
THE TUSSLE BETWEEN THE INDIAN PARLIAMENT AND THE JUDICIARY: IN THE EARLY POST- CONSTITUTIONAL PERIOD

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ABSTRACT

The relation in between the Indian Parliament and the judiciary during the early years after the Indian Constitution came into effect. Both of the nation's most important pillars were fighting over supremacy: the Indian Parliament had unlimited power to amend the Constitution, while the judiciary took the stand that the Constitution is the supreme law and the nation has to follow it. Parliament and the judiciary argue over Article 368, which gives Parliament the power to amend the whole Constitution,¹ while the judiciary takes a strong stand on Article 13(2), which clearly states that any law that violates the fundamental rights in Part III shall be declared void and unconstitutional. The Indian judiciary clearly made a perception in the mind that if the provisional parliament or even the constitution makers want to make the parliament supreme over the constitution, then they clearly would not mention the term “Any Law” under Article 13(2) in the constitution, while they do show they cut their own hand regarding the supremacy over the constitution. This article examines the historical background of the tussle, how parliament amended the constitution for the achievement of its goal of socio-economic empowerment and preservation of peace and unity of the nation and how the judiciary plays a safeguard role for the fundamental rights and to safeguard the Constitution's basic structure.

The study does not argue only about the parliament-judiciary conflict for institutional supremacy, but also about a necessary constitutional dialogue that helped to define the features of Indian Democracy. By balancing the need for social transformation with the protection of constitutional values, the tussle ultimately strengthened the principle of constitutional supremacy. For achieving this there was a series of landmark judgments which gave the most important Doctrine of “Basic Structure”, gave the concept of checks and balances between the three organs: the legislative, the executive, and the judiciary².

¹ The Indian Constitution, 1950

² Kesavananda Bharati vs State of Kerala

Introduction

The constitution of India, which came into force on 26 January, 1950, established a democratic republic based on the principles of constitutional supremacy, separation of powers, and protection of fundamental rights. The Constitution imagine a balance between the three organs of the State- the Legislature, Executive and Judiciary. At the initial time after Independence, a major conflict arose between the Indian Parliament and the Judiciary regarding, concerning the scope of, Parliament's power to amend the Constitution, especially, the Fundamental Rights. This conflict, also known as the "Parliament-Judiciary Tussle," shaped Indian Constitutional law and empowered the doctrine of "Judicial review" ³and constitutional supremacy.

The main reason behind the tussle was related mainly to two articles: -

- (i) Article 368, whether the parliament had the unlimited power to amend the constitution or there were certain limitations on this power?
- (ii) Article 13, generally, a constitution enactment or a constitution amendment is regarded as law. But whether such a law shall become within the inhibition contained in article 13(2)?

The dispute between the Parliament and the Judiciary evolved through a series of Constitutional amendments and Landmark judgements, ultimately leading to the development of the "Basic Structure Doctrine".

Background of the conflict

At first, we need to understand the purpose of Article 13. The general purpose of this article is that a law inconsistent with or against fundamental rights is liable to be declared void. It can be said that Article 13 accords paramountcy or supremacy to fundamental rights under the scheme of the Indian Constitution.

Article 13 enacts Constitutionalism (limited government by law or constitution is supreme) in the functional sense of the term, and all laws have to accord with the provisions of Part III.

'LAW' includes: - ordinance, bye-law, rules, regulations, customs and usages having the force

³ The Indian Constitution, 1950, article 13

of law.

Article 13, by implication, enables judicial review, which is exercised by the court in order to declare void a law or executive action if it is found in the violation of a fundamental right.

The power of “judicial review”, as first enunciated by the Supreme Court of America in

“Marbury v. Madison, 1803”⁴, this judgment established judicial supremacy in the U.S.A.

“There is a cause-and-effect relationship between Article 13 on one hand and Article 32 or Article 226 of the Constitution on the other hand”.

Flow chart: -

- (i) The government wanted to pursue the goals of socio-economic empowerment, preservation of peace, and unity of the nation.
- (ii) The government initiated certain laws related to its goals.
- (iii) A few of such laws were declared void by the High Court on the grounds of Fundamental rights.
- (iv) As a reaction, Parliament enacted the Constitution Amendment One after the other.
- (v) The Supreme Court doubted the power of Parliament to enact certain amendments.
- (vi) Finally, the Supreme Court gave the Basic Structure doctrine.

