

# CHANGING IDEALS AND JURISPRUDENCE OF INDIAN LEGAL ACADEMIA

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## INTRODUCTION

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"Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive. The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counter-productive and undermine the credibility of the institution. Courts cannot "create rights" where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that judicial activism does not become "judicial adventurism", the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile - failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties"<sup>2</sup>

These words depict the unease of the Supreme Court over its own excessive "pro-activist" role. Though in all fairness, this is not what the Supreme Court was at its inception. Today

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<sup>2</sup> *Common Cause (A Regd. Society) v. Union of India*, (2008) 5 SCC 511, p. 522, para 22 (Quoting Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India from *Divl. Manager, Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683, p. 693, para 29.).

sliding from the mean position Supreme Court has move a little right; near to the point where; on introspection even it feels the need to pull back a little.

This paper analyses the early days of the Supreme Court, its role in the changes in Fundamental Rights and Freedoms guaranteed by the Constitution, and the changes in Legal Jurisprudence along with the reasons for these changes. These topics are dealt in five parts.

Part I deals with the changes brought over by the interpretation of the Constitutional provisions by Supreme Court. This is analysed by the means of various case laws. This ranges from the narrow positivistic interpretation of the Gopalan case<sup>3</sup> to the liberal interpretation in accordance with the naturalistic legal philosophies of Maneka Gandhi's case<sup>4</sup>. This part also attempts to answer the question that whether Maneka Gandhi's case<sup>5</sup> is only a generic over-ruling of the interpretation of Gopalan<sup>6</sup>, and that it was really not the decision in Maneka's case that undid the formalism of Gopalan<sup>7</sup>, so much as certain landmark decisions in the interim. It also deals with reasons of the forms interpretation observed in the early days and the change therein in the later days. The shift in the Legal Jurisprudence of the country from Positivism to Natural Law philosophy and the reasons for the shift is also dealt herein.

Part II examines the change liberalisation of interpretation of Constitutional Freedoms ushered. The Supreme Court (and specially Justice P. N. Bhagwati's) naturalistic view of the Fundamental Freedoms and Rights, being mutually inclusive of each other in the case of Maneka Gandhi<sup>8</sup> is seen as the cornerstone of the Judicial activism in India, and can even be called as the starting point of the revolution of Rights in India. Though when viewed from a critical view-point, one may argue that the mutual exclusivity of the freedoms guaranteed by Article 19 and the liberty protected by Article 21, provided by the Supreme Court via the Gopalan Case<sup>9</sup>, had a certain objective appeal. And thus Maneka's case where the interpretation by the court is the conflation of the civil and political freedoms of 19 with the personal liberty of 21, is more likely to confuse than clarify. This part also attempts to tackle this view held by many legal scholars.

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<sup>3</sup> A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

<sup>4</sup> Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

<sup>5</sup> Ibid.

<sup>6</sup> Supra, note 2.

<sup>7</sup> Ibid.

<sup>8</sup> Supra, note 3.

<sup>9</sup> Supra, note 2.

Finally Part III is the conclusion where an attempt is made to critically analyze and put forward my own opinion with respect to the questions answered and views reflected in the paper. This involves a critic of the Constituent Assembly and the Drafting Committee's work while framing the Grund Norm of India, the Constitution. How the drafting eventually succumbed though partially to the political pressure and the circumstances surrounding the country in that era.

### Part I: A Journey from Gopalan to Maneka: Change from narrow to wide

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*“Solomon’s Throne<sup>10</sup> was supported by lions on both sides; Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.”<sup>11</sup>*

Referring the above biblical metaphor, the Supreme Court tried to answer and analyze the nature of the Indian Federation. India is not a completely Federal State. The doctrine of ‘Separation of Power’ is not exactly followed in India. Though at the time of drafting of the Constitution, Prof. K. T. Shah did attempt, by the way of Article 40 A, to have the absolute ‘Separation of Powers’ enshrined in the constitution, but this attempt did not yield any positive result. Prof. K. T. Shah proposed an amendment and moved the assembly to include Article 40 A after Article 40 in the draft Constitution.

*Article 40 (A) “There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial.”<sup>12</sup>*

There were many members of the committee and commission who were in support of the amendment, proposed by Prof. Shah. Though the reply to the proposal from Dr. B. R. Ambedkar, made other members change their view. Dr. Ambedkar stated his opinion:

*“There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but if my*

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<sup>10</sup> The Throne of Solomon refers to the throne of King Solomon in the Hebrew Bible, and is a motif in Judaism, Christianity and Islam. King Solomon made a great throne, which was fashioned of ivory and covered with gold.

<sup>11</sup> *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441 at page 504 (Biblical apologue in the Old Testament as coined by Francis Bacon in his ‘*Essay of Judicature*’).

<sup>12</sup> Constituent Assembly Debates, CONSTITUENT ASSEMBLY OF INDIA - VOLUME VII, Friday, the 10<sup>th</sup> December, 1948. (Available at <http://parliamentofindia.nic.in/ls/debates/vol7p24.htm>, last visited on 2<sup>nd</sup> October, 2015.); Constituent Assembly Debates Official Report, Friday 10<sup>th</sup> December, 1948; Lok Sabha Secretariat, New Delhi, Fifth Reprint, Book no. 2, Vol. VII, p. 959.

*friend, Prof. Shah, had read some of the recent criticisms of that particular provision of the Constitution of the United States, he would have noticed that many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature..... There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.”<sup>13</sup>*

So even though there were debates over the roles and parts of the three major organs of the State, India did not accept the horizontal structure of State. Instead as stated above and agreed by the Supreme Court, we adopted a structure somewhat like the throne of King Solomon. What is interesting to note is that the framers of the constitution though had utmost confidence in the Judiciary, did not intend to provide it with the power it holds today. Initially the throne was supposed to be the Sovereign Parliament, while the lions were to be the Executives and the Judiciary; keeping the Sovereign in check, yet under it and not strong enough to overpower it. Thus the Judiciary initially was meant to be the alarm bell only, in cases where the other organs of the state were concerned. Its function was to advise rather than direct, the state. This is acutely evident from the speech of the First Prime Minister of the country, Pandit Shri Jawaharlal Nehru, given in the Constituent Assembly.

