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GOVERNMENTAL REACTION TO EMERGING TRENDS OF "JUDICIAL ACTIVISM" AND ACTIVIST JUDGES

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In *A.K. Gopalan v. State of Madras*[1] it was held that the expression "procedure established by law" means procedure enacted by a law made by the state. The Supreme Court, by a majority, rejected the argument that the "Law" in Article 21 is used in the sense of jus and lex the just law and that it means the principles of natural justice on the analogy of "due process of law" as interpreted by the American Supreme Court. That in effect amounted to holding that Article 21 was a protection only against the executive and not against the legislature. This interpretation was taken to its logical end in *ADM, Jabalpur v. Shivkant Shukla*[2] where the Supreme Court held that Article 21 repository of the right to life and personal liberty against its illegal deprivation by the executive and in case enforcement of Article 21 was suspended by a presidential order under Article 359, the court could not enquire whether the execution action depriving a person of his life or personal liberty was authorized by law.

It was contended that the obligation of the Government to act according to law stems from the suspension of the rule of law, and the suspension of Article 21 did not automatically entail the suspension of rule of law, the Supreme Court, with the dissent of Khanna, J., legitimized the suspension of the writ of habeas corpus during the period of Emergency on the basis of higher claims of national security.[3]

The majority opinions by and large relied primarily on the language of the Presidential Order. The order, unlike the order of 1962 impugned in *Makhan Singh*[4] which was confined to detentions under the Defence of India Act, and the rules made under it, was of general nature which applied to all detentions without reference to any law.

Before *Maneka Gandhi*[5] there were few

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[1] AIR 1950SC27.

[2] (1976)2SCC521: AIR 1976 SC 1207.

[3] V.N.Sukla, 'Constitution of India',11th(ed.).

[4] MakhanSingh v.StateofPunjab, AIR 1964 SC 381.

[5] ManekaGandhi v.UnionofIndia,AIR 1978 SC 597.

instances where the judges played positivist role by giving their majority or minority judgments. In this connection since 1951, questions have been raised the scope of the constitutional amending process in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through a constitutional amendment?

In *Shankari Prasad Singh v. Union of India,*[6] the first case on the above question came before the Supreme Court for interpretation. The court held that the terms of Article 368 are perfectly general and empower Parliament to amend the Constitution without any exception. The same question was raised again after 13 years in 1964 in *Sajjan Singh v. State of Rajasthan.*[7] The conclusion of the Supreme Court in *Shankari Prasad* as regards the relation between Arts. 13 and 368 was reiterated by the majority. Though there of the five judges (Gajendragadkar C.J.and Wanchoo and Dayal JJ.) in that case fully approved *Shakari Prasad case* two of them (Hidayatullah and Mudholkar, JJ.) in their separate but concurring opinions expressed serious doubts whether fundamental rights created no limitation on the power of amendment.

In his minority opinion Hidayatullah, J. stated that "To make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of the Constitution and without concurrence of states", because, "the Constitution gives so many assurances in part III that it would be difficult to think that they were playthings of a special majority".

Mudholkar, J., in his minority opinion felt reluctant " to express a definite opinion on the question whether the word 'law' in Article 13(2) of the Constitution excludes an Act of Parliament amending the Constitution and also whether it is competent to Parliament to make any amendment over all to part III of the Constitution". But Mudholkar, J.'s argument was set in a much broad frame. His basic argument was that every Constitution has certain fundamental features which could not be changed.

As will be seen, *Golak Nath,*[8] the next case, was based on Hidayatullah, J's argument of non-amendability of Fundamental Rights, but *Kesavananda* was based on Mudholkar, J's view of basic features.

[6]AIR 1951 SC458.
[7]AIR 1965 SC845.
[8]L.C.GolakNath v.StateofPunjab,AIR1967SC1673:1967 (2) SCC 762.

It is worth noting that these two judges who delivered these two minority opinions were considered as positivist judges and it was their approach that played a significant role in the Indian judiciary in later years.

