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CONFLICTS BETWEEN PARLIAMENT AND SUPREME COURT OF INDIA ON CONSTITUTIONAL PROVISIONS

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Indian Constitution has not adopted separation of power in absolute form. Though the constitution defines the powers and functions of the institutions of the government, i.e., legislature executive and the judiciary, yet they do not function in isolation, keeping apart from each other. There is a deep inter-relationship between the three organs of the government[1]. The parliament makes law and the courts interpret and apply it. The parliament sanctions all appropriations necessary for the maintenance of the judicial department. On the other hand, the judiciary may exercise considerable control over legislation by reviewing laws in order to determine their constitutionality. In India, there is no express provision declaring the constitution to be the supreme law. But the Supreme Court's power of judicial review is subject to controversy although its scope is not as extensive as that of the supreme court of the United States[2]. In simple words, judicial review means the power of the court to interpret the constitution and to declare acts of legislature, executive or administration void, if it finds them in conflict with the Constitution. The Constitution of India explicitly establishes the doctrine of judicial review in several articles, such as 13, 32, 131, 136, 143, 226 and 246.

As a constitutional practice, judicial review is usually considered to have begun with the assertion by John Marshall, Chief Justice of the United States, in *Marburry Vs Madison*[3] in 1803, of the power of the Supreme Court to invalidate legislation enacted by Congress.

However, the power of judicial review in India is limited inasmuch as if an Act of parliament is set aside by the judiciary as ultra vires or violative of the Constitution, parliament can re-enact it after removing the defects for which it was set aside. Also, the Parliament may within the limits of its constituent powers, amend the Constitution in such a manner that the law no longer remains unconstitutional. Since 1950, questions have been raised about the scope of the Constitution amending process contained in Article 368. The basic question raised has been whether the basic rights are amendable so as to dilute or take away any fundamental right through a constitutional amendment? The most affected fundamental right was the right to property contained in Article 31, which was amended many times. It appeared that parliament was asserting the supremacy as enjoyed by the British Parliament, but the Supreme Court was interpreting Parliament as a creature of the Constitution, exercising powers under and not beyond the Constitution. The constitutional validity of these amendments has been challenged in number of times before the apex court.

The question as to the scope of the amending power of the Parliament came before the Supreme court for the first time in *Shankari Prasad Vs Union of India*.[4] In this case, the Constitutional validity of the Constitution (First Amendment) Act, 1951[5] was challenged before the Supreme Court. The argument against its validity was that Article 13 (2) prohibited enactment of a law infringing or abrogating a fundamental right. In its original form Article 13(2)[6] states:-

> "The State shall not make any law which takes away or abridges the rights conferred by this part (that is, Part III of the Constitution on fundamental rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void".

The Constitution (First Amendment) Act was enacted to remove certain difficulties brought to light by judicial pronouncements in regard to fundamentals rights and the directive principal of the state policy. A new provision, Article 31-A was added by the Constitution (First Amendment) Act, 1951. Article 31-A provides that no law providing for acquisition of any 'estate' or any right therein, extinguishment or modification of any such right shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14 or 19 of the Constitution. Besides Article 31-A, the Constitution (First Amendment) Act, 1951 also added a new provision, Article 31-B, along with the Ninth Schedule to the Constitution. Article 31-B immunizes the laws included in the Ninth Schedule, from attack on the ground of their inconsistency with any of the fundamental rights. Article 31-B gives blanket protection to all items in the Ninth Schedule and is retrospective in nature. Even if a statue has already been declared unconstitutional, if included within the schedule, it is deemed to be constitutional from the date of its inception.

In *Shankari Prasad*, the Supreme Court upheld the Constitutional validity of the Ninth Schedule. The question before the Supreme Court was whether an amendment of the Constitution made under Article 368 was included in term "Law' in Article 13(2)? The Court, upholding the Constitutionality of the First Amendment, observed the "law" in Article 13(2) does not include an amendment enacted under Article 368. The Court thus, laid down that Article 368 conferred constituent power on

parliament, in the exercise of which it can amend every provision of the Constitution, including the fundamental rights. These rights were immune only against an ordinary law, i.e. a law made under legislative powers outside article 368. Article 13 must be read subject to article 368 and, thus, the Court disagreed with view that the fundamental rights were sacrosanct, inviolable and beyond the reach of the process of constitutional amendment as laid down in Article 368.