FIRST AMENDMENT 1951

Background: - In the initial years of the Constitution, land reforms, agricultural reforms, nationalism and the regulation of free speech had become the most important goals of the government. Such reforms were needed to execute the noble visions of the welfare state, as contemplated in Part IV of the Constitution. The overall purpose was to give land to the landless from the zamindars, ensure social empowerment for the weaker and depressed classes of the citizens, and to ensure peace and unity within the nation. The government needed to acquire

⁴Marbury vs Madison, 1803, 5 U.S. (1 Cranch) 137(1803)

private land for infrastructural purposes. Land being a state subject, a law in this behalf could only be made by the state legislature.

When the Bihar legislature enacted a law of land reforms authorising the state to put a maximum limit or ceiling within which a private person could hold land, the law was declared unconstitutional by the Patna High Court, in “Kameshwar Singh v. State of Bihar, 1950”⁵. Similarly, the laws authorising the regulation of the press were declared unconstitutional, by the Supreme Court in two important cases in May, 1950: “Romesh Thapar v. State of Madras”⁶, also known as the “Cross Road” case and the other was “Brij Bhushan v. State of Delhi”⁷, also known as the “Organiser” case.

The ‘Cross Road’ was banned in Madras and in Bombay because of its pro-communist ideology and the disturbance of peace that it advocates it there by. The ‘Organiser’ was banned because it was perceived as following a communal agenda where by aggravate the Hindu-Muslim divide that was already there in the aftermath of the partition of the country.

Further, in the case of, “Champakam v. State of Madras”⁸, the honourable High Court and later, the honourable Supreme Court declared the “reservation policy of the state government void, where the state provides reservation of seats in medical and engineering colleges in favour of backward classes”.

The Nationalisation agenda of the government also suffered a setback when the Calcutta High Court in March, 1951, in “State of West Bengal v. Bela Banarjee”⁹, pronounced that in the case of acquisition or nationalisation of private property, the expropriated owner shall be given full compensation which would be equivalent to the current market price of the property.

Such like judgment, of course, requires an amendment to the Constitution so as to enable the government to pursue socio-economic goals and the preservation of peace and unity among the people of nations. Thus, the provisional parliament (previous constituent assembly) enacted the Constitution 1st Amendment Act 1951, which brought in the following changes in the

⁵ Kameshwar singh vs state of Bihar, 1952 SCR 889

⁶ Romesh Thapar vs state of Madras, (1950) SCC 436: 1950 SCC OnLine SC 19: AIR 1950 SC 124: 1950 SCR 594

⁷ Brij Bhushan vs state of Delhi, (1950) SCC 449: 1950 SCC Online SC 20: AIR 1950 SC 129: 1950 SCR 605

⁸ State of madras vs Champakam Dorairajan, AIR(1951)SC 226: 1951 SCR 525

⁹ State of west Bengal vs Bela Banerjee, 1954 SCR 558: AIR 1954 SC 170

Constitution: -

- (i) Article 15 was amended, and clause 4 was added to it, to enable the state to provide specially for SCs and STs and socially- educationally backward classes (this was done because of the CHAMPKAM CASE 1951¹⁰)
- (ii) Article 19(2) and (6) were amended so as to regulate free speech and to facilitate the state to pursue its business or commerce-related activity in a monopolistic manner as well (inspired by the judgment of the court in (a) Brij Bhusan 1950, (b) Romesh Thapar 1950, (c) Shail Bal Devi v. State of Bihar)
- (iii) Articles 31A and 31B, along with Schedule 9, were added to the Constitution. Article 31B and Schedule 9 provide protection from judicial review to law which may be violated of Fundamental rights. (inspired by the judgment of Kameshwar singh 1950 case and Bela Banerjee Case).

“The constitutional validity of the First Amendment Act 1951 was challenged for judicial review to the Supreme Court, Article 32 read with Article 13(2) of the Constitution”. (supra)

The landmark case is titled: -

CASE: Shankari Prasad v. Union of India 1951 SC (5JB)¹¹

The main argument of the petitioner was that, the First Amendment of the Constitution was a law within the meaning of Article 13(2); as such, it should be declared void in exercise of judicial review by the Supreme Court. Article 31B and the 9th Schedule, it was argued and violated the fundamental right provision by precluding judicial review of a law violative of fundamental rights.

