CHAPTER IV

THE JOURNEY FROM A.K. GOPALAN TO MANEKA GANDHI: A STUDY FROM 1950-1978

The jurisprudential thinking that had been reflected in *A.K. Gopalan* v. *State of Madras*[1] underwent a transformation in *Maneka Gandhi* v. *Union of India*[2] and beyond. This chapter focuses upon this journey. From classical positivism as reflected in *A.K. Gopalan* v. *State of Madras* Indian judiciary reached the sociological thought while also delving into several other schools of thoughts like Realist school and others. It was evident that in *A.K. Gopalan* v. *State of Madras* the Indian judiciary was following analytical positivistic thought. Positivism, in general, denotes that law must be identified independently without any moral or evaluative arguments. Therefore, the question arises whether law is about its content or its pedigree. The Utilitarian theory of both Bentham and John Stuart Mill has a moral standard in it as both were of the view that the end of the law must be to bring pleasure (i.e. absence of pain, unhappiness and privation of pleasure). However, the Analytical School of Positivism focused on distinguishing law from other form of social control. Thus it considers that a norm attains legal standard when it originates from a human superior and does not require to adhere to the moral standard.

In the previous chapter it has already been stated that the legal philosophy reflected in the preamble of the Constitution of India was not limited to a legal philosophy devoid of moral standards. However, in A. K. Gopalan the literal interpretation of 'Law' by the Indian Judiciary reflected the idea of Analytical Positivism.

In *A. K. Gopalan* v. *State of Madras* the validity of the Preventive Detention Act, 1950 was challenged. This case was heard by the Bench consisting of 6 judges i.e. Chief Justice Hiralal Kania, Saiyad Fazl Ali J., Patanjali M. Shastri J., Mehr Chand Mahajan J. ,Sudhi Ranjan Das J., B. K. Mukherjea J. The detenue contended that sections empowering the Govt. to detain a citizen under the Preventive Detention Act, 1950 violated Article 13, 19 and 21 of the Constitution of India. It was also stated that

[1] *A. K. Gopalan* v. *State of Madras* AIR 1950 SC 27
[2] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597

the section 12 of the Act of 1950[3] was contradictory to the Article 22 (4) of the Constitution of India[4].Moreover, the condition enumerated in section 14 of the Preventive Detention Act 1950 disentitled any court of Law from requiring any public officer making such detention order to disclose or communicate any document of such detention order or the report of the Advisory Board[5].

It was argued by the petitioner (the detenue) that detention order amounted to violation of the Fundamental Rights guaranteed under Article 19 (1) (d) (this gives the right to free movement of the citizen within the territory of India) and Article 21 (this Article ensures right to life and personal liberty) of the Constitution of India. However, Chief Justice Kania observed that the right to free movement guaranteed under Article 19 (1) (d) of the Constitution of India is just an aspect of personal liberty guaranteed under the Article 21. Thus Article 19(1) (d) does not purport to cover all the aspects of liberty which includes right to sleep, right to work etc. Thus, according to Kania C. J., any legislation entitling the Government to detain an

[3] Section 12 of the Preventive Detention Act, 1950
Duration of detention in certain cases.--(1) Any person detained in any of the following classes of cases or under 'my of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but not exceeding one year from the date of his detention, namely, where such person has been detained wish a view to preventing him from acting in any manner prejudicial to--
(a) the defence of India, relations of India with foreign powers or the security- of India; or
(b) the security of a State or the maintenance of public order.

[4] Article 22 (4) of the Constitution of India-
No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention

[5] Section 14 of the Preventive Detention Act, 1950-
Disclosure of grounds of detention, etc.--(1) No court shall, except for the purpose of a prosecution for an offence punishable under sub-section (9,), allow any statement to be made, or any evidence to be given. before it of the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by 'him against such order; and notwithstanding anything contained in any other law, no court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an Advisory Board or that par of the report of an Advisory Board which is confidential. (2) It shall be an offence punishable with imprisonment for term which may extend to one year, or with fine, or with both, for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1):
Provided that nothing in this sub-section shall apply to a disclosure made' to his legal adviser by a person who is the subject of a detention order.

individual on a ground of suspicion is not in conflict with Article 19 (1) (d) of the Constitution of India.

It was argued by the petitioner that the word 'Law' in Article 21 of the Constitution of India purported mean *jus* i.e. law inclusive of principle of natural justice and not *lex* i.e. the enacted law. This contention of the petitioner was based upon the interpretation given by the Supreme Court of United States to the phrase 'due process of law' of the Constitution of United States. However, Kania C.J. observed that this interpretation of 'due process of law' could not be applicable in the place of 'procedure established by law' in India. He also pointed out that several interpretations of the phrase 'due process of law' were provided in Willis's book on Constitutional Law and Cooley's Constitutional Limitation. Due to these various and wider interpretation of the protection of right and liberty under the U.S. Constitution the doctrine of 'Police Power'[6] was developed in U.S. in order to restrict the rights and liberty of U. S. citizens. Moreover, it was also emphasized that in Article 21 the Constitution of India has mentioned about established procedure and in Article 22 that procedure has been prescribed[7].

Kania C. J. pointed out that insertion of 'procedure established by law' in Article 21 of the Constitution of India has been made after much debates in the Constituent Assembly. Therefore, dropping of the phrase 'Due process of law' and adoption of the 'procedure established by law' was a conscious decision of the Draft Committee of the Constituent Assembly[8]. He observed that both Willis's book on Constitutional Law and Cooley's Constitutional Limitation considered 'law' in 'due process of law' as a 'reasonable law'. Thus, according to him the 'law' in the 'procedure established by law' must mean 'procedure established by law so prescribed by the State'. In the words of Kania C. J. the omission of the word 'due', limitation upon the rights by insertion of 'procedure' and adding of 'established' clearly brings out the idea of supremacy of legislature in determining the law. However, the court acknowledged the right of an aggrieved to approach the court under Article 32 of the Constitution of

[6]In United States constitutional law police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.

[7] Ramesh Chandra Ghosh, Constitutional Decisions of the Supreme Court of India, 14(2), *The Indian Journal of Political Science*, 98, (1953)

[8]Constituent Assembly Debate, Volume VII.

India. In such a case the person approaching the court must prove it substantially that the law enacted by the Parliament violated the fundamental rights of the aggrieved. But, in the present case the Supreme upheld the impugned Act and declared section 14 of the impugned Act[9] void.

Austin's analytical school of law has given the following criteria for a norm to be law-

a. It has to be prescribed by the human superior to human inferior,
b. The human superior must not be in the habit of obedience to any other human superior,
c. It must have element of censure,

The observation of 'Law' in A. K. Gopalan v. State of Madras by Kania C. J. has a similarity to the concept of 'Law' provided by the analytical school of jurisprudence. These are-

a. The 'Law' in procedure established by law means Law provided by the State,
b. The legislature is the supreme authority to determine what the law should be,
c. The censorial element in the law is in the form of restriction or limitations of the right to life and personal liberty of an individual.

The judgment delivered by the seven judges Bench in *State of Madras* v. *Champakam Dorairajan*, *C. R. Srinivasan*[10] is another significant judgment immediately after the adoption of the Constitution of India. In this case a government order by the State of Madras regarding reservation for the purpose of admission in a Government Engineering and Medical College was in question. The reservation in the government college within the State was maintained even before the independence. The same was continued after independence through Communal G. O. in the year 1950.The criterion of reservation was caste (i.e. non Brahmin Hindu, backward Hindu, Brahmins, Harijans, anglo-Indian and Indian Chrisrtian, Muslims).

[9]Observation of Kania C. J. on section 14 of the Preventive Detention Act, 1950
It appears to me, therefore, that section 14 of the Act in so far as it prevents the detenu from disclosing to the Court the grounds communicated to him is not in conformity with Part III of the Constitution and is, therefore, void under article 13 (2). That section, however, is clearly severable and cannot affect the whole Act.
[10]*State of Madras* v. *Champakam Dorairajan, C. R. Srinivasan* AIR 1951 SC 226

Eventually Srimathi Champakam Dorarirajan and C. R. Srinivasan were denied admission in Medical college and Engineering college respectively since they were found not eligible according to the new Communal G. O. of the State of Madras.

It was contended on behalf of by Srimathi Dorairajan and C.R. Srinivasan that the criteria of reservation by the State government were arbitrary and against Article 16 (2) and Article 29 (2) of the Constitution of India. Due to the arbitrary criteria of reservation both of them could not take admission in the respective courses despite securing higher percentage that the candidates admitted under reserved category.

It was observed by the Bench that the government order by the State of Madras was violative of Article 29 (2) of the Constitution of India which talks about non-discrimination for the purpose of admission into the institution maintained by the State or receiving aid from the State funds on grounds only of religion, race, caste, language or any of them.

The similarity between A.K. Gopalan and Champakam Dorairajan's case was the Bench that presided over both the cases. Champakam Dorarirajan case had another additional Judge i.e. Vivian Bose J.In A. K. Gopalan case the Bench observed that the law enacted by the legislature is supreme and its validity can not be tested against the Constitution. However, in *State of Madras* v. *Champakam Dorairajan* case the Bench maintained that the validity of order issued by the State (and not formally enacted by the legislature) could be tested against the Constitution. In this backdrop it is significant to point out that Austin was confused between *de facto* (de facto government receives obedience) government and *de jure* (de jure government is the law making body) government. Dias has observed that Austin always meant *de jure* government while referring uncommanded commerder who makes laws.[11]

Therefore, it was again made clear that the law making authority i.e. the legislature was supreme in making laws and its validity could not be tested.

In *Sankari Prasad* v. *Union of India*[12] again the power of the parliament to abridge fundamental right by way of amending the provisions of the Constitution of India was is question. The questions raised in this case were-

[11]Dias, *Jurisprudence*, 348 (Lexis Nexis, Haryana,2014)

[12] *Shankari Prasad Deo* v. *Union of India* AIR 1951 SC 458

a. Can the parliament be regarded as the 'State' in order to bring it under the purview of the limitations mentioned in Article 13 of the Constitution of India?
b. Can changes made by way of the constitutional amendments be regarded as 'Law' in order to bring it under the limitations of Article 13 (2) of the Constitution of India?

The Bench in this case was consisting of 5 judges having H. J. Kania as Hon'ble Chief Justice. Chief Justice Kania brought no different observation in Sankari Prasad's case than the observation he made in A. K. Gopalan v. State of Madras.

It was observed by Kania C.J., that two kinds of laws are-

i. Ordinary law enacted by virtue of legislative power and,
ii. Constitutional law enacted by virtue of constituent power.

According Dicey constitutional law is the law that includes all the rules defining the distribution and exercise of power by the organs of the State. Constitution makers of India intended to immune the fundamental rights from being violated by the laws enacted by the State. Thus Article 13 (2) was included in the Constitution of India. However, the then Hon'ble chief Justice H.J. Kania did not find any intention of the constitutional makers to immune fundamental rights guaranteed under part III of the Constitution of India from the constitutional amendments. It was also pointed out that there was no clear provision in Article 368 intending the intentions of the constitution-makers to remove fundamental rights from the ambit of Article 368 of the Constitution of India.

Thus, it was observed by the court that the power to amend the Constitution including the fundamental rights was contained in Article 368. The word 'law' under Article 13 (2) of the Constitution of India only includes ordinary law enacted in the exercise of the legislative power.[13]

The observation in this case that the parliament is all powerful to even amend the fundamental rights enunciated the idea of unlimited sovereign power as stated in the analytical jurisprudence by Austin. The way Austin did not put any limitations upon the powers of the sovereign, the majority view in Sankari Prasad case did not also put any limitations upon the amending power of the Parliament of India.

[13] V. N. Shukla, *Constitution of India*, 884 (Eastern Book Company, 2007).

In *Chiranjit Lal Chaudhuri* v. *Union of India*[14] the power of the parliament to enact laws on the basis of reasonable classification was questioned. This case was heard by a Bench consisting of 5 judges and they were H. J. Kania C. J., Fazal Ali Saiyad J., Patanjali M. Sastri J., B. K. Mukherjea and SudhiRanjan Das J. Due to mismanagement and neglect in Sholpur Spinning and weaving Company Ltd. there was a situation of unemployment amongst a certain community. The then Governor General, on seeing this situation, promulgated an ordinance which was re-enacted in the form of an Act of the Legislature i.e. Sholpur Spinning and Weaving (Emergency Provisions) Act, 1950. By virtue of this Act the powers of the shareholders of this company in the matter of voting, appointment of directors, and taking resolutions were curtailed. This Act also gives the power to the Government of India to make necessary modifications to the Indian Companies Act, 1930 and also the power to appoint directors for the proper management of the Sholpur Spinning and Weaving Company.

One of the shareholders of the abovementioned company filed a writ petition under Article 32 of the Constitution of India seeking the Supreme Court to issue the writ of mandamus to the Government of India. It was contended by the petitioner i.e. the shareholder that the enactment of the Sholpur Spinning and Weaving (Emergency Provisions) Act, 1950 has violated the petitioner's right under Article 14, Article 19 (1) (f) and 31 of the Constitution of India.

Kania C.J., Fazal Ali Saiyad J., Mukherjea J. and Das J. were of the view that-

i. There was no violation of the rights of petitioner guaranteed under Article 31 of the Constitution of India because the Act did not talk about the acquisition of the properties held by the shareholders. However, the impugned Act only restricted exercise of some of the powers by the shareholders of the company,
ii. There was also no violation of the rights to be treated equally guaranteed under the Article 14 of the Constitution of India. As contended by the petitioner that enactment of such Act created a distinction between the shareholders of Sholpur Spinning and Weaving Company and the shareholders of other companies in India. The classification of this

[14]*Chiranjit Lal Chaudhuri* v. *Union of India* AIR 1951 SC 41.

distinction was reasonable as the company went through some rough situations and any company in future to be faced by such situation would attract such measures. It was also pointed out that along with enacting the Act of 1950 there was also a suggestion to modify the provisions of the Indian Companies Act, 1930.