*“No Supreme Court and no judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament.”<sup>14</sup>*

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<sup>13</sup> Constituent Assembly Debates, CONSTITUENT ASSEMBLY OF INDIA - VOLUME VII, Friday, the 10<sup>th</sup> December, 1948. (Available at <http://parliamentofindia.nic.in/ls/debates/vol7p24.htm> , last visited on 2<sup>nd</sup> October, 2015.); Constituent Assembly Debates Official Report, Friday 10<sup>th</sup> December, 1948; Lok Sabha Secretariat, New Delhi, Fifth Reprint, Book no. 2, Vol. VII, p. 967.

<sup>14</sup> Constituent Assembly Debates, CONSTITUENT ASSEMBLY OF INDIA - VOLUME IX, Saturday, the 10<sup>th</sup> September 1949. (Available at <http://parliamentofindia.nic.in/ls/debates/vol7p24.htm> , last visited on 2<sup>nd</sup> October, 2015.); Constituent Assembly Debates Official Report, 10<sup>th</sup> September 1949; Lok Sabha Secretariat, New Delhi, Fifth Reprint, Book no. 4, Vol. IX, p. 1197.

Thus what can be observed is that the Indian Judiciary was so designed by the framers of the Constitution as to have rather lesser role than the Executives and Legislatures. But, this system had a major flaw. As the powers of these three organs not acutely defined, spill-over was quite possible. Then came the shift in the entire Jurisprudential outlook of the Legal Community, in the entire world, and the Judiciary which was so designed as to stay under the throne of the Sovereign, interchanged its position. Now the Judiciary assumed the place of the Throne of Solomon, and the Legislature became the lion beneath it, keeping checks and balance, yet not having any superior authority over it.

Now let us see how this transformation of roles and power actually happened. This needs to be addressed using the various case laws the Supreme Court laid down.

*A.K. Gopalan v. State of Madras*<sup>15</sup>

To begin with the very first case related to the constitution was the matter dealing with the newly formed Article 21. The case was of Mr. A. K. Gopalan, a well-known Indian communist, who was ‘preventively’ detained under the impugned Preventive Detention Act, 1950. Mr. Gopalan was under detention since December, 1947. Under the ordinary criminal law he was sentenced to terms of imprisonment, but these were set aside. While he was thus under detention, under one of the orders of the Madras State Government, on the 1st of March, 1950, he was served with an order made under Section 3(1) of the Preventive Detention Act, 1950. Mr. Gopalan contented a violation of Article 13, 19, 21 and 22, by way of a Writ Petition under Article 32 of the Constitution and for a writ of Habeas Corpus against his detention under the impugned act.

Counsel for Gopalan contended that the Preventive Detention Act, 1950 contravened Article 21 and Article 19 (1) (a) – 19 (1) e and 19 (1) (g) and was void because:

- a) Preventive Detention violated the freedoms conferred by Article 19 (1) (a) to (e) and (g) and the impugned law did not satisfy the test of Article 19(2) to 19 (6).<sup>16</sup>
- b) Personal Liberty included the rights conferred under Article 19 and hence a violation of 19 makes the impugned act void.
- c) Article 19 (1) and Article 21 should be read together because Article 19 (1) dealt with *Substantive Rights* and Article 21 dealt with the *procedural* aspects of Freedom of Liberty.<sup>17</sup>

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<sup>15</sup> *Supra* note 2.

<sup>16</sup> *Supra* note 2 at para 7.

- d) In the Alternative of Article 19 (1) (a) to (e) not being violated, Article 19 (1) (d) was directly affected as freedom of movement is an essence of the personal liberty.<sup>18</sup>
- e) That the words ‘in the territory of India’ in Article 19 (1) (d) were *superfluous* and not having any importance.<sup>19</sup>
- f) Article 21 is violated as the words ‘procedure established by law’ do not mean any form of legislation (*lex*) but refer to the ‘due process’ of law (*jus*) that needs to be followed.<sup>20</sup>

The majority in the bench adjudging the case held that these contentions did not make sense and nor were valid. It was held that violation of Article 19 had not taken place as the rights conferred under it are rights that are affected not as a direct consequence but as only an implication. Article 21 on the other hand was not violated as the detention was as per the ‘*procedure established by law*’.

Now over this stand of the Supreme Court the counsel for Gopalan contended that even if the rights under Article 19 (1) (a) to (e) and (g) were violated as only implication not directly by the Act, Article 19 (1) (d) violation was not an implication. Article 19 (d) provides the freedom to move freely throughout the territory of India. Hence Gopalan contended that the detention of any person directly makes him disabled as he cannot move freely. Thus Article 19 (1) (d) is a direct right having direct relations with Freedom of Liberty given under Article 21. Hence there is a direct violation of Article 19 (1) (d).

To this contention the Supreme Court held that both the rights, that are Right to move freely and the Freedom of Liberty are two distinct rights and do not have any relation to one another. Right given under Article 19 (1) (d) is the right to move freely, uninterrupted, unhindered ‘*throughout the territory of India*’. It is not merely a right to move freely. Hence it is distinct from the Freedom of Liberty given under Article 21.

Gopalan countered this stand of the Supreme Court stating that the words ‘*throughout the territory of India*’ doesn’t hold any substantive meaning as any law made by the Legislature would only have effect in the territory of India and hence the words are superfluous and not important. He made an analogical reference to Article 14 and the same words contained

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<sup>17</sup> *Ibid* at para 11 and 13.

<sup>18</sup> *Ibid* at para 9 and 13.

<sup>19</sup> *Ibid* at para 10.

