

## JUDICIAL FRICTION WITH PARLIAMENT ON CONSTITUTIONAL AMENDMENTS UNDER INDIAN CONSTITUTION: A COMPREHENSIVE STUDY

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### ABSTRACT

The Constitution of India is the most comprehensive document in the world providing for three main pillars of parliamentary democracy, namely, the Legislature, the Executive and the Judiciary. The very nature of the duty entrusted to Parliament requires formulation of legislative policy and enacting it into a binding rule of conduct. On the other hand, the constitutional duty of the court arising from Judiciary is to annul all those legislative enactments which are either inconsistent with provisions of the Constitution or are beyond the legislative competence. This has led to some controversy between the Legislature and the Judiciary involving questions of relative supremacy of these organs.

In view of this matter, the three organs of the State are not competing or rival authorities but are supposed to complement and supplement each other. The division of authority or what is constitutionally called as the separation of powers makes sure that the Legislature, the Executive and the Judiciary cohabit peacefully without overstepping and encroaching upon other's jurisdiction. This demands a large measure of cooperation and mutual adjustment among the three wings, no one vying for superiority in authority as the final authority resides in the Supreme law of the land called the Constitution. Thus, it is assumed that the three organs of the State shall discharge their functions within their own field with the ultimate objective of providing together a good system of governmental administration conducive in all respects to the people. But in actual practice, situations of conflicts and rows between the Parliament and the Judiciary have arisen in the past. In view of the above, the present study intends to explore the constitutional amendment in terms of Parliament versus Judiciary debate.

**Keywords: constitution, amendments, Judicial, Parliament, India.**

### INTRODUCTION

Apparently, the doctrine of the separation of powers does not envisage any conflict and confrontation between the three organs. The Constitution has not recognized the doctrine of separation of powers in its absolute rigidity, the functions of the three organs of state viz, the Legislature, the Judiciary and the executive have been sufficiently demarcated. Both Parliament and State Legislatures are sovereign within the limits assigned to them by the Constitution. The supremacy of the Legislature under a written Constitution as observed by the Supreme Court, is

only within what is in its power but what is within its power and what is not, when any specific act is challenged, it is for the courts to say (**Pion and David, 2010**).

These salutary checks merely indicated that the Constitution is supreme and it will veto any law as ultra vires through courts of law, and that it will remove irremovable Judges on the ground of proved misbehaviour or incapacity through the machinery of the Legislature. It was stated by Patanjali Sastri, C.J., that it was not a pleasant task for the Court to strike down a legislation passed by Parliament and that it had to do so only as it was a solemn duty cast on the Court as the sentinel on the qui vive when a citizen's basic rights guaranteed in Part III of the Constitution were violated by State action.

The prime artificer of Parliamentary Democracy in India, Jawaharlal Nehru himself had great faith in the Parliament and that is why he held that..." parliamentary institutions are ultimately the people's character, thinking and aims. They are strong and lasting in the measure that they are in accordance with the people's character and thinking."

In a democratic setup the Parliament is the sole repository of the will of the people and the supreme representative institution in the country. In principle, it occupies a preeminent position in the country's polity and a remark by Pandit Jawaharlal Nehru took the predominance of the Parliament to greater heights. He once said that "no Supreme court and no Judiciary can stand in judgement over the will of the Parliament representing the entire will of the community."

There have been two divergent approaches in respect of the plea for parliamentary supremacy in India. The first approach is headed by people who wish to establish parliamentary supremacy over the Judiciary. This view is headed by the Congress party. On February 13, 1976, the Communist Party of India expressed its view that, "the Judiciary including the Supreme Court, should have no power or jurisdiction to interpret the Constitution or decide any question of constitutional validity of law."

The Swaran Singh Committee Report did not immunize ordinary legislation from Judicial Review. It suggested some procedure for the declaration of the invalidity of laws, i.e. the Supreme Court Bench to consist of not less than seven judges and High Court not less than five judges. The declaration of invalidity will require two third majority support Mr. D.K. Barooah, Congress President, pleading for "elastic and dynamic" Constitution asserted the need of constitutional amendments pointing out that:

"The Constitution did envisage courts sitting in judgement over parliamentary enactments. The idea was that courts should bring to the notice of the Parliament the unconstitutionality of any of its laws. But the courts were not envisaged as the third chamber."

