

Contested Primacy between Parliament and Supreme Court of India

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Abstract: *This article dwells upon the intricate relationship between the Parliament and the Supreme Court of India, tracing its evolution and development from the early days of Indian independence to the contemporary challenges. It discusses the doctrine of basic structure of the constitution and its literal implications in shaping the dynamic constitutional governance. The article not only explores some of the key constitutional amendments but also highlights the relevant landmark court cases. It analyzes the ongoing debate over the primacy of constituent power between the Parliament and the Supreme Court by highlighting the constitutional jurisprudence and historical perspectives. The article aims to shed on the delicate balance between the two essential pillars of Indian democracy.*

Keywords: Constituent power, Jurisprudence, Prerogative power, Basic structure, Legitimate government, Judicial landscape, Concomitant autonomy, Majoritarianism, Judicial collegiums, Constitutionalism.

1. Introduction

Working of constitutional governance in India virtually shows the unabated exercise of prerogative power by the Parliament. However, by accepting the constituent power of a national legislature as the *sui juris*, there was no visible conflicting issue over the primacy between the legislature and judiciary till the end of the Jawaharlal Nehru regime; surprisingly, in the post 1965, discontents between the two constitutional organs began to roll out every now and then, especially in the matter of exercising the constituent power of the state. Every legal system adopted across the globe strongly emphasises the significance of those provisions relating to the legislative power of amendment. According to John Burgess, a constitutional expert, a complete national constitution consists of three fundamental parts; viz, the first part, which is the most vital part, deals with the organization of state for accomplishment of future changes in the constitution (termed as amending power). The second and third parts relate to constitution of liberty and constitution of government. The framers of Indian constitution also inserted Article 368 in the constitution of India realizing the implications of amendment procedure. It is worth mentioning the statement of H. E. Willis, a constitutional expert of USA, he observed that the doctrine of amenability of constitution is grounded on the doctrine of sovereignty of people, and if no provision for amendment is provided, there would be a constant danger of revolution, and on the contrary, if the process of amendment is too easy, there would be another danger of too hasty action. However, the term amendment, used in the constitution of India, seems to carry all shades of meaning, such as alteration, revision, repeal, deletion, addition of any provision of the Constitution. In this regards, H. M. Seervai, a constitutional expert, opined that the power to frame the Constitution is the primary power and the power to amend the Constitution as the derivative power, the amending power under Article 368 stands to be higher than the judicial and executive power but lower than the constituent power in true sense. He further pointed out that the Parliament is not authorised to discharge the constituent power unlike the Constituent Assembly, but it can exercise as aquasi-constituent power under Article 368.

2. Contesting Primacy

During the passage of time, Article 368 becomes one of the breeding grounds in India that has, eventually led to contestation between the parliament and judiciary. The actual debacle between the two organs began to roll out in Goloknath's case (1967) when the apex court by majority of 6:5 overruled the Sankari Prasad's judgment (1951) declaring that the parliament has no power to take away or abridge the fundamental rights, enshrined in the part III of the Constitution. Again in Kesavananda's case (1973), the apex court by majority of 7:6 overruled the decision of Goloknath's case stating that parliament can't alter the basic structure of the Constitution while exercising its power under Article 368. The top court culled out the theory of basic structure by interpreting both the constitutional text and norms, glossed by the judiciary. Such limitations of amending power of the parliament were epitomized by the necessary implications developed during the working of constitutional governance.

Interestingly, in the early 1970s when the Congress party, led by Indira Gandhi, had an overwhelming majority in the parliament, the judges were apprehensive of radical changes which were likely to be happened in the constitutional governance. Even the ruling political party termed the judgment of Kesavananda's case (1973) as a coup by the judges of the Supreme Court to wrest supremacy from parliament and as such, the political executive, as a retaliatory action, broke the judges' seniority convention by appointing Justice A. N. Ray, who was in the fourth in seniority list, as the Chief Justice of India. Eventually, such deliberate political executive action compelled the three senior most judges of the apex court to resign from their respective judgeships in protest. At that point of time, the court's verdict not only ignited the political executive to take such drastic measures, but also conditioned them to get the basic structure doctrine rescinded by attempting to constitute a larger constitutional bench of another thirteen judges for reconsidering the same, however, it could not be materialised. The most pertinent question was that how and why the basic structure doctrine aims to impede the