<sup>20</sup> *Ibid* at para 12, 14 and 16.

therein, where these words have got no substantive meaning and only are acting as a showpiece.

Supreme Court dismissing this contention held that the same words of two different provisions cannot be understood to have the same meaning and that the words in question do hold significance and thus the right was not a right to move freely but was a right to move freely throughout the territory of India.

Over the contention of violation of Article 21, and that the words 'procedure established by law' meant 'due process' of law; the Supreme Court held that had the Legislatures wanted them to mean 'due process' they would expressed so. And as it is not mentioned I cannot be interpreted in that manner. The counsel for Gopalan argued that the word 'law' meant '*JUS*' and not the simple '*LEX*'. And as the laws of preventive detention were not *jus* they could not contravene without violating Article 21.

Supreme Court rejected this argument stating that the intent of the constitution framers is clear from the constitution and hence the words cannot be interpreted in any manner that what could be understood by a simple reading of the Article.

Chief Justice Kania effectively restricted the scope of fundamental rights giving the majority judgment, by reading the fundamental rights in Article 19 in isolation and separately from Article 21, and Article 22, which provided guidelines for preventive detention. The majority held that the talks of *natural justice* and law to mean *jus* were not very strong and thereby could not be admitted.

*To read the word "law" as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard. This is particularly so when in omitting to adopt "due process of law" it was considered that the expression "procedure established by law" made the standard specific. It cannot be specific except by reading the expression as meaning procedure prescribed by the legislature. The word "law" as used in this Part has different shades of meaning but in no other article it appears to bear the indefinite meaning of natural justice. If so, there appears no reason why in this article it should receive this peculiar meaning.<sup>21</sup>*

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<sup>21</sup> *Ibid* at para 21.

In stark contrast to the majority opinion, Justice Fazl Ali dissented. His dissenting opinion had adopted a much expansive and liberal interpretation of the phrase "procedure established by law" in Article 21. Whereas the majority read Articles 19, 21 and 22 as being separate or to say "*mutually exclusive*", Justice Fazl Ali argued for a broad, structural reading of the Constitution, whereby the fundamental rights contained in Article 19 are read in conjunction with Articles 21 and 22, which provide, respectively, for procedure established by law and for specific procedures for preventive detention.<sup>22</sup>

*"There is however no authoritative opinion available to support the view that this freedom is anything different from what is otherwise called personal liberty. The problem of construction in regard to this particular right in the Constitution of Danzig is the same as in our Constitution. Such being the general position, I am confirmed in my view that the juristic conception that personal liberty and freedom of movement connote the same thing is the correct and true conception, and the words used in Article 19(1)(d) must be construed according to this universally accepted legal conception."*<sup>23</sup>

*"Being fully alive to the fact that it is a serious matter to be asked to declare a law enacted by Parliament to be unconstitutional, I have again and again asked myself the question: What are we to put in the scales against the construction which I am inclined to adopt and in favour of the view that preventive detention does not take away the freedom of movement guaranteed in Article 19(1)(d)? The inevitable answer has always been that while in one of the scales we have plain and unambiguous language, the opinion of eminent jurists, judicial dicta of high authority, constitutional practice in the sense that no Constitution refers to any freedom of movement apart from personal liberty, and the manner in which preventive detention has been treated in the very laws on which our law on this subject is based, all that we can put in the opposite scale is a vague and ill founded apprehension that some fearful object such as the revision of the Penal Code is looming obscurely in the distant horizon, the peculiar objection that the mere mention of the scheduled tribes will alter the meaning of certain plain words, the highly technical and unreal distinction between restriction and*

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<sup>22</sup> Mate, M. (2010). The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases. *Berkeley Journal of International Law*, 28(1), 216-260. Retrieved October 2, 2015, from <http://scholarship.law.berkeley.edu/bjil/vol28/iss1/7>.

<sup>23</sup> *Supra* note 2 at para 59.

*deprivation and the assumption not warranted by any express provision that a person who is preventively detained cannot claim the right of freedom of movement because he is not a free man and certain other things which, whether taken singly or collectively, are too unsubstantial to carry any weight. In these circumstances, I am strongly of the view that Article 19(1)(d) guarantees the right of freedom of movement in its widest sense, that freedom of movement being the essence of personal liberty, the right guaranteed under the article is really a right to personal liberty and that preventive detention is a deprivation of that right.”<sup>24</sup>*

Thus such was the interpretation of the court which way in complete sync with the Positivistic outlook, considering State to be the *Supremeo* and the laws to mean *Lex* than *Jus*. Case such as the 1<sup>st</sup> amendment case of **Shankri Prasad**<sup>25</sup> is a prime example of the supremacy of the State over the Judiciary.

Then the court moved forward and laid its opinion in different matters. The positivistic approach and outlook of the state is vividly visible in matters such as slowly but surely this positivistic approach of the State did loosen up and the same very *Natural law Jurisprudence* which the Judiciary had previously rejected came to be re-considered.

Cases such as **Anwar Ali Sarkar**<sup>26</sup> and **Kathi Raning Rawat**<sup>27</sup> where the seeds of reasonableness and naturalistic outlook had been sowed, prove the slow shift in the outlook and the Jurisprudence in the country, from the view that State is supreme to the view more in sync with Natural law where freedoms and rights are given much more weightage.

The Supreme Court can be seen to have recognised the flaw in structure, if the Legislature were give utmost power and supremacy in the Anwar Ali Sarkar<sup>28</sup> case. Here when the power as well as the jurisdiction of the Special Courts was challenged, the Supreme Court held that there cannot be *uncanalized* or *arbitrary* power given to anyone to ‘pick and choose’ as per their whims and fancies. Holding the Special Courts Act to be unconstitutional the court hinted over the fact that even if the law is made by the ‘Supreme’, it might still be flawed.

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<sup>24</sup> *Ibid* at para 67.

<sup>25</sup> *Shankari Prasad v. Union of India*, (AIR 1951 SC 455).

