

FROM GOPALAN TO GOLAKNATH, AND BEYOND: A TRIBUTE TO MR. M K NAMBYAR

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The buzz word today is Incredible India. Be that as it may, it is indeed incredible that a district lawyer practicing in a district court in Mangalore would ultimately occupy centre stage in the Supreme Court and make an invaluable contribution to the evolution and development of our constitutional law. But that is precisely what Meloth Krishnan Nambyar achieved. After practicing in Mangalore for about 10 years during which time he was the Public Prosecutor and Government pleader, he shifted to Madras. He commanded a large and lucrative practice in the Madras High Court for several years especially in cases relating to nationalisation of road transport.

Before he began practicing in the Madras High Court he appeared in 1933 in the Privy Council, instructing Senior Counsel Subba Rao and appeared along with him in the case. The judgment in which his appearance is noted is reported in AIR 1933 PC 167.

Nambyar made his mark as a constitutional lawyer by his appearance and arguments in the case of *A.K. Gopalan v. State of Madras*¹. This case arose out of the detention of a well-known Indian communist A.K. Gopalan. It is a curious coincidence that the full name of his client was Ayilliath Kuttieri Gopalan Nambiar.

Gopalan's case was the first case of seminal significance regarding the interpretation of fundamental rights and their interplay. One of Nambyar's arguments was that the expression "except according to procedure established by law" in Article 21 should not be read literally in the sense that the Court only has to ascertain whether there is a procedure and it is established by law but procedural due process and the principles of natural justice should be read into it. The majority of the Supreme Court in *Gopalan* did not accept Nambyar's argument. In its first historic judgment delivered on 19th May 1950 the Supreme Court placed an unduly narrow and restrictive interpretation upon Article 21 and held that "procedure established by a law" means procedure established by law made by the State; that is to say, the Union Parliament or the legislatures of the State, and refused to infuse the procedure with the principles of natural justice.

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¹ AIR 1950 SC 27.

Another argument advanced by Nambyar that, preventive detention law could be challenged on the anvil of the fundamental rights guaranteed by Article 19, was also rejected because of the doctrine of mutual exclusivity of fundamental rights evolved by the Supreme Court. The Court's startling conclusion was that Article 21 excluded enjoyment of the basic freedoms guaranteed under Article 19 because Article 19 postulates legal capacity to exercise the rights guaranteed by it and if a citizen loses his freedom by detention he cannot claim the rights under clauses (a) to (e) and (g) of Article 19. Consequently, a law of detention could not be challenged on the touchstone of Article 19.

This unsound doctrine which held the field for a long time was ultimately overruled in 1970 in the Bank nationalization case, *R.C.Cooper v. Union of India*². In *Maneka Gandhi's* case decided on 25th January 1978, Justice Chandrachud stated that

"...the assumption in A.K. Gopalan that certain Articles of the Constitution exclusively deal with specific matters cannot be accepted as correct. Though the Bank Nationalisation case was concerned with the inter-relationship of Articles 31 and 19 and not of Articles 21 and 19, the basic approach adopted therein as regards the construction of fundamental rights guaranteed in the different provisions of the Constitution categorically discarded the major premise of the majority judgment in A.K. Gopalan as incorrect. That is how a seven-Judge Bench in Shambhu Nath Sarkar v. State of West Bengal³ assessed the true impact of the ratio of the Bank Nationalisation case on the decision in A.K. Gopalan. In Shambhu Nath Sarkar it was accordingly held that a law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(d). Later, a five-Judge Bench in Haradhan Saha v. State of West Bengal⁴ adopted the same approach and considered the question whether the Maintenance of Internal Security Act, 1971 violated the right guaranteed by Article 19(1)(d)".

It is ironical that in a property case relating to the nationalization of a bank the restrictive interpretation placed by the Supreme Court in a case involving personal liberty in *Gopalan's* case was over-turned.

Again, it was after 28 years, that the Supreme Court differed from *Gopalan* as to its interpretation of Article 21 and ruled in *Maneka Gandhi's* case, that the expression in Article 21 "except according to procedure

2 (1970) 2 SCC 298.

3 (1973) 1 SCC 856.

4 (1975) 3 SCC 198.

established by law” means a procedure which is just fair and reasonable. Nambyar’s farsighted arguments which if accepted by the Supreme Court in *Gopalan* would have led to a healthy development of constitutional law ultimately secured judicial acceptance by the Apex Court, and Nambyar’s submissions and stand were fully vindicated.

It needs to be noticed that on account of Nambyar’s persuasive advocacy, section 14 of the Preventive Detention Act was struck down as unconstitutional on the ground that it contravened the provisions of Article 22(5) of the Constitution “in so far as it prohibits a person detained from disclosing to the Court the grounds on which a detention order has been made or the representation made by him against the order of detention, and is to that extent *ultra vires* and void”.

Kania C.J. in his judgment in *Gopalan* paid a well deserved tribute to Nambyar in these words: “The Court is indebted to the learned counsel for the applicant [that is Nambyar] and the Attorney-General for their assistance in interpreting the true meaning of the relevant clauses of the Constitution”.