The Supreme Court held that, “generally a constitutional amendment act is regarded as law, but this law is made by the legislature, and is done in exercise of constituent power. Constituent power is different and distinguishable from ordinary legislative power”. Article 132 contemplates laws made in exercise of ordinary legislative power and rules, regulations made by the executive organ of the state for the purpose of day-to-day administration. Therefore, the

¹⁰ Supra 8

¹¹ Shankari prasad Singh vs UOI, 1951 SCC 966: 1951 SCC Online SC 59: AIR 1951 SC 458: 1952 SCR 89

Supreme Court held that “Constitutional amendment is not law within the meaning of Article 13(2)”. Thus, the Constitution Amendment Act can’t be declared void on the grounds of violation of fundamental rights.

This judgment essentially meant that Article 31B and Schedule 9 were valid, and that Parliament, by way of a constitutional amendment, could add a new law in the 9th Schedule, and such a law could remain protected from said to be void by the court.

By the 1st Amendment Act, 13 laws were placed in the 9th Schedule.

CASE: Sajjan Singh v. State of Rajasthan¹²

Background: - The Supreme Court in “State of West Bengal v. Bela Banarjee, 1953” held that in the case of compulsory acquisition by the state of private property, the expropriated owner shall be given full compensation equivalent to the current market value of the property. Thereafter, the parliament enacted the 4th constitutional amendment in 1955, thereby amending Article 31(2), making the above-mentioned compensation amount not a subject matter of judicial review by the Supreme Court vide Article 32 and the High Court vide 226.

Further, the 4th Amendment placed 7 laws in the 9th Schedule, and thereafter, the Constitutional 17th Amendment Act of 1964 also placed some laws in the 9th Schedule. The Constitutional validity of the 4th and 7th Constitution Amendment Acts was considered by the Supreme Court in this case.

In this case, 5 judge bench upheld its judgment in the “Shankari Prasad, 1951” case and upheld the 4th and 17th amendment act.

In the following case, the Supreme Court held that our Constitution provides for 3 methods for the amendment into the Constitution. The substantive part of Article 368 applies to the majority of the amendments made to the Constitution, whereas the proviso contained in Article 368 indicates those constitutional provisions in respect of which the constitutional amendment has to be passed by the state legislative assembly also. Further, the Constitution amendment, such as is contemplated for Article 4, does not require the procedure given in Article 368 to be

¹² Sajjan Singh vs state of Rajasthan, 1964 SCC Online SC 25: (1965) 1 SCR 933: AIR 1965 SC 845

followed by the parliament.

Based on the above stated, the Supreme Court held that, “if the constitution makers had intended to make the fundamental rights unamendable or amendable by any extraordinary process, they would have indicated as much in the constitution itself. In the absence of such an indication, it must be held that fundamental rights are amendable”.

After the Judgment of the Supreme Court in both the above cases, the constitutional validity of the 17th Amendment Act of 1964, again came up for consideration.

In case Golak Nath v. State of Punjab, 1967¹³

In order to review the correctness of the previous amendment and previous judgment thereon, an 11-judge constitutional bench was constituted, headed by Chief Justice “K. Subba Rao”. The Supreme Court gave the judgment by a majority of 6:5 that the fundamental rights are unamendable because they are “Primordial and Transcendental” (supernatural).

The Supreme Court held that the Constitutional Amendment Act is a law within the meaning of Article 13(2) of the Indian Constitution. Therefore, a constitutional amendment law that is violative of fundamental rights shall be declared void. However, the Supreme Court refused to strike down the First, Fourth, and Seventeenth amendments by applying the doctrine of overruling, which was evolved by the American Supreme Court in the 1930s.

PARLIAMENT REPLY TO JUDICIARY BY AMENDMENT

In response, to the judgment of the Supreme Court in the Golaknath case of 1967. The parliament enacted the 24th Amendment Act of 1971 and also the 25th Amendment Act of 1971. Two other amendments, namely the 26th Amendment of 1971 and the 29th Amendment Act of 1972 also part of the same context.

