preventive detention.

It has been decided by this Court in *Gopalan's*(1) case that in the case of punitive detention for offences under the Penal Code, it cannot be challenged on the ground that it infringes the right specified under Art. 19(a) to (e) and (g) of the Constitution of India. Kania C.J. held :

> "If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms etc.; the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legisation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged the question of the application of Article 19 does not arise."

(1) [1950] S.C.R. 88.

A Fazal Ali J., though he dissented from the majority view regarding the application of Article 19 to punitive detention observed as follows :—

> "The Indian Penal Code does not primarily or .... necessarily impose restrictions on the freedom of movement and it is not correct to say that it is a law imposing restrictions on the right to move freely. Its primary object is to punish crime and not to restrict movement ..... But if it (the Punishment) consists in imprisonment there is a restriction on movement. This restraint is imposed not under a law imposing restrictions on movement but under a law defining crime and making it punishable. The punishment is correlated directly with the violation of some other person's right and not with the right of movement possessed by the offender himself. In my opinion, therefore, the Indian Penal Code does not come within the ambit of the words 'law' imposing restrictions on the right to move freely."

The learned Judge, Justice Fazal Ali, took a different view regarding preventive detention on the basis that it did not admit of a trial but the order of detention rested on an apprehended and not actual danger. Regarding punitive detention, the decision of a Bench of five Judges in *H. Saha* v. *State of West Bengal,*(1) expressed the same view. Chief Justice Ray observed :

> "It is not possible to think that a person who is detained will yet be free to move or assemble or form association or unions or have the right to reside in any part of India or have the freedom of speech or expression. Suppose a person is prosecuted of an offence of cheating and convicted after trial, it is not open to him to say that the imprisonment should be tested with reference to Art. 19 for its reasonableness. A law which attracts Article 19, therefore, must be such as is capable of being tested to be reasonable under clauses (2) to (5) of Article 19."

In the case of punitive detention, it will be open to the accused to raise all defences that are open to him in law, such as that there have been no violation of any law in force. Regarding punitive detention this Court in *Saha case* has held that as the Constitution has conferred rights under Art. 19 and also adopted the preventive detention to prevent the greater evil by imperilling security, the safety of the State and the welfare of the nation, it is not possible to think that a person who is detained will yet be free to move or assemble or form associations etc.

Applying the same reasoning, it is contended on behalf of the state that when a person is deprived of his life or personal liberty in accordance with the procedure established by law, he cannot invoke to his aid any of the rights guaranteed under Art. 19 of the Constitution of India. Whether this contention could be accepted

(1) [1975] 1 S.C.R. 778.

or not will be examined with reference to the provisions of the Constitution and the decisions rendered by this Court. A

Article 19 to 22 appear under the title "Right to freedom". Article 19 confers freedoms on the citizens whereas Art. 20 to 22 are not limited to citizens but apply to all persons. Article 19 does not deal with the right to life which is dealt with under Art. 21. While Art. 19 provides for freedoms which a citizen is entitled to, B Articles 20 to 22 restrain the State from doing certain things. Though the right to life and personal liberty is not dealt with under Art. 19, as it is mentioned in Art. 21 though in a negative form, the right to life and personal liberty is secured and the State can deprive it only according to the procedure established by law. While the rights guaranteed under Art. 19(1) are subject to restrictions that may be placed by Articles 19(2) to (6), the right not to be deprived of life and personal liberty is subject to its deprivation by procedure established by law. The scope of the words "personal liberty" was considered by Mukherjea, J. in *Gopalan's case* (supra.) The learned Judge observed: "Article 19 gives a list of individual liberties and prescribes in the various clauses the restrictions that may be placed upon them by law so that they may not conflict with the public welfare or general morality. On the other hand, Articles D 20, 21 and 22 are primarily concerned with penal enactments or other law under which personal safety or liberty of persons would be taken away in the interest of society and the set down the limits within which the State control should be exercised..... the right to the safety of one's life and limbs and to enjoyment of personal liberty, in the sense of freedom from physical restrain and coercion of any sort, are the inherent birth rights of a man. The essence E of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of "freedom" to do particular things...." The words "personal liberty" take their colour from the words "deprivation of life". It means liberty of the person, that is freedom from personal restraint. Article 21 is one of the Articles along with Articles 20 and 22 which deal with restraint on the person. According to Dicey: F

> "The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."
>
> (Dicey's Laws of Constitution 10th Edn. page 207) G

In the debates relating to the drafting of the Constitution, in Art. 15 the word that was used was "liberty". The framers of the Constitution thought that the word "liberty" should be qualified by the insertion of the word "personal" before it for otherwise it might be construed very widely so as to include even the freedoms already dealt with under Art. 19, 30 (which corresponds to Art. 19 in the H Constitution). The word "personal liberty" in Article 21 is, therefore, confined to freedom from restraint of person and is different from other rights enumerated in Article 19 of the Constitution.

A It is contended on behalf of the petitioner that after the decision of the *Bank Nationalisation case* and *Bennet Colomon's case* the view taken earlier by the Supreme Court that in construing whether the deprivation of personal liberty is valid or not the enquiry should only be confined to the validity of the procedure prescribed without any reference to the rights conferred under Art. 19(1) is no longer good law. The decisions bearing on this question may now be B examined.

In *Gopalan's* case it was held that Art. 19 dealt with the rights of the citizens when he was free, and did not apply to a person who had ceased to be free and had been either under punitive or preventive legislation. It was further held that Art. 19 only applied where a legislation directly hit the rights enumerated in the Article and not C where the loss of rights mentioned in the Article was a result of the operation of legislation relating to punitive or preventive detention. It was also stated by Justice Mukherjea that a law depriving the personal liberty must be a valid law which the legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the Fundamental Rights the Constitution lays dawn. The learned Judge explained that the reasonableness D of a law coming under Art. 21 could not be questioned with reference to anything in Art. 19 though a law made under Art. 21 must conform to the requirements of Articles 14 and 20. It cannot be said that it should conform to the requirements of Article 19. The view, thus expressed in *Gopalan's* case, was affirmed by the Supreme Court in *Ram Singh* v. *State of Delhi*(1) where it was held :

> E "Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Art. 19(1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct from fundamental rights and made separate provisions in Art. 19 and Arts. 21 and 22 as to the limitations and conditions subject to which alone they could F be taken away or abridged...The interpretation of these Articles and their correlation was elaborately dealt with by the full court in *Gopalan's* case.

Approving the interpretation of the Articles in *Gopalan's* case it was held that law which authorises deprivation of personal liberty did not fall within the purview of Art. 19 and its validity was not to be judged by the criteria indicated in that Article but depended on G its compliance with the requirements of Arts. 21 to 22.

This view was again affirmed in *State of Bihar* v. *Kameshwar Singh*,(2) where Das, J. in approving the law laid down in *Gopalan's* case observed as follows :

> H "As I explained in *Gopalan's* case and again in *Chiranjit Lal's* case 1950 SCR 869 our Constitution protects the freedom of the citizen by article 19 (1) (a) to

(1) [1951] S.C.R. 451
(2) [1952] S.C.R 889.

> (e) and (g) but empowers the State, even while those freedoms last, to impose reasonable restrictions on them in the interest of the State or of public order or morality or of the general public as mentioned in clauses (2) to (6). Further, the moment even this regulated freedom of the individual becomes incompatible with and threatens the freedom of the community the State is given power by article 21, to deprive the individual of his life and personal liberty in accordance with procedure established by law, subject of course, to the provisions of Art. 22.

In *Express Newspapers (P) Ltd. & another* v. *The Union of India & Others,*(1) the test laid down was that there must be a direct or inevitable consequence of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessary be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned. The test, thus applied, is whether the consequences were "direct and inevitable" ?

In *Hamdard Dawakhana (Wakf) Lal Kuan* v. *Union of India,*(2) after citing with approval the case of *Ram Singh* and *Express Newspapers* case, it was observed :

> "It is not the form or incidental infringement that determine the constitutionality of a statute in a reference to the rights guaranteed in Art. 19(1) but the reality and the substance.....Viewed in this way, it does not select any of the elements or attributes of freedom of speech falling within Art. 19(1)(a) of the Constitution."

