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HABEAS CORPUS AND H.R. KHANNA

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"*However good a constitution may be, it is sure to turn out to be bad because those who are called to work it, happen to be bad lot. However bad a constitution maybe it may turn out to be good if those who are called to work it, happen to be good lot.*" - Dr. BR Ambedkar.

The speech made by BR Ambedkar in the constituent assembly turned out to be true when the constitutional powers were exploited by the then Prime Minister of India, Mrs. Indira Gandhi. The dawn of the dark began when on 26th June 1975, Internal Emergency was declared by Mrs. Gandhi's repressive government. Maintenance of Internal Security Act was passed by Parliament during the emergency and several opposition members, including student leaders, were put to jail as per MISA without any reasonable cause along with which extensive censorship was imposed.

Maintenance of Internal Security act was a draconian law passed by parliament empowering Mrs. Gandhi's government with vast arbitrary powers for preventive detention for indefinite period, search and seizure without warrant authority. Jayaprakash Narayan, LK Advani, Atal Bihari Vajpayee were some of the iconic leaders who were sent to jail. The one landmark case in the legal archive of India that occurred during the Emergency was *ADM Jabalpur v. Shivkant Shukla*[1], popularly known as the Habeas Corpus case[2]. The facts of the case are that several leaders were put to detention according to recently passed MISA provisions. Constitution of India provides a provision for writ of Habeas Corpus under Article 32 and Article 227 to be filed in Supreme Court, and High Court respectively.

Habeas Corpus writ is filed to secure release against an illegal detention/arrest of a person without any reasonable assertion. Such a writ could be filed by anyone for the release of a detenue and such detentions could only be upheld

[1] 1976 AIR 1207, 1976 SCR 172
[2] Subrata Chattoraj & Saibal Sen, *Tapas Pal hate speech case: Lawyers Welcome Split Verdict*, THE TIMES OF INDIA (Last Aug 14, 2014, 04:33 AM), https://timesofindia.indiatimes.com/city/kolkata/tapas-pal-hate-speech-case-lawyers-welcome-split-verdict/articleshow/40206323.cms.

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if the facts assert a strong case against detenue. Several writs were filed in different High Courts all over India against arbitrary imprisonment. The state governments in such petitions contended the preliminary objection of maintainability of the writs that since the emergency has been imposed and all the fundamental rights were suspended by the President under Article 359, no cause arise for the court to entertain the writs with the assertion that Article 21 in itself was suspended during Internal emergency as per President's order dated 27 June 1975. However, High Courts of Allahabad, Bombay, Delhi, Karnataka, Rajasthan, Madhya Pradesh & Punjab held that it was open to entertain such writs if the petitioner showed that the detainment was ultra-vires MISA and not done in accordance with its provisions.

Various state governments along with the Union of India appealed to the Supreme Court of India to challenge the orders of 9 High Courts. The appeal was heard by a 5-judges constitution bench consisting of Hon'ble Chief Justice A.N. Ray, and Justice H.R. Khanna, Justice M.H. Beg, Justice Y.V. Chandrachud, and Justice P.N. Bhagwati. The judgment shook the entire country and was indeed a black day for the Indian judiciary. The confidence of the public in Judiciary seemed to vanish. The majority judgment of 4:1 stated in view of Presidential order dated 27 June 1975 held that "*no person has right to move a writ petition under Article 226 before the High Court for habeas corpus or any other writ, to challenge the legality of detention order on the ground that the order is not under or in accordance with the act, or is illegal, or is vitiated by mala-fides, factual or legal, or is based on extraneous considerations.*"[3]

The only judge dissenting was His Lordship Justice HR Khanna who wrote in his dissenting judgment stated that the Power of High Court to entertain a writ under Article 226 is an integral part of the Constitution and it can't be swayed upon by any kind of internal disturbance in the country. The words of the learned judge were – "*Even in the absence of Article 21 of the constitution, the state has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of men in all civilized nations. Without such*

[3] *ADM Jabalpur vs Shivkant Shukla*, (1976) 2 SCC 521

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sanctity of life and liberty, the distinction between a lawless society and one governed by laws will cease to have any meaning, the principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land."[4]

His lordship's judgment was based on the facet of Rule of law which stated absence of Arbitrariness. However, as the judgment was passed along with the dissent of Justice Khanna who was due to become Chief Justice after A.N. Ray. The cost of the dissent was that he was superseded by Justice M.H. Beg because of his minority dissent. It was in fact foreseen. Fali S. Nariman, a respected jurist has written in his autobiography – "*It was directly as a result of the dissent in this case that Justice Khanna was subsequently 'superseded' in January 1977 when it was his turn as the senior-most judge, to be appointed Chief Justice of India. Contrary to long standing practice, he was not appointed Chief Justice of India. Khanna then promptly resigned*."[5] (Nariman, 2010) The judgment of Chief Justice AN Ray was though conceivable but the succumbing of two of the finest judges that India had ever seen in its history – Justice Y.V. Chandrachud and Justice P.N. Bhagwati, to the political tyranny, no doubt was astonishing.