Article 31-A was again amended with retrospective effect by the Constitution (Fourth Amendment) Act[7], 1955, which inserted certain state acts in the Ninth Schedule. The amendment remained unchallenged because of decision in *Shankari Prasad* case.

The Constitution (Seventeenth Amendment) Act[8], 1964, extended the scope of Article 31-A and Ninth Schedule to protect certain agrarian reforms enacted by the Kerala and the Madras states. The validity of Seventeenth Amendment was questioned in *Sajjan Singh Vs State of Rajasthan.*[9] The Supreme Court again rejected the argument by majority of 3 to 2 and expressed its full concurrence with the decision in *Shankari Prasad* and laid down that Article 13(2) does not affect amendments of the Constitution made under Article 368. The Court held that the constituent power conferred by the Article 368 on parliament, includes even power to take away fundamental rights under Part III of the Constitution. The majority again distinguished between an 'ordinary law' and a 'constitutional law' made in exercise of 'constitutional' power and held that only the former, but not the latter, fell under Article 13.

The Constitutional validity of the Constitution First, Fourth and Seventh Amendments was again examined by the Supreme Court in *I.C. Golak Nath & Others Vs State of Punjab*[10] case. The Supreme Court by a majority of 6:5 overruled its earlier decisions in *Shankari Prasad* & *Sajjan Singh* held that parliament has no power to amend the fundamental rights. The court held that an amendment is a legislative process and an amendment of the Constitution is made only by the legislative process with ordinary majority or with special majority, as the case may be, and that an amendment could be nothing but "Law" within the meaning of Article 13. The Supreme Court further described that the Parliament would have no power in future, i.e., from the date of *Golak Nath* decision on February 27,1967, to amend any provision of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein. On the other hand, the minority judges upheld the power of parliament to amend fundamental rights. The minority stuck to the arguments which had already been developed in *Shankari Prasad & Sajjan Singh*.

The *Golaknath* case stirred a great controversy regarding the scope of judicial review. In 1971 when the government emerged strong after the Lok Sabha elections, it took the bold step of amending the constitution by the Constitution (Twenty Fourth Amendment) Act, 1971.[11] The amendment made certain modifications in Article 13 and 368 to get over the *Golak Nath* ruling and to assert the power of parliament, denied to it in *Golak Nath*, to amend the fundamental rights. The Parliament also passed the Constitution (Twenty Fifth Amendment) Act, 1971[12] which further restricted the right to property and the Constitution (Twenty Sixth Amendment) Act, 1971[13] which abolished the privy purses. The validity of these amendments was challenged in *Kesavananda Bharti* case[14]. The Court observed that the power of amendment of parliament under Article 368 is subject to certain implied and inherent limitations and that in the exercise of its amending power, parliament can not amend the 'basic structure' or framework of the Constitution. According to Sikri, C.J., the basic structure may include the following features,

a) Supremacy of the Constitution.
b) Republican and democratic form of government,
c) Secular character of the Constitution.
d) Separation of powers.
e) Federal character of the Constitution.

In the same case, Justice Hegde and Justice Mukherjee included the sovereignty and unity of India, the democratic character of our polity and individual freedom in the elements of the basic structure of the Constitution. They believed that parliament has no power to revoke the mandate to build a welfare state and an egalitarian society. Justice Khanna also said that parliament could not change our democratic government into a dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha.

Soon after that the Supreme Court applied the *Kesavandada* ruling regarding the non-amendability of the basic features of the Constitution in *Indira Nehru Gandhi Vs Raj Narain case*.[15] Here was involved the question of the validity of clause-4 of the Constitution (Thirty Ninth Amendment) Act, 1975.[16] This amendment sought to do three things: one, generally, to withdraw the election of the Prime Minister and a few other union officials from the scope of the ordinary judicial process; two, more specifically, to void the high court's decision declaring Indira Gandhi's election to the Lok Sabha as void ; and, three, to exclude the Supreme Court's jurisdiction to hear any appeal. All five judges delivered concurring judgement to strike down

clause (4) of Thirty Ninth Amendment Act and declared judicial review, free and fair election, rule of law and right to equality as constituting the basic feature of the Constitution.