Reality and substance test was laid down in this case while approving of the earlier decisions when the court was considering the question whether the ban on advertisement would affect the rights conferred under Art. 19(1)(a).

The correctness of the view as laid down in *Gopalan's* case and affirmed in *Ram Singh's* case was doubted by Subba Rao, J. in *Kochuni* v. *The State of Madras*(3). The learned Judge after referring to the dissenting view of Fazal Ali, J. in *Gopalan's* case rejecting the plea that a law under Art. 21 shall not infringe Art. 19(1) observed :

> "The question being integra with the dissenting view expressed by Fazal Ali, J. we are bound by this judgment."

Reliance was placed by the learned counsel for the petitioner on the decision by this Court in *Sakal Papers (P) Ltd. and Ors.* v. *The Union of India.*(4) The learned counsel referred to the passage at page 560A

(1) [1959] 1 S.C.R. 135.
(2) [1960] 2 S.C.R. 671 at page 691.
(3) [1960] 3 S.C.R. 887.
(4) [1962] 3 S.C.R. 842.

A Part I where it was held that "the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to a citizen and not merely what manner and method has been adopted by the State in placing the restriction and, therefore, the right to freedom of speech cannot be taken away with the object of taking away the business activities of the citizen. Reference was also made to another passage at 867 where it was held that the "legitimacy of the result in-
B tended to be achieved does not necessarily imply that every means to achieve it is permissible; for even if the end is desirable and permissible, the means employed must not transgress the limits laid down by the constitution if they directly impinge on any of the fundamental rights guaranteed by the Constitution. It is no answer when the constitutionality of the measure is challenged that apart from the fundamental right in-
C fringed the provision is otherwise legal.

The above observations relied on by the learned counsel were made in a petition where the validity of Delhi Newspapers (Price and Page) Order, 1960 which fixed the maximum number of pages that might be published by a newspaper according to the price charged was questioned. The order was challenged as contravening Art. 19(1)(a) of the Constitution. The court held that the order was void as it violated
D Art. 19(1)(a) of the Constitution and was not saved by Article 19(2). The court held that the right extended not merely to the method which is employed to circulate but also to the volume of circulation, and the impugned Act and order placed restraints on the latter aspect of the right as the very object of the Act was directly against circulation and thus, interfered with the freedom of speech and expression. At page 866, the Court observed :

E

> "The impugned law far from being one, which merely interferes with the right of freedom of speech incidently, does so directly though it seeks to achieve the end by purporting to regulate the business aspect to a newspaper. . . . . Such a course is not permissible and the courts must be ever vigilant in guarding perhaps the most precious of all the
F freedom guaranteed by our Constitution."

This decision does not help us in resolving the point at issue in this case for the court was concerned with the question whether the right of freedom of speech was directly affected by the impugned order. The impact of legislation under Art. 21 on the rights guaranteed under Art. 19(1) was not in issue in the case.

G The two cases which were strongly relied on by the learned counsel for the petitioner as having over-ruled the view of *Gopalan's* case as affirmed in *Ram Singh's* case are *Bank Nationalisation Case*(1) and *Bennet Colomon's case.*(2)

In *Kharak Singh*'s(3) case the majority took the view that the word 'liberty' in Art. 21 is qualified by the word 'personal' and there its con-
H tent is narrower and the qualifying adjective has been employed in order

(1) [1970] 3 S.C.R. 530.
(2) [1973] 2 S.C.R. 757.
(3) [1964] 1 S.C.R. 332.

to avoid overlapping between those elements or incidents of liberty like freedom of speech or freedom of movement etc. already dealt with in Art. 19(1) and the liberty guaranteed by Art. 21 and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub clauses (2) to (6) of the Article of the several species of liberty dealt with in a several clauses of Article 19(1). The minority view as expressed by Subba Rao, J. is that if a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the State laws satisfy the test laid down in Article 19(2) as far the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that petitioners fundamental rights are not infringed by showing that the law only imposes reasonable restrictions within the meaning of Art. 19(2) of the Constitution. The submission of the learned counsel for the petitioner is that the view as expressed by Subba Rao, J. has been affirmed by the subsequent decisions in the *Bank Nationalisation*(1) case and *Bennet Colomon*(2) case.

On 19th July, 1969, the acting President promulgated an ordinance No. 8 of 1969 transferring to and vesting the undertaking of 14 names commercial banks in the corresponding new bank under the ordinance. Subsequently, the Parliament, enacted Banking Companies (Acquisition of Transfer of Undertaking) Act, 1969. The object of the Act was to provide for the acquisition and transfer of the undertakings of certain banking companies in conformity with the national policy and objectives and for matters corrected therewith and incidental thereto. The petitioners before the Supreme Court who held shares in some of the named banks or had accounts current or fixed deposits in the banks challenged the validity of the enactment. In the petitions under Art. 32 of the Constitution the validity of the Ordinance and the Act was questioned on various grounds. I am concerned with ground no. 3 which runs as follows :

Article 19(1) (f) and Art. 31(2) are not mutually exclusive and the law providing for acquisition of property for public purpose could be tested for its validity on the ground that it imposes limitation on the right to property which were not reasonable; so tested the provision of the Act transferring undertaking of the named banks and prohibiting practically from carrying banking business violates the guarantee under Art. 19(1) (f) and (g). In dealing with this contention, the court held that Articles 19(1)(f) and Article 31(2) are not mutually exclusive. The court observed that the principle underlying the opinion of the majority in *Gopalan's* case was extended to the protection of the freedom in respect of property and it was held that Art. 19(1) (f) and 31(2) were mutually exclusive in their operation and that substantive provisions of law relating to acquisition of property were not liable to be challenged on the ground that it imposes unreasonable restrictions on the right to hold property. After mentioning the two divergent lines of authority, the court held that "the guarantee under Art. 31 (1) and (2) arises out of the limitations imposed on the authority of the State,

(1) [1970] 3 S.C.R. 530.
(2) [1973] 2 S.C.R. 757.

A by law, to take over the individual's property. The true character of the limitation of the two provisions is not different. Clause (1) of Article 19 and clause (1) and (2) of Art. 31 are part of the similar article 19(1) (f) enunicating the object specified and Article 19(1) and 31 deal with the limitation which may be placed by law subject to which the rights may be exercised. Formal compliance with the conditions of Art. 31(2) is not sufficient to negative protection of guarantee to the B rights to property. The validity of law which authorises deprivation of property and the law which authorises compulsory acquisition of the property for a public purpose must be adjudged by the application of the same test. Acquisition must be under the authority of a law and the expression law means a law which is within the competence of the legislature and does not impair the guarantee of the rights in Part III.

C The learned counsel for the petitioner submitted that on similar reasoning it is necessary that an enactment under Art. 21 must also satisfy the requirements of Article 19 and should be by a law which is within the competence of the legislature and does not impair the guarantee of the rights in part III including those conferred under Art. 19 of the Constitution of India. The important question that arises for consideration is whether the decision in the *Bank Nationalisation* case has D over-ruled the decision of *Gopalan's* case and is an authority for the proposition and an act of the legislature relating to deprivation of life and personal liberty should also satisfy the other fundamental rights guaranteed under Art. 19(1) of the Constitution.

In order to determine what exactly is the law that has been laid down in *Bank Nationalisation* Case, it is necessary to closely examine E the decision particularly from pages 570 to 578 of 1970(3) SCR. After holding that :

> "Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection. To concentrate merely on power of the State and the object of the State action in exercising that power is therefore to ignore the true intent of the Constitution."

F the Court proceeded to observe that "the conclusion in our judgment is inevitable that the validity of the State action must be adjudged in the light of its operation upon rights of individual and groups of individuals in all their dimensions." Having thus held the Court proceeded to state :

> G "But this Court has held in some cases to be presently noticed that Art. 19(1)(f) and Art. 31(2) are mutually exclusive."

It is necessary at this stage to emphasize that the Court was only considering the decisions that took the view that Article 19(1)(f) and 31(2) were mutually exclusive. After referring to passages in *A. K.* H *Gopalan's* case at pages 571 to 573 noted at page 574 :

> "The view expressed in *A. K. Gopalan's* case was reaffirmed in *Ram Singh and others* v. *State of Delhi*(1)".

