

Mohd Yaqub v. state of Jammu and Kashmir, AIR 1968 SC 765

1) Facts

The case involves twenty-one petitions for the issuance of a writ in the nature of Habeas Corpus filed pursuant to Article 32 of the Constitution. The facts are practically identical for all petitioners. On 11 November 1966, the government detained the petitioner pursuant to Rule 30(1)(b) of the Defence of India Rules, 1962 ("Rules"). After six months, the case was reviewed, but the petitioner was not given the chance to present his case to the reviewing authority. This resulted in the order being declared illegal after the initial six-month period. Recognizing this defect, the State Government rescinded the order dated November 11, 1966 on August 3, 1967, and issued a new order of detention on the same day. This new order is now being challenged before the Supreme Court.

2) Issues

The petitioners primarily challenged the President's declaration of an emergency pursuant to Article 359(1) of the Constitution. Particularly they raised the following issues:

- i. Because the president is an "Authority" as defined in Article 12, they would fall under the definition of "State." Seen in this light, a presidential declaration of emergency would constitute law within the provisions of Part 13(2) of the Constitution and thus is open to scrutiny via Fundamental Rights.
- ii. Only those fundamental rights can be curtailed which have a nexus with the reasons the emergency was declared under Article 359. Therefore, only Article 21 and 31(2) can be curtailed.
- iii. Even if the president can suspend fundamental rights, the order can still be challenged under fundamental rights.
- iv. Orders made pursuant to Article 359 may be appealed under Article 14. The challenge would be successful in this case as there is discrimination. Individuals may be arrested under a variety of different statutes and regulations, including but not limited to the Defence of India Act, the Preventive Detention Act and the Rules in question. The executive has been given complete discretion over which act to pursue and when to detain.

- v. The Act and Rules must contain an explicit reference stating that Fundamental Rights may be suspended in the event of an emergency. Due to the absence of the same, the Presidential order may be challenged under Part III.
- vi. As the presidential order did not do away with Article 22(5), the grounds of detention need to be communicated to the detenu for effective representation.

Apart from these main contentions the petitioners made three subsidiary contentions –

- i. that the new order was not conveyed to the detainees and thus rendered ineffective;
- ii. As the order was not in the format specified by Article 166 it is up to the State Government to establish that it was issued by the proper authority;
- iii. Order was mala fide

On the other hand, the state argued that once fundamental rights are suspended pursuant to an emergency order, they cannot be relied upon for any reason. For subsidiary points, the state stated that the order was communicated to all parties involved, was in the proper format, and that Article 166 does not apply to the state of Jammu and Kashmir. Finally, the state asserted that the order was not made in bad faith.

3) Ratio

The court held –

- i. There should be no inquiry into the correlation between a suspended fundamental right and the declaration of emergency.
- ii. Orders made under Article 359 of the Indian Constitution cannot be considered as law under Article 13(2).
- iii. Suspending the implementation of a fundamental right pursuant to Art. 359(1) cannot be challenged under that particular fundamental right.
- iv. There is no need to include an express provision under the Act/Rules As a result, authorising the stay on the enforcement of fundamental rights protected by Articles 14, 21 and 22.
- v. There is no requirement to communicate grounds of detention to the detenu as Article 22(5) has been suspended via the president's order.
- vi. Fresh orders were communicated to the detenu.

- vii. Article 166 does not apply here and the orders have been made in the form prescribed under Article 45 of the Constitution of Jammu and Kashmir.
- viii. The orders are not mala fide.

4) Rationale

The court noted –

- i. Considering proclamation of emergency order issued under Article 359 as law under Article 13(2) would make Article 359 nugatory. If these orders are considered laws under Article 13(2), they can be challenged via Fundamental Rights. However, orders under Article 359 may suspend these fundamental rights during such a period of emergency. If the order under Article 359 is judged via the same rights they suspend, it would effectively make Article 359 nugatory. Therefore, applying the principle of harmonious construction Article 359 cannot be seen as law under Article 13(2).
- ii. Article 359 vests the President with categorical authority to cease the enforcement of any fundamental rights bestowed by Part III during the duration of an emergency declaration. It is implicit in Article 359 that rights are suspended in the interest of security of India and therefore it is unnecessary to inquire whether the rights suspended have a nexus with the emergency proclaimed.
- iii. As the current order of the president under Article 359 provided that fundamental rights under Article 14, 21 and 22 would be suspended if the person is deprived of the same under the Act/Rules, it is not necessary for the Act/Rules themselves to create an express provision to that effect.
- iv. Given that the new order was issued on the same day as the previous one was cancelled, there is no reason to disbelieve the State's assertion that the new order was communicated.
- v. Article 166 does not apply to the state of Jammu Kashmir. Therefore, the requirements of Article 45 of the Jammu and Kashmir Constitution would need to be fulfilled. Presumption would be in favour of the state and it is duty of the petitioners to show whether these requirements have not been met. In the current situation no such effort was undertaken.
- vi. No grounds have been provided to show mala fide and fresh orders were only issued as the due process of review was not followed.