It was observed in this case that the impugned Act of 1950 was not *ultra vires* and did not violate the right of an individual i.e. the petitioner. Thus, it was necessary for the government to introduce enactment imposing partial restrictions upon the rights of the shareholders of the company so that the employees and the beneficiaries of the company did not suffer. The interpretation of government's action in this case has a nexus with the principle of utility.

Principle of utility tests the moral sanction of the government action. According to the utilitarianism the morality of the government action is tested on the basis of the amount of happiness it produces. Thus, any government action maximizing the happiness in society can be regarded to be adhered to the said moral standard.

The Philosophy of Epicurus (341- 270 B. C. E.) stated that the goal of human life is to attract happiness free from physical pain and mental disturbance. Epicureanism states that the greatest good is to seek pleasure and avoid bodily pain and freedom from fear.

According to Bentham's (1748-1832) Principle of Utility is the principle that approves or disapproves any individual's action which in turn will augment or diminish the happiness of the individual in question. Thus, this utilitarianism states that the desired consequence of human action is always to produce greatest happiness. Bentham's utilitarianism is quantifiable as he propounded 'greatest happiness of the greatest number'. This principle also guides the legislating power of the government. This can also be said to be a measure for the Government where the government (be it an individual or a body of individuals) must legislate with a tendency to augment or diminish the greatest happiness of greatest number. People will follow the legislation because the disobedience of the law amounts to diminishing of happiness and causing of pain. Such causing of pain operates as a deterrent to disobedience.

John Stuart Mill (1806-1873) modified Bentham's utilitarianism. According to Mill's utilitarianism the desired consequence of individual's action is to produce greatest

happiness. However, Mill has suggested hierarchy of pleasure in order to bring out the qualitative aspect of happiness (pleasure). Pleasures were distinguished between higher pleasure and lower pleasure. Higher pleasure requires mental faculty to experience which only an educated human being could experience. Lower pleasure does not require mental faculty and only includes bodily pleasure and can also be experience by animals.

Mill's utilitarianism differs from Bentham's utilitarianism because Bentham's utilitarianism did not state about the quality of the pleasure. The distinction between higher and lower pleasure by Mill reflected the quality of pleasure to be experienced by individual. Mill's stratification of higher pleasure indicates a group of individuals who are educated and intelligent and may derive pleasure from say, a relaxed/ lenient tax law or a law that makes investment easier.

The happiness at the lower level is for human beings who irrespective of education and intelligence are able to comprehend that happiness lies in obedience and pain ensues disobedience. This can also be comprehended by animals. In the lowest rung would be hedonism experienced by all, human, animal alike.

In this case again it was observed that the government has the power to enact laws restricting the rights of shareholders which in turn may restrict the shareholder to exercise his fundamental rights. This case is also another instance of Indian Judiciary's following of legal positivism.

State of Madras v. *V. G. Row*[15] is significant as the observations in this case differed from its preceding cases during 1950. The State of Madras in 1950 declared People's Education Society as unlawful by virtue of Indian Criminal Law Amendment Act, 1908 as amended by Indian Criminal Law Amendment (Madras) Act, 1950. The Government claimed that this society worked beyond its objectives as set out in its memorandum. The Government also contended that it had information that the society was helping communist party in Madras thereby interfering with the administration and maintenance of law and order within the State and issued a Government Order to that effect. However, copy of the order declaring the Society unlawful was not served upon the Society.

[15] *State of Madras* v. *V.G. Row* AIR 1952 SC 196.

This case was presided over by five judges Bench comprised of Patanjali M. Sastri C.J., M. C. Mahajan J., B.K. Mukherjea., Sudhi Ranjan Das J., Chandrasekhara N. Aiyar J. Four of five judges observed-

a. The factors constituting reasonableness of restriction by the Madras Government was not clear and conclusive,
b. There can not be any abstract ground for imposing restrictions under Article 19 (4) of the Constitution of India.
c. Association can be formed for various reasons and the curtailment of such right may be fraught with potential reactions in religious, political and economic field.

Thus, the majority was of the opinion that any such restriction without intimation of any ground may lead to grave injustice if kept beyond judicial scrutiny. The Bench maintained that the Court was concerned only of the question of constitutionality of any Act or Order declaring any association unlawful without providing grounds. This judgment is significant as in this case judges upheld the purpose of law as laid down in sociological school of law. As Dias pointed out a social study of laws has assumed following forms[16]-

a. There are inquiries which seek the social origins of laws and legal institutions,
b. There are also examinations of the impact of laws on various aspects of society,
c. There are other inquiries which deal with the task which laws should perform in society,
d. There is the attempt to find some social criterion by which to test the validity of laws.

In *State of Madras* v. *V. G. Row* the Bench inquired into the origin of the Act and or Order of the Madras Government declaring any association unlawful without any depiction of grounds. On examining the effect of such Act/ Order upon the society the Bench found that such Act/Order was arbitrary because it did not provide any reason for curtailing the rights to form association. In the context of this case the Bench also inquired into the other functions of law i.e. to provide proper information to each

[16] R. W. M. Dias, *Jurisprudence* 423 (Lexis Nexis, Haryana, 2014).

individual and to provide equal opportunity to each individual to be able to present its case.

There is a deviation here from all the cases discussed here in before. For the first time the court recognised the right to hearing and reasonableness which was not done hither-to-fore. The Bench in A.K. Gopalan was six judges Bench, Champakam had five judges Bench Shankari Prasad also had five judges Bench. Hence the position of A.K. Gopalan remained dominant supported by Champakam Dorairajan and Shankari Prasad. Hence, even when V.G. Row case showed slight variation, the dominant position remained the same.

The last factor of Dias's social study of law can also be found in this case. The Bench tested the validity of the Order and Act of the Madras Government on the basis of the term 'reasonableness'. The validity of the impugned Act was tested and declared as unconstitutional. Therefore, it can aptly be said that principles of sociological school of law was first followed in *State of Madras* v. *V.G. Row* case. In this case the Judiciary looked at the law as a tool for resolving conflicting interest. In the backdrop of interest it is pertinent to mention Bentham's Utilitarianism and Roscoe Pound's Social Engineering theory. Bentham in his Utilitarian theory mentioned about individual interest and community interest. The sovereign must enact law not to guarantee selfish desire of individuals but to ensure and secure common good. The 'Public Good' ought to be, according to Bentham, the object of legislator. The Law must ensure maximum happiness (pleasure) and minimum pain. To measure such pleasure and pain inflicted by 'law' Bentham devised 'felicific calculus' method. He was of the opinion that the 'law' must know how to balance individual interest and common welfare. However, he did not clearly stated satisfactorily as to how such conflicting interest was to be balanced[17]. Thus, a recourse has to be made to Roscoe Pound's Social Engineering theory to understand the method of balancing conflicting interests.

Roscoe Pound identified three types of conflicting interest in his theory of Social Engineering i.e. individual interest, public interest and social interest. In *State of Madras* v. *V. G. Row* there was a conflict between individual interest and public interest. Pound's Social Engineering theory looked at law as a tool for balancing

[17] R. W. M. Dias, *Jurisprudence* 427-429, (Lexis Nexis, Haryana, 2014)

conflicting interest. However, Pound mentioned that if two conflicting interest were to be balanced then there must be a 'scale' or 'yardstick' (any ideal as Pound mentioned) that would serve as benchmark with reference to which it could be balanced. As an example Pound stated that with reference to the 'ideal of freedom of individual' all interest pertaining to individual's self-assertion would carry more weight than other two interests. With reference to the 'ideal of welfare state' the public interest and/ or social interest would carry more weight than the individual interest[18]. It was observed in this case that the ideal (reasonable ground of policy framework) for banning any kind of association by virtue of an Act by the Madras Government was not clear. Therefore, the Indian Criminal Law Amendment Act, 1908 as amended by Indian Criminal Law Amendment (Madras) Act, 1950 was declared void.

State of Bombay v. *Narasu Appa Mali*[19] is significant as the status of personal laws as law under Article 13 of the Constitution of India has been in question in this case. This case was presided over by Hon'b;e Chief Justice M.C. Chagla and Justice Gajendragadkar. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 has been questioned as it was contended that it violated the fundamental rights of Hindus to practise its religion. The issues involved in this case were-

a. The impugned Act makes bigamy (polygamy) punishable if celebrated by a Hindu male.
b. The impugned Act makes bigamy a non-compoundable offence while under Indian Penal Code the offence is compoundable.

A significant observation in this case was that there is a distinction between religious faith and religious practice. State is entitles to protect religious faith and or belief but if religious practice is found against the public order and morality then the State can interfere with such practice. Both the judges in this case distinguished between personal laws and laws enacted by the legislature and/or by competent authority. It was also observed that this Act was in furtherance of social reform of religious practices. The Bench also expressed its concerned as to why the State legislature deprived another community from such social reform by not including it in an Act prohibiting Bigamy. Observation regarding status of personal law as law under Article

[18] R. W. M. Dias, *Jurisprudence* 435, (Lexis Nexis, Haryana, Fifth Edition, 2014)
[19] *State of Bombay* v. *Narasu Appa Mali* AIR 1952 Bom 84.

13 of the Constitution of India was that personal laws in India are *laws in force in general.* However, the 'law in force' as used in Article 13 of the Constitution of India does not indicate any law in force in general. It indicates a statutory law enacted by the legislature or by competent authority. Therefore, it won't be legitimate to call personal law a law under Article 13 of the Constitution. Observation in this case is in keeping with the concept of law as a command of the sovereign as stated in analytical positivism i.e. a law coming from a definite source. Therefore, in the language of Austin 'personal law' is a 'law improperly so called. The decision in Narasu Appa Mali case had conceptual similarity with the decision in A.K. Gopalan case and expressly adhered to the principles of analytical positivism.

K. M. Nanavati v. *State of Bombay*[20] was another significant case where the philosophy of analytical school was reiterated. K.M. Nanavati was second in command of I.N.S. Mysore. The petitioner, K.M. Nanavati, was arrested in connection of a charge of murder under Section 302 of the Indian Penal Code. While being in the police custody under the order of the additional Chief Presidency Magistrate the petitioner was shifted to Naval Jail under the order of Naval provost Marshall. The petitioner remained in the Naval custody when he was placed on trial before the Session Judge, Greater Bombay. The petitioner underwent a trial by Jury.[21]The Jury found him not guilty by a majority of eight to one. The learned session judge made a reference to the Bombay High Court. The petitioner was found guilty under section 302 of the Indian Penal Code by the Bombay High Court on 11th March, 1960.

On the same day the Governor of Bombay by virtue of Article 161 of the Constitution of India granted pardon to K.M. Nanavati. Due to unusual and unprecedented situation because of the pronouncement of judgment by the High Court and grant of pardon by the Governor on the same day, the case was referred to the larger Bench of the Hon'ble Supreme Court.

The issue in this case was the scope of the power of the Governor to grant pardon under Article 161 of the Constitution of India after K.M. Nanavati had been found

[20]*K.M. Nanavati* v. *State of Bombay* AIR 1961 SC 112.
[21]The jury trial was ended in India with the *K.M. Nanavati* v. *State of Bombay* AIR 1961 SC 112.

guilty of murder. In this case the Bench was consisted of B.P. Sinha C.J., J.L. Kapur J., K. Subba Rao J., K.N. Wanchoo J., P.B. Gajendragadkar J.

'It was observed by the Court that 'Pardon is one of the prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie. Whether the sovereign happened to be an absolute monarch or a popular republic or a Constitutional king or queen, sovereignty has always been associated with source of power... the power to legislate and to adjudicate upon all kinds of disputes.'

K. Subba Rao J. found grant of pardon by the Governor under Article 161 of the Constitution of India an encroachment upon the jurisdiction of the Judiciary. He was of the opinion that the grant of pardon would have been logical had the case been pending before the Hon'ble Supreme Court. He even proposed for reconciliation of the powers of the Governor under Article 161 and those of the Supreme Court of India under Article 142, 144 and 145 of the Constitution of India. However, the rest of judges held that the power to order of punishment by the Supreme Court was a general power and the grant of pardon by the Governor was a special power. Thus, in the event of conflict between special power and general power the special power would prevail.

Kapur J. observed that in the judgment there was no sentence to surrender to. The execution of sentence is an Executive power. The function of the Court ends with passing of the sentence. To carry the sentence into execution is an Executive order.[22]This judgment not only re-established the concept of sovereignty as propounded by Analytical Positivism but also sanctified the separation of power.

State of Rajasthan v. *Vidhyawati*[23] is a case where the Supreme of India took the first step to resolve the problem regarding vicarious liability of State. In this case a jeep car of the Government of State of Rajasthan used to be maintained for the use of its civil servant. The car hit a pedestrian while being driven back from its private workshop by the driver appointed by the government. The injured pedestrian later on succumbed to his injuries. The widow and the minor child of the deceased filed a suit against the driver and its employer, the government. The Trial court dismissed the suit against the

[22]*Landmark Judgments* 17-21 (Universal, New Delhi, 2012)
[23] *State of Rajasthan* v. *Vidhyawati* AIR 1962 SC 933.

State stating that the government is not vicariously liable since it has been used by another individual. The High Court reversed the judgment of the lower court and ordered the State of pay Rs. 15000/- as compensation to the survivors of the deceased. The High Court observed that the Government's vicarious liability can not be excluded on the ground that the car was maintained for the use of another individual. However, the fact that the car was maintained for a civil servant i.e. employee of the government imposed the vicarious liability upon the government. The State of Rajasthan appealed to the Supreme Court of India.

This case in the Supreme Court was presided over by a Bench of five judges consisting of B. P. Sinha C.J., J. C. Shah J., J.L. Kapur J., J.R. Mudholkar J., and M. Hidayatullah J. The Bench in this case applied strict interpretation rule and followed the precedent laid down in *Peninsular and Oriental Steam Navigation Co*. v. *Secretary of State*[24]. The court observed that-

The secretary of State-in-Council of India is liable for the damages occasioned by the negligence of servants in the service of government if the negligence is such as would render an ordinary employer liable.