(1) [1951] S.C.R. 451.

Having thus dealt with the passages in the judgment in *Gopalan's* case the Court proceeded to consider its effect and observed that the principle underlying the judgment of the majority was extended to the protection of freedom in respect of property and it was held that Article 19(1)(f) and Art. 31(2) were mutually exclusive in their operation. While observations in judgment of *Gopalan's* case as regards the application of Art. 19(1)(f) in relation to Art. 21 were not referred to, the Court proceeded to deal with the correctness of the principle in *Gopalan's* case being extended to the protection of the freedom in respect of property. In *A. K. Gopalan's* case (supra) Das, J., stated that if the capacity to exercise the right to property was lost, because of lawful compulsory acquisition of the subject of that right, the owner ceased to have that right for the duration of the incapacity. In *Chiranjit Lal Chowduri's case,*(1) Das, J. observed at page 919 :

> "....the right to property guaranteed by Art. 19(1)(f) would.....continue until the owner was under Art. 31 deprived of such property by authority of law."

Das, J. reiterated the same view in *The State of West Bengal* v. *Subodh Gopal,*(2) where he observed :

> "Art. 19(1)(f) read with Art. 19(5) pre-supposes that the person to whom the fundamental right is guaranteed retains his property over or with respect to which alone that right may be exercised.

Thus the observation in *Gopalan's* case extending the principle laid down in the majority judgment to freedom in respect of property was reiterated by Das, J. in *Chiranjit Lal Chowduri's* case (supra) and *Subodh Gopal's* case. The principle was given more concrete shape in *State of Bombay* v. *Bhanjit Munji*(3) case wherein it was held that "if there is no property which can be acquired held or disposed of, no restriction can be placed on the exercise of the right to acquire, hold or dispose it of, and as clause (5) contemplates the placing of reasonable restrictions of the exercise of those rights it must follow that the Article postulates the existence of property over which the rights are to be exercised." This viw was accepted in the later cases *Dabu Barkya Thakur* v. *State of Bombay*(4) and *Smt. Sitabati Debi and Anr.* v. *State of West Bengal.*(5) The Court proceeded further after referring to some cases to note that. "With the decision in *K. K. Kochuni's* case(6) there arose two divergent lines of authority (1) "authority of law" in Art. 31(1) is liable to be tested on the ground that it violates other fundamental rights and freedoms including the right to hold property guaranteed by Art. 19(1)(f) and (2) "authority of law" within the meaning of Art. 31(2) is not liable to be tested on the ground that it impairs the guarantee of Art. 19(1)(f) in so far as it imposes substantive restrictions

(1) [1950] S.C.R. 869.
(2) [1954] S.C.R. 587.
(3) [1955] (1) S.C.R. 777.
(4) [1961] 1 S.C.R. 128.
(5) [1967] 2 S.C.R. 940.
(6) [1960] 3 S.C.R. 887.

A though it may be tested on the ground of impairment of other guarantees." Later in the decision of *State of Madhya Pradesh* v. *Ranojro Shinde*(1) the Supreme Court opined that the validity of law in cl. (2) of Art. 31 may be adjudged in the light of Art. 19(1)(f). But the Court in that case did not consider the previous catena of authorities which related to the inter-relation between Art. 31(2) and Art. 19(1)(f).

B

In considering the various decisions referred to regarding the inter-relation of Art. 31(2) and Art. 19(1)(f) the Court proceeded to express its view that "the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions." Having so stated the Court considered the C inter-relation of Art. 31(2) and Art. 19(1)(f) and held :

> "The true character of the limitations under the two provisions is not different. Clause (5) of Art. 19 and cls. (1) & (2) of Art. 31 are parts of a single pattern; Art. 19(1)(f) enunciates the basic right to property of the citizens and Art. 19(5) and cls. (1) & (2) of Art. 31 deal with limitations D which may be placed by law, subject to which the rights may be exercised."

It must be noted that basis for the conclusion is that Art. 19 and cl. (1) and (2) of Art. 31 are parts of a single pattern and while Art. 19(1)(f) enunciates the right to acquire, hold and dispose of property; cl. (5) of Art. 19 authorise imposition of restrictions upon the right. There must be reasonable restriction and Art. 31 assures the right to property E and grants protection against the exercise of the authority of the State and cl. (5) of Art. 19 and cls. (1) and (2) of Art. 31 prescribe restrictions upon State action, subject to which the right to property may be exercised. The fact that right to property guaranteed under Art. 19(1)(f) is subject to restrictions under Art. 19(5) and 31 and thereby relate to the right to property closely inter-related cannot be overlooked for that formed the basis for the conclusion. After referring to the F various Articles of the Constitution the Court observed :

> "The enunciation of rights either express or by implication does not follow uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or group of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a G pattern of guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights."

It proceeded

"We are therefore unable to hold that the challenge to the validity of the provisions for acquisition is liable to be tested only on the ground H of non-compliance with Art. 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired

(1) [1968] 3 S.C.R. 489.

under a law with characterstics set out in that Articles. Formal compliance of the condition of Art. 31(2) is not sufficient to negative the protection of the guarantee of the right to property." A

After expressing its conclusion, the Court proceeded to state that it is found necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which just fies this apparently inconsistent development of the law. While stating B that in its judgment the assumption in *A. K. Gopalan's* case that certain articles exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of State action alone need be considered, and effect of laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. To this extent the Court specifically over ruled the view that the object and form of the State action alone C need be considered. It proceeded "We hold the validity "of law" which authorities deprivation of property and "a low" which authorises compulsory acquisition of property for public purpose must be adjudged by the application of the same tests." It will thus be seen that the entire discussion by the Court in *Bank Nationalisation* case related to the interrelation between Art. 31(2) and Art. 19(1)(f). In dealing with the question the Court has no doubt extracted passages from the judgments D of learned Judges in *Gopalan's* case but proceeded only to consider the extension of the principle underlying the majority judgment to the protection of the freedom in respect of property, particularly, the judgment of Justice Das. After stating that two views arose after *Kochuni's* case the Court concerned itself only in determining the rationale of the two lines of authority. The view taken in *Gopalan's* case that the objection and the form of State action has to be considered was over ruled and it E was laid down that it is the effect and action upon the right of the person that attracts the jurisdiction of the Court to grant relief. It is no doubt true that certain passing observations have been made regarding the liberty of persons, such as at page 576 :

> "We have carefully considered the weighty pronouncements of the eminent judges who gave shape to the concept F that the extent of protection of important guarantees such as the liberty of person, and right to property, depends upon the form and object of State action and not upon its direct operation upon the individual's freedom."

Though the liberty of person is incidentally mentioned there is no further discussion on the subject. While undoubtedly *Bank Nationa-* G *lisation* case settles the law that Art. 19(1)(f) and Art. 31(2) are not mutually exclusive there is no justification for holding that the case is authority for the proposition that the legislation under Art. 21 should also satisfy all the fundamental rights guaranteed under Art. 19(1) of the Constitution. As emphasised earlier Art. 19(1)(f) and Art. 31(2) form a single pattern and deal with right to property. The fundamental right under Art. 19(1)(f) is restricted under Art. 19(5) or Art. 31(2) H and as the article refer to right to property they are so closely interlinked and cannot be held to be mutually exclusive. But Art. 21 is related to deprivation of life and personal liberty and it has been held

A that it is not one of the rights enumerated in Art. 19(1) and refers only to personal rights as are not covered by Article 19.

The decision in *Bank Nationalisation* case so far as it relates to Articles 19(1) and 21, is in the nature of *obiter dicta*. Though it is a decision of a Court of 11 Judges and is entitled to the highest regard, as the Court had not applied its mind and decided the specific question and B as is in the nature of a general, casual observation on a point not calling for decision and not obviously argued before it, the case cannot be taken as an authority on the proposition in question. The Court cannot be said to have declared the law on the subject when no occasion arose for it to consider and decide the question.