By the Constitution 24th Amendment Act 1971, clause (4) was added in Article 13. Clause 4 of Article 13 reads that nothing in Part III shall apply to a constitutional amendment enacted under Article 368, Similarly, Article 368 was also amended by the 24th Amendment and clause (3) was added herein, which virtually says that Part III shall not apply to a Constitution amendment

¹³ Golak Nath vs state of Punjab, 1967 SCC Online SC 14:(1967) 2 SCR 762: AIR 1967 SC 1643: 1967 2 SCJ 486

enacted under Article 368 of the Constitution¹⁴. The overall effect of this amendment was that a constitutional amendment law shall not be regarded as a law within the meaning of Article 13(2) of the Constitution. Thus, a Constitutional amendment enacted vide Article 368 shall not be declared void even if it is found to be in contravention of fundamental rights. The 24th Amendment directly reduced the scope of judicial review of the Supreme Court, and the High Court were precluded from exercising judicial review on constitutional amendments.

Further, the scope of judicial review of the ordinary law or constitutional amendment law was reduced or eliminated by the Constitution 25th Amendment Act 1971, whereby “Article 31C” was added into the Constitution. Article 31C in its original form said that an ordinary law purporting to give effect to the Directive Principle contained in Article 39(b) or Article 39(c) shall remain protected from judicial review on the ground of violation of fundamental rights and a law containing a declaration that it is for the purpose of giving effect to Article 39(b) or Article 39(c) shall not be subjected to judicial review in order to find out whether the law actually gave affect to Article 39(b) or Article 39(c).

It is to be noted that, even if a colourable law is made by the parliament, the same is protected from judicial review. Thus, it can be said that (Article 31c) totally eliminated the scope of judicial review of ordinary laws.

Constitutional 26th Amendment Act of 1971, by this amendment, Article 366(22) was amended, and Articles 291 and 362 were deleted. The overall effect was that the “Rulers” of the erstwhile princely state were derecognised, and their privy purse (pension) and other privileges were abolished.

Constitutional 29th Amendment Act 1972, by this amendment, the 9th Schedule was amended to insert two laws relating to land reforms in the state of Kerala. As a result of this amendment, the right to property of one Kesavananda Bharti of Kerala came under the threat of ceiling and acquisition. He challenged the constitutional validity of the 29th Amendment to the Supreme Court.

On the argument of the petitioner's counsel, the Supreme Court agreed to consider the constitutional validity of the 24th, 25th, and 26th amendments along with its judgment in previous

¹⁴ The constitution of India, 1950

cases.

Kesavananda Bharti v. State of Kerala 1973 SC, 13JB¹⁵

In this case, the main arguing counsel was “Nani Palkhivala”. He emphasises the text of the “preamble” to suggest a limited power of the parliament to amend the constitution. “Preamble, it was argued, contains an implied limitation to amend the Constitution. Based on the content of the preamble, fundamental rights, directive principles of the state policy, the structure of parliamentary democracy and the need for independent democracy”.

The majority of 7 judges laid down the “Basic Structure doctrine” to limit the power of the parliament to amend the constitution. The ratio of the judgement was reduced by 6 majority points in the following manner:

- (i) The Golaknath judgement was overruled.
- (ii) The Constitutional validity of the 24th Amendment Act was upheld.
- (iii) The extent part of 31C was added by the 25th amendment, and was declared void to the extent it precluded judicial review.
- (iv) The constitutional validity of the 26th Amendment was left to be decided by a lesser bench in light of the principle laid down in this case.
- (v) The constitutional validity of the 29th amendment was upheld.
- (vi) Article 368 doesn't permit the parliament to alter the “Basic Structure” or the basic framework of the constitution.

The following were declared to be part of the Basic Structure of the Indian Constitution: -

- (i) Constitutional supremacy.
- (ii) Judicial review

¹⁵ Kesavananda Bharati vs state of Kerela, (1973) 4 SCC 225: 1973 SCC online SC 156: AIR 1973 SC 1461: 1973 Supp SCR 1(supra)

- (iii) Democratic and republican forms of government.
- (iv) Constitutions secular character.
- (v) Separation of power, between the legislative, the executive and the judiciary.
- (vi) The dignity of the individual.
- (vii) The unity and integrity of the nation.
- (viii) Parliamentary government.