B. P. Sinha C.J. observed that the immunity of British sovereign from liability is based on old feudalistic notion. The State must be made liable for any tortious act of its servant committed during his/her course of employment functioning under its employer.

In this case the very notion of immunity of sovereign was quashed and the sovereign was held liable for the tortious act of its employee during its employment. The observation in this case was opposite to the idea of the sovereign of analytical positivism. In analytical school of thought the sovereign is under no one and does not obey any other entity. The judiciary under democratic set up is an integral part of the sovereign just as the executive is. Hence the sovereign is expected to revise its order under the direction of one of its own wing. Hence the sovereign in Vidyawati v. State of Rajasthan was not projected as composite whole as is portrayed by the school of analytical positivism. In analytical school of thought the concept of sovereign is not very clear. It can be a single individual, a group of persons, or an institution. Nothing has been discussed whether a part of the 'sovereign' undo the actions/ decisions of

[24] *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State* 5 Bom. H.C.R. L.R. 65

another part and if it tantamount to obedience by the sovereign. There is no clarification for this grey area.

In *Kharak Singh* v. *State of Uttar Pradesh*[25] the petitioner i.e. Kharak Singh challenged a regulation issued by the UP government. According to the regulation the Police had the authority to keep an individual under surveillance on suspicion. The regulation provided for five types of surveillance[26] and domiciliary visit constituted one of such surveillances. The petitioner, Kharak Singh, was one of such suspect in a case of dacoity. For the purpose of surveillance, frequently the chaukidar of the village or the police constable used to visit his house, knock and shout at his door, wake him up during the middle of night. The petitioner, thus, filed a writ petition under Article 32 of the Constitution of India seeking the Hon'ble Supreme Court to issue a Writ of Mandamus and to declare the Chapter XX of U.P. Police Regulation as unconstitutional[27].In defence, the State contended that the U. P. Police regulation was formulated for the interest of general public and for their protection. Thus, it was not violative of fundamental rights guaranteed underArticle 21 of the Constitution of India.

This case was presided over by a 6 judges Bench consisting of Bhuvneshwar P. Sinha C.J., Rajagopala N. Ayyangar, Syed Jaffer Imam J., K. Subbarao, J., J. C. Shah J., J. R. Mudholkar J. It was observed by the majority (K. Subba Rao J. dissenting) in this case that Personal Liberty under article 21 and the Right to freedom of movement under Article 19 (1) (d) were independent of each other. Both rights may overlap but the question of being carved out from each other was negated by the Bench. It was observed-

[25]*Kharak Singh* v. *State of Uttar Pradesh* AIR 1963 SC 1295.

[26] "serveillance" is Regulation 236 which reads : "Without prejudice to the right of Superin- tendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures : (a) Secret picketing of the house or approaches to the house of suspects; (b) domiciliary visits at night; (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation; (d) the reporting by constables and chaukidars of movements and absence from home; (e) the verification of movements and absences by means of inquiry slips; (f) the collection and record on a history- sheet of all information bearing on conduct."

[27] Chapter XX of U. P. Police Regulation made provision of five types of surveillance of any individual on being suspected of any offence.

The fundamental rights of life and personal liberty have many attributes and some of them are found in Art. 19. The State must satisfy that both the fundamental rights are not infringed by showing that there is a law within the meaning of Art. 21 and that it does amount to a reasonable restriction within the meaning of Art. 19 (2) of the Constitution of India.

Subba Rao J., and C. J. Shah J., observed *that the whole of Regulation 236 is unconstitutional and not the cl. (b). alone The attempt to dissect the act of surveillance into its various ramifications is not realistic. Clauses (a) to (f) of Regulation 236 are the measures adopted for the purpose of supervision or close observation of movements of the petitioner and are therefore parts of surveillance.*

The majority opinion in this case applying the doctrine of eclipse struck down the part of domiciliary visit of Regulation 236 as unconstitutional and violative of Article 21. Another reason for striking out of domiciliary visit as unconstitutional was that there was no Law to justify such activity by the State. However, the majority opinion upheld the rest of Regulation 236. It reiterated that Rights under Article 21 and Article19 of the Constitution of India are independent of each other. Article 21 is wider in concept thus may include the rights guaranteed under Article 19 within its ambit. Nonetheless, it can not said that either of the rights were carved out of each other.

It is worthwhile to recall that in to A.K. Gopalan case where it was held that article 19 (1) (d) was not a part of or an extension of article 21. Both Benches were six judges and hence it creates conflicting position. However, the paradigm shift from A.K. Gopalan in 1950 to Kharak Singh is noteworthy. Over these ensuing thirteen years, at least in Kharak Singh the classical positivism seems to be relaxing its grip.

The observation of the Supreme Court in *State of Rajasthan* v. *Vidyawati*[28] holding the sovereign liable for the tortious act committed by its employee during its employment was significant as it raises question upon Austinian concept of sovereign. Austinian sovereign does not take into account separation of power of the sovereign. Austin's sovereign is a composit whole not in the habit of obeying anyone, not even a

[28] State of Rajasthan v. Vidhyawati AIR 1962 SC 933.

like sovereign or politically inferior body. Therefore, the judgment in *Rajasthan* v. *Vidyawati*[29] is significant on few accounts-

a. It raises question on the nature of the sovereignas-
    i. Is the sovereign a composite whole?
    ii. Is separation of power contemplated in the Austinian concept of sovereign?
    iii. If separation of power is accepted in Austinian idea of a sovereign, then is one part of the sovereign is bound to obey or can disagree with the other parts?
b. The judgment made the sovereign accountable for its action to the citizens who are considered inferior to it politically.

This case was perhaps the first case in India which ushered the school of realism in India.[30] Realists avoid dogmatic formulation of law and concentrate on judgments delivered not only on the basis of formal law but also on the human factor of judge and the lawyer. Like positivism the realism also is concerned about the expression of law. While the positivists argue that law is expression of the Parliament or the King, the realists argue that the law is expression by the judges. The judgment in *State of Rajasthan* v. *Vidyawati*[31] holding the sovereign liable for tortuous activity marks the transformation in the Indian legal system. Therefore, the Constitution becomes what the Court says it is. This development took place automatically due to open texture of

[29] *State of Rajasthan* v. *Vidhyawati* AIR 1962 SC 933.

[30] Realism has various versions of it. As Dias mentioned American Realism is combination of both the analytical positivist and sociological approach. It is positivist because it considers law as it is. However, thinks that the ultimate aim of the law should be 'Reform'. Practising lawyers and judges in America advocated for American Realism and according to them social factors play important role in reformation of law.

There are two significant schools of Realism. These are-

i. American Realism.
ii. Scandinavian Realism.

Salient features of American Realism-

a. Judges make the law,
b. Judges are substantially constrained in the judicial process by the social and institutional context in which they act and find the law.

Salient features of Scandinavian Realism-

a. Law can not be explained by physical facts alone,
b. It also exists in psychological effects caused by certain facts,
c. It is opposed to metaphysical speculations,
d. It is more concerned with general investigation of the fundamental facts of legal system.

[31] *State of Rajasthan* v. *Vidhyawati* AIR 1962 SC 933.

the legal system. Therefore, law was started to be used as a tool of social transformation for creating new social order with primacy to social justice. R.W.M. Dias observed that *philosophy of analytical positivism was easier to preserve in country like Britain which had comparatively been stable where the law could be abstracted from social, moral and other value considerations. However, when tensions began to convulse the very surface of national life, jurists, let alone judges, has to make conscious decisions at which way to steer if shipwreck to be avoided.*

In *Kasturilal Ralia Ram Jain* v. *State of Uttar Pradesh*[32] the State was not held liable for the alleged tortious act committed by its employee. The observation made by the court was that in order to make the State liable for tortious act committed by its employee it had to be proved that the act so committed could be referable to the power so delegated by the Sovereign. Though the Sovereign in this case was found not liable, but the Court did not deny Sovereign's liability in a case where it could be referable to the power so delegated by the sovereign.

In A.K. Gopalan Case Kania C.J. had observed that the Constitution can not be interpreted basing upon the abstract idea such as 'spirit of the constitution'. Post *State of Rajasthan* v. *Vidyawati* case the Indian judiciary seemed to consider 'spirit of the constitution' while interpreting the questions involving constitutional matters. In *Kameshwar* v. *State of Bihar*[33] it was observed that the Constitution must be interpreted as it is laid down by Justice Mahajan.[34] Observation in Vidyawati case in 1962 was significant as it ushered the concept of reformation of positive law through liberal interpretation of the Constitution and/ or an enactment in Indian legal philosophy. But Vidyawati v. state of Rajasthan was five judges Bench as against A.K. Goapalan which was a Six judges Bench.so in essence the philosophy laid down in A.K. Gopalan prevailed. However, in contrast to Vidyawati case *Kasturilal* v. *State of U.P.* stood in affirmation with thoughts with A.K. Gopalan.

In *Sajjan Singh* v. *Union of India*[35] the Constitution (Seventeenth Amendment) Act, 1964 was challenged and the issue of the ambit of 'law' under article 13 (2) again came up. The Constitution (Seventeenth Amendment) Act, 1964 was challenged

[32] *Kasturi Ralia Ram Jain* v. *State of Uttar Pradesh* AIR 1965 SC 1039.
[33] *State of Bihar* v. *Kameshwar* AIR 1952 SC 252
[34] M. P. Jain, Indian Constitutional Law 1628 (Lexis Nexis, Haryana, Seventh Edition, Reprint, 2014).
[35] *Sajjan Singh* v. *Union of India* AIR 1965 SC 845.

because it placed some Acts under the IXth Schedule which amounted to violation of fundamental rights. This case was presided over by the constitutional bench of 5 judges i.e. the then Hon'ble Chief Justice of India Gajendragadkar, Wanchoo J., Raghubir Dayal J., Hidayatullah j., and Mudholkar J.

In the judgment Gandregadkar, for himself and Wanchoo J., and Raghubir Dayal J., approved that the fundamental rights were not meant to be final and immutable. Thus, any amendment to the fundamental rights could not be brought under the purview of article 13(2) of the Constitution of India.

Mudholkar J., stated that 'since we have chosen to live under a written Constitution that accords paramount importance to the citizens of our country. It would be of critical importance for us to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time, or at least for the foreseeable future, or whether the yard no more enduring than the implemental and subordinate provisions of the Constitution'. Hidayatullah J., and Mudholkar J., both were of the view that amended laws must also be included within the ambit of 'law' under article 13 (2) of the Constitution.

In Sajjan Singh's case the Constitutional Bench in 3:2 decided that the parliament under article 368 has the absolute power to amend the Constitution including fundamental rights guaranteed under part III. In this judgment the Parliament emerges as a composite whole of the sovereign. However, there appears to be a shift from Sajjan Singh in 1965 to Golaknath in 1967.

Golak Nath v. *State of Punjab*[36] was a significant case regarding the extent of amending power of the parliament. Punjab government enacted Punjab Security of Land Tenures Act imposing maximum ceiling limit on holding lands per individual. This Act was also placed in IXth Schedule thereby providing it immunity from judicial review. The petitioner challenged the Act and contended that imposition of maximum ceiling limit on holding of lands amounted to violation of his right to hold property and right to practice any profession guaranteed under Article 19 (1) (f) and 19 (1) (g) respectively. The issue involved in this case was whether fundamental rights guaranteed under part III of the Constitution could be abridged by way of amendment under Article 368 of the Constitution of India.

[36] *Golak Nath* v. *State of Punjab* AIR 1967 SC 1643

This case was presided over by eleven judges Bench with K. Subba Rao J. being the Chief Justice. The other judges were C. A. Vaidialingam J., G.K. Mitter J., J.C. Shah J., J.M. Shelat J., K.N. Wanchoo J., M. Hidayatullah J., R.S. Bachawat J., S. M. Sikri J., V. Bhargava J., and Ramaswamy J. Chief Justice K. Subba Rao equated fundamental right with that of natural rights and characterised it as primordial rights necessary for the development of human personality. Another significant observation made in this case was that Article 368 of the Constitution of India merely stated the procedure of amending the Constitution and did not bestow any power upon the parliament to abridge fundamental right by way of amendment. The power to amend the Constitution was to be found in the residuary legislative power of the parliament contained in Article 248 of the Constitution. Therefore, the power to amend the Constitution was not expressly conferred upon the parliament till the delivery of the judgment in Golaknath case.

Debate on amendment procedure in the Constituent Assembly on 17th September, 1949 showed that the intention of the framers was to facilitate the amendment procedure of the Constitution of India as the Assembly was aware that despite taking much caution there might be questions regarding some Articles in future[37]. The framers of the Constitution only discussed the modalities and the requisite majority for amending any article of the Constitution. However, insertion of IXth schedule and making it immune to judicial review by virtue of 1st Amendment to the Constitution of India in 1951 contemplated by the framers and it did not reflect the intention of framers of the Constitution. The very object of the 1st Constitutional Amendment was

[37] P.S. Desmukh, member of Constituent Assembly, on the Amendability of the Constitution of India on 17th September, 2019

I feel that at any rate for some time to come it would be necessary to amend the Constitution in many particulars. Though we have spent many months making the Constitution, there are still many defects in it. There are contradictory provisions in some places which will be more and more apparent when the provisions are interpreted. Therefore, if we do not make it easy for amendments to be affected the whole administration will suffer. As I said in the beginning, if you do not provide outlets it might lead to, the whole, Constitution being rejected or not being accepted by future Parliaments and their resorting to something much more drastic and radical if we do not allow them chances to mould the future of this country in their own ways, by simplifying the procedure by amendments, they will have no alternative left but to go the whole hog and reject the Constitution as a whole. In such a situation it is the State that will suffer. Therefore it is better to provide outlets so that any dissatisfaction with any Provision in the Constitution may easily be cured. We should not allow complaints and dissatisfaction to grow to such a pitch as will result in dislocating the administration of the State.

to remove landlordism. Nonetheless the process of the insertion and immunisation of IX[th] schedule in the Constitution were reflective of Austinian Sovereignty[38].