It may also be noted that as the Court ruled that the impugned Act C violated Art. 31(2) by not laying down the necessary principles, the decision of the inter-relationship between Art. 19(1)(f) and 31(2) was not strictly necessary for the purpose of giving relief to the petitioner. We are not concerned in this case as to whether the decision in *Bank Nationalisation* case is in the nature of *Obiter dicta* so far as it held that Arts. 19(1) and 31(2) are interrelated. But it is necessary to state that the decision proceeded on some erroneous assumptions. At page D 571 of *Bank Nationalisation* case (supra) it was assumed. "The Majority of the Court (Kania, C.J. and Patanjali Sastri, Mahajan, Mukherjea & Das JJ.) held that Art. 22 being a complete code relating to preventive detention the validity of an order of detention must be determined strictly according to the terms and within the four corners of that articles." This statement is not borne out from the text of the judgments in *Gopalan's* case. At p. 115 of *Gopalan's* case (supra) Kania C.J. E has stated : "The learned Attorney General contended that the subject of preventive detention does not fall under article 21 at all and is covered wholly by article 22. According to him, article 22 is a complete code. I am unable to accept that contention." Patanjali Sastri J. at page 207 of the judgment said : "The learned Attorney General contended that article 22 clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, pro- F vided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view". Das J. in referring to the Attorney General's argument at page 324 stated : "that article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also." G Mukherjea J. at p. 229 of that judgment observed : "It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether article 22 by itself is a self-contained Code with regard to the law of preventive detention and whether or not the procedure it lays down is exhaustive." Justice Mahajan at page 226 held that "I am satisfied on a review of the whole scheme of the Constitution that the intention was to make article 22 self-contained in res- H pect of the laws on the subject of preventive detention." It is thus seen that the assumption in *Bank Nationalisation's* case that the majority of the Court held that article 22 is a complete code is erroneous and the basis of the decision stands shaken. If the *obiter dicta* based

on the wrong assumption is to be taken as the correct position in law, it would lead to strange results. If arts. 19(1)(a) to (e) and (g) are attracted in the case of deprivation of personal liberty under art. 21, a punitive detention for an offence committed under the Indian Penal Code such as theft, cheating or assault would be illegal as pointed out in *Gopalan's* case by Kania C.J. and Patanjali Sastri J. for the reasonable restriction in the interest of public order would not cover the offences mentioned above. As held in *Gopalan's* case and in *Saha's* case there can be no distinction between punitive detention under the Penal Code and preventive detention. As pointed out earlier even though Fazal Ali J. dissented in *Gopalan's* case, the same view was expressed by His Lordship so far as punitive detention was concerned. He said : "The Indian Penal Code does not primarily or necessarily impose restrictions on the freedom of movement and it is not correct to say that it is a law imposing restrictions on the right to move freely." The conclusion that art. 19(1) and Art. 21 were mutually exclusive was arrived at on an interpretation of language of art. 19(1)(d) read with art. 19(5) and not on the basis that art. 19(1) and 21 are exclusive and Art. 21 a complete code. The words "personal liberty" based on the Draft Committee report on Art. 15 (now Art. 21) was added to the word 'personal' before the word 'liberty' with the observation that the word 'liberty' should be qualified by the word 'personal' before it for otherwise it may be construed very wide so as to include even the freedoms already dealt with in Art. 13 (now Art. 19). In *Gopalan's* case it was also pointed out by the Judges that art. 19(1) and 21 did not operate on the same field as Art. 19(1) and 31(2) of the Constitution are. The right under Art. 21 is dierent and does not include the rights that are covered under art. 19. Art. 19(1) confers substantive right as mentioned in clauses (a) to (g) on citizen alone and does not include the right of personal liberty covered in Art. 21. For the reasons stated above *obiter dicta* in *Bank Nationalisation's* case that a legislation under art. 21 should also satisfy the requirements of Art. 19(1) cannot be taken as correct law. The Court has not considered the reasoning in *Gopalan's* case and over-ruled it.

Before proceeding to consider the test of validity of a legislation as laid down in *Bennet Colomon's* case following the *Bank Nationalisation* case the decisions which followed the *Bank Nationalisation* case holding on the erroneous premises that the majority in *Gopalan's* case held that Article 22 was a self-contained Code, may be shortly referred to. In *S. N. Sarkar* v. *West Bengal*(1), the Supreme Court held that in *Gopalan's* case the majority Court held that Article 22 was a self-contained Code and, therefore, the law or preventive detention did not have to satisfy the requirement of Articles 19, 14 and 20. In the *Bank Nationalisation* case the aforesaid premise in *Gopalan* was disapproved and, therefore, it no longer holds the field. Though the *Bank Nationalisation* case dealt with in relation to Article 19 and 31, the basic approach considering the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premises of the majority in the *Gopalan* case was erroneous. The view taken in this case also suffers from the same infirmities referred to in

(1) [1973] 1 S.C.C. 856.

A *Bank Nationalisation* case. Later, in the case of *Khundiram* v. *West Bengal*(1), a Bench of four Judges again erroneously stated that *Gopalan's* case had taken the view that Article 22 was a complete Code. After referring to *Bank Nationalisation* case and *S. N. Sarkar's* and to the case of *H. Saha* v. *State of West Bengal*(2) the Court regarded the question as concluded and a final seal put on this controvery and held that in view of the decision, it is not open to any one now to contend that the B law of preventive detention which falls in Article 22 does not have to meet the requirement of Art. 14 or Art. 19."

In *Additional District Magistrate* v. *S. S. Shukla*,(3) the locus standi to move a habeas corpus petition under Article 226 of the Constitution of India while the Presidential order dated 27th June, 1975 was in force fell to be considered. The Court while holding that the C remedy by way of writ petition to challenge the legality of an order of detention under the Maintenance of Internal Security Act is not open to a detenu during the emergency, had occasion to consider the observations made by the majority in *Bank Nationalisation* case regarding the application of Art. 21 of the Constitution of India. Chief Justice Ray, at page 230 held :

> D "Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The negative language of fundamental right incorporated in Part III imposes limitations on the power of the State and declares the corresponding guarantee of the individual to that fundamental right. The limitation and guarantee are complimentary. The limitation of State action embodied in a fundamental right couched in negative form is the measure of E the protection of the individual."

After quoting with approval the view held in *Kharak Singh's* case that personal liberty in Art. 21 includes all varieties of rights which go to make personal liberty other than those in Art. 19(1), the learned Judge observed that the *Bank Nationalisation* case merely brings in the concept of reasonable restriction in the law. Justice Beg, as he F then was, considered this aspect a little more elaborately at page 322. After referring to the passage in *Bank Nationalisation* case the learned Judge observed :

> "It seems to me that Gopalan's case was merely cited in Cooper's case for illustrating a line of reasoning which G was held to be incorrect in determining the validity of 'law' for the acquisition of property solely with reference to the provisions of Art. 31. The question under consideration in that case was whether Articles 19(1)(f) and 31(2) are mutually exclusive."

The learned Judge did not understand the *Cooper's* case as holding that effect of deprivation of rights outside Art. 21 will also have to H

(1) [1975] 2 S.C.C. 81.
(2) [1975] 1 S.C.R. 778.
(3) [1976] Supp. S.C.R. 172.

be considered. Justice Chandrachud understood the decision in *Bank Nationalisation* case as holding that Art. 21 and Art. 19 cannot be treated as mutually exclusive. Justice Bhagwati at page 433 of the reports took the view that in view of the decision of this Court in *Cooper's* case the minority view in *Kharak Singh's* case that the law under Art. 21 must also satisfy the test laid down in Art. 19(1) so far the attributes covered by Art. 19(1) are concerned was approved. It is seen that the view taken in the *Bank Nationalisation* case that a law relating to deprivation of life and personal liberty falling under Art. 21 has to meet the requirements of Art. 19 is due to an error in proceeding on the basis that the majority Court in *Gopalan's* case held that Article 22 was a self contained Code. The decisions which followed *Bank Nationalisation* case, namely, the case of *S. N. Sarkar* v. *West Bengal* and *Khundiram* v. *West Bengal, H. Saha* v. *West Bengal*, suffer from the same infirmity. With respect I agree with the view expressed by Chief Justice Ray and Justice Beg, as he then was, in *Shukla's* case.