After Supreme Court's pronouncement in the *Indira Nehru Gandhi* case declaring clause 4 of the Thirty Ninth Amendment invalid. The government very much desired to ensure that never in future; the courts should have the power to pronounce a constitutional amendment invalid. To achieve this objective, two new clauses were added to Article 368 by the Constitution (Forty Second Amendment)[17] Act in 1976. The true object of these clauses was to remove the limitations imposed on Parliament's power to amend the Constitution through the *Kesavananda* case. In *Minerva Mills Vs Union of India,*[18] the Supreme Court struck down five clauses of the Forty Second Amendment as unconstitutional and declared judicial review as a part of the basic structure. The Court again reiterated the doctrine that under Article 368, Parliament cannot so amend the Constitution as to damage the basic features of the Constitution and destroy its basic structure. The Court also observed,

> "Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of the limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of the Constitution and, therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."

Soon after that in *Woman Rao Vs Union of India,*[19] the Supreme Court limited the immunity only to certain status listed in the Ninth Schedule (read with Article 31-B) from their challengeability under fundamental rights. The court held that all the amendments to the Constitution made prior to the decision in *Keswandanda Bharti* case by which the Ninth Schedule was amended and several acts and regulations were included, were valid but amendment made on or after decision (April 24, 1973) in the Ninth Schedule are open to challenge on the ground that they are beyond the amending power of the Parliament since they damage the basic structure of the Constitution. The Supreme Court in *Kihoto Hollohan Vs Zachillu*[20] & *Raghunath Rao Vs Union* of India[21] has reiterated the proposition that the basic features of the Constitution cannot be amended by following the procedure laid down in *Article* 368. The Supreme Court has also argued that the power to issue a notification for bringing into force the provisions of a constitutional amendment "is not a constituent power of the Parliament because it does not carry with it the power to amend the Constitution in any manner." Parliament can therefore vest in an outside agency to bring a constitutional amendment into force. Justice Ramaswamy in the *S.R. Bommai* case[22] held that a democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review were among the basic features of the Constitution. In a plethora of cases[23], the Supreme Court asserted that independence of judiciary, democracy; secularism, federalism etc. are the basic features of the Constitution.

More recently, the fundamental question discussed by Supreme Court in *I.R. Coelho*[24] is whether on and after 24th April, 1973 when basic structure doctrine was propounded, it is permissible for parliament under Article 31-B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so, what is its effect on the power of judicial review of the Court? The Supreme Court after discussing *Kesavananda Bharti, Indira Nehru Gandhi and Minerva Mills* cases, observed that rights and freedom created by the fundamental rights chapter could be taken away or destroyed by amendment of relevant article, but subject to limitation of basic structure doctrine. It may reduce the efficacy of Article 31-B, but that it inevitable in view of the progress the laws have made post *Kesavananda Bharti*, which has limited the power of parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure. Now after the landmark judgment of Supreme Court in *I.R. Coelho* which was delived on Junuary 11, 2007, it is now settled principle that any law placed under Ninth Schedule after April 23, 1973 are subject to scrutiny of courts, if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislature.

Keeping in view the significance of an amending provision, almost all the framers of modern constitutions have incorporated amending clause in their respective constitutions. It is quite possible that a constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context. It thus becomes necessary to have some machinery, some process, by which the Constitution may be adapted from time to time in accordance with contemporary national needs. Therefore in India the amending procedure was made partly flexible so as to make it easy for the legislature to adapt the Constitution according to the changing needs of the society. But in India, more than 100 amendments made to the Constitution in a short span of 65 years cannot be regarded as a happy situation.

After independence in the early years of its working, the Supreme Court adopted the attitude of judicial restraint in which the court gave a strict and literal interpretation of the Constitution. Then the *Golaknath case* resulted in an open conflict between the judiciary and the legislature. The parliament asserted its supremacy and the Supreme Court asserted its power of judicial review, which resulted in a series of constitutional amendments in which the parliament tried to limit the power of judicial

review. In the post emergency scenario, the major parts of the Constitution have come into the ambit of basic structure of the Constitution which the parliament cannot change. The doctrine of basic structure of the Constitution is a great constitutional concept that has been formally engrafted upon the Constitution by the judiciary through the interpretative process. The doctrine prevents the Parliament from having unconditional power and becoming the master of law itself. Till date it has proved to be a very effective tool in deciding the validity of the constitutional amendments. There can still be debates about what constitutes basic structure.

The legislature and the judiciary are both supreme within their respective sphere. The doctrine of the parliamentary supremacy as understood in England does not prevail in India except to the extent provided by the constitution. The power of judicial review is exercised by the judges on behalf of the people of India. Justice V.R. Krishna Iyer has very aptly remarked that,

"The judicial power is exercised by courts on behalf of the people of India, so long as 'we the people' have appointed them to exercise such power."

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