In *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*⁵ Nambyar argued with great force that “where the contravention of fundamental rights is concerned, the legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights”. Unfortunately the Supreme Court did not accept that argument. In view of certain observations of the Supreme Court in the eleven-Judge Bench judgment in *I.R. Coelho v. State of Tamil Nadu*⁶ it is arguable that Nambyar’s stand about the incapacity of the legislature to retrospectively validate a law which has been declared void because of violation of fundamental rights has now become acceptable.

In the case of *Deep Chand v. State of Uttar Pradesh*⁷ important constitutional issues were involved. One of the issues was whether the doctrine of eclipse as propounded by the Supreme Court in *Bhikaji Narain Dhakras v. The State of Madhya Pradesh*⁸ could also apply to a post-Constitution law that infringed a fundamental right conferred on citizens. Nambyar was a leading counsel in the case and successfully argued that the doctrine of eclipse cannot apply to any post-constitutional law that infringed fundamental rights conferred on citizens alone. The Supreme Court accepted Nambyar’s argument that a post constitutional law contravening the provisions of Part III of the Constitution “was a nullity from its inception to the extent of such

5 AIR 1962 SC 1760.

6 (2007) 2 SCC 1.

7 AIR 1959 SC 648.

8 AIR 1955 SC 781.

contravention". The prohibition [imposed by Article 13] "went to the root and limited the State's power of legislation and law made in spite of it was a still-born one". The arguments advanced by Nambyar in that case manifest his deep research and study.

Nambyar's most significant contribution in the field of constitutional law and fundamental rights was his argument in the case of *Golaknath*⁹ that the amending power under Article 368 of the Constitution is not absolute but is subject to certain implied limitations. It was urged that the power of amendment was that by exercise of the power of amendment of the Constitution its essential features cannot be destroyed and thereby the Constitution cannot be damaged. The stand adopted by Nambyar and his arguments apart from reflecting his deep research, study and erudition are evidence of his farsightedness. It can be said that he had an almost prophetic vision of the Supreme Court judgment in 1973 in *Kesavananda Bharati*¹⁰ where the doctrine of implied limitation was accepted. The Court in its path breaking judgment held by majority that the power to amend the Constitution cannot be so exercised as to damage its basic structure. It is a pity that on account of his indifferent health Nambyar could not appear in the *Kesavananda Bharati* case.

It is remarkable that the very arguments advanced by Nambyar in *Gopalan's* case in 1950 as well as in *Golaknath's* case in 1967 regarding implied limitations were subsequently accepted by the Apex Court. Nambyar's sensitivity to fundamental rights and the need for their protection is evident in his submissions and approach to the interpretation of fundamental rights..

Justice Krishna Iyer has paid an apt tribute to Nambyar in these words: "There was a commitment about him in the garb of fundamental rights. He fought the case not for the ideology of his client who was a Communist but for the ideology of human rights which found expression in Part III ... his complete commitment to the human cause".

Nambyar passed away on 18th December 1975, a few months after the spurious June 1975 emergency was foisted on the country. I was informed by his son K.K. Venugopal, who is a thorough gentleman and a great lawyer in his own right having argued many important constitutional law cases in the Supreme Court, that his father was disturbed by the imposition of emergency and the mala fide detention of reputable political leaders and other persons. On account of his weak health he could not lead an active campaign against the emergency.

9 I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

10 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

I had occasion to be briefed with him in a matter in the Bombay High Court in the case of Century Mills. The legislation was challenged on the ground that it was confiscatory because of some of its provisions. He was courteous, appreciative of whatever little assistance I could give him and generous in his praise. The matter went on for about four days. Justice N.A. Mody who was the presiding judge in the Bombay High Court which was hearing the case requested Nambyar after the case was over to meet him for tea in his chamber. Justice Mody was warm in his appreciation of Nambyar's arguments and his approach.

Subsequently when Nambyar was appearing in the Bombay High Court on behalf of certain persons detained under COFEPOSA, I had occasion to oppose him appearing for the government. Obviously there could be no question of grant of interim relief by way of suspension of the detention orders. Therefore Nambyar forcefully urged that the cases be heard most expeditiously and the government should not be given more than ten days for filing its counter affidavit. He was agreeably surprised when I informed the Court that the government would file its counter affidavit within a week and the matter could proceed to hearing promptly thereafter. I will never forget what he told me after we both left the Court: "Why did you oppose me? You should have been my junior in this matter". To which I replied, "unfortunately the Government of India had briefed me before your solicitors Gagrat & Co. sent me the brief".

There have been many great Indian lawyers. However there can be no doubt that MK Nambyar was one of our greatest constitutional lawyers. On account of the farsightedness and the vision involved in his arguments regarding the interpretation of constitutional provisions, especially fundamental rights, he paved the way for and stimulated, constructive juristic thinking. There could be no better tribute to Nambyar's invaluable contribution to the development of our constitutional law than the fact that his arguments, his stand, his approach towards fundamental rights were ultimately accepted by our Apex Court.