Next to *Bank Nationalisation* case strong reliance was placed on *Bennet Colomon's* case by the petitioner for the proposition that the direct effect of the legislation of the fundamental rights is the test.

In the case the petitioners impugned the new newsprint policy on various grounds. The Court held that though Article 19(1)(a) does not mention the freedom of press, it is settled view of the Court that freedom of speech and expression includes freedom of press and circulation. Holding that the machinery of import control cannot be utilised to control or curb circulation or growth of freedom of newspapers it was held that Newspapers Control Policy is ultra-vires of the Import Control Act and the Import Control Order. The Court after referring to the two tests laid down in *Bank Nationalisation* case observed : "Direct operation of the Act upon the right forms the real test". The question that was raised in the case was whether the impugned newsprint policy is in substance a newspaper control. The Court held that the Newsprint Control Policy is found to be Newspaper Control Order in the guise of framing an import control policy for newsprint. As the direct operation of the Act was to abridge the freedom of speech and expression, the Court held that the pith and substance doctrine does not arise in the present case. On the facts of the case there was no need to apply the doctrine of pith and substance.

It may be noted that in *Bennet Colomon's* case the question whether Articles 21 and 19 are mutually exclusive or not did not arise for consideration and the case cannot be taken as an authority for the question under consideration in the case. *Bennet Colomon's* case, *Express Newspapers* case, *Sakal Newspapers* case were all concerned with the right to freedom of the press which is held to form part of freedom of speech and expression.

Whether the pith and substance doctrine is relevant in considering the question of infringement of fundamental rights, the Court observed at page 780 of the *Bank Nationalisation* case "Mr. Palkhivala said that the tests of pith and substance of the subect matter and of direct

A and of incidental effect of the legislation are relevant to question of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights." It is thus clear, that the test of pith and substance of the subject matter and of direct and incidental effect of legislation is relevant in considering the question of infringement of fundamental right.

B

The Court at page 781 said : "by direct operation is meant the direct consequence or effect of the Act upon the rights and quoted with approval the test laid down by the Privy Council in *Commonwealth of Australia* v. *Bank of New South Wales.*(1)

C In deciding whether the Act has got a direct operation of any rights upon the fundamental rights, the two tests are, therefore, relevant and applicable. These tests have been applied in several cases before the decision in *Bank Nationalisation* case. A reference has been made to the decision of *Express Newspapers (P) Ltd. and Anr.* v. *Union of India,*(2) where the test laid down was that there must be a direct and inevitable consequence of the legislation. In *Hamdard* D *Dawakhana* v. *Union of India*(3) this Court followed the test laid down in *Express Newspapers* case. The Court expressed its view that it is not the form or incidental infringement that determine constitutionality of a statute but reality and substance. In *Sakal Papers (P) Ltd.* v. *Union of India*(4) it was held that the "Correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method E have been adopted by the State in placing the restriction. The Supreme Court in some cases considered whether the effect of the operation of the legislation is direct and immediate or not. If it is remote, incidental or indirect, the validity of the enactment will not be effected. The decision in *Copper's* case has not rejected the above test. The test laid down in *cooper's* case is the direct operation on the rights of the person.

F The test was adopted and explained in *Bennet Colomon's* case as pointed above.

The view that pith and substance rule is not confined in resolving conflicts between legislative powers is made clear in the decision of the Federal Court in *Subramaniam Chettiar's* case,(5) where Vardachariar, J. after referring briefly to the decision of *Gallagher* v. G *Lynn,*(6) held that "They need not be limited to any special system of federal constitution is made clear by the fact hat in *Gallagher* v. *Lynn,* Lord Atkin applied pith and substance rule when dealing with a question arising under the Government of Ireland Act which did not embody a federal system at all."

(1) [1950] A. C. 235.
(2) [1959] 1 S.C.R. 235.
H (3) [1960] 2 S.C.R. 671.
(4) [1962] 3 S.C.R. 842.
(5) [1940] Federal Court Reports 188.
(6) [1937] A. C. 863.

The passport Act provides for issue of passports and travel documents for regulating the departure from India of citizens of India and other persons. If the provisions comply with the requirements of Article 21, that is, if they comply with the procedure established by law the validity of the Act cannot be challenged. If incidentally the Act infringes on the rights of a citizen under Art. 19(1) the Act cannot be found to be invalid. The pith and substance rule will have to be applied and unless the rights are directly affected, the challenge will fail. If it is meant as being applicable in every case however remote it may be where the citizen's rights under Art. 19(1) are affected, punitive detention will not be valid.

The result of the discussion, therefore, is that the validity of the Passport Act will have to be examined on the basis whether it directly and immediately infringes on any of the fundamental right of the petitioner. If a passport is refused according to procedure established by law, the plea that his other fundamental rights are denied cannot be raised if they are not directly infringed.

The decisions of the Supreme Court wherein the right of person to travel abroad has been dealt with may be noticed. In *Satwant Singh* v. *Assistant Passport Officer, Delhi*(1) the Court held that though a passport was not required for leaving, for practical purposes no one can leave or enter into India without a passport. Therefore, a passport is essential for leaving and entering India. The Court held the right to travel is part of personal liberty and a person could not be deprived of it except according to the procedure laid down by law. The view taken by the majority was that the expression "personal liberty" in Article 21 only excludes the ingredients of liberty enshrined in Art. 19 of the Constitution and the exression 'personal liberty' would take in the right to travel abroad. This right to travel abroad is not absolute and is liable to be restricted according to the procedure established by law. The decision has made it clear that "personal liberty" is not one of the rights secured under Article 19 and, therefore, liable to be restricted by the legislature according to the procedure established by law. The right of an American citizen to travel is recognised. In *Kent v. Dulles,*(2) the Court observed that the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. "The freedom of movement across the frontiers in either direction, and inside frontiers as well, as a part of our heritage, Travel abroad, like travel within the country.....may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." In a subsequent decision—*Zemel* v. *Rusk*(3) the Court sustained against due process attacks the Government's refusal to issue passports for travel to Quba because the refusal was grounded on foreign policy considerations affecting all citizens. "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction."

(1) [1967] 2 S.C.R. 525.

(2) 357 U.S. page 116, at page 127 (1958).

(3) 381 U.S. (1) at page 14.

A (The Constitution of the United States of America-Analysis and interpretation—at page 1171)

In *Herbert Aptheker etc.* v. *Secretary of State*,(1) the Court struck down a congressional prohibition of international travel by members of the Communist Party. In a subsequent decision the Court upheld the Government's refusal to issue passports for travel to Cuba, because B the refusal was on foreign policy consideration affecting all citizens [*Zemel* v. *Rusk* (supra)]. Thus an American's citizen's right to travel abroad may also be restricted under certain conditions. Our Constitution provides for restriction of the rights by 'procedure established by law'. It will be necessary to consider whether the impugned Act, Passport Act satisfies the requirements of procedure established by law.

C

The procedure established by law does not mean procedure, however, fantastic and oppressive or arbitrary which in truth and reality is no procedure at all [(*A. K. Gopalan* v. *State of Madras*) (2) observations of Mahajan, J.]. There must be some procedure and at least it must confirm to the procedure established by law must be taken to mean as the ordinary and well estabished criminal procedure, that D is to say, those settled usages and normal modes of proceedings, sanctioned by the Criminal Procedure Code which is a general law of Criminal procedure in the Country. But as it is accepted that procedure established by law refers to statute law and as the legislature is competent to change the procedure the procedure as envisaged in the criminal procedure cannot be insisted upon as the legislature can modify the procedure. The Supreme Court held in *Kartar Singh's* E case(3) that Regulation 236 clause (b) of the U.P. Police Regulation which authorises domiciliary visits when there was no law on such a regulation, violated Article 21.

I will not proceed to examine the provisions of Passport Act, Act 15 of 1967, to determine whether the provisions of the Act are in accordance with the procedure established by law.

F

The Preamble states that the Act is to provide for the issue of passports and travel documents to regulate the departure from India of citizens of India and other persons and for matters incidental or ancillary thereto. It may be remembered that this Act was passed after the Supreme Court had held in *Satwant Singh* V. *Union of India*(4) that the right to tavel abroad is a part of person's personal liberty of G which he could not be deprived except in accordance with the procedure established by law in terms of Article 21 of the Constitution. The legislature came forward with this enactment prescribing the procedure for issue of passports for regulating the departure from India of citizens and others.