<sup>26</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

<sup>27</sup> *Kathi Raning Rawat v. The State Of Saurashtra*, 1952 AIR 123.

<sup>28</sup> *Supra* note 25.

Similarly, the Supreme Court understood and interpreted the 'lex' not just on the sole basis of it being *lex* but also on the basis that it must be 'jus' and non-arbitrary in nature, in the case of *Kathi Raning*<sup>29</sup>. Similar situation as *Anwar Ali Sarkar*<sup>30</sup> case, but the difference was that herein the State of Swarashtra had a 'legitimate purpose' and the classification done therein was having a 'reasonable nexus' with that purpose. Herein the Special Courts were held not to be violative of the Fundamental Right of Equality.

What is noteworthy is that though the positivistic mentality of the Judiciary had not completely vanished but the process of transformation had started. The Judiciary had realised that the Supreme cannot always be right. Liberalisation in law had begun, though undoubtedly slow, which still showed some affinity to the Positivistic outlook but still there was a hint, a faint whiff of the Naturalistic ideologies that though were not present in essence then but still existed in obscured forms.

Cases in the three decades such as **Kharak Singh**<sup>31</sup> where the interpretation provided to Article 21 was indeed very liberal, proves that the Supreme Court had also realised the flaws prevalent with Positivistic approach and started to consider and interpret in the light of Natural law.

While adopting a broad interpretation of liberty, the majority's holding in the case seemed to be based on a procedural due process rationale. The court held that clause (b) of Regulation 236 is plainly violative of Art. 21 and as there is no 'law' on which the same could be justified, it must be struck down as unconstitutional.<sup>32</sup> However, the four judge majority upheld the rest of regulation 236's provisions, including those authorizing police surveillance of a suspect's home at night, on the ground that that there was no implied right of privacy in the constitution<sup>33</sup>:

*"the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right."*<sup>34</sup>

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<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Supra* note 25.

<sup>31</sup> *Kharak Singh v. State of Uttar Pradesh*, 1964 S.C.R. 332, 349.

<sup>32</sup> *Ibid* at 351.

<sup>33</sup> *Supra* note 21.

<sup>34</sup> *Supra* note 28.

The majority in the case went on to note that when a fundamental right such as the right enshrined in Article 19, that is the right to free movement or that of Article 21's, freedom of personal liberty is implicated:

*"that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness."*<sup>35</sup>

Here, the majority in the case adopted a restrictive idea of liberty which purposely only extended to the *direct infringement* of the freedom of movement, and refused to recognize the existence of a right to privacy as such under it. As a result, the Court only invalidated the domiciliary provision of Regulation 236, on the grounds that domiciliary visits constituted a direct infringement of liberty.<sup>36</sup>

Though the majority took such an opinion, there was a dissent. In his dissent, Justice Subba Rao began with a 'substantive-due-process' based argument.

*"Therefore, the petitioner's fundamental right, if any, has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straight away, for the State could not justify it on the basis of any law made by the appropriate Legislature or the rules made thereunder."*<sup>37</sup>

*"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security."*<sup>38</sup>

This opinion of Justice Rao shows his willingness to include the Right of Privacy in the scope of Article 21. And the shift in attitude in the Judiciary which though had started had yet not developed into a full grown idea.

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Supra* note 21.

<sup>37</sup> *Supra* note 27 at 352.

<sup>38</sup> *Ibid* at 359.

The case proved to be more in sync with the Gopalan<sup>39</sup> interpretation of the Fundamental rights but still the approach of the court regarding the idea of liberty can be seen as a shift in the attitude of the judiciary with respect to the legal jurisprudential thoughts.

The cases that came thereafter had much more generalised outlook, and were in compliance to the Natural Law Jurisprudence.

Cases such as **Satwant Singh**<sup>40</sup>, where just three years after his dissent in the Kharak Singh decision, Chief Justice Subba Rao's dissenting position in Kharak Singh effectively became the majority opinion in Satwant Singh Sawhney<sup>41</sup>, a case dealing with a decision of the Indian Government to withdraw passport and travel privileges from an import/export businessman.

In impounding Sawhney's passport the Ministry of External Affairs alleged that Sawhney had violated conditions of the import license that had been granted to him by the Indian government, was under investigation for offences under the Export and Import Control Act, and was likely to flee India to avoid trial. Sawhney challenged the action on the grounds that it infringed upon his fundamental rights under both Article 21 and Article 14 of the Constitution. In a 3-2 decision, the majority (which comprised of the Chief Justice Subba Rao, Justice C.A. Vaidalingam, and Justice J.M. Shelat), invalidated the Government's withdrawal and impoundment of Sawhney's passport on the grounds that such actions violated both Articles 14 and 21.<sup>42</sup>

Justice Subba Rao ruled that the Government's actions were in essence unreasonable and therefore violated Article 14, which contains the right of equality and equal protection. According to Justice Rao, the right to equality in Article 14 was a corollary to the rule of law, which forbids arbitrary government actions. In many ways, this holding was an early precursor to the doctrine of non-arbitrariness that was created in **E. P. Royappa's case**<sup>43</sup> which is one of the main reason for the reasoning behind the judgment of **Maneka Gandhi**<sup>44</sup>.

The majority opinion hailed the concepts of Natural law as by imbibing these principles, though not in expressed terms but in obscured sense into their interpretation of the

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<sup>39</sup> *Supra* note 2.

<sup>40</sup> *Satwant Singh Shawhaney v. Ramanathan*, 3 SCR 525 (1967).

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*; *Supra* note 21.

<sup>43</sup> *E. P. Royappa v. State Of Tamil Nadu & Anr.*, 1974 AIR 555.

<sup>44</sup> *Supra* note 3.

Fundamental rights. Though here too the rights under Article 19 and Article 21 were considered and held to be ‘*mutually exclusive*’, the wide interpretation provided to Article 21 did pave a way for the future liberalisation in the interpretation. In many sense this was one of the corner-stones over which the case of Maneka<sup>45</sup> relied.