legitimate constitutional changes. Invariably, multiple apprehensions with a sense of mistrust, especially on the part of the political executive grew up when the judiciary had begun to restrain the Parliament from further mutilation of the law of the land. Such a new constitutional jurisprudence was manifested by the Supreme Court's judicial craftsmanship, and eventually, the doctrine has been used by the judiciary while striking down the legislative actions in order to uphold the rule of law and supremacy of the Constitution. Having failed to get the basic structure doctrine overruled judicially, the legitimate government made many distorted attempts to erase it through constitutional amendments; however, their abortive efforts were held to be *ultra vires* to the Constitution by the apex court on the ground of the basic structure doctrine.

3. Legitimate Premises

There may be two probable grounds of in building such mistrust between the political executive and the judiciary—the first ground entails itself adequate reasons for having created the issue of contested primacy between the two, simply because the Westminster model of parliamentary democracy has been put in place in India as a replica of the past colonial ruler without much changes. Whereas the second ground could be the misconception and misinterpretation of the theory of basic structure. For instance, in Indira Gandhi's case (1975), the apex court interpreted the democracy, free and fair election, equality and separation of powers as some of the elements of the basic structure of the Constitution. Again in *Minerva Mill's* case (1980), the court held that harmony between fundamental rights and directive principles is the basic structure. In similar way, the apex court further held in *L. Chandra Kumar's* case (1997) that judicial power is also basic structure. Subsequently, in number of decided cases of the top court, judicial review has also been termed as the basic structure of the Constitution. Even the Presidential orders under Article 356 in *S.R. Bommai's* case (1994) and also in *Arunachal Pradesh's* case (2016), the apex court employed the basic structure doctrine to justify the executive actions and also applied the same doctrine to ordinary legislation as well as executive action. Such judicial landscape has also been perceived and commented by many jurists as unwarranted. For instant, Professor Upendra Baxi observed that in such situation, the constituent power in India must be shared between the Parliament and Supreme Court.

Another facet of hiatus between political executive and judiciary broke out when the apex court categorically reasserted independent of judiciary with its concomitant autonomy in appointments of higher courts judges as the integral part of the basic structure in a series of decided cases, such as in *S. P. Gupta's* case (1982) commonly known as *First Judges' case*, in *Supreme Court Advocates on Record's* case (1993) known as *Second Judges' case* and in *Third Judges' case* (1998). The point is clear that despite the Supreme Court's verdict in *Kesavananda's* case, the multiple features of basic structure doctrine seem to be expanding with larger judicial perspectives that have, eventually led to galvanise the mistrust between legislature and judiciary. Professor S.P. Sathe commented in his book "Judicial

Activism in India"(2008) that the basic structure is essentially a counter- majoritarian check on temporary legislatures in India. The reason being is that the original constitution reflects a national consensus; as such, the temporary legislative body can't go against the national consensus. In a way, it is relatively significance to recall the debate on judicial review in the Constituent Assembly in which those members of the Assembly representing the minorities were apprehensive of majoritarian rule implicit in the system, and they were in favour of greater say by the court rather than the parliament.

Another important constitutional slot was that of deliberate avoidance of using "due process of law" incorporated in Article 21 of the Constitution, thereby narrowing down the scope of judicial review. Interestingly, in the early decades of independent India, judiciary interpreted Article 21 faithfully to the intention of the framers of the Constitution as a positivist court, but in the post -1967, more particularly in the post- Maneka Gandhi's verdict of 1978, the Indian court has become an activist court, and the constitutional courts have also begun to transform the USA doctrine of "due process of law" in the Indian legal jurisprudence. In the aftermath, such judiciary has, virtually become the important power centre of parliamentary democracy through the means of judicial review *inter alia* judicial activism. As such, the Indian court is, perhaps the only court in the world that can not only question the validity of executive action but also can strike down the impugned Constitutional Amendment Acts. It is worth mentioning some of the verdicts of the apex court of India that have strongly worded for safeguarding the intrinsic rights of citizens and also successfully attempted to rescue from thwarting the common will of the people by the unwarranted legislative interventions. The apex court in *Indira Gandhi vs Raj Narain* (1975) upheld the Allahabad High Court judgement of invalidating the Indira Gandhi's winning of the election and also barring her from holding any elected public post for six years. The said decision of the court fomented a serious political crisis that had, subsequently led to proclamation of national emergency (1975-1977) on the ground of internal disorder. By resorting to the constituent power of Parliament, the 39th Constitutional Amendment Act, 1975 inserted Article 329A in the Constitution that had diluted the standing apex court's verdict of Indira Gandhi's election case. The said Amendment was challenged in the court of law on the ground of distorting the basic feature of the constitution, laid down in the *Kesavananda Bharati's* case, further, the court held the impugned Amendment Act as unconstitutional and void thereby leading to deletion of article 329A by the 44th Constitutional Amendment Act, 1978.