(1) 378 U.S. 500.

H (2) [1950] S.C.R. 88 at page 230.

(3) [1963] 1 S.C.R. 332.

(4) [1967] 3 S.C.R. 525.

Section 5 of the Act provides for applying for passports or travel documents etc. and the procedure for passing orders thereon. On receipt of an application under sub-section (2) the passport authority may issue a passport or a travel document with endorsement in respect of the foreign countries specified in the application or issue of a passport or travel document with endorsement in respect of some foreign countries and refuse to make an endorsement in respect of other countries or to refuse to issue a passport or travel document and to refuse to make on the passport or travel document any endorsement. In the event of the passport authority refusing to make an endorsement as applied for or refusal to issue a passport or a travel document or refusal of endorsement, the authority is required to record in writing a brief statement of its reasons and furnish to that person, on demand, a copy thereof unless the authority for reasons specified in sub-section (3) refuses to furnish a copy. Section 6 provides that the refusal to make an endorsement shall be on one or other grounds mentioned in sub-sections (2) to (6). Section 8 provides that every passport shall be renewable for the same period for which the passport was originally issued unless the passport authority for reasons to be recorded in witing otherwise determines.

Section 10 is most important as the impounding of the passport of the petitioner was ordered under section 10(3) (c) of the Act. Section 10(1) enables the passport authority to vary or cancel the endorsement on a passport or travel document or may with the previous approval of the Central Government, vary or cancel the conditions subject to which a passport or travel document has been issued, and require the holder of a passport or a travel document by notice in writing, to deliver up the passport or travel document to it within such time as may be specified in the notice. Sub-section (2) enables the holder of a passport or a travel document to vary or cancel the conditions of the passport.

Section 10(3) with which we are concerned runs as follows :

10(3).—The passport authority may impound or cause to be impounded or revoke a passport or travel document,—

(a) If the passport authority is satisfied that the holder of the passport or travel document is in wrongful possession of;

(b) If the passport or travel document was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passpot or travel document or any other person on his behalf;

(c) If the passport authority deems it necessary so to do in the interests of the sovereignity and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;

(d) If the holder of the passpot or travel document has, at any time after the issue of the passort or travel document, been convicted by a court in India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years;

(c) If proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India;

(f) If any of the conditions of the passport or travel document has been contravened;

(g) If the holder of the passport or travel document has failed to comply with a notice under sub-section (1) requiring him to deliver up the same.

(b) If it is brought to the notice of the passport authority that a warrant or summons for the appearance or a warrant for the arrest, of the holder of the passport or travel document has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been so issued or an order has been so made."

Section 10(3)(c) enables the passport authority to impound or revoke a passport if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public.

Section 10(5) requires the passport authority to record in writing a brief statement of the reasons for making an order under sub-section (1) or(3) and to furnish the holder of the passport on demand a copy of the same unless in any case the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy. Section 11 provides for an appeal by the aggrieved person against any order passed by the passport authority under several clauses mentioned in sub-section (1) of that section. It is also provided that no appeal shall lie against any order passed by the Central Goverament. Section 11(5) provided that in disposing of an appeal, the appellate authority shall follow such procedure as may be prescribed and that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of representing his case. Rue 14 of the Passport Rules, 1967 prescribes that the appellate authority may call for the records of the case from the authority who passed the order

appealed against and after giving the appellant a reasonable opportunity of representing his case pass final orders. A

To sum up under section 10(3)(c) if the passport authority deems it necessary so to do for reasons stated in the sub-section, he may impound a passport. He is required to record in writing a brief statement of the reasons for making such order and to furnish a copy of the order on demand unless in any case he thinks for reasons mentioned in sub-section (5) that a copy should not be furnished. Except against an order passed by the Central Government the aggrieved person has a right of appeal. The appellate authority is required to give a reasonable opportunity to the aggrieved person of representing his case. B

It was submitted on behalf of the petitioner that on a reading of section 10(3) observance of rules of natural justice, namely the right to be heard, is implied and as the Government had failed to give an opportunity to the petitioner to explain her case the order is unsustainable. In the alternative it was submitted that if section 10(3)(c) is construed as denying the petitioner an opportunity of being heard and by the provisions of section 11 a right of appeal against an order passed by the Central Government is denied the provisions will not be procedure as established by law under Article 21 and the relevant sections should be held ultra vires of the powers of the legislature. It was contended that the power conferred on the authority to impound a passport in the interests of general public is very vague and in the absence of proper guidance an order by the authority impounding the passport "in the interests of general public" without any explanation is not valid. The last ground may easily be disposed of. The words 'in the interests of general public' no doubt are of a wide connotation but the authority in construing the facts of the case should determine whether in the interests of public the passport will have to be impounded. Whether the reasons given have annexus to the interests of general public would depend upon the facts of each case. The plea that because of the vagueness of the words 'interests of the general public' in the order, the order itself is unsustainable, cannot be accepted. C D E F

The submission that in the context the rule of natural justice, that is, the right to be heard has not been expressly or by necessary implication taken away deserves careful consideration. Under Section 10(3) the passport authority is authorised to impound or revoke a passport on any of the grounds specified in clauses (a) to (h) of sub-section (3). Sub-section 3(a) enables the authority to impound a passport if the holder of the passport is in wrongful possession thereof. Under sub-section 3(b) the authority can impound a passport if it was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the passport. Under clause (d) a passport can be impounded if the holder had been convicted by a Court of India for any offence involving moral turpitude and sentenced to imprisonment for not less than two years. Under clause (e) the passport can be impounded where G H

proceedings in respect of an offence alleged to have been committed by the holder of a passport is pending before a criminal court in India. Clause (f) enables the authority to impound the passport if any of the conditions of the passport have been contravened. Under clause (g) the passport authority can act if the holder of the passport had failed to comply with a notice under sub-section (1) requiring him to deliver up the same. Under sub-clause (h) a passport may be impounded if it is brought to the notice of the passport authority that a warrant or summons for appearance of the holder of the passport has been issued by any court or if there is an order prohibiting departure from India of the holder of the passport has been made by a court. It will be noticed that when action is contemplated under any of the clauses (a), (b), (d), (e), (f) and (h), it is presumed that the authority will give notice, for the passport authority cannot be satisfied under sub-clause (a) that the holder is in wrongful possession thereof or under clause (b) that he obtained the passport by suppression of material information. Similarly under clause (d) whether a person has been convicted by a court in India for any offence involving moral turpitude and sentenced to imprisonment for not less than two years, can only be ascertained after hearing the holder of the passport. Under clause (e) the fact whether proceedings in respect of an offence alleged to have been committed by the holder of the passport are pending before a criminal court can only be determined after notice to him. Equally whether a condition of passport has been contravened under sub-clause (f) or whether he has failed to comply with a notice under sub-section (1) can be ascertained only after hearing the holder of the passport. Under clause (h) also a hearing of the holder of the passport is presumed. Reading clause (c) in juxtaposition with other sub-clauses, it will have to determined whether it was the intention of the legislature to deprive a right of hearing to the holder of the passport before it is impounded or revoked. In this connection, it cannot be denied that the legislature by making an express provision may deny a person the right to be heard. Rules of natural justice cannot be equated with the Fundamental Rights. As held by the Supreme Court in *Union of India* v. *J. N. Sinha*,(1) that "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice." So also the right to be heard cannot be presumed when in the circumstances of the case there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would defeat the very purpose or where it is expected

(1). [1971] 1 S.C.R. 791.