It was observed in Golaknath case[39] that 'law' under Article 13(2) of the Constitution of India includes both general law and constitutional law. This meaning of 'law' as understood was exactly opposite to the meaning of 'law' as observed in Shankari Prasad v. Union of India case[40]. However, in Golaknath case five judges K.N. wanchoo J., R.S. Bachawat J., V. Ramaswami J., V. Bhargava J., and G.K. Mitter held the dissenting view and stated that 'law' under Article 13(2) did not include amendment laws.

Six judges (majority of judges) ruled the definition of 'law' keeping with A.K. Gopalan but the other five judges differed.

The majority view of Subba Rao J., J.C. shah J., Shelat J., Sikri J., Vaidalingam J., and Hidayatullah J. in Golaknath case held two impugned Acts namely Punjab Security of Land Tenures Act, 1953 and Mysore Land Reforms Act, 1962 as constitutionaly valid because these two were protected under Article 31 A[41] of the

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[38] Law in Analytical Positivism-

a. Emanates from superior authority,
b. This superior authority is not in a habit of obeying like superior,
c. Sanction is imposed in case of disobedience of the command of the superior political being by the inferior political being.

[39] *Golaknath* v. *State of Punjab* AIR 1967 SC 1643.

[40] *Shankari Prasad Singh Deo* v. *Union of India* AIR 1951 SC 458.

[41] Article 31A in The Constitution Of India 1949

31A. Saving of laws providing for acquisition of estates, etc (1) Notwithstanding anything contained in Article 13, no law providing for

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19: Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent: Provided further that where any law makes any provision for the

Constitution of India and received the President's assent. Nonetheless the Constitutional (Seventeenth Amendment) Act, 1964 was declared void because it did not follow the procedure for amendment as laid down in Article 368 of the Constitution of India[42]. Thus the decision to declare amendment void was due to its procedural shortcomings and not because of its substance.

Almost in the same time frame of Sajjan Singh's case (1965) and I.C. Golaknath case (1967) the Supreme Court of India was articulating on another plane in its judgments in judgments in *Balaji* v. *State of Mysore*[43], *T. Devadasan* v. *Union of India*[44]. In *Balaji* v. *State of Mysore* (1963) the newly inserted Article 15 (4) was examined. The government of Mysore had issued a governmental order wherein backward classes were identified exclusively on the basis of caste and in *T. Devadasan* v. *Union of India* (1964) the scope of Article 16 (4) was challenged. The 'carry forward' rule made by the government to regulate appointment of backward classes in government services formed the subject matter of challenge. These are two parallel events in legal history, on one hand in Sajjan Singh case (1965) to I.C. Golaknath case (1967) the Supreme Court was labouring to determine the scope of the expression 'Law under Article 13', on the other hand, almost simultaneously in Balaji (1963) and Devadasan (1964) the Supreme Court was fixing 'the scope of law' in social context. While this can not be stated as a clear instance of paradigm shift it certainly is an early indication that the Supreme Court was trying to break free from classical analytical school of thought. The case of Champakam Dorairajan (1951) had addressed the issue of reservation and held that reservation was in violation of Article 16 (2) of the Constitution of India.

In *Balaji* v. *State of Mysore* a government order issued by the State of Mysore in 1962 reserving 68% seats in medical, engineering and other technical institutions for backward classes and scheduled tribes was in question. The rest 32% seats were to be

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acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

[42] Ratification by the Legislature by not less than one half of the States was prerequisite since the amendment was to effect the land laws of concerned States.

[43] *Balaji* v. *State of Mysore* AIR 1963 SC 649

[44] *T. Devadasan* v. *Union of India* AIR 1964 SC 179.

filled in on the basis of merit of candidates. In this backdrop it is also pertinent to mention that in 1958 the State of Mysore issued an order declaring all communities except Brahmins within the State as socially and educationally backward class. 75% seats were reserved for scheduled castes and scheduled tribes in educational institutions. After the order of reservation upto 68% in professional courses 23 petitioners filed a case under Article 32 of the Constitution of India before the Supreme Court against the impugned order. This case was presided over by 5 judges i.e. Bhuvneshwar P. Sinha C.J., P.B. Gajendragadkar J., K.N. Wanchoo J., K.C. Dasgupta J., J.C. Shah. In this case the court attempted to impose a constitutional limit on the preference for reservation. It was observed by the Bench that reservation must be done for advancement of socially and educationally backward classes and must not be in conflict with the interests of unreserved categories. It was also observed that a formula must be evolved which would strike a balance between several competing interests.

However, the Indian legal philosophy is still in confusion regarding the nature of sovereign in India and the extent of the power of sovereign in India. In Vidyawati and I. C. Golaknath efforts were made to provide a different view of sovereign power from that of the existing one. However, the majority decision in I.C. Golaknath (majority view of 6 judges led by Subba Rao C.J.) only leaves us with more confusion. The majority decision in I.C. Golaknath observed that 'law' for the purpose of Article 13 of the constitution of India includes both the laws enacted in the exercise of legislative power and constituent power. However, 6 judges Bench in A.K. Gopalan has observed exactly the opposite and kept constitutional amendments out of the purview of Article 13 of the Constitution of India. The majority decision (R. S. Bachawat J. & V. Ramaswamy dissenting) observed that article 368 merely prescribes the procedure for amending the Constitutional provisions and not the power of parliament to amend the Constitution.

In such situation the 24th Constitutional Amendment is introduced in 1969. This amendment is a repercussion of the decision of Golaknath case where it has been stated that Article 368 of the Constitution of India lays down only the procedure for amendment and not the power of parliament to amend the Constitution. The following phrases were inserted in Article 368 of the constitution of India

a. The Title of Article 368 i.e. 'Procedure for amendment of the Constitution' was substituted by 'Power of Parliament to amend the Constitution and procedure therefore'.
b. Insertion of article 368 (1) i.e. notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in this Article.
c. Article 368 was renumbered as Article 368 (2).
d. Insertion of Article 368 (3) i.e. nothing in article 13 shall apply to any amendment made under this article.

This clearly shows that Parliament has the power to undo the judicial decision, hence more powerful than the judiciary. It must be noted that in *Vidyawati* v. *State of Rajasthan* (1962) the judiciary had held the State vicariously liable where it emerged that the sovereign would abide by the decision of the judiciary. Post *I.C. Golaknath* v. *Union of India* (1967) the Parliament in supercession of the judgment amended the Article 368 of the Constitution by the Constitution (Twenty Fourth Amendment) Act, 1971 clearly indicating that the Parliament had the power to undo the decision of the judiciary.

Clearly there was a conflict in the minds of the judges and the legislature regarding the scope and limitation of the powers of the sovereign in India had to continue itself to the classical analytical school of thought. Significantly almost simultaneously starting with Champakam Dorairajan social concerns were also rising begging to define the scope and limitation of the sovereign in the social, political and economic context. Therefore, the period 1951-1971 saw an attempt to define the scope and power of the sovereign on one hand and to contain, curb or limit the power of the sovereign on the other hand. In this backdrop it is also relevant to mention that still the Indian Judiciary was of the view that Article 14, 19 and Article 21 of the Constitution of India were mutually exclusive. The relation between these three Articles was not questioned after A.K. Gopalan case till I.C. Golaknath case.

It is worthwhile to note that country was ruled by the congress from 1947 to 1964 under the able leadership of Pandit Jawaharlal Naehru. Nehru and Congress were influenced by the English jurisprudence. Thus the strong hold of analytical school of

thought was very evident in the time frame of 1947-1964. Though Gulzarilal Nanda, an economist specialised in labour issues, succeded Jawaharlal Nehru in 1964, understandably not much change in the jurisprudential thoughts was evinced during the short stint of his Prime Ministership. Lal Bahadur Shastry became the Prime Minister in June 1964. He had a strong allegiance to the Congress philosophy, hence not much change was seen during his leadership from 1964-1966. He continued with Gandhi-Nehruvian legacy. During this period the judiciary appeared to grapple with the analytical philosophy on one hand and the socio economic demands of the time on the other hand.

Indira Gandhi served as Prime Minister from 1960 to 1977 in the first phase and 1980 to 1984 in the second phase. She too belonged to the Gandhi- Nehruvian school. She is known for her political intransigency and unprecedented centralisation of power. 1975 marks the end of an era and the beginning of another as emergency was declared during this period. One instance of Mrs. Gandhi inclination towards centralisation of power is the nationalisation of banks in India.

R.C. Cooper v. *Union of India*[45] is popularly known as bank nationalisation case where the question was regarding the constitutional validity of Banking Companies (Acquisition and Transfer of Undertakings) Act 1969. This Act was enacted by the Government of India in order to nationalise all the commercial banks in India. The petitioner i.e. R.C. Cooper contended that the legislation for nationalisation of banks amounted to violation of fundamental rights guaranteed under Article 19 (1) (g)[46] of the Constitution of India. It was contended on behalf of the government that the acquisition of commercial banks would not be without paying compensation to the owners of such banks. Moreover, it was also contended that such acquisition was done for welfare purposes and to stop accumulation of wealth in the hands of few. This case was presided over by 11 judges i.e. J.C. Shah J., S.M. Sikri J., J.M. Shelat J., Vishishtha Bhargava J., G.K. Mitter J., C.A. Vaidyialingam J., K.S. Hegde J., A.N. Grover J., A.N. Ray J., Jagmohan P. Reddy J., I. D. Dua J.

In this case the majority decision was given by 10 judges (J.C. Shah J., S.M. Sikri J., J.M. Shelat J., Vishishtha Bhargava J., G.K. Mitter J., C.A. Vaidyialingam J., K.S.

[45] *R.C. Cooper* v. *Union of India* AIR 1970 SC 564.

[46] Article 19 (1) (g) of the Constitution of India guarantees right to profess, or to carry on any occupation, trade or business.

Hegde J., A.N. Grover J., Jagmohan P. Reddy J., I. D. Dua J.) and the dissenting view was delivered by Justice A.N. Ray. One of the legal contributions of this case was that it overruled the 'mutual exclusive' theory as propounded in A.K. Gopalan case. The petitioner i.e. R. C. Cooper contended that the impugned Act, also a result of an Ordinance, was violative of article 14, 19 and 31[47] of the Constitution of India. The observations made by majority judges were-

a. Mutual exclusive theory of fundamental rights as propounded in A.K. Gopalan case could not be held valid at all in this case as the impugned Act was not only violative of Article 31 of the Constitution of India but also violated other rights of the petitioner guaranteed under Part III of the Constitution of India.
b. On the issue of *locus standi* of the petitioner the majority view was that the petitioner has filed the suit because the impugned Act violated fundamental rights of petitioner guaranteed under Part III of the Constitution of India. Therefore, even though the impugned Act was about acquisition of assets of commercial banks it effected the rights of petitioner adversely.

Thus, the majority decision declared the impugned Act unconstitutional and the method of determining the compensation was also declared arbitrary. R.C. Cooper case brought a significance change in Indian legal philosophy by nullifying the mutual exclusive theory as stated in A.K. Gopalan case in 1950. However, the Bench accepted the contention of the Union government regarding nationalisation of banks in furtherance of applying concept of welfare state. The Bench found that there was no enough factor in support of the Ordinance so promulgated by the President and held the impugned Act unconstitutional. The Act was declared unconstitutional because it was born of an ordinance but the purpose for such nationalisation was accepted by the courts. This action by the government may be termed utilitarian as it was expected to produce greatest happiness of the greatest number. In order to undo the damage resulting from declaring the impugned Act unconstitutional the Constitutional (Twenty Fifth Amendment) Act was passed in 1971.

Twenty Fifth amendment to the Constitution of India in 1971 was followed after the decision of R.C. Cooper case. The twenty-fifth amendment substituted the word 'compensation' with 'amount' in Article 31 of the Constitution of India which, before

[47] Article 31 of the Constitution of India is now repealed.

being repealed, dealt with payment of compensation in acquisition and requisition of properties by the government. Article 31-C was inserted which laid down that a law giving effect to the state policy towards securing directive principles contained article 39 (b) or (c) would not be held void because of its inconsistency with article 14, 19 and 31. Any law enacted to give effect to directive principles of state policy towards securing directive principles is also made immune from being challenged before the court of law.[48]

Twenty-Fifth Amendment, 1971 was a step backward after the Indian judiciary took a step forward in R.C. Cooper case.

A.K. Kraipak v. *Union of India*.[49] a notification of selection for Indian Forest Services was announced. A Selection Committee was constituted for interviewing the candidates. It was later on found out that the selected candidate was the Acting Chief Conservator of Forest of a State and was one of the members of the Selection Committee. The action of the Committee and the selection of the candidate was challenged on the ground that a candidate himself could not be judge of his own interview. It was contended by the appellant, A.K. Kraipak, that the selection was made unanimously and there were other members in the Selection Committee. This case was heard by five judges Bench of the Supreme Court of India comprising of M. Hidayatulla C.J., J.M. Shelat J., Vishishtha Bhargava J., K.S. Hegde J., and A.N. Grover J. The judgment was delivered by Justice K.S. Hegde (for himself and on behalf of other four judges). The Bench observed that until recently the principle of natural justice did not apply to administrative discretion unless the administrative authority was required to act judicially under any specific enactment. The purpose of application of principle of natural justice was to prevent miscarriage of justice, therefore, the Bench did not find any reason to not apply principle of natural justice to administrative discretion. There is a thin line difference between administrative enquiry and quasi-judicial enquiry. The consequence in administrative enquiry was far reaching. Therefore, the Bench observed that which particular principle of natural law would apply in a given case would vary from case to case.

[48] M.P. Jain, Indian Constitutional Law 1710, (Lexis Nexis, Haryana, Seventh Edition, 2014)
[49] *A.K. Kraipak* v. *Union of India* AIR 1970 SC 150.

The Bench observed that the selection was made by the Union Public service Commission (U.P.S.C.) and the Selection Committee only sent recommendations. Despite this arrangement the Bench stated that the possibility of bias could not be ruled out because the candidate was present in the Selection Committee and might have had influence upon other members. The Bench in this case brought administrative decision under judicial review. The presence of the appellant in the Selection Committee and as a Candidate vitiated the whole procedure.