4. NJAC Symptom

A historic constitutional episode also began to surface sometimes at the end of UPA regime during 2012-2013, when the government made an attempt to take away the Judicial Collegium, which was set up in accordance with the Supreme Court's verdicts for appointments of higher courts judges, by introducing a National Judicial Appointments Commission Bill (NJAC Bill) in the Parliament, however, it could not succeed. When the NDA came in power in 2014 with thumping majority, they again revived the NJAC Bill

and got enacted the 99th Constitutional Amendment Act, but within no time the constitutional validity of the said Amendment Act was challenged in the apex court. Eventually, the court by majority of 4:1 struck down the 99th Constitutional Amendment Act on the ground that the Parliamentary can amend the Constitution so as to alter its basic structure. The court also further held that such Constitutional Amendment giving politicians and civil society a final say in appointment of judges to the higher courts violates the independence of judiciary *inter alia* the basic structure doctrine. It was also strongly observed by the court that judiciary can't risk being caught in a web of indebtedness towards the government. Upholding the independence of judiciary and ensuring the court as the sole fundamental key for the vibrant democracy, the said Amendment was declared as unconstitutional and void. Contention of the court explores that democracy can only be strengthened when judiciary is allowed to fulfil its constitutional obligations. Recalling the relative values of the apex court judgment held in A. K. Gopalan's (1950) in which judiciary is empowered to uphold the supremacy of the constitution. In fact, the will of people, as reflected in the decision of the elected representatives, is also subjected to the will of the constitution which is normally found reflected in the verdicts of the unelected independent judiciary. Since the constitution of India is itself considered to be the act of revolution, judiciary is legally expected to discharge its inherent power to check and counter-check the majoritarian rule. Surprisingly, on the other hand, the apex court verdict on NJAC of 2015 has been criticised as well as lauded by many. Arun Jaitley, finance minister, commented by saying that "invalidating the 99th Constitutional Amendment by the Supreme Court, Indian democracy can't be a tyranny of the unelected and if elected are undermined, democracy itself would be in danger". Ravi Sankar Prasad, the then Telecommunication Minister, also remarked that "parliamentary sovereignty has received a setback because of the apex court judgment". Mukul Rohatgi, the then Attorney General of India went on to say that "the NJAC judgment was a flawed judgment ignoring the unanimous will of the Parliament, half of the states' legislatures and the will of the people for transparency in judicial appointment." On the contrary, the law of the land has given the power of judicial review to the unelected judges of superior court to check the constitutionality of executive as well as legislative action. Justice R.M. Lodha, the then former CJI pointed out that once the legislature has done a legislative act, the constitutionality of such act can only be decided through the process of judicial review and there can be no rule of law without such a provision. He further stated that the NJAC verdict of 2015 demonstrated the constitutional compliance but not the judiciary flexing its muscles to knock out the people's will.