that the person affected would take an obstructive attitude. To a limited extent it may be necessary te rovoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the passport authority or the Government to revoke or impound the passport. But that by itself would not justify denial of an opportunity to the holder of the passport to state his case before a final order is passed. It cannot be disputed that the legislature has not by express provision excluded the right to be heard. When the passport authority takes action under section 10(5) he is required to record in writing a brief statement of reasons and furnish a copy to the holder of the passport on demand unless he for sufficient reasons considers it not desirable to furnish a copy. An order thus passed is subject to an appeal where an appellate authority is required to give a reasonable opportunity to the holder of the passport to put forward his case. When an aappeal has to be disposed of after given for a specified period the revocation or impounding during the without hearing the aggrieved person. Further when a passport is given for a specified period the revocation or impounding during the period when the passport is valid can only be done for some valid reason. There is a difference between an authority revoking or modifying an order already passed in favour of a person and initially refusing to grant a licence. In *Purtabpur Co.* v. *Cane Commissioner, Bihar*,(1) the Supreme Court held that "it would not be proper to equate an order revoking or modifying a licence with a decision not to grant a licence." In *Schmidt* v. *Secretary of State, Home Affairs*,(2) Lord Denning observed that "If his permit (alien) is revoked before the time limit expires he ought, I think, to be given an opportunity of making representation; for he would have a legitimate expectation of being allowed to stay for the permitted time." Lord Denning extended the application of the rule of *audi alteram partem* even in the case of a foreign alien who had no right to enter the country. When a permit was granted and was subsequently sought to be revoked it has to be treated differently from that of refusing permission at the first instance. As in the present case the passport which has been granted is sought to be impounded the normal presumption is that the action will not be taken without giving a opportunity to the holder of the passport. Section 10(3) in enumerating the several grounds on which the passport authority may impound a passport has used the words like 'if the authority is satisfied', "the authority deems it necessary to do so." The Privy Council in *Duravappah* v. *Fernando*(3) after referring to an earlier decision in *Sugathadasa* v. *Jayasinghe*(4) disagreed with the decision holding "As a general rule that words such as 'where it appears to ....' or 'if it appears to the satisfaction of....' or 'if the ....considers it expedient that....' or 'if the....is satisfied that....' standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially." The Privy Council in disagreeing with this approach observed

(1) [1969] 2 S.C.R. 807.
(2) [1969] 2 Ch. 149.
(3) [1967] 2 A. C. 337.
(4) [1958] 59 N.L.R. 457.

A that these various formulae are introductory of the matter to be considered and are given little guidance upon the question of *audi alteram partem*. The statute can make itself clear on this point and if it does cadit quaestio. If it does not then the principle laid down in *Cooper* v. *Wardsworth Board of Works*(1) where Byles, J. stated "A long course of decision, beginning with Dr. Bentley's case, and ending with some very recent cases, establish, that although there are B no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." In the circumstances, there is no material for coming to the conclusion that the right to be heard has been taken away expressly or by necessary implication by the statute.

I may at this stage refer to the stand taken by the learned Attor- C ney-General on this question. According to him "on a true construction, the rule *audi alteram partem* is not excluded in ordinary cases and that the correct position is laid down by the Bombay High Court in the case of *Minoo Maneckshaw* v. *Union of India*.(2) The view taken by Tulzapurkar, J. is that the rule of *audi alteram partem* is not excluded in making an order under sec. 10(3)(c) of the Act. But the Attorney General in making the concession submitted that the D rule will not apply when special circumstances exist such as need for taking prompt action due to the urgency of the situation or where the grant of opportunity would defeat the very object for which the action of impounding is to be taken. This position is supported by the decision of Privy Council in *De Verteuil* v. *Knaggs*,(3) wherein it was stated 'it must, however, be borne in mind that there may be special circumstances which would satisfy a Governor, acting in good faith, E to take action even if he did not give an oppotunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice." This extraordinary step can be taken by the passport authority for impounding or revoking a passport when he apprehends that the passport holder may leave the country and as such prompt action is essential. These observations would justify the authority to impound the passport F without notice but before any final order is passed the rule of *audi alteram partem* would apply and the holder of the passport will have to be heard. I am satisfied that the petitioner's claim that she has a right to be heard before a final order under s. 10(3)(c) is passed is made out. In this view the question as to whether sec. 10(3)(c) is ultra vires or not does not arise.

G It was submitted on behalf of the state that an order under subclause 10(3)(c) is on the subjective satisfaction of the passport authority and that as the decision is purely administrative in character it cannot be questioned in a court of law except on very limited grounds. Though the courts had taken the view that the principle of natural justice is inapplicable to administrative orders, there is a change in the judicial opinion subsequently. The frontier between judicial or

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(1) 1723. 1 Str. 557 ; Mod. Rep. 148.
(2) 76 B.L.R. (1974) 788.
(3) [1918] A. C 557

quasi judicial determination on the one hand and an executive or administrative determination on the other has become blurred. The rigid view that principles of natural justice applied only to judicial and quasi judicial acts and not to administrative acts no longer holds the field. The views taken by the courts on this subject are not consistent. While earlier decisions were in favour of administrative convenience and efficiency at the expense of natural justice, the recent view is in favour of extending the application of natural justice and the duty to act fairly with a caution that the principle should not be extended to the extreme so as to affect adversely the administrative efficiency. In this connection it is useful to quote the oft-repeated observations of Lord Justice Tucker in *Russell* v. *Duke of Norfolk*(1) "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth....but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." In *R.* v. *Gaming Board Ex. p. Benaim*,(2) Lord Denning held that the view that the principle of natural justice applied only to judicial proceedings and not to administrative proceedings has been over-ruled in *Ridge* v. *Baldwin*.(3) The guidance that was given to the Gaming Board was that they should follow the principles laid down in the case of immigrants namely that they have no right to come in, but they have a right to be heard. The Court held in construing the words the Board "Shall have regard only" to the matter specified, the Board has a duty to act fairly and it must give the applicant an opportunity of satisfying them of the matter specified in the section. They must let him know what their impressions are so that he can disabuse them. The reference to the cases of immigrants is to the decisions of Chief Justice Parker *in Re H. K. (An infant)*(4). In cases of immigrants though they had no right to come into the country it was held that they have a right to be heard. These observations apply to the present case and the plea of the petitioner that the authority should act fairly and that they must let her know what their impressions are so that, if possible, she can disabuse them, is sound.

In American law also the decisions regarding the scope of judicial review is not uniform. So far as constitutional rights are involved due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as the questions of law are concerned but the extent to which the Court should go and will go in reviewing determinations of fact has been a highly controversial issue.

(Constitution of the United States of America, P. 1152, 1973 Ed.)

On a consideration of various authorities it is clear that where the decision of the authority entails civil consequences and the petition is

(1) [1949] 1 All E.R. 109, 118.
(2) [1970] 2 Q.B. 417.
(3) [1964] A.C. 40
(4) [1967] 2 Q.B.617, at 630.

A prejudicially affected he must be given an opportunity to be heard and present his case. This Court in *Barium Chemicals Ltd.* v. *Company Law Board*(1) *and Rohtas Industries Ltd. v. S. D. Agrawal*,(2) has held that a limited judicial scrutiny of the impugned decision on the point of rational and reasonable nexus was open to a court of law. An order passed by an authority based on subjective satisfaction is liable to judicial scrutiny to a limited extent has been laid down B in *U.P. Electric Co.* v. *State of U.P.*(3) wherein construing the provisions of s. 3(2)(e) of the Indian Electricity Act 9 of 1910 as amended by the U.P. Act 30 of 1961, where the language used is similar to s. 10(3)(c) of the Passport Act, this Court held that when the Government exercises its power on the ground that it "deems such supply necessary in public interest" if challenged, the Government must make out that exercise of the power was necessary in the public C interest. The Court is not intended to sit in appeal over the satisfaction of the Government. If there is prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy to consumers the requirements of the statute are fulfilled. "In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review." The decisions cited are clear author- D rity for the proposition that the order passed under s. 10(3)(c) is subject to a limited judicial scrutiny. An order under s. 10(3)(c) though it is held to be an administrative order passed on the subjective satisfaction of the authority cannot escape judicial scrutiny. The Attorney General fairly conceded that an order under s. 10(3)(c) is subject to a judicial scrutiny and that it can be looked into by the court to the limited extent of satisfying itself whether the order passed E has a rational and reasonable nexus to the interests of the general public.