The force of the plea for making ordinary law immune from Judicial Review has been exhausted, but there is strong and consistent plea for putting the constituent power beyond the judicial

purview. The Union Law Minister, H.R. Gokhale asserted in Lok Sabha on April 2, 1976 that “Parliament’s constituent power to make laws and amend the Constitution was supreme and that it would not tolerate any erosion of its supremacy. Dr. Gajendragadkar, the Chairman of Law Commission while delivering the first Motilal Nehru Memorial Lecture on “Lawyers and social change”, expressed the opinion that, “no limitation can be directed in the provisions of Art 368 on the ground of basic features of the Constitution”. Accordingly, the constitutional amendments should not be reviewed by the Judiciary.

The opposite camp pleads that the concept of the supremacy of parliament is a “perennial fallacy”. According to N.A. Palkhivala, an eminent constitutional layer, the abrogation or abridgement of the right of Judicial Review would be tantamount to banishing the rule of law in the country. Hon’ble Mr. Justice K.K. Mathew, delivering the first Tej Bahadur Sapru Memorial lecture on March 26 on “Democracy and Judicial Review”, remarked that, “it is over simplification to contend that no society can be democratic unless the Legislature has sovereign power.” Mr. Justice V.R. Krishna Iyer of the Supreme Court pointed out that the Constitution amending process should not do away with “lasting constitutional values.” The learned judge favoured the retention of “supremacy of court in the assigned sphere.” Thus, there are certain zones where the conflict between the two organs becomes inevitable. Presently the court is accused of widening the scope of judicial review beyond constitutional boundaries, usurping the powers of the executive and legislature and employing techniques of adjudication and prescribing remedies considered inappropriate for courts.

## **OBJECTIVE OF THE STUDY**

To explore the constitutional Amendment in terms of Parliament versus Judiciary debate.

## **RESEARCH METHODOLOGY**

The present research work is doctrinal in nature. A systematic and descriptive methodology has been adopted for the present study. This paper is based on secondary sources including online publications, books and article, Journals, Magazines, Digests and different periodicals having reference to the present examination.

## **ANALYSIS**

In the field of constitutional amendments, the Supreme Court had four important and historic occasions to deal with the matter concerning parliamentary supremacy.

## **Judico-Legislative Clash Episodes**

For the purpose of gaining an understanding of the history of Indian constitutional amendments and how Judiciary has countermanded the legislative actions of amending constitutions, the episodes of clash can be divided into five periods.

1. Period starting from 1951 with Sankari Prasad's judgement and ending with I.C. GolakNath judgement in 1967
2. Period starting with post-Golaknath scenario and ending in 1973 with Kesavanand Bharti's judgement
3. Period starting with post Kesavanand Bharti's scenario and ending with Indira Nehru Gandhi's case.
4. The Fourth period has witnessed judgement like Minerva Mill's case and Waman Rao's case which discussed consequences of Kesavanand Bharti's case and modified the result of Kesavanand Bharti.
5. The fifth period is continuous & more focussed on independence of Judiciary especially in Judges Appointments in the Supreme Court & High Courts with judgments of first, second & third judge transfer case & finally stuck down the 99<sup>th</sup> Constitutional Amendment Act 2014 & over stretch of discretionary power under Art 142 even in policy decision and Tribunal members tenure extension in Oct 2022 in Krishna B. & ors V Government of India & ors. W.P.(C) No. 829/2022.

### **1. The 1st Period - Shankari Prasad's Case to Golknath's Judgement**

The main disagreement between Parliament and Supreme Court was socialism and conservatism. In the 1950s the Congress Party, and especially Jawaharlal Nehru's government, wanted to bring about land reform. The Supreme Court stood in the way, upholding the rights of property owners under Part III of the Constitution: Fundamental Rights. Further Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951.

After Independence many laws relating to land reforms and tenancy matters were enacted and their constitutional validity was challenged. The Election Manifesto, 1946 of the Congress party stated: "The reform of the land system, which is so urgently needed in India, involves the removal of intermediaries between the peasant and the state. The rights of such intermediaries should therefore be acquired on payment of equitable compensation."<sup>1</sup>

The Government of Bihar, Madhya Pradesh and Uttar Pradesh had enacted certain legislation which was compendiously described as Zamindari Abolition Acts. These measures were adopted in pursuance of the Congress Agrarian Reforms Committee Report (1949) The land reforms were introduced as per the electoral promise of the ruling Congress party.