5. Cleansing the mistrust

Accepting the universal notion of independent judiciary as one of the cardinal objectives of a civilised legal system, appointment of judges to higher courts is seen to be crucial mechanism in realising the cherished goal of the constitutional governance. Justice J. S. Verma, the then former CJI once opined that the preamble to the supreme law of the land indicates the actual location of the political

sovereignty in the country; hence, both the legislature and judiciary discharge only the delegated legislation. In this context, one may also recall the debate that took place in the Constituent Assembly while deliberating on Article 21 of the Constitution pertaining to the question of primacy between legislature and judiciary. There were two dividing views among the Assembly members on this issue; *viz*, one view preferred to grant supremacy to the legislatures for being the elected representatives of people and other view representing the minority people preferred to give the judiciary with the authority to sit in judgement over the will of the legislatures under the purview of judicial scrutiny. The chairman of the drafting committee of Indian Constitution, Dr. B. R. Ambedkar was himself not free from such dilemma about the wisdom of giving unlimited constituent power to legislature; he further observed that however good a constitution may be, it is sure to turn out bad, because those, who are called to work it, happen to be bad. However bad a constitution may be, it may turn out to be a good if those, who are called to work it, happen to be a good lot. (CAD, Vol. XI, P.975) Interestingly, Jawaharlal Nehru representing the majority view of the Constituent Assembly members expressed the significance of a long struggle against the colonial rule with great patriotism *inter alia* complete elimination of such colonial rule from the soil of India, and also ensured that there would be no threat to freedoms of our country men, simply because the constitutional governance would obviously take care of all in near future. He further gave his assurance to every individual to feel secure with the national legislature taking into account that the legislature ought to be trusted not to make bad laws for their own fellow citizens. However, in reality, such assurances are being proved to be mere ritual promises, and it is also true that veto is bad wherever and whomsoever it is vested. Since the constitution is a living organism, it must also be allowed to grow and change like any other living thing, but in the name of change, it must not be allowed to end the constitution and constitutionalism. It seems that citizens are not happy in such situation, and to do away such malady, it is imperative for all public authorities to adopt the culture of justification rather than the culture of authority. In a way, the basic structure doctrine remains the rallying point for those who want to preserve the constitution and constitutionalism in India, if such doctrine is used and applied with foresight and judiciousness, it could lend to stable constitutional governance, but it will obviously depend upon the far-sighted judicial policy and its discretion. Implications of the consequential hearings and scope for Memorandum of Procedure (MoP) preparation, as provided by the apex court, also reveal the viable ways for mending up the deficiencies in the existing Collegiums system, and that has also ironically paved the road for collaboration rather than confrontation. The pertinent question is how to sustain the supremacy of constitution and constitutionalism without scarifying democracy. The actual answer lies only with the parliament and judiciary but not with people, and both the institutions can iron out the issue by cooperating each other.

6. Conclusion

The intricate relations between the Parliament and the Supreme Court, as developed through constitutional

practices and also demonstrated through the evolution of the basic structure of the constitution, highlights the complex dynamic and dimensions of constitutional governance in the country. The Parliament retains its role as a legislative powerhouse in Indian democracy, while the judiciary serves as a custodian of the constitution and protector of citizens as well, ensuring that the will of the people aligns with the principles embedded in the Constitution. The interplay of constituent powers between the two pillars of the nation, at times marked by collaboration and at other point of times by confrontation, is essential to uphold the principles of constitutional democracy and rule of law. It is imperative that both the institutions continue to cooperate and evolve a viable solution by keeping in mind that the ultimate goal of sustaining the supremacy of the constitution and constitutionalism without compromising the principles of democracy is sacrosanct.

References

- [1] Grenville Austin: the Indian Constitution: Cornerstone of a Nation, (1960)
- [2] H.R. Khanna: India's Making of India's Constitution, (1981)
- [3] Umakant Tiwari: The Making of the Indian Constitution, (1967)
- [4] V.N. Sukla: Constitutional Law of India, (9th edition,1994)
- [5] M.P.Jain: Outlines of Indian Legal History, (1966)
- [6] Durga Das Basu: Constitutional Law of India, (2nd edition,1980)
- [7] A.G. Noorani: Constitutional Questions in India, (2002)
- [8] Subhash C. Kashyap: Our Constitution: An Introduction to India's Constitution and Constitutional Law,(2009)
- [9] H.M. Seervai: The Constitutional Law of India, Vol. 3, 4th edition (2015)
- [10] S.P.Sathe: Judicial Activism in India, (2nd edition,2002)
- [11] Constitutional Assembly Debate(CAD), Vol. X,XI &XII