Twenty- Ninth Amendment, 1972 inserted two Kerala Acts dealing with land reforms in IXth schedule and made them immune. The legal contribution of *Kesavananda Bharti* v. *State of Kerala*[50] was the introduction of the concept of 'Basic Structure' in the legal system of India. This case was presided over by 13 judges Bench consisting of S.M. Sikri C.J., A.N. Grover J., A.N. Ray J., D. G. Palekar J., H.R. Khanna J., J.M. Shelat J., K.K. Mathew J., K.S. Hegde J., M.H. Beg J., P. Jagmohan Reddy J., S. N. Dwivedi J., Y.V. Chandrachud J., & S.N. Mukherjea J.

In this case the 24th, 25th and 29th Amendments to the Constitution of India were challenged. This case is significant because it was the first case where these three amendments were challenged and the extent of the power of parliament to alter the nature of the Constitution of India was in question. While dealing with this case the Bench interpreted the judgment of Golaknath case again and gave the concept of 'Basic Structure'. In Kesavananda Bharti case Hon'ble Chief Justice S.M. Sikri observed that despite previous cases and several confusion as to the amending power of parliament the main issue in this case was to decide the extent of power of parliament in amending the Constitution of India under article 368.

It was Justice Mudholkar who observed in Sajjan Singh v. State of Rajasthan for the first time mentioned about 'basic feature' of the Constitution which can not be altered. After Sajjan Singh's case in Kesavananda Bharti the oncept of 'basic feature' resurfaced and came to be known as 'basic structure' of the Constitution.

Observation made by S.M. Sikri C.J., in the context of meaning and nature of amendment in article 368 of the Constitution mentioned '*According to Mr. Seervai, the power of amendment given by Article 4, read with Articles 2 and 3, Article 169, Fifth Schedule and Sixth Schedule, is a limited power limited to certain provisions of*

[50] *Kesavananda Bharti* v. *State of Kerala* AIR 1973 SC 1461.

the Constitution, while the power under Article 368 is not limited. It is true every provision is prima facie amendable under Article 368 but this does not solve the problem before us.' The court held that the power to amend the Constitution is to be found in article 368 of the Constitution of India. It was emphasized that the 'provisions relating to the amendment of the Constitution are some of the most important features of any modern Constitution.'[51]

All the thirteen judges held that 24th, 25th and 29th Amendment Acts were valid. Ten judges held that Golaknath's case was wrongly decided and amendment to the Constitution was not 'law' for the purpose of article 13 of the Constitution of India. Hegde and S.N. Mukherjea JJ., observed that it could not be possible that the Constitution-makers had left the important power to amend the Constitution hidden in Parliament's residuary power. Therefore, the views expressed in Shankari Prasad and Sajjan Sing's case regarding the amending power of parliament were endorsed and the view expressed in Golaknath's case i.e. the amending power of parliament is not found in article 368 was overruled. Both of them also observed that there is a distinction between law and constitutional law in context of article 13. Therefore, in article 13 the expression 'law' is used as enacted law and it does not include Constitutional law.

Seven judges held that power to amend the Constitution is a plenary power of parliament and fundamental rights can also be amended under article 368 of the Constitution of India. However, Kesavananda Bharti case does not concede an unlimited power to the parliament to amend the Constitution. The amending power of the parliament is subject to a qualification named as 'Basic Structure'. Seven judges A.N. Grover J., H.R. Khanna J., J.M. Shelat J., K.S. Hegde J., P. Jagmohan Reddy J., B.K. Mukherjea J., led by Hon'ble Chief Justice S. M. Sikri observed that the power of parliament to amend the Constitution does not allow it to alter the basic structure of the Constitution. However, six judges D.G. Palekar J., K.K. Mathew J., M.H. Beg J., S.N. Dwivedi J., Y.V. Chandrachud j., led by A.N. Ray J., refused to conform to any such idea as to 'basic structure' of the Constitution of India.

While deciding the constitutional validity of 29th Amendment to the Constitution A.N. Grover J., J.M. Shelat J., K.S. Hegde J., P. Jagmohan Reddy J., B.K. Mukherjea J., led

[51] M.P. Jain, M.P. Jain, *Indian Constitutional Law* 1677, (Lexis Nexis, Haryana, 2014)

by Hon'ble Chief Justice S. M. Sikri observed that the inclusion of two Acts in 9th schedule through 29th Amendment is constitutional only if it does not violate fundamental rights. However, D.G. Palekar J., K.K. Mathew J., M.H. Beg J., S.N. Dwivedi J., Y.V. Chandrachud j., and A.N. Ray J. unconditionally accepted the constitutionality of 29th Amendment Act. Justice H. R, Khanna joined the group led by Justice A.N. Ray and upheld the constitutionality of 29th amendment unconditionally. This situation gave rise to an ambivalence.[52] However, the significant contribution of Kesavananda Bharti case is invention of the term 'Basic Structure'.

Chief Justice S. M. Sikri writing for majority indicated that the Basic Structure was:

a. The supremacy of the Constitution,
b. A republican and democratic form of Government,
c. The secular character of the Constitution,
d. Maintenance of the separation of powers,
e. The federal character of the Constitution,

Justice Shetal and Grover added three features to this list, and these are:

a. The mandate to build a welfare state contained in the Directive Principles of State Policy,
b. Maintenance of unity and integrity of India,
c. The Sovereignty of country.

Justice Hegde and Mukherjea provided a separate list of basic structures, and these are:

a. The sovereignty of India,
b. The democratic character of the polity,
c. The unity of the country,
d. Essential features of individual freedoms,
e. The mandate to build a welfare State.

Justice Reddy stated that basic structure of the Constitution was laid out by the Preamble and therefore could be represented by

a. A sovereign democratic republic,

[52] Virendra Kumar, Basic Structure of the Indian Constitution: Doctrine of the Constitutionally Controlled Governance, 49 (3), JILI, 365-398 (2007).

b. The provision of social, economic and political justice,
c. Liberty of the right, expression, belief, faith and worship,
d. Equality of status and opportunity.

Therefore, in Kesavananda Bharti case the court by majority of 7:6 held that the parliament had wide powers to amend the whole of the Constitution. Nonetheless, this case also established the principle that the parliament can not alter the basic structure by way of amending the Constitution.

Kesavananda Bharti case was in short defining the power of the sovereign. While conceding almost an absolute power on the sovereign, it imposed, so to say, a reasonable restriction on the power of the sovereign by mentioning what is today known as the basic structure doctrine. The struggle for supremacy is very clear. The Parliament under the Prime Ministership of Mrs. Indira Gandhi was struggling to concentrate all power in the sovereign. It is remarkable how the Supreme Court struck a balance and prevented the sovereign from assuming the all pervading arbitrary powers. History is witness to the fact that the judgment did not go down well for the powers that be. Some sociological aspects emerged as the by product of the case (judgment) but that did not catch the attention of the nature as it should have at this juncture. But what is significant is that the Supreme Court of India signified a shift from strict classical analytical positivist thought. Kesavananda Bharti case may rightly be acclaimed as sowing the seeds of a paradigm shift in the Indian legal philosophy.

After Kesavananda Bharti decision the concept of "Basic Structure' (which was started with Sajjan Singh's case) was then clarified. The influence of classical positivism in Indian legal system was seemed to be diminishing. However, another turn of event ceased the course for a while. One of the significant cases in India, i.e. Raj Narain accusing Indira Gandhi of election malpractices, halted the transformation of Indian legal system from classical positivism for a while.

On 24th April, 1971 Raj Narain, a leader of opposition in election, filed a petition before the High Court of Allahabad accusing Mrs. Indira Gandhi of abusing her power during election. The petition was listed before Justice W. Broom. The petition was heard by Justice B.N. Lokur for a while following the retirement of Justice W. Broom. On retirement of Justice B.N. Lokur the matter was then taken up by Justice

K.N. Shrivastava. Justice Shrivastava retired in 1974 and the case finally was taken up by Justice Jag Mohan Lal Sinha. This year and the case became watershed because of its unique decision.

The issue before Justice Jag Mohan Lal Sinha was whether Mrs. Gandhi was accused of election malpractices. If she was found to have done so then her election as the Prime Minister would have been held unconstitutional. Mrs. Indira Gandhi was not the sovereign. The Parliament is the sovereign. Raj Narain did not challenge the validity of the Parliament but the win of Mrs. Gandhi as an individual.

In *Kanwar Lal Gupta* v. *Amar Nath Chawla*[53] Supreme Court Bench composed of P.N. Bhagwati J., and Srakaria J., gave a far-fetched decision. This case was also instituted challenging excess expenditure incurred by friends and family members in connection with the election of the candidate. It was laid down that expenditure incurred by any person with the consent or acquiescence of a candidate, or any expenditure of which the candidate takes advantage or fails to disavow, shall be treated as expenditure impliedly authorized by the candidate must be included in his/her return of election expenses,[54]This decision was referred by Jagmohan Lal Sinha in Raj Narain v. Indira Gandhi[55].

Immediately after the decision in Chawla's case an Ordinance[56] was promulgated by the government led by Mrs. Indira Gandhi amending the law on election expenses retrospectively. This act was to nullify the decision of Chawla's case. This amendment further added an explanation to the relevant section of the Representative of People's Act regarding election expenses.

On 12th June, 1975 Justice Jag Mohan Lal Sinha of Allahabad High Court delivered the historic judgment. Justice Sinha found Mrs. Gandhi guilty of election malpractices and had been convicted on two charges-

a. That she had procured the assistance of the District Magistrate and Superintendent of Police by getting rostrums constructed and loudspeakers installed for her election meetings, and

[53] Kanwar Lal Gupta v. Amar Nath Chawla AIR 1975 SC 308

[54] Prashant Bhushan, *The Case that Shook India*, 17 (Penguin Books, Gurgaon, 2018)

[55] *Raj Narain* v. *Indira Gandhi*

[56] Ordinance is law which can be passed by the executive when the Parliament is not in session. It has to be ratified by Parliament within six months or it lapses.

b. That she had procured the assistance from Yashpal Kapoor while he was still a gazetted officer in the service of the government.

On 23rd June, 1975 Mrs. Gandhi filed an appeal against the order of the Allahabad High Court and a petition for extension of absolute and unconditional stay upon the High Court Judgment until the Supreme Court delivers its judgment.

Appeal filed by Mrs. Indira Gandhi was heard by a Constitutional Bench composed of five judges i.e. A.N. Ray C.J.I., H.R. Khanna J., K.K. Mathew J., M.H. Beg, Y.V. Chandrachud. In this appeal the inclusion of Election Laws Amendment Act, 1975 and the Representation of People Amendment Act, 1974 in the Ninth Schedule of the Constitution of India was challenged[57].This case was decided on 7th November, 1975 by 4:1 majority. Justice K.K. Mathew upheld the decision of Allahabad High Court. Other four judges upheld the validity of election of Mrs. Gandhi by reversing the judgment delivered by Justice Sinha.

State of Uttar Pradesh v. *Raj Narain*[58] brought to the forefront Mrs. Indira Gandhi's machination to stay in power. When she found herself losing the case she led the Parliament to impose emergency in India. This was a wake up call to alert on the dangers of the sovereign centralising all powers and by virtue of such all encompassing powers, acting arbitrarily Emergency was proclaimed on 25th June, 1975.

After the judgment by Justice Sinha of Allahabad High Court finding Mrs. Gandhi guilty of election malpractices national emergency was proclaimed on 25th June, 1975. The emergency period was a period of fundamental rights violation, press censorship and deterioration of constitutional principles. Moreover, individual's right to move the High Court under Article 226 of the Constitution of India was also said to be suspended during the emergency period under the Presidential Order on 27th June, 1975.

Many opposition leaders and several people were detained during emergency under the Maintenance of Internal Security Act, 1971. These detenus filed petitions under

[57] The 39th Constitutional Amendment has changed the election laws and laws related to Representation of People Act in order to nullify the Allahabad High Court judgment and to validate the election of Mrs. Gandhi.

[58] *State of Uttar Pradesh* v. *Raj Narain* AIR 1975 SC 865.

article 226 before the High Courtfor writ of habeas corpus. The name of Additional District Magistrate of Jabalpur was Mr. Kiran Vijay Singh. He appealed against the order of Madhya Pradesh High Court in favour of detenu, Shivkant Shukla, by setting him free even after being detained under MISA, 1971. *A.D.M. Jabalpur* v. *Shivkant Shukla*[59] is the appeal filed by Mr. Kiran Vijay Singh before the Supreme Court of India. Issues involved in this case were-

a. Whether the writ petitions under article 226 of the Constitution was maintainable for enforcing the right to personal liberty during emergency declared under article 352 (1) of the Constitution of India?
b. What is the scope of judicial scrutiny of Presidential Order if these petitions are maintainable.

This case was presided over by Constitutional Bench of five judges composed of A.N. Ray C.J.I., H.R. Khanna J., M.H. Beg J., P.N. Bhagwati J., Y.V. Chandrachud J.

This case was decided by 4:1 majority having Justice H.R. Khanna dissenting. The majority in this case observed that-

In view of the Presidential Order dated 27th June, 1975 no person has any locus to move any writ petition under article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations.

A.N. Ray C.J.I., M.H. Beg J., P.N. Bhagwati J., Y.V. Chandrachud J declared that fundamental rights including right to personal life and liberty can be abrogated during emergency. The dissenting judgment given by H.R. Khanna J., is today considered the correct view and the best dissent in the history of Indian Judiciary.

The judgment in *A.D.M. Jabalpur* v. *Shivkant Shukla* was criticised as it brought back the concept of limited and/or restricted fundamental rights as given in A.K. Gopalan Case in 1950. In the A.D.M. Jabalpur case justice Khanna stated that laws of India do not permit life and liberty to be at the mercy of the absolute power of the executive. The rule of law was at stake. Should law speaking through the authority of courts be

[59] *A.D.M. Jabalpur* v. *Shivkant Shukla* 1976 (2) SCC 521.

silenced and rendered mute? Detention without trial is an anathema to all those who love personal liberty.