The shift from positivism to natural law philosophy was most evident in the case of *R. C. Cooper v. Union of India*<sup>46</sup>, also called the Bank Nationalisation case. This case could be seen as a tussle between the Government (spearheaded by Mrs Indira Gandhi) and the Judiciary of the country. In an attempt to concrete her position in the country, Mrs Gandhi wished to bring the private banks under the Governmental fold. Thus to achieve this Banking Companies (Acquisition and Transfer of Undertakings) Ordinance was passed, which later was promulgated into the impugned Act<sup>47</sup>. This Act provided for the nationalisation of banking institutions having deposits of Fifty Crore or above. This was challenged by one Rustom Cavasjee Cooper, who had current and fixed accounts in three of the banks (in the list of the banks to be taken over) and besides that was a shareholder and a director of one of the bank. He challenged the impugned Act under Article 14, 19 and 31 of the Constitution of India. A eleven judge bench presided over by Justice Shah looked into the matter of the Nationalisation of the banks.

The court held that Article 31B even though established by law properly, it was read with Article 19(1) (f) of the Constitution of India. Part III of the Constitution weaves a pattern of guarantees on the texture of basic Human Rights. The guarantees delimit the protection of those rights in those allotted fields. They do not attempt to enunciate distinct rights.

Stating contrary to what was held in Gopalan<sup>48</sup>, the Justice Shah, stated — that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by various clauses of Article 19(1) does not cease to be applicable on him and the law which authorizes such kind of detention has to satisfy the test of the freedoms applicable under Article 19(1).<sup>49</sup> Prior to this above judgment 13(2) and 19(1) (f) was also considered to be mutually exclusive but it was changed after this judgment came. The learned judge in the above case, presented a construction according to

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<sup>45</sup> *Ibid.*

<sup>46</sup> *R. C. Cooper v. Union of India*, (1970) 1 SCC 248.

<sup>47</sup> Banking Companies (Acquisition and Transfer of Undertakings) Act, 22 of 1969, *Ibid.*

<sup>48</sup> *Supra* note 2.

<sup>49</sup> *Supra* note 43.

which Article 14, 19 and 21 are to be completely integrated so that whenever either of them is applicable. All of them have to be necessarily applied.<sup>50</sup>

In effect the majority judgment held that the court can and will strike down laws which deprive a person of his property if the compensation provided is either illusory or the principles laid down for the determination of the compensation are not relevant, vague or unjust in essence.

The major reform in law which must be highlighted is the change in stance regarding the law laid down in Gopalan<sup>51</sup>. The court rejecting the previous declaration of Fundamental Rights being ‘mutually exclusive’ to one another held that they needed to be viewed as a single unit with different departments, interlinked with each other, and thus they cannot be treated as ‘mutually exclusive’.

*“We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negate the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression “law” means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(1) and 31(2) are mutually exclusive.”*<sup>52</sup>

Thus not only did R. C. Cooper’s case<sup>53</sup> changed the rigidity and narrow approach of the Judiciary interpreting Part III but also in effect over-ruled the Gopalan<sup>54</sup> precedent of ‘mutually exclusive’ rights.

The change from Positivistic Jurisprudence to Natural Law Jurisprudential view became significant with *Bennett Coleman & Co. v. Union of India*<sup>55</sup> when the Court discussed the earlier argument of Gopalan<sup>56</sup> which stated that Art. 19 could be invoked only if it covered

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Supra* note 2.

<sup>52</sup> *Supra* note 43 at para 53.

<sup>53</sup> *Supra* note 43.

<sup>54</sup> *Supra* note 2.

<sup>55</sup> AIR 1973 SC 106.

<sup>56</sup> *Supra* note 2.

the law directly, narrowing the scope of the right. So, accordingly it was decided that preventive detention, which deprived a person of several rights in Art. 19 could not be questioned for validity under Art. 19 if it is not directly within the ambit of Article 19, that is to say that only if the direct consequence of the law was the abridgement or the deprivation of the rights under Article 19 could that law be questioned under it.

This contention was completely reversed in Bennett Coleman where the court overruled the argument that 19(1) (a) could not apply to a law affecting freedom of speech and was not directly enacted within the supervision of 19(1) (a).<sup>57</sup>

What one needs to understand is that even though the case of Gopalan<sup>58</sup> was not discussed in detail in the case, it was indeed noticed that the Bank Nationalization<sup>59</sup> case might have over-ruled the precedent set by Gopalan<sup>60</sup>.

In the wake of the liberal attitude of the Supreme Court interpreting the Fundamental Rights and the Constitution much in harmonization with the Natural Law ideologies and legal jurisprudence came a case which till date is referred as the '*gospel*' of Indian Law. The case of **Kesawananda Bharti**<sup>61</sup>. It is of not much import here in the present discussion but needs to be cited in order to showcase the roadmap which led to the Jurisprudential shift. Kesawananda<sup>62</sup> is a prime case which in expressed terms brought about Natural law Jurisprudence in the Indian Legal Community. Deciding on an age old tussle between the Parliament and the Judiciary, for power and supremacy the court held that though the legislature had the power to amend each and every provision of the constitution, what it cannot do and had no power in was the amendment or abridgement of the Basic Structure of the Constitution. This case had dire consequences. Not only it settled the power tussle between the Legislature and the Judiciary, declaring that though the Legislature had the pull to do anything with the Constitution, it did not howsoever had the power to alter the Basic Structure of the Constitution, it also expressly brought Natural law jurisprudence in the mainstream judiciary and legal academia of the country.

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<sup>57</sup> *Supra* note 42.

<sup>58</sup> *Supra* note 2.

<sup>59</sup> *Supra* note 43.

<sup>60</sup> *Supra* note 2.

<sup>61</sup> *Kesawananda Bharti v. State of Kerela*, (1973) 4 SCC 225.