Perhaps, encouraged by the above-stated remarks of these two judges, the question whether any of the Fundamental Rights could be abridged or taken away by parliament in exercise of its power under Article 368 was raised again in *Golak Nath* in 1967.[9]

The majority now held, overruling the earlier cases of *Shankari Prasad*[10]and *Sajjan Singh*[11], that the Fundamental Rights were non amendable through the Constitutional amending procedure set out in article 368.

Subba Rao, C.J., speaking on behalf of himself and four other Judges, equated Fundamental Rights with natural rights and characterized them as "the primordial rights necessary for the development of human personality.

The majority judgment had taken the view that the word "law" in Art. 13 included a constitutional amendment as well, not be curtailed or diluted.[12]

In,1971, Parliament enacted the Constitution (Twenty Fourth) Amendment Act introducing certain modification in Art.13 and 368 to get over the *Golak Nath* ruling and to assert the power of parliament, denied to it in *Golak Nath,* to amend the Fundamental Rights.

As could be expected, the Constitutional validity of both the Amendments, viz, XXIV and XXV, was challenged in the Supreme Court through an Art.32 writ petition in *Kesavananda Bharati v. State of Kerala.*[13] The matter was heard by a bench consisting of all the 13judges of the court because *Golak Nath*, the 11-judge Bench decision was under review.

The court now held that the power to amend the Constitution is to be found in Art. 368. The amending power was now subjected to one very significant qualification, viz, that the amending power cannot be exercised in such a manner as to destroy or emansculate the basic or Fundamental Features of Constitution.

The supersession of the three senior judges (Shelat, Hegde and Grover JJ.) in the matter of the appointment of the Chief Justice of the Supreme Court, on the day after the Supreme Court delivered its

[9]L.C.Golak Nathv.StateofPunjab,AIR1967SC1673:1967(2)SC R 762.
[10]AIR 1951 SC458.
[11]AIR 1965 SC845.
[12]Suprano.9.
[13]AIR 1973 SC146.

judgment in the Fundamental Rights case ignited a controversy throughout the Country.[14]

After the supersession A.N. Ray appointed as the new Chief Justice of India. The only issue arising in this case is simple.

Was it on considerations of caliber, merit and suitability that the three distinguished judges were superseded, or did they pay the price for their independence, creativity and intellectual integrity?

After the Emergency the fierce light of controversy has been turned on the Supreme Court. The controversy was sparked off by the incredible order passed by the Supreme Court in the *A.D.M. Jabalpur*[15] fierce light has blazed even more fiercely because when faced with the stern test posed by the Emergency the High Court's rose to the occasion by upholding the rule of law and the personal liberty of citizens. Faced with the same test the Supreme Court sank under the test when in the *Habeas Corpus case*, it passed an order which in effect declared that law had ceased to operate in India is respect of the personal liberty of the citizen. If for example, Khanna J. had been preventively detained for delivering, a brave dissenting judgment, a judgment which the censor had blacked out, no court could have given him relief against such outrageous violation of the law.[16]

Mrs. Gandhi had superseded Khanna J., the senior most judge, for the office of the Chief Justice of India because of his brave dissenting judgment in the *Habeas Corpus case*, and Beg, J. who was a party to the *Habeas Corpus case*, should admit two years later that the order "was perhaps misleading as it gave the impression that no petition at all would lie either under Art. 226 or Art.32 to assert the right to personal liberty because the *Locus Standi* of the citizen was suspended" must, by itself, make the majority judgments indefensible.[17]

[14]K.SubbaRao,"TheSupersessionofJudges–ThePriceofExecutiveInterference""AJudiciarymade toMeasure"EditedbyN.A.Palkhivala.
[15]A.D.M.Jabalpurv.ShivkantShuklaAIR1976SC1207.
[16]H.M.Seervai, "Constitutional Lawof India", 4th (ed.) vol.3.
[17]Suprano.15