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<sup>1</sup> *Indian Constitution: Property Rights and Social Reform, The Comparative Constitutional Law, Merillat, YCL Ohio St. LJ 1960*

At that time the Zamindari system was in vogue and Congress party in pretext of giving effect to the constitutional provisions contained in Article 39 (b) and (c) of the Directive Principles of State Policy, which indicated equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few, introduced land reform acts which adversely affected the right to property of the property owners. In order to forestall further difficulties likely to arise in the matter of land reforms and other progressive measures, the provisional Parliament proceeded to enact the Constitution (First Amendment) Act, 1951 which inter alia purported to place the laws abolishing Zamindari system in different states beyond challenge in the courts of law. With this amendment an era of recurrent clashes between the Legislature and the Judiciary was inaugurated. The validity of this amendment was challenged by the Supreme Court in *Shankari Prasad V. Union of India*<sup>2</sup>.

### **1.1 First Face-Off between The Parliament and The Judiciary: Shankari Prasad Singh V. Union of India**

Shankari Prasad v. Union of India was the first case on the amenability of constitution, in which the validity of the Constitution (First Amendment) Act, 1951 curtailing the right to property guaranteed by Art. 31 was objected. The amendment was challenged on the basis that it abridges the rights conferred by Part III which is prohibited under Article 13(2) and hence was void. Article 13(2) provides that any law passed by state contravening the provisions under Part III i.e., Fundamental Rights would be considered void to the extent of contravention. It was debated that State in Article 12 included Parliament and the word Law in Article 13(2) therefore must cover Constitutional Amendment. Hence it was contended that amendments are laws passed by state as for the purpose of article 13(2). Supreme Court rejected the above argument and held that power to change the Constitution covering the fundamental rights is contained in Article 368 and though constitutional amendment is a Law there is a clear distinction between legislative and constituent power. It was asserted by Patanjali Shastri J. that the power to amend the Constitution is constituent power and not limited by Article 13(2), applicable only to legislative power.

The Supreme Court ruled that a constitutional amendment, not being law under article 13(2), will be valid even if it abridges any of the fundamental rights. The petitioner challenged the amendment mainly on the following grounds. First the power of amending the Constitution provided for under Art. 368 was conferred not on Parliament but on the two houses of Parliament as a designated body and therefore the Provisional Parliament was not competent to exercise that power under Art. 379.

Secondly, so far as the Constitution (Removal of Difficulties) order number 2 made by President, purports to adopt Art. 368 by omitting “either House” and “in each House” is beyond the powers conferred on him by Art. 392, as “any difficulties” sought to be removed by adoption under that Article must be difficulties in the actual working of the Constitution during the transitional period and whose removal is necessary for carrying on the Government.

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<sup>2</sup> AIR 1951 SC 458 11

Thirdly, in any case Art. 368 is a complete code in itself and does not provide for any amendment being made in the Bill after it has been introduced in the House. The Bill in the present case having been admittedly amended in several particulars during its passage through the House, the Amendment Act cannot be said to have been passed in conformity with the procedure prescribed in Art. 368.

Fourthly, the Amendment Act, in so far as it purports to abridge the rights conferred by Part III of the Constitution, falls within the prohibition of Art. 13(2). Lastly, as the newly inserted Art. 31A and 31B seek to make changes in Art. 132 and 136 in Chapter 4 of Part V and Art. 226 in chapter 5 of Part VI, they require ratification under Cl. (b) of the provision to Art. 368 and not having been so ratified they are void and unconstitutional.

On the first point, it was submitted that whenever the Constitution sought to confer a power upon Parliament, it specifically mentioned "Parliament" as the donee of the power as in Arts. 2, 3, 33, 34 and numerous other Articles, but it deliberately avoided the use of that expression in Art. 368. Realizing that the Constitution, as the fundamental law of the country, should not be liable to frequent changes according to the whim of party majorities, the framers placed special difficulties in the way of amending the Constitution and it was a part of that scheme to confer the power of amendment on a body other than the ordinary Legislature as was done by Art. V of the American Constitution.

To make a law which contravenes the Constitution, constitutionally valid is a matter of constitutional amendments, and as such falls within the power conferred under Art. 368, and not under Art. 246.