<sup>62</sup> *Ibid*.

What this Basic Structure was, or included was not clarified by the court and till date remains a conflicting point. As this is not the right forum for such discussion, this paper would not delve into that.

The case which followed Kesawananda<sup>63</sup> in its footsteps of Natural Justice and Natural Law Jurisprudence propounded an entirely new and dynamic concept. Justice P. N. Bhagwati unintentionally maybe stumbled upon a concept, or maybe this was his intention which he could not articulate in its crudest sense. The principle of Non-Arbitrariness equated with the concept of Equality, in the famous case of **E. P. Royappa**<sup>64</sup>.

My opinion over this legendary case and its impact over the later decisions is not required to be stated in this part, but is discussed later in the paper in conclusion. What is required is to note the contribution Royappa's case<sup>65</sup> made to Maneka's decision. In this case Justice Bhagwati held that "*All actions of arbitrariness are an anathema to equality*". In essence all government actions which are arbitrary were unconstitutional. This expanded the scope of Fundamental Right of Equality to its farthest sense. It added an extra wall as a protection of Fundamental Right of Equality, and thereby gave an additional protection to Article 21<sup>66</sup>.

But even when the Supreme Court had developed a Natural Law Ideology, the Government was having a hard time adjusting to the fact that the Positivistic Mentality of the country had changed and that the State was not in itself the 'Supremo'. In that confusion, Miss Indira Gandhi declared Internal Emergency, thereby suspending all forms redressal for the violation of the Fundamental rights.

This was the infamous *A.D.M. Jabalpur v. Shivkant Shukla*<sup>67</sup>. Emergency was declared and during that period and fundamental rights such as Article 14, Article 21 and Article 22, were violated.

The detained person had no right to approach a court regarding the violation of the fundamental rights during the emergency period the enforcement of the Fundamental Rights was suspended.

However relying over the precedent of Makhan Singh<sup>68</sup> various High Courts, throughout the country had issued Writ of Habeas Corpus directing the State to produce the many national

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Supra* note 42.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Infra* note

<sup>67</sup> (1976) 2 SCC 521.

leaders, preventively detained in the courts. The Supreme Court on an appeal constructed a five judge bench to hear the matter. It was held that, as it was mentioned in Gopalan<sup>69</sup>, the legislation had the power to take away the rights of citizen according to the procedure established by law. The Supreme Court ruled that the courts had no power to review the preventive detention orders, even if these orders were *ultra vires* as review of the orders or the issue of the writ of habeas corpus would mean the enforcement of Article 21, which was suspended during that time of emergency. What struck the entire nation including the entire legal community was the acceptance of the court of the State's contention that Article 21 was the sole repository of the right to life and personal liberty and that them being made by law, could also be negated completely by law.<sup>70</sup>

Multiple reasons are cited for this sudden shift or turn of tables, of which the retaliation of the Parliament, to return to its former glory and position of undisputed authority is most well regarded. Speculations also involve the then Chief Justice, to be somewhat in-league with the Parliament and hand-in-hand with Mrs. Gandhi. Whatever may be the truth what matters is its role in the decision of Maneka<sup>71</sup>.

The Jabalpur case<sup>72</sup> had struck horror in the entire country. What was more than horrifying was the fact the Supreme Court whom every man in the country looked up to, in times when troubled by the State, had *surrendered* in front of the state. Not only this it went forward to even justify the point of the state that the people preventively detained have no mental bearing or ill effects of that detainment and 'are well-fed and taken care' by the state.

*"It seems to me that courts can safely act on the presumption that powers of preventive detention are not being abused. The theory that preventive detention serves a psycho-therapeutic purpose may not be correct. But, the constitutional duty of every Government faced with threats of widespread disorder and chaos to meet it with appropriate steps cannot be denied. And, if one can refer to a matter of common knowledge, appearing from newspaper reports, a number of detenus arrested last year have already been released. This shows that the whole situation is periodically reviewed. Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well-*

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<sup>68</sup> *Makhan Singh v. State of Punjab*, AIR 1964 SC 381.

<sup>69</sup> *Supra* note 2.

<sup>70</sup> *Supra* note 66 at para 138.

<sup>71</sup> *Supra* note 3.

<sup>72</sup> *Supra* note 66.

*housed, well-fed, and well-treated, is almost maternal. Even parents have to take appropriate preventive action against those children who may threaten to burn down the house they live in.”<sup>73</sup>*

Though this was the majority opinion, only Justice Khanna, had the courage to take the right decision in favor of human nature and liberty. He knew what was at stake. Speculations are made that he knew that his dissent would cost him the seat of the Chief Justice of India and it did (Justice Beg, one of the majority judges was superseded and made the Chief Justice over Justice Khanna).

*“Before I part with the case, I may observe that the consciousness that the view expressed by me is at variance with that of the majority of my learned Brother has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes [ *Prophets with Honour* by Alan Barth, 1974 Ed., pp 3-6] , Judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the court to have been betrayed.”<sup>74</sup>*

This case held the same Positivistic rule of Law being nothing but a ‘*command of the Sovereign*’, which had gradually declined with the flow of time, since Gopalan’s era. Though in the views of Justice Khanna it’s evident that Natural Law Jurisprudence had not vanished but only got suppressed by the ‘political debris’ and ‘ambitious constructions’.

Then came the case which turned the tide all over again to the Natural Jurisprudential outlook of the Legal Community. The country was aghast due to the emergency period and the atrocities committed then. Justice Bhagwati, redeeming his ‘mistake’ in the Jabalpur

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<sup>73</sup> *Ibid* at para 324 A, p. 643.

<sup>74</sup> *Ibid* at para 594, p. 777.

case<sup>75</sup> gave an extremely eloquent judgment relating the Fundamental Rights and 'formally' over-ruling the precedent of Gopalan<sup>76</sup>, which got revived in the Jabalpur<sup>77</sup> case.