This judgment caused Justice Khanna to lose the Chief Justiceship of India. Justice Beg was appointed Chief Justice in his place. Justice Khanna resigned on the same date. Two important issues emerge from this-

i. When the sovereign is absolutely powerful, life and personal liberty do not find favour with it. More arbitrary power is exercised. In other word the right to life and personal liberty curtail the absolute power of the sovereign.
ii. As sovereign, striving to assume absolute power interferes with the independence of the judiciary and freedom of press. Such action shifts the voice of the opposition and the common man.

The analytical school of positivism is silent on this issue. According to this school of thought the sovereign has unlimited power. The school is silent on should the sovereign act arbitrarily and in violation of the rule of law, then how to contain such arbitrariness. Bentham makes a feeble attempt as it stating that there is a *pacta regalia* between the sovereign and the people. People delineate the boundary of sovereign actively (*lex Principem*) and the sovereign lay down laws for governance (*lex populem*). If the sovereign violates *lex principem* then people can overthrow the sovereign. As the cycle gets repeated a habit of obedience is formed. This was seen in operation when Mrs. Gandhi and Congress lost the election in 1977.

The Constitution (Forty Second Amendment) Act, 1976 took place during emergency and brought several changes in the Constitution of India. In the statement of objects and reasons of the Amendment Act, 1976 the Parliament mentioned that to cope up with changes in society the Constitution must evolve. Thus, this amendment was to remove any impediment in the way of the growth of the Constitution. This amendment has inserted three words in the Preamble i.e. Socialist, Secular and Integrity[60].

[60] The Constitution (Forty- Second Amendment) Act, 1976
Statement of Objects and Reasons
3. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be

This amendment endeavoured to increase the power of centre than the states, oust the jurisdiction of courts in large number of matters, increase emergency powers of the centre and to restrict the fundamental rights[61]. Because of these reasons the forty-second amendment was widely criticised. Rajeev Dhavan in his book 'Amendment: Conspiracy or Revolution' has gone far saying that Forty-Second amendment during the middle of emergency was to replace the parliamentary form of government to Presidential form of government in India.[62] On the basis of the report of Swaran Singh Committee in 1976 the Constitution of India was re-examined and altered to a great extent.

Another reason of criticising forty-second amendment was that it brought changes during the period of emergency which imposed restriction on press, exercise of fundamental rights by individual. The decision in *A.D.M. Jabalpur* v. *Shivkant Shukla* also added fuel to this discontent.

Following this discontent through out India Mrs. Gandhi had to take a decision to lift emergency. Finally emergency was lifted in March, 1977. The adverse effect of emergency and forty second amendment cost Mrs. Gandhi her Prime Ministership. In 1977 election Janata Part won and Morarji Desai became the Prime Minister of India.

The Janata Dal was heavily influenced by the philosophy of Jayprakash Narayan who was an activist, theorist, socialist and a political leader. He had called for a total revolution against the policies of the ruling party during the later half of 1970s. Desai had rigid puritan principles, deep rooted belief in Gandhian philosophy and strong religious beliefs. The task of undoing much of the wrong now befell on his aged shoulder.

Now, it became necessary to amend and alter those restrictive provisions inserted by virtue of forty second amendment to the Constitution of India. This led to the Constitution (Forty Fourth Amendment) Act, 1978.Forty fourth amendment Act altered several provisions inserted through forty-second amendment act. The proposal

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relied upon to frustrate socio-economic reforms for implementing the directive principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities, whether by individuals or associations.

[61] Rajeev Dhavan, Amending The Amendment: The Constitution (Forty-Fifth Amendment) Bill, 1978, 20(2), JILI, 249 (1978).

[62] Rajeev Dhavan, *Amendment: Conspiracy or Revolution*, (Wheeler Publication, Allahabad, 1978).

to restrict jurisdiction of High Courts by establishing tribunals were to be re-considered.[63]

Emergency in 1975 and 42nd Amendment to the Constitution were implications of returning of Austin's analytical positivism into the Indian legal system. India took several steps back with emergency after Kesavananda Bharti case decision. However, Maneka Gandhi v. Union of India opened a new avenue in the legal system of India.

In *Maneka Gandhi* v. *Union of India*[64] the issue was impounding of passport of Maneka Gandhi thereby restricting her movement outside India. This case was presided over by Seven judges Bench composed of M.H. Beg C.J.I., N.L. Untawali J., P.N. Bhagwati J., P.S. Kailasam J., A. Murtaza Fazl Ali J., V.R. Krishna Iyer J., Y.V. chandrachud J.

The petitioner, Maneka Gandhi, contended that impounding of her passport was not in accordance with the law and she was not given any opportunity to represent her side. This case is significant as it led the Bench re-consider the phrase 'except according to the procedure established by law' as stated in article 21 of the Constitution of India.

According to the decision in A.K. Gopalan in 1950 the 'procedure established by law' would mean law enacted by the sovereign and such law could not be subject to judicial scrutiny. However, from 1950 to 1978 India underwent several changes and each and every incident contributed to the development of the legal system in 1978. Moreover, the emergency of 1975 was another evidence of what it would be to have a sovereign with absolute unconditional power without being subject to judicial scrutiny. Thus, it became incumbent upon the Bench to deliver a judgment pertinent to the then political, economic and social condition of India.

The significant contribution of this case is the concept of 'Golden Triangle' of fundamental rights which was left untouched after A.K. Gopalan judgment. In A.K. Gopalan the Bench observed that the fundamental rights are not inclusive and therefore the violation of one fundamental right did not automatically amount to violation of another fundamental right. Hon'ble Chief Justice of India M.H. Beg observed along with Justice P.N. Bhagwati and Justice V. R. Krishna Iyer-

[63] S.P. Sathe, Forty-Fourth Constitutional Amendment,11(43), Economic and Political Weekly.
[64] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.

The correct ratio of A.K. Gopalan case should have been that Article 22 of the Constitution of India must be the complete code as to the procedural formalities in case of preventive detention. Any departure from the provisions of article 22 would be ultra vires to the Constitution.

Hon'ble Justice Beg also referred that had this Bench of Maneka Gandhi case dealt with A.K. Gopalan case then the outcome would have been somewhat different. Seconding Justice Mukherjea's view in A.K. Gopalan case Justice Beg stated-

Justice Mukherjea has considered concept of natural law given by Blackstone. It says that 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.

In support of the concept of 'natural right' Justice Beg also quoted Hon'ble Chief Justice Subba Rao's judgment in I.C. Golaknath case which laid down that *fundamental rights are the rights of people written down and protected by the Constitution. Fundamental rights are what traditionally known as natural rights*.

Y. V. Chandrachud in his judgment stated that-

a. In a situation where the law prescribes a procedure to be followed the procedure must be fair, just, reasonable and not fanciful, oppressive, arbitrary,
b. Fair, just and reasonable procedure for taking away fundamental rights is not the end of article 21 because a fair, just and reasonable procedure to take away fundamental rights can still possibly meet challenges under article 14 and 19 of the Constitution of India.

This observation of Y. V. Chandrachud J., formed the concept of 'Golden Triangle' where article 14, 19 and 21 are not exclusive.

According to Bhagwati J., impounding of passport of the petitioner by the passport authority 'in the interests of general public' is violative of right to equality as guaranteed under article 14 of the Constitution. He has also stated that the reason of impounding passport 'in the interest of general public' was vague.

Kailasam J., restriction by virtue of 'procedure established by law' under article 21 did not pose any restriction upon the fundamental rights of freedom of speech and expression, peaceful assembly, carry out any profession, reside and movement within the country as guaranteed under article 19 of the Constitution of India.

Opposing the view expressed by Kailasam J., Fazl Ali J., observed that liberty of an individual can be violated only through 'procedure established by law'. The rights guaranteed under article 19 (1) of the Constitution can only be violated for reasons enumerated under article 19 (2) to article 19 (6) of the Constitution. According to Fazl Ali J., the grounds restrictions of rights guaranteed under article 19 and article 21 may be different but violation of personal life and liberty indirectly imposes restriction upon free movement of an individual. Thus, rights guaranteed under article 19 and 21 are inclusive.

According to V.R. Krishna Iyer J., no Article in the Constitution pertaining to a Fundamental Right is an island in itself. Just as a man is not dissectible into separate limbs, cardinal rights in an organic constitution have a synthesis.

Though the Bench did not interfere with the impounding of passport and ruled in favour of the passport authority, but defect in the order of impounding passport was asked to be removed and to be made according to the procedure established by law.

The contribution of this case is that of overruling 6 judges Bench decision in A.K. Gopalan case. The 'mutual exclusive' theory as propounded in A.K. Gopalan case was nullified by R.C. Cooper case in 1970 and was further expanded in Maneka Gandhi v. Union of India case in 1978. Maneka Gandhi case is significant because in this case it was conformed that fundamental rights are natural rights inherent to an individual.

In Maneka Gandhi case Justice Beg, Justice Bhagwati and Justice Chandrachud upheld the inviolability of fundamental rights while these three judges in A.D.M. Jabalpur case in majority decision decided that during emergency right to personal life and liberty guaranteed under article 21 can also be abrogated.

Therefore, the period from 1950 to 1978 was a period of turbulence due to different interpretation to fundamental rights and the emergency which was finally settled by the principles laid down in *Maneka Gandhi* v. *Union of India* case.

It may be worth noting that this judgment came at a time when Janata Dal was on the treasury benches in the Parliament. By laying the Principle of mandatory adherence to the procedure established by law and the paramountcy of the fundamental rights the Supreme court succeded in limiting the power of the sovereign. The first phase of paradigm shift was complete.

Apart from the analysis of the evolution of the school of thought there is also another aspect of the school of thoughts based upon the voting pattern of judges and the trends that emerge from the type of judgments delivered by them. A study in this regard has been made by George H. Gadboi Junior in 'Indian Judicial Behaviour'.[65]

[65] George H. Gadboi Junior, Indian Judicial Behaviour, 5 (3/5) *Economic and Political Weekly*, 149-166 (1970).

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
1.	*A.K. Gopalan*v. *State of Madras(1950)*	FAZL ALI M.C. MAHAJAN		KANIA B.K. MUKHERJEA PATANJALI SHATRI S.R. DAS	
2.	*State of Madras* v.*ChampakamDorai rajan(1951)*	KANIA FAZL ALI M.C. MAHAJAN SHASTRI B.K. MUKHERJEA S.R. DAS VIVIAN BOSE			
3.	*Chiranjit Lal Chaudhury* v. *Union of India (1951)*		KANIA FAZL ALI MUKHERJEA DAS		SHASTRI
4.	*Shankari Prasad Deo* v. *Union of India*(1951)				KANIA PATANJALI SHASTRI MUKHERJEA S.R. DAS N.C. AIYAR

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
5.	*State of Madras* v. *V.G. Row (1952)*	PATANJALI SHASTRI M.C. MAHAJAN S.R. DAS N.C. AIYAR		B.K. MUKHERJEA	
6.	*State of Bihar* v. *Kameshwar Prasad Singh (1952)*				PATANJALI SHATRI M.C. MAHAJAN S.R. DAS B.K. MUKHERJEA N.C. AIYAR
7.	*State of Rajasthan* v.*Vidyawati (1962)*	B.P. SINHA J.C. SHAH J.L. KAPUR J.R. MUDHOLKAR M. HIDAYATULLAH			
8.	*Kharak Singh* v. *State of Uttar Pradesh (1963)*	B.P. SINHA S.J. IMAM J.C. SHAH J.R. MUDHOLKAR R.N. AYYANGAR (PARTIAL) K. SUBBA RAO (WHOLE SUPPORT.		B.P. SINHA S.J. IMAM J.C. SHAH J.R. MUDHOLKAR R.N. AYYANGAR (PARTIAL)	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
9.	*Balajiv. State of Mysore (1963)*	B.P. SINHA P.B. GAJENDRAGADKAR K.N. WANCHOO K.C. DASGUPTA J.C. SHAH (PARTIALLY)		B.P. SINHA P.B. GAJENDRAGADKAR K.N. WANCHOO K.C. DASGUPTA J.C. SHAH (PARTIALLY)	
10	*T. Devadasnv. Union of India (1964)*	J.R. MUDHOLKAR, S.R. DAS, K. SUBBARAO RAGHUBAR DAYAL N. RAJAGOPALA AYYANGAR,			.
11	*KasturilalRaila Ram Jain v. State of Uttar Pradesh(1965)*			GAJENDRAGADKAR WANCHOO RABHUBAR DAYAL HIDAYATULLAH MUDHOLKAR	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
12	*Sajjan Singh* v. *State of Rajasthan (1965)*	M. HIDAYATULLAH MUDHOLKAR		GAJENDRAGADKAR WANCHOO RAGHUBAR DAYAL	
13	*Golaknath*v. *State of Punjab (1967)*	K. SUBBA RAO J.C. SHAH J.M. SHELAT VAIDALINGAM HIDAYATULLAH SIKRI		G.K. MITTER K.N. WANCHOO R.S. BACHAWAT V. BHARGAVA RAMASWAMY	
14	*R.C. Cooper*v. *Union of India (1970)*		SHAH SIKRI SHELAT BHARGAVA MITTER VAIDYAILINGAM HEGDE A.N. GROVER JAGMOHAN P. REDDY I.D. DUA		A.N. RAY

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
15	*A.K. Kraipak*v. *Union of India (1970)*	M. HIDAYATULLAH J.M. SHELAT VISHISHTHA BHARGAVA K.S. HEGDE A.N. GROVER			
16	*Keshavananda Bharti*v. *State of Kerala (1973)*	A.N. GROVER SHELAT HEGDE JAGMOHAN REDDY B.K. MUKHERJEA SIKRI KHANNA (BASIC STRUCTURE DOCTRINE ONLY)		D.G. PALEKAR K.K. MATHEW M.H. BEG S.N. DWIVEDI Y.V. CHANDRACHUD A.N. RAY	
17	*KanwarLal Gupta* v. *Amar Nath Chawla (1975)*				P.N. BHAGWATI R.S. SARKARIA