Dissent until 80's in the Supreme Court's bench was extremely rare and done in exceptional circumstances only. At that time, it was considered that the bench must speak in a single, irrevocable judgement. There are basically three types of judgment: Majority judgment – where majority of judges in a bench agree, concurring judgment – where a separate judgment is written by a judge though agreeing with the decision of majority judgment but on a different standing, and Dissenting judgment – where the judge does not agree with the view taken by rest of the bench in the case (Chandrachud, 2018). Out of all the cases decided by the Supreme Court of India from 1950 to 2009, only 11% total cases had

[4] *S. Kasi. Vs. Respondent: State Through The Inspector of Police Samaynallur Police Station Madurai District*, MANU/SCOR/30906/2020.

[5] Priyanshag, *Justice Khanna's Dissent in the ADM Jabalpur Case*, Legal Service India (Last Accessed on May 28, 2021), http://www.legalserviceindia.com/legal/article-5389-justice-khanna-s-dissent-in-the-adm-jabalpur-case.html

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dissenting judgments[6]. In those 59 years - cases pertaining to Freedom of Speech & Expression under Article 19, dissenting judgments were passed 10.8% out of all the cases[7]. The rate of dissent of Supreme Court of India is very less as compared to other countries.

Taking U.S. Supreme Court as an example, dissent was given in around 70% of the cases decided between 1946 to 2009[8]. Chief Justice of US Charles Evans Hughes was of the observation that dissent in a court of last resort is an appeal to the brooding spirit of the law so that in future days a later decision may correct the error which has crept into the majority decision which the dissenting judge believes the court to have been betrayed. This was impeccably significant with Justice Khanna's dissenting judgment. Such robust was his dissent that later in *Maneka Gandhi v Union of India*[9], arbitrariness was considered as antithesis for equality. Justice Khanna's dissent became law of the land as the 44th Constitutional Amendment Act was enacted which came after emergency when Indira Gandhi's regime fell, and a new coalition government was formed in the leadership of Morarji Desai. It amended Article 359 of the Constitution and made it clear that the right to move any court for the enforcement of rights guaranteed under Article 20 & 21 could not be suspended. Before the amendment, Article 359 barred to move to any court in respect of the enforcement of all the rights guaranteed under Part III of the constitution. Although the judgment was not long-lived and got away with 44th amendment but it was formally overruled in the case of *Justice K.S. Puttaswamy (Retd.) v Union of India*[10] in 2017 by none other than son of Justice Y.V. Chandrachud (*part of majority bench in ADM Jabalpur case*), Hon'ble Justice D.Y. Chandrachud of Supreme Court of India.

In an interview with Justice Bhagwati in 2011[11], he readily agreed with the popular opinion that the judgment was short-sighted and apologized. Hon'ble Chief Justice M.N. Venkatachaliah

[6] In 11 per cent cases there was at least one dissent, and in 4 per cent cases there was at least one dissent and one concurrence. Nick Robinson et al, 'Interpreting the Constitution: Supreme Court Constitution Benches since Independence', Economic and Political Weekly, 26 February 2011, pp. 27-31, 28.

[7] Ibid

[8] Lee Epstein, William M. Landes and Richard A. Posner, 'Are Even Unanimous Decisions in the United States Supreme Court Ideological?', Northwestern University Law Review, vol. 106, 2012, pp. 699-714, p. 701. The data relates only to orally argued cases.

[9] 1978 AIR 597, 1978 SCR (2) 621

[10] WP (C) 494/2012

[11] *Justice Bhagwati on the Supreme Court's darkest hour*, MYLAW, Aug 2, 2011, https://youtu.be/qdq_c6qr17M

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remarked in H.R. Khanna Memorial Lecture in 2009 that the majority judgment in habeas corpus case should be confined to dustbin. FS. Nariman rightly found some similarity between the decision of the ADM Jabalpur and that of *Dred Scott*[12], rendered more than a century ago in 1857 by a 6:2 majority of the American Supreme Court. The majority in Dred Scott held that a black person could never be a citizen of the US. A strong criticism of this view by Abraham Lincoln got national attention and ultimately helped him win the presidential election, which changed history. In both the cases, powerful dissenting opinions brought about far-reaching changes in these two democracies.

[12] *Dred Scott v. Sandford*, 60 U.S. 393 (1856)