It was next contended on behalf of the petitioner that the provisions of s. 10(5) of the Act which empowers the Passport authority or the Government to decline furnishing the holder of the passport a F brief statement of the reasons for making an order if the authority is of the opinion that it will not be in the interest of sovereignty and integrity of India, security of India, friendly relations of India with any foreign country, or in the interests of the general public is unsustainable in law. It was submitted that along with the right to refuse to furnish a copy of the order made by the Government, as a right of appeal is denied against an order made by the Central Govt. the G provisions should be regarded as total denial or procedure and arbitrary. In view of the construction which is placed on s. 10(3)(c) that the holder of the passport is entitled to be heard before the passport authority deems it necessary to impound a passport, it cannot be said that there is total denial of procedure. The auhority under s. 10(5) is bound to record in writing a brief statement of the reasons for making an order and furnish to the holder of the passport or travel docu-

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(1) [1966] Supp. S.C.R. 311.
(2) [1969] 3 S.C.R.108
(3) [1969] 3 S.C.R. 865.

ment on demand a copy of the same, unless in any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relation of India with any foreign country or in the interests of general public to furnish such a copy. The grounds on which the authority may refuse to furnish the reasons are the same as provided in s. 10 (3)(c) for impounding a passport but the two powers are exercisable in totally different contexts. Under sec. 10(3), the question that has to be considered is whether the passport has to be impounded in the interests of sovereignty and integrity of India etc. or in the interests of general public. In passing an order under sec. 10(5) it has to be considered whether in the interests of the sovereignty and integrity of India etc. or in the interests of general public, furnishing of a copy of the reasons for the order, should be declined. Though the same grounds are mentioned for impounding a passport as well as for refusing to furnish the reasons for making an order, it would not mean that when an order under s. 10(3)(c) is passed it would automatically apply to s. 10(5) and for the same reason the authority can decline to furnish the reasons for the order. S. 10(5) says that the authority shall furnish to the holder of the passport on demand a copy *unless in any case* the authority is of opinion that it will not be in the interests of sovereignty and integrity of India etc. The expression "unless in any case" would indicate that it is not in every case that the authority can decline to furnish reasons for the order. There may be some cases, and I feel that it can be only in very rare cases, that a copy containing the reasons for making such order can be refused. Though rare there may be some cases in which it would be expedient for the authority to decline to furnish a copy of the reasons for making such order. But that could only be an exception is indicated from the fact that the aggrieved person has a right of appeal under s. 11 which has to be decided after giving a reasonable opportunity of representing his case. A reasonable opportunity cannot ordinarily be given without disclosing to that person the reasons for the order. In those rare cases in which a copy for the reasons of the order is declined by the passport authority and is not furnished during the hearing of the appeal, it would furnish sufficient justification for the courts to have a close look into the reasons for the order and satisfy itself whether it has been properly made. But I am unable to say that a provision which empowers the authority to decline to furnish reasons for making the order is not within the competence of the legislature. The learned counsel for the petitioner, with some justification, submitted that if no reasons are furnished by the Govt. and no appeal is provided against the order of the Govt. it would virtually amount to denial of procedure established by law as contemplated under Art. 21 of the Constitution of India. Though there is considerable force in this submission. I am unable to accept this plea for two reasons. Firstly, the Govt. is bound to give an opportunity to the holder of the passport before finally revoking or impounding it. I expect the case in which the authority declines to furnish reasons for making such an order would be extremely rare. In such cases it should be borne in mind that when the Govt. itself passes an order it should be presumed that it would have made the order after careful scrutiny. If an order is passed

A by the passport authority, an appeal is provided. If the Govt. passes an order, though no appeal is provided for, but as the power is vested in the highest authority the section is not unconstitutional—(*Chinta Lingam and Ors.* v. *Government of India & Ors.*(1) for the order would be subject to judicial scrutiny by the High Court and the Supreme Court. I feel that in the circumstances there is no justification for holding that s. 10(5) of the Act is *ultra vires* of the powers of the B legislature. We have taken note of the fact that in the present case there is no reason in declining to furnish to the petitioner the statement of reasons for impounding the passport but such a lapse by the authority would not make sec. 10(5) *ultra vires* of the powers of the legislature.

C It was next contended that in the present case the passport was impounded under s. 10(3)(c) of the Act on the ground that (a) it is in the public interest that Smt. Maneka Gandhi should be able to give evidence before the Commission of Inquiry and, (b) that Smt. Maneka Gandhi should have an opportunity to present her views before the Commission of Inquiry and according to a report received there is likelihood of Smt. Maneka Gandhi leaving India. It was submitted D that impounding of the passport on the ground stated above is unjustified. Referring to s. 10(3)(h) where it is provided that when it is brought to the notice of the passport authority that a warrant or summons for appearance or a warrant for the arrest of the holder of the passport has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the E holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been so issued or an order has been so made, impound the passport. For application of this clause there must be a warrant or summons from the court or an order by the Court prohibiting the departure from India. It was submitted that it is not certain whether the Commission would require the presence of the petitioner F at all and if required when her presence will be necessary. There had been no summons or any requisition from the Commission of Inquiry requiring the petitioner's presence and in such circumstances it was submitted that the order is without any justification. A notification issued by the Ministry of External Affairs under s. 22(a) of the Passports Act on 14-4-76 was brought to our notice. By that notification the Central Govt. considered that it is necessary in the public interest G to exempt citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and if they produce orders from the Court concerned permitting them to depart from India from the operations of the provisions of clause (f) of sub-section (2) of s. 6 of the Act subject to the condition that the passport will be issued to such citizen only for a period specified in such order of the Court and if no period H is specified the passport shall be issued for a period of six months and may be renewed for a further period of six months if the order of the

(1) [1971] 2 S.C.R. 871 at p. 876.

court is not cancelled or modified. The citizen is also required to give an undertaking to the passport authority that he shall, if required by the court concerned, appear before if at any time during the continuance in force of the passport so issued. It was submitted that when such facility is provided for a person who is being tried for an offence in a criminal court the same facility at least should be given to a person who may be required to give evidence before a Commission of Inquiry. It is unnecessary for me to go into the question as to whether in the circumstances the impounding of the passport is justified or not for the learned Attorney General submitted that the impounding was for the purpose of preventing the petitioner from leaving the country and that a final decision as to whether the passport will have to be impounded and if so for what period will be decided later. On behalf of the Government a statement was filed which is as follows :—

"1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case, the grounds for impounding the passport are those mentioned in the affidavit in reply dated 18th August, 1977 of Shri Ghosh except those mentioned in para 2(xi).

2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

3. In the event of the decision of impounding the passing having confirmed, it is clarified that the duration of the impounding will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation.

4. Pending the consideration of the petitioner's representation and until the decision of the Government of India thereon, the petitioner's passport shall remain in custody of this Honourable Court.

5. This will be without prejudice to the power of the Government of India to take such action as it may be advised in accordance with the provisions of the Passport Act in respect of the petitioner's passport."

In view of the statement that the petitioner may make a representation in respect of impounding of passport and that the representations will be dealt with expeditiously and that even if the impounding of the passport is confirmed it will not exceed a period of six months from the date of the decision that may be taken on the petitioner's representation, it is not necessary for me to go into the merits of the case any further. The Attorney General assured us that all the grounds

A urged before us by the petitioner and the grounds that may be urged before the authority will be properly considered by the authority and appropriate orders passed.

In the result, I hold that the petitioner is not entitled to any of the fundamental rights enumerated in Article 19 of the Constitution and that the Passport Act complies with the requirements of Art. 21 B of the Constitution and is in accordance with the procedure established by law. I construe section 10(3)(c) as providing a right to the holder of the passport to be heard before the passport authority and that any order passed under section 10(3) is subject to a limited judicial scrutiny by the High Court and the Supreme Court.

In view of the statement made by the learned Attorney General to C which reference has already been made in judgment, I do not think it necessary to formally interfere with the impugned order. I accordingly dispose of the Writ Petition without passing any formal order. There will be no order as to costs.

ORDER

Having regard to the majority view, and, in view of the statement D made by the learned Attorney-General to which reference has already been made in the judgments we do not think it necessary to formally interfere with the impugned order. We, accordingly, dispose of the Writ Petition without passing any formal order. The passport will remain in the custody of the Registrar of this Court until further orders. There will be no order as to costs.

E

P.H.P.