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
18	*Indira Gandhi* v. *Raj Narain (1975)*		A.N. RAY H.R. KHANNA Y.V. CHANDRACHUD M.H. BEG		K.K. MATHEW
19	*A.D.M.. Jabalpur* v. *Shivkant Shukla (1976)*	H.R. KHANNA		A.N. RAY M.H. BEG P.N. BHAGWATI Y.V. CHANDRACHUD	
20	*Maneka Gandhi* v. *Union of India (1978)*	M.H. BEG N.L. UNTAWALIA P.N. BHAGWATI P.S. KAILASAM A. MURTAZA FAZL ALI V.R. KRISHNA IYER Y.V. CHANDRACHUD			

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr CLASSIFICATION IN THIS CHAPTER

CLASSICAL CONSERVATIVE	MODERN CONSERVATIVE	CLASSICAL LIBERAL	MODERN LIBERAL	AMBIVALENT
A.N. RAY	NOT FOUND ANY	SAIYID FAZL ALI	PATANJALI SHASTRI	H. KANIA
P.B. GAJENDRAGADKAR		M.C. MAHAJAN	N.C. AIYAR	S.R. DAS
K.N. WANCHOO		VIVIAN BOSE		S.J. IMAM
R.S. BACHAWAT		B.P. SINHA		K.C. DASGUPTA
RAGHUBAR DAYAL		J.C. SHAH		M.H. BEG
B.K. MUKHERJEA		MUDHOLKAR		
V. RAMASWAMI		N.R. AYAANGAR		
D.G. PALEKAR		K. SUBBA RAO		
K.K. MATHEW		J.L. KAPUR		
M.H. BEG		HIDAYATULLAH		
S.N. DWIVEDI		J.M. SHELAT		
R.S. SARKARIA		S.M. SIKRI		
BHARGAVA		JAGANMOHAN REDDY		
P.N. BHAGWATI		S.N. MUKHERJEE		
P.S. KAILASAM		H.R. KHANNA		
Y.V. CHANDRACHUD		G.K. MITTER		
		VAIDYAILINGAM		

		HEGDE		
		I.D. DUA		
		A.N. GROVER		
		N.L. UNTAWALIA		
		V.R. K. IYER		

George H. Gadboi in 'Indian Judicial Behaviour' made an exploratory study of the behavioural patterns of Supreme Court judges. He has made this study on the basis of interviews taken of Supreme Court judges during 1950 – 1967.[66]The present chapter covers the period 1950-1978. Hence, the study made by Gadboi Jr. is wholly relevant here. Gadboi has studied almost 3272 cases in order to make a comprehensive study of behavioural pattern of judges. However, for the purpose of this chapter a study of behavioural pattern of judges on the basis of cases analyzed in this chapter alone is done.In this article Gadboi has categorized judges in four categories namely modern liberal, modern conservative, classical liberal and classical conservative basing upon the individualistic behaviour of judges in non-unanimous judgments.

Modern Liberal- one whose voting behaviourreflects an antipathy towards deprivation of civil liberties but approves of regulation of economic liberty of an individual. In other words approves civil liberty and regulation of economic liberty.

Modern Conservative- one who condones restriction of civil liberties by the government but oppose to the economic regulation. That approves restriction of civil liberty but does not approve economic restriction.

Classical Liberal- one whose voting behaviour corresponds to the belief in freedom of individual's both his personal and property right.

Classical Conservative- judges whose voting behaviour suggest predisposition to upholding government's restriction upon both the individual right and property right.

George H. Gadboi Jr. in another article named Indian Supreme Court Judges: A Portrait[67] mentioned that from 1950-1967 judges in the Supreme Court were appointed from almost homogeneous background. Since, most of them shared common socialization experience they were likely to manifest this common background in similar attitudes and approaches in decision making. Gadboi has also mentioned that during 1950-1967 the number of dissenting judgments was very less. Judgment

[66] George H. Gadboi Jr., Indian Judicial Behaviour, 5 (3/5) *Economic and Political weekly* 149-166 (1970)

[67] George H. Gadboi Jr., Indian Supreme Court Judges: A Portrait 3 (2/3) *Law & Society Review*, 317-336 (Nov, 1968 to Feb, 1969)

delivered by Supreme Court during this period could be characterized mostly by unanimous single judgment.[68]

This categorization of cases during 1950-1967 is found to be true. In this Chapter 21 cases have been analyzed while 12 cases belong to the period of 1950-1967. These cases have been purposively chosen so that equal number of cases represent issues dealing with civil liberties and property rights.From amongst these 12 cases, cases dealing with civil liberties are-

- A.K. Gopalan v. State of Madras AIR 1950 SC 27
- State of Madras v. Chamkam dorairajan, C.R. Srinivasan AIR 1951 SC 226
- State of Madras v. V.G. Row AIR 1952 SC 196
- Kharak singh v. State of Uttar Pradesh AIR 1963 SC 1295
- State of Rajasthan v. Vidyawati AIR 1962 SC 933
- Kasturi Raila Ram Jain v. State of Uttar Pradesh AIR 1963 SC 1295

Cases dealing with property rights of individual are-

- Shankari Prasad Deo v. Union of India AIR 1951 SC 458
- Chiranjit Lal Chaudhuri v. Union of India AIR 1951 SC 41
- State of Bihar v. Kameshwar
- Sajjan Singh v. State of Rajasthan AIR 1965 SC 845
- Golaknath v. State of Punjab AIR 1967 SC 1643.

From amongst six cases dealing with government's restrictions upon civil liberties dissenting judgment can be found in 3 cases these dissenting judgments were delivered by-

- Fazl Ali J., and M.C. Mahajan in A.K. Gopalan v. State of Madras,
- B.K. Mukjherjea J. in State of Madras v. V.G. Row,
- K. Subba Rao J. in Kharak Singh v. State of Uttar Pradesh.

Cases dealing with government's restriction upon property right of individual have shown more dissents and more individualistic behaviour by the judges. Dissents could be found in-

[68] Abhinav Chandrachud, *Supreme Whispers*, 49 (Penguin, Haryana, First edition, 2018).

- Patanjali M. Shastri's dissenting judgment in Chiranjit Lal Chaudhuri v. Union of India.
- Hidayatullah J. & Mudholkar J. dissenting in Sajjan Singh v. State of Rajasthan. Where both the judges delivered separate dissenting judgment.
- In Golaknath v. State of Punjab minority opinions were delivered by Wanchoo J. (for himself and on behalf of Bhargava J., and Mitter J.), R.S. Bachawat J., and V. Ramaswami J. in three separate dissenting judgments.

Gadboi has categorized judges in four categories i.e. modern liberal, modern conservative, classical liberal and classical conservative.

The present chapter deals with a period between 1950to 1978 involving twenty two cases of which two are High Court cases. Following Gadboi Jr. classification twenty cases of the Supreme Court with forty four judges are dealt with in this chapter and analyzed. However, the criterion chosen by George H. Gadboi Jr. in economic category is individual property right but in this chapter person's (both legal and natural) economic right/ property right is considered. The researcher has also created separate category called 'Ambivalent group' where the stand taken by the judge is not clearand consistent.

It is also important to remember that during this period various legislations were introduced by the government owing to its obligation to socialist form of economy in India. The legislations were introduced with a purpose to lay down ceiling limit of land holding and distribution of the excess land to landless. In this backdrop it is necessary to mention that judges positioned under the head 'approves of economic freedom' in the chart (prepared by the researcher) do not indicate that they have not supported land ceiling and distribution of the excess land to landless. The abovementioned category in the chart does not indicate supporting or opposing socialist economy in India.

In Ambivalent group five judges have been positioned and they are- H. Kania, S.R. Das, S.J. Imam, K.C. Dasgupta and M.H. Beg JJ.

Hiralal Kania was the first Chief Justice of independent India. However, he served the Federal Court of British India as an acting Chief Justice and became Chief Justice of British India after succeeding Sir Patrick Spens, the then Chief Justice of Federal Court

of British India. There are four cases in this chapter where Chief Justice Kania shared the Bench. While analyzing A.K. Gopalan case and Champakam Dorarirajan case Chief Justice faced a dilemma regarding the nature of sovereignty was found in Chief Justice Kania. In A.K. Gopalan (1950) he observed that the law enacted by the legislature can not be tested in the light of constitutional validity. However, in Champakam Dorairajan case (1951) Kania J. observed that order of the State would be sacrosanct only when it was formally enacted by the legislature. Thus, Justice Kania has been positioned in Ambivalent group.

This dilemma was also reflected in the observation of B.K. Mukherjea J., Patanjali Shastri J., and S.R. Das J. as these three judges shared Bench with Chief Justice Kania in abovementioned two cases. There seemed to be confusion as to *de facto* government and *de jure* government. *De facto* government receives the order i.e. the executive while *de jure* government is the law making body i.e. the legislature.

However, this confusion as to the nature of sovereign in India did not last long and post 1951 i.e. after Champakam Dorairajan case legislature and executive functioned closely. All of the above judges favoured restriction upon civil liberties through law enacted by the legislature.

Justice S.R. Das has been put in Ambivalent group because his voting behaviour shows that he voted according to the merit of the case. In Champakam Dorairajan, V.G. Row he approved civil liberty. In chiranjit Lal Chaudhuri he approved economic liberty. However, Justice Das's voting behaviour was different in A.K. Gopalan case where he upheld government's restriction upon civil liberty. In Shankari Prasad and Maharaja Kameswar case he upheld government's restriction of economic freedom.

Reason for putting Justice Imam in Ambivalent group is that in Kharak Singh case he declared police visit at home at night for search is unconstitutional. However, he maintained that right to privacy is not a part of the right to life and liberty guaranteed under article 21 of the Constitution of India.

Justice M.H. Beg is positioned under the Ambivalent group because of his voting behaviour disapproving 'Basic Structure' doctrine in Keshavananda Bharti case and

favouring the concept of 'Golden Triangle' of article 14, 19 and 21 in Maneka Gandhi's case. In Indira Gandhi v. Raj Narain Justice Beg voted in favour of the plaintiff demonstrating approval of economic of the plaintiff i.e. Mrs. Indira Gandhi.

Classical conservative are those judges who manifested voting behaviour upholding restriction upon both the civil liberty and economic freedom. Judges manifesting this kind of voting behaviour are- A.N. Ray, P.B. Gajendragadkar, K.N. wanchoo, R.S. Bachawat, Raghubar Dayal, B.K. Mukherjea, Ramaswamy, D.G. Palekar, K.K. Mathew, S.N. Dwivedi, R.S. Sarkaria, P.N. Bhagwati, Y.V. Chandrachud JJ.

Justice A.N. Ray found to be voted in favour of economic liberty only in Indira Gandhi v. Raj Narain case. He was the then Chief Justice of India and declared judgment in favour of the plaintiff i.e. Mrs. Indira Gandhi. Justice Sarkaria in Kanwarlal Gupta v. Amarnath Chawla disapproved economic freedom of the candidate of election. The significance of this judgment is that Justice Sarkaria attempted to limit unnecessary expenditure incurred by election candidates in India. This case was decided prior to the Raj Narain v. Indira Gandhi case where the Allahabad High Court declared Mrs. Gandhi's election unconstitutional.

D.G. palekar, S.N. Dwivedi JJ. disapproved civil liberty in Keshavananda Bharti case having voted against 'Basic Structure' doctrine. Therefore, an assumption is made that they would favour restriction upon economic freedom as well. R.S. Bachawat, Ramaswamy, and Bhargava JJ. disapproved civil liberty by observing that the Parliament has unrestricted power to amend the Constitution including the fundamental rights guaranteed under part III of the Constitution.

P.B. Gajendragadkar, K.N. Wanchoo JJ. have been considered as classical conservative because of their voting behaviour in Sajjan Singh and Balaji case. Even though judgment in Balaji v. State of Mysode struck a balance between interest of reserved and unreserved category, but it has put a restriction upon civil rights of unrestricted reservation of unreserved category. K.N. Wanchoo J. also disapproved civil liberty in Golaknath case.

Justice P.N. Bhagwati's voting behaviour reflects classical conservative thought because of his judgment in Kanwar lal Gupta and A.D.M. Jabalpur case. however, Justice Bhagwati eventually approved civil liberty in Maneka Gandhi v. Union of India.

Justice Y.V. Chandrachud is also considered as classical conservative because of his disapproval of 'basic structure' doctrine in Keshavananda Bharti case and disapproval of civil liberty in A.D.M. Jabalpur case. However, in Indira Gandhi v. Raj Narain he upheld economic freedom of the plaintiff i.e. Mrs. Indira Gandhi.

Justice K.K. Mathew manifested voting behaviour of classical conservative thought for his disapproval of civil liberty in Keshavananda Bharti case and disapproval of economic liberty in Indira Gandhi v. raj Narain. However, significance of *Indira Gandhi* v. *Raj Narain* case is that Justice Mathew held Mrs. Gandhi's election unconstitutional on the basis of unaccounted expenses for election campain of Mrs. Indira Gandhi.

Modern Liberal judges are those who approved civil liberty but disapproved economic freedom. Patanjali shastri and N.C. Aiyar JJ. are modern liberal judges. However, Justice Shahstri disapproved civil liberty in A.K. Gopalan case. In Maharaja Kameswa case Justice Aiyar disapproved economic liberty while in V.G. Row case he approved civil liberty.