*Maneka Gandhi v. Union of India*<sup>78</sup>

The Court's decision in *Maneka Gandhi v. Union of India*<sup>79</sup>, was a ground breaking one, in that, it reversed the restricted view of the Gopalan<sup>80</sup> majority of the terms "personal liberty" and "procedure established by law" in Article 21, in holding that the right to travel was a part of the broad ambit of liberty, and that regulations restricting that right were subject to judicial scrutiny and invalidation where those regulations were held to be arbitrary and unreasonable. The court overturned and invalidated regulations under the Passport Act of 1967, on the grounds that the seizure of petitioner's passport was arbitrary and unreasonable and infringed on her fundamental right of travel.

The facts leading up to this were that Emergency period had just ended, and there were criticism all over of the Indira led Congress. Maneka Gandhi was a journalist and had been going out of India and speaking on the atrocities inflicted in the emergency period. This had attracted a lot of International criticism of Indira Gandhi and thus something needed to be done.

Now under the Passport Act, 1967, a letter was sent to Miss Maneka informing her that her passport was being impounded under Section 10 (3) (c) of the act, in the 'interest of general public'. Miss Gandhi filled a petition in the Supreme Court contending the violation of her Fundamental Right under Article 14, 19 (1) (g) and (d) and 21.

This Passport Act came into being when the decision in the Satwant Singh case<sup>81</sup> mandated that the parliament form an act to govern the executive actions in respect to the passports.

Drawing and propounding a necessary connect in Article 14, 19 and 21; the Supreme Court held that the act of the Passport authorities was arbitrary in nature and thereby a violation of Fundamental right of Equality and thus could not be considered as a 'valid' law. Herein the term 'procedure established by law' was taken up as to mean a "just" and "fair" process of law. Where the law is 'reasonable' and 'just' and 'non-arbitrary'. Hence the Supreme Court

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<sup>75</sup> *Supra* note 66.

<sup>76</sup> *Supra* note 2.

<sup>77</sup> *Supra* note 66.

<sup>78</sup> *Supra* note 3.

<sup>79</sup> *Supra* note 3.

<sup>80</sup> *Supra* note 2.

<sup>81</sup> *Supra* note 39.

drew the necessary connect in the Fundamental Rights “FORMALLY” undoing the precedent of Gopalan<sup>82</sup>.

According to Justice K. Iyer, ‘*a fundamental right is not an island in itself*’. The expression “personal liberty” in Article 21 was interpreted broadly to engulf a variety of rights within itself. The court further observed that the fundamental rights should be interpreted in such a manner so as to expand its reach and ambit rather than to concentrate its meaning and content by judicial construction. Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with procedure established by law but that does not mean that a mere semblance of procedure provided by law will satisfy the Article, the procedure should be just, fair and reasonable. The principles of natural justice are implicit in Article 21 and hence the statutory law must not condemn anyone unheard. A reasonable opportunity of defense or hearing should be given to the person before affecting him, and in the absence of which the law will be an arbitrary one.

Here the “immediate consequence” of the Gopalan case<sup>83</sup> was converted into the “inevitable consequence” and thereby the necessary connect was made between Article 19 and Article 21. The “*pith and substance*” test was districted was set aside.

In major context it was the Royappa’s case<sup>84</sup> that gave validity to the holding of this case. Holding all arbitrary actions a violation of Fundamental Right of Equality and thereby a violation of Article 14 was an ingenious approach. Herein the act of the authorities fell afoul of this. Hence not only now there should be ‘*procedure established by law*’ that takes away the right under Article 21, without violating it, it also needs to pass the test of Article 14 in order to be that “*law*”. Herein the term law could be seen to have gone the tremendous transformation as not to mean “*lex*” but to mean “*jus*”.

Thus this is how gradually the positivistic outlook of the court changed into the natural law ideologies, and which is coincidental with the liberalisation in the interpretation of the Fundamental rights.

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<sup>82</sup> *Supra* note 2.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 63.

## Part II: Shift in Jurisprudence – Positivism to Natural Law & Confusion by Maneka's Case

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*“No Supreme Court and no judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament.”*

These words of the First Prime Minister of India Pandit Shri Jawaharlal Nehru depict the view of the then era to be in synchronisation with the legal philosophy of Austin which states that Law is the command of the Sovereign. Such legal theory came to be known as Legal Positivism. The concept of this legal theory primarily distinguishes the question whether a rule is a ‘legal’ rule from the question whether it is a ‘just’ rule, and seeks to define law, not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on.

Be it the Indian Legal System or the American Legal Academia, Supremacy of the Supremo was a common scene. Fundamental Rights were not fundamental, and the Parliament ruled the Legal order.

But then came about a change. The wind of Natural Law hit the Legal Dominion of the entire world. This wind brought forth by the blasts of the bombs of the Second World War, slowly but undoubtedly changed the outlook of the Legal Community. Natural Law theory dictates that law consists of rules in accordance with reason and that nature has formed the basis of the variety of Natural Law theories ranging from classical times to the present day. The central notion of this legal theory is that there exists objective moral principles which depends upon the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law insofar as it confirms to these principles of Morality and Justness.

Now in the process of promoting this Natural Law in the Legal Community the essential element was loosening the power grip of the Sovereign. Thus essentially the adjudicators of law had to be strengthened while a balance had to be created wherein the powers of the

Supremo would be in check by the powers of the Judiciary, therefore there should have been no question of Supremacy between these two, as they needed to be on par with each other in terms of power and authority (as to promote just laws and to keep the Supremo from mandating unjust or un-natural laws) for this Natural Law to take over.

But then, as it is with the course of nature, sometimes if the winds are unchecked they might just blow out the fire for whose existence they were blowing, something similar happened. In the spirit of empowering the adjudicators, instead of creating a balance somewhere the legal community went a little off. Today the adjudicators at times forget that the need is for a balance and not for the supremacy of one over the other, and under such circumstances the Judiciary at times oversteps and trespasses in the role of the Legislature.