Thus, it was obvious that the majority of the features or attributes contained in the preamble were declared part of the basic structure, and therefore, it became an obvious conclusion that the preamble is part of the Constitution.

The first validity of the basis structure doctrine was pronounced by the Supreme Court in the case: “Indra Gandhi v. Raj Narain 1975”¹⁶, also known as the “election case”.

In the following case, the Supreme Court declared” free and fair election” a part of the “Basic Structure” of the Constitution. In this case, the Supreme Court struck down the part of the Constitution, 39th Amendment Act, 1975 through which Article 329A was added by virtue of which the election dispute involving the Prime Minister or Speaker of Lok Sabha was excluded from the jurisdiction of the High Court or the Supreme Court, and such disputes were to be heard by an authority which the parliament would prescribe.

THE CONSTITUTION 42ND AMENDMENT ACT, 1976

The 42nd Amendment added, the clause (4) and clause (5) in Article 368. It also amended Article 31C. These amendments were aimed at diluting the effect of the judgment in the Kesavananda Bharti case.

Article 368(4) excluded the scope of the judicial review of the constitutional amendments on any grounds whatsoever. The meaning of this clause was that a constitutional amendment, even if violative of the basic structure, shall not be declared void in exercise of judicial review by

¹⁶ Indira Gandhi vs Raj Narain, (1975) 2SCC 159: 1975 SCC Online SC 519: AIR 1977 SC 69

any court, including the Supreme Court.

Article 368(5)- There shall be no limitation whatsoever on the amending power of the Parliament as regards the amendment of the Constitution.

Article 31C, the extended part of this article, gave protection to the law giving effect to any of the provisions of the directive principal Part IV from judicial review on grounds of violation of fundamental rights.¹⁷

Apply the Basic Structure doctrine to the Supreme Court in the case “Minerva Mills v. Union Of India,1980”¹⁸, declared clauses 4 and 5 of Article 368 unconstitutional as being violative of the “Basic Structure” doctrine. The Supreme Court struck down the extension of Article 31C, whereby the Directive Principles were given primacy over fundamental rights and limited the scope of Article 31C to only the directives contained in Article 39(b) and Article 39 (c). The Supreme Court repeated that “Judicial Review” is part of the “Basic Structure” of the Constitution.

A further validation came in the case of “WAMAN RAO V UNION OF INDIA ,1981”¹⁹, where the Supreme Court held that the laws placed in the 9th Schedule after the judgment of Kesavanand Bharti 1973. Can be subjected to judicial review on the ground of violation of the Basic Structure of the Constitution. It is to be noted that the same statement has been repeated by the Supreme Court in “I.R COELHO V. STATE OF TAMILNADU”²⁰

CONCLUSION

The tussle in between the Indian Parliament and the Judiciary in the early post- constitutional period was not merely a power struggle between two institutions, but it was a debate over the nature and vision of the Indian Constitution. Parliament fought for the broad and ultimate power to implement social and economic reforms, while the Judiciary fought to preserve and uphold the Constitutional values and protect Fundamental Rights.

The story of who is supreme begins with Shankari Prasad and Sajjan singh, reaching a critical stage in Golaknath, and finally stops by the historic Kesavanand Bharati judgment. The tussle

¹⁷ Article 368 and 31 of the Indian Constitution, 1950

¹⁸ Minerva Mills vs UOI, (1980) 2 SCC 591: 1980 SCC Online SC 187 AIR 1980 SC 1789

¹⁹ Waman Rao vs UOI, (1981) 2 SCR 1

²⁰ I.R Coelho vs state of Tamil Nadu,(2007) 2 SCC 1: 2007 SCC Online: SC 71

shaped the Constitutional identity of India by giving the Basic Structure Doctrine and providing a balance between Parliament's amending power and the Judiciary's role as the guardian of the Constitution.

Today, this doctrine remains one of the most essential features of the Indian Constitution and serves as a safeguard against arbitrariness and constitutional changes. The early tussle ultimately strengthened Indian democracy by ensuring that neither Parliament and Judiciary is supreme; rather, it is the Constitution itself that remains supreme.

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