Classical liberal judges are those who approve both the civil and economic liberty. These judges are- Sayyid Fazl Ali, M.C. Mahajan, Vivian Bose, B.P. Sinha, J.C. Shah, Mudholkar, N.R. Ayyangar, K. Subba Rao, Vaidyialingam, J.L. Kapur, Hidayatullah, Shelat, Sikri, A.N. Grover, Jaganmohan Reddy, S.N. Mukherjee, H.R. Khanna, G.K. Mitter, Hegde, I.D. Dua, N.L. Untawalia, S.Murtaza Fazl Ali, V.R. Krishna Iyer JJ. Hidayatullah and Mudholkar JJ., however, disapproved civil liability in Kasturilal Ralia Ram Jain case by accepting sovereign immunity concept. In Kharak Singh case B.P. sinha, J.C. shah, Mudholkar and N.R. Ayyangar supported civil rights of an individual against police visit at odd hour of the day. However, they also upheld that right to privacy was not part of article 21 of the Constitution of India.

In this chapter voting behaviour of forty five judges in nineteen Supreme Court cases have been analyzed. In some of the instances the voting behaviour of judge has been found only once. Therefore, there is a chance that the overall voting behaviour of the judge differs from the one studied under this chapter.

State of Rajasthan v. Vidyawati in 1962 dealt with a separate issue. For the first time in India the matter of immunity enjoyed by the sovereign was questioned. The five judges Bench consisting of B.P. Sinha, J.C. Shah, J.L. Kapur, J.R. Mudholkar, and M. Hidayatullah JJ. Quashed the notion of immunity of sovereign and held the sovereign liable for tortuous act of its employee during his employment under the sovereign. Interpretation of this case shows that limitation of privileges enjoyed by the sovereign means securing civil liberties to the individual against exploitationby the sovereign.

George H. Gadboi has made his four categories of judges strictly separated compartment. This operates as impediment as strict compartmentalization is not possible because there are instances when a judge was found to take different approaches in different cases at different point of time while deciding cases. Justice Patanjali Shastri in A.K. Gopalan case(1951) voted in favour of government's restriction of civil liberties. However, his approach changed in State of Madras v. V.G. Row (1952) where he voted against government's restriction of civil liberties. This attitude was seen in judgments delivered by Justice Sudhi Ranjan Das in A.K. Gopalan and V.G. Row case.No justification for such ambivalence ispresented by George H. Gadboi and the present research too is not able to explain a shift except that there was a realization that classical positivism was not tenable at all times. Justice Y.V. Chandrachud did not accept the concept of Basic Structure in Keshavananda Bharti case (1973). However, he upheld the Basic Structure doctrine in Minerva Mills case (1980) even when he could have overturned the basic structure doctrine in Minerva Mills while he had that opportunity. Therefore, these changes in approach made it little complicated to strictly categorize judges. For, various external factors led to different approaches of the same judge in different cases. Gadboi has mentioned that often the outcome of judgment used to be dependent on the judges sharing the Bench. He mentioned that Justice Y.V. Chandrachud and Justice Bhagwati have hardly ever given a same

judgment. In Minerva Mills case Justice Bhagwati wrote a separate judgment concurring with the majority judgment written by Justice Y.V. Chandrachud. Therefore, the constitution of the Bench in a case used to be a decisive factor in a unanimous judgment, or judgment with concurrence or judgment with minority dissenting judgment.[69]

Another factor for different approach was that Supreme Court judges used to endorse different ideologies which later on manifested in their judgments. During 1950-1967 there were not much differences amongst judicial approach as Gadboi pointed out that during that phase Supreme Court judges had almost similar social, economic and political background. Therefore there was similarity in their outlook as they shared similar socialization experiences.[70]

However, post 1967 this strict categorization had to be done away with. Post 1967 Supreme Court justices identified themselves as either Activist or Conservative.[71]

With the passage of time the nature of cases in India changed. It was not only about violation of civil rights or property rights of an individual. Cases involved much more than this like extent of power of the legislature to amend the Constitution. Immediately after independence the parliament enacted laws introducing agrarian reform by way of limiting the maximum holding of land per individual. Cases like Shankari Prasad, Sajjan Singh and Golaknath were not only about individual's property right but also about parliament's power to introduce such enactments in India. In Golaknath case K. Subba Rao, Shah, Shelat, Sikri, Vaidalingam, Hidayatullah JJ. observed that constitutional amendments could also be tested under article 13 (2) of the Constitution of India[72]. However, the majority view upheld enactments which introduced ceiling limit for land holding in Punjab and Mysore. These abovementioned six judges would

[69] Abhinav Chandrachud, Supreme Whispers, 45-64 (Penguin, Haryana, First edition, 2018). Here he has pointed out that selection for chief justice's post depended on ideology and political leaning of the judge.
[70] George H. Gadboi Jr., Indian Supreme Court Judges: A Portrait 3 (2/3) *Law & Society Review*, 317-336 (Nov, 1968 to Feb, 1969)
[71] Abhinav Chandrachud, *Supreme Whispers*, 28 (Penguin, Haryana, First edition, 2018).
[72] Article 13 (2) of the Constitution of India laid down that any law contradicting the Constitutional provisions would be *ultra vires* and severed to the extent of its inconsistency with the Constitutional provision.

have been considered as modern liberal for their voting behaviour favouring government's restriction upon property rights. However, the reasons for upholding these enactments and observation restricting parliament's amending power of the Constitution show that they have ordered-

a. In favour of that section which does not enjoy property right because another section is holding it in excess. Therefore, the judgment was not favouring government's restriction upon property right, but favouring the property right of those who were not having it,
b. Restricting parliament's amending power of fundamental rights of the Constitution which indirectly secured civil liberties from possible infringement through new amendments.

Therefore, these judges could easily be considered as activist judges.

Activist judges could be distinguished from Conservative judges basing upon two factors[73]. Firstly, an activist interprets the Constitution in a manner that stretched beyond what the framers of the Constitution intended. These activist judges believe in the idea of living Constitution; that the words of the Constitution have to be given meaning according to the social reality of the time in which the court is sitting. For example, Justice Mudholkar in 1965for the first time in Sajjan Singh v. State of Rajasthan mentioned about basic feature of the Constitution. However, for Indian judiciary it took almost eight years to uphold the basic structure doctrine in majority decision. Justice Mudholkar can be considered as an activist judge because he tried to interpret the constitutional amendment provision under article 368 liberally and gave a concept of basic feature which if amended will change the nature of the Constitution of India.

Secondly, activist judges adopted procedural innovation by converting letters and postcards into writ petition. Judges following this kind of activism has also relaxed rules of standing to enable petitions to be filed on behalf of those who could not come to the court thereby changing the rule of *Locus Standi* to Public interest Litigation. In this

[73] Factors distinguishing activist judge from that of conservative judge have been laid down by Abhinav Chandrachud in Abhinav Chandrachud, *Supreme Whispers*, 28 (Penguin, Haryana, First edition, 2018).

category Justice P.N. Bhagwati qualifies to be an activist judge. It was him who relaxed the procedural nuances of filing cases under article 32 and 226 of the Constitution of India. Until 1980 individual knocking the door of the Supreme Court and the High Courts under Writ jurisdiction had to prove his/her *locus standi*. However, this rule was relaxed when Pushpa Kapila Hingorani, a practicing lawyer of the Supreme Court, filed a petition on behalf of 18 under-trials before the court of Justice P.N. Bhagwati.[74]Justice Bhagwati expanded the scope of *Locus Standi* to Public Interest Litigation which allowed any individual, even an NGO to file a petition seeking Writ subject to proof that such petition was filed in the larger interest of undefinable entity called public. This also allowed the court to take *suo moto* consideration of any matter. In 1983 Justice Bhagwati in Bandhua Mukti Morcha case accepted a post card as Public Interest Litigation.

Justice H.R. Khanna is considered as an activist because of his famous dissenting jusdment in A.D.M. Jabalpur v. Shivkant Shukla in 1976. In this same case Justice Bhagwati accepted government's restriction upon civil liberties. Therefore, Justice Bhagwati could be considered as an activist from the point of view of relaxing complicated procedures for petition filing. However, when it comes to infringement of civil liberties the voting behaviour of Justice Bhagwati was totally opposite of his activist nature in introducing procedural innovation. This is why Justice Khanna did not subscribe to Justice Bhagwati's school of judicial activism. Justice Khanna believed that post 1980 judgments were heavily tilted in favour of the government under the cover of 'high sounding words like social justice'.[75]

Approach of Justice Y.V. Chandrachud was drastically changed post 1978. In Keshavananda Bharti case Justice Y.V. Chandrachud dissented to the judgment which upheld basic structure doctrine. In A.D.M. Jabalpur case Justice Y.V. Chandrachud in majority judgment upheld government's interference with fundamental rights especially right to life and liberty under article 21 during the emergency. However, post 1978 in Minerva Mills case (1980) Justice Chandrachud upheld the Basic Structure doctrine of

[74] Pioneer of PIL, available at https://www.thebetterindia.com/105513/bhagwati-justice-law-pil-supreme-court/. (visited on 02.06.2020)

[75] H.R. Khanna, neither Roses Nor Thrones, 63 (Eastern Book Company, Lucknow, First Edition, 1982).

the Constitution of India thereby clarifying limitation of the parliament to amend Constitutional provisions. This clearly shows a transformation of Justice Chandrachud's approach while decision making.

Talking about conservative judges Justice A.P. Sen coule be considered. Justice Sen did not approve the way Justice Bhagwati introduced 'due process' clause of the American Constitution in the Indian Constitution[76]. Justice P.S. Kailasam was also a conservative judge and was critical of activist judges. He criticized lawmaking by judges and PIL as well[77].

Justice Grover was critical of Justice Bhagwati for bringing PIL cases in Indian legal system by converting letters he got as the head of Legal Aid Committee into writ Petitions.[78]

Nevertheless, Gadboi's claim that judges social, economic and political experience used to be manifested in their judgments could not be denied. However, this was not true always. Justice Fazl Ali belonged to a socially prestigeful and economically advantaged family. However, Justice fazl Ali manifested different approach towards civil liberties while his colleagues like Hiralal Kania, B.K. Mukherjea, S.R. Das, Patanjali Shastri manifested a comparatively conservative approach towards civil liberties. This goes for Justice M.C. Mahajan as well. Justice Mahajan also criticized government's control of civil liberties despite belonging from a socially prestigeful and economically advantaged family[79].

In conclusion it may be seen that change in the judicial thinking, even while remaining conservative and within the strict boundary of the Constitution of India and the positive analytical school was going in favour of approval of civil liberties although within the

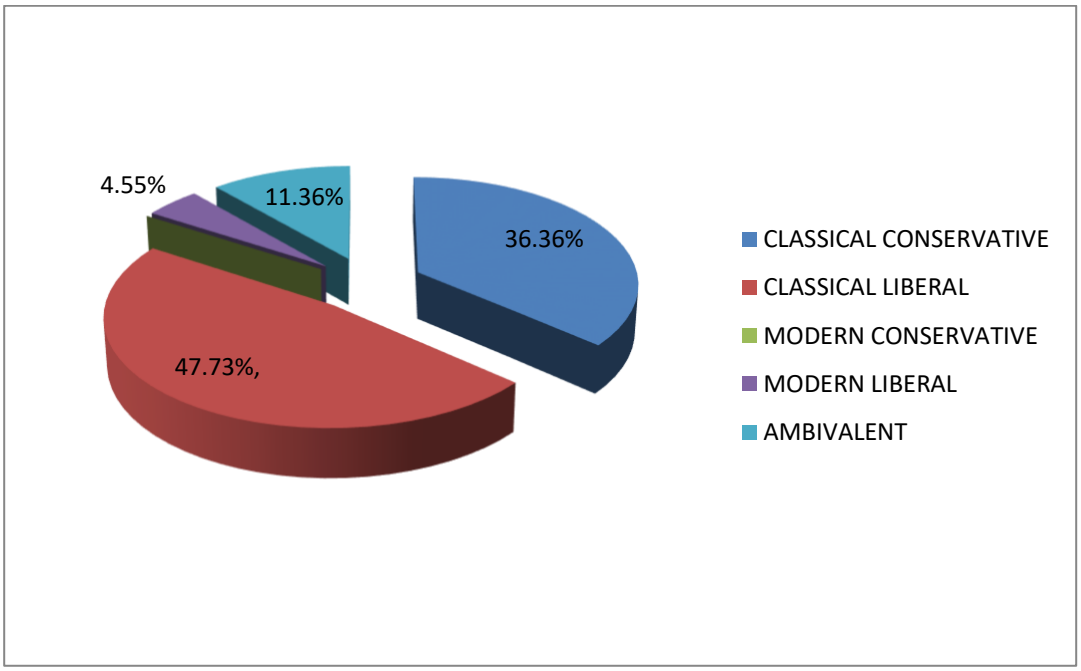
[76]Information was gathered during interview of Justice A.P. Sen on 11th May, 1983 by George H. Gadboi. Available at Abhinav Chandrachud, *Supreme Whispers*, 34 (Penguin, Haryana, First edition, 2018).

[77]Information was gathered during interview of Justice P.S. Kailasam on 24th June, 1983 by George H. Gadboi. Available at Abhinav Chandrachud, *Supreme Whispers*, 35 (Penguin, Haryana, First edition, 2018).

[78] Information was gathered during interview of Justice Grover on 24th May, 1983 by George H. Gadboi. Available at Abhinav Chandrachud, *Supreme Whispers*, 36 (Penguin, Haryana, First edition, 2018).

[79]George H. Gadboi Jr., Indian Supreme Court Judges: A Portrait 3 (2/3) *Law & Society Review*, 317-336 (Nov, 1968 to Feb, 1969).

identified boundary. During sixties and seventies culminating with Maneka Gandhi's case there is a clear shift of thinking which also embraced economic liberalization as well as civil liberty overstepping the boundary of strict analytical jurisprudence.



VOTING BEHAVIOUR OF SUPREME COURT JUDGES FROM 1950-1978

In this chapter voting behaviour of 44 judges have been studied and analyzed. No judge has been found to be Modern Conservative. 16 judges from amongst 44 judges i.e. 36.36% judges belong to Classical Conservative group. 21 judges from amongst 44 judges i.e. 47.73% belong to Classical Liberal group. 2 judges i.e. 4.55% belong to Modern Liberal group while 5 judges i.e. 11.36% belong to Ambivalent group.