This overstepping of the Judiciary though admittedly is indeed against the very covenants of the Constitution and the Covenants of Natural Law, which requires a balance between the Supremo and the Judiciary. Today's Supremacy battle is not the real essence of Checks and Balances as envisaged by our Constitution. Today there are instances where, at times the Judiciary has taken over the Legislature and the Executive. Judiciary and its supremacy over the other two organs of the State is prima facie evident from the state of affairs in the country. Though recently the tussle for power has re-emerged. The recent coup to restore the power in the Parliament in the form of the National Judicial Appointments Commission brought in existence via Ninety Ninth Amendment Act of 2014 was thwarted by the Judiciary, restoring the controversial Collegium System. The Collegium System allegedly sways the power primarily towards the Judiciary and away from the Parliament. The Right Wing Extremists claim that the present Collegium System devised by the Supreme Court is completely void of substance and justice and is simply a 'misreading' of the Constitutional provision under Article 124 of the Constitution of India.

This paper is neither the right forum nor the appropriate analysing framework to discuss this tussle of power and the legality of NJAC or the Collegium. The major purpose of this paper is to highlighten the change in the legal framework of the country.

The major contention put forward here is that the legal academia of India in today time has come leaps and bounds ahead of what was meant to be and what should have been. The pot of Legal Structure of the country has become a little unstable. Though most of this is a welcome change but still what is essential is to remember the very important idiom – *excess of anything is always harmful*.

As can be seen from Part I, the change is nakedly visible. The change from rigidity to flexibility, change from positivistic outlook of Parliamentary Supremacy to naturalistic ideals of Supremacy of Justice, change from a weak and yielding Supreme Court to the resilient and controlling Supreme Court of India. And undoubtedly Maneka's case should be hailed as the pivot point that ushered the Indian Revolution of Rights and Justice, which in turn is responsible for these changes.

One of the significant interpretation in this case is the discovery of inter connections between Article 14, 19 and 21. Thus a law which prescribes a procedure for depriving a person of "personal liberty" has to fulfil the requirements of Article 14 and 19 also. Moreover the 'procedure established by law' as required under Article 21 must satisfy the test of reasonableness in order to conform to Article 14. The main problem with the interpretation made in Maneka Gandhi<sup>85</sup> is, as the critics contend, the unnecessary judicial intervention in a place where the Constitution didn't allow for, if read very objectively. On the other hand, the object that this interpretation achieves far outweighs the negatives.

A very important historical context to keep in mind when the decisions favouring the naturalistic theory of jurisprudence came out was that, it was when India was under Emergency. A black period in Indian history when the government abused its powers to the detriment of its own citizens. The provision, Article 21 read with a positivist point of view would lead to a world where the legislature, provided it had a good enough majority could enact any draconian law which in itself would lead to the end of the democratic setup as we know it.

One needs to remember that there were a number of reasons why the entire world's Legal Community had either undergone or was undergoing this jurisprudential shift. This reason was the implications and consequences of the horror caused by the Second World War. The world had seen what happens when a Sovereign becomes all powerful. Germany led by Adolf Hitler was a prime example of what defects Positivism had. If '*Jus*' is not the sole premise of any State action, then the destruction of that State is inevitable.

Thus to cure these defects it became essential to logically think and rationally adhere to the Natural law philosophy which could never allow any such situation to occur.

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<sup>85</sup> *Supra* note 3.

The transformation of the Indian Jurisprudence from the view which held State to be the Solomon's Throne to the view where Judiciary became the throne and the State adopted the role of the lions, is well evident from Part I.

If '*command of sovereign*' was all that was required to justify any abridgement of Fundamental Right then the Legal Structure of the country was sure to become the pedestal for the self-inflicted destruction. Hence the change into a more of Self-protected mode of Natural Law was essential.

Though the problem which is often pointed out in the Maneka's case is that the court changed its stance over the Fundamental Freedoms and its exclusivity from "mutually exclusive" to "inclusive of all". In Maneka<sup>86</sup> Supreme Court also held that what needs to be seen is the "ultimate consequence" and not the "immediate consequence". This as per many scholars is the part that is confusing and mudding the concept of Fundamental rights.

One more criticism often made of this legendary case is that it established a link between Article 19 and Article 21 rights and all the rights contained therein cannot be linked and should not be linked or else not only does that defeat the very purpose of the framers to classify and put them in different slots but also pushes the uniqueness of our Constitution towards a beanie similarity with that of the United States Constitution.

Viewing these criticisms one definitely gets influenced by the negativity so portrayed but one if analyses the judgement in detail, would observe the fine nuances that it propounds. One must understand the reason of reading the rights as a collective entity belonging to the same family. The Constitution can necessarily be traced to the ideals and principles of Constitutionalism, that is Constitutionalism. These principles safeguard the rights of individuals and are a package. It could be understood by the help of an analogy, if five people are involved in an activity, even if they have different functions, they belong to one class. Similarly the criticism can be rebutted by the fact that the rights even though are individual are a package in themselves.

One needs to see that the opinion of the Supreme Court basically clarified the position rather than mudding it. Every Fundamental right has a distinct role to play but still is a combined component of Rights basic to an individual.

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<sup>86</sup> *Ibid.*

### Part III: Conclusion

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The Drafting Committee and Constituent Assembly drafted the Constitution, intending to keep the Judiciary low on Power. But the circumstances changed the view of the legal authorities changed, due to a number of reasons, as mentioned in Part II. Thereby the Judiciary took upon itself a more atavistic role protecting individual rights and promoting the Freedoms enshrined in the constitution.

Though learning from the past one must take heed to the point that no one entity should attain so much power as to become completely corrupt. The courts should keep the “Separation of power” on the highest pedestal and refrain from breaching their own limits, unless very essential circumstances arise and require the breach.

Thus Judicial Activism must be refrained from converting into Judicial Adventurism.

*‘One must not live long enough to see oneself converted into a villain’*

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