The Court in the Shankari Prasad made a mechanical appreciation of Art. 368. It disclosed no theory of any organic fundamental higher law. The unqualified opening words, "An Amendment of this Constitution", it held, made the given amending procedure applicable to all parts of the Constitution including Part III. For purposes of the Article, every provision of the Constitution carried equal weight. The provisions of part III were not any more fundamental than those of Part IV. The provisions of each of these parts could be amended similarly Part III was not out of the reach of the amending procedure. No implied, or inherent exception to the given amending procedure could be read in the course of judicial interpretation of the Article. The adjectival description of the Part III Rights by the word "Fundamental" did not confer any immunity from the amending power of Parliament. Indeed, while acting in accordance with the prescribed amending procedure Parliament did not act as a legislature simpliciter. In certain respects it was transformed into a temporary Constituent Assembly, and could make any change it liked to make in the Constitution. Subject to the proviso provisions, it could amend all provisions unilaterally. Having amended the Constitution itself it became bound by it as a legislature simpliciter as also other constituted authorities while acting under Art. 368, it did not legislate, in the normal sense, it enacted organic higher law.

A constitutional amendment Act was not a legislative enactment, the definition of 'law' given out in Art. 13(3) did not embrace it, and Article 13(2) was not attracted to it, It was not a law which the court could judicially review, and declare unconstitutional on the ground of inconsistency with the provision it sought to amend. A declaration of unconstitutionality could not be made for it. Indeed, the court should read the Constitution as it stood "amended in accordance with the terms of the Bill."

## 1.2 Parliamentary Sovereignty versus Judicial Supremacy *Sajjan Singh V. State of Rajasthan*<sup>3</sup>

The issue of the competence of the Parliament to amend the Constitution was again raised in *Sajjan Singh vs. The State of Rajasthan* case in which the validity of the Constitution's (17th amendment) Act 1964 was challenged on the ground that Parliament cannot encroach upon the Fundamental Rights of the citizen even by way of constitutional amendments. This amendment too adversely affected the right to property under Art. 19(f) by inserting certain other land acquisition acts in the 9th schedule. Similar question as that in *Shankari Prasad's* case was raised in this case also. The majority led by Gajendragadkar CJ. approved the majority judgement rendered in *Shankari Prasad's* Case and held that the words "amendment of the Constitution" means amendment of all the provision of the Constitution i.e. Article 368 extends to all the parts of the constitution thereby fortifying the position of the Parliament.

The Supreme Court gave its verdict in favour of the Parliament where it was assumed that the Parliament possessed the all-embracing power to amend the Constitution including the provisions dealing with fundamental Rights. So far during this phase no rift could be identified between the two over the issue of parliament's competence of amending the Constitution. It enjoyed unchallenged supremacy both in letter and spirit as both the organs worked in tandem (**David and David, 2014**).

## 1.3 Circumstances that encouraged the Judiciary to assume a political role

The position of the Court vis-à-vis the Parliament until 1967 was that the Parliament had the unfettered right to amend any part of the constitution in accordance with the procedure prescribed in Article 368. This right was conceded by the Court in various decisions. Its veto on progressive legislations could also be overridden by subsequent amendments.

In the *Shankari Prasad v. Union of India* in 1951 the Supreme Court unanimously upheld that within the terms of the article 368 any provision of the Constitution could be amended with the caveat that the article could not be treated as a complete code in itself and it should be supplemented with the procedural rules or practices of Parliament relating to ordinary enactments.

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<sup>3</sup> 1965 AIR 845

Later in the case of Sajjan Singh v. State of Rajasthan in 1965 the Court upheld by a hair line majority of 3:2 the verdict pronounced in Shankari Prasad 's case, but the minority judgement reflected the somewhat diffuse and fluid political situation which had been brewing in 1964.

It was the Golak Nath case which perhaps foretold the shape of things to come. The Supreme Court by a majority of 6 to 5 in the I.C. Golak Nath case v. State of Punjab in 1967 decided that Parliament had henceforth no power to make amendments in Part III of the Constitution so as to modify, take away or abridge any of the Fundamental rights. The hitherto enjoyed right to amend the Fundamental rights was henceforth denied to the Parliament. Besides that the Supreme Court showed its allegiance to the American doctrine of prospective overruling in laying down that all the previous amendments were void but this could not be applicable since that would lead to enormous destabilising effect upon the arrangements made in pursuance of the amendments.

#### **1.4 Case that further incapacitated the Parliament of its powers:**

##### **Golaknath V. State Of Punjab<sup>4</sup>**

The decision affirmed in the Golak Nath case by the Court diminished the authority of the Parliament. Historically of course the Judiciary had struck down much progressive legislation in the past. But every time the Parliament had the opportunity to overcome this bottleneck through appropriate amendments. But the Golak Nath case blocked the way to constitutional remedy and thwarted all the efforts of the Parliament to bring forth any legislations of socio-economic nature.

This Supreme Court's decision in the contentious Golak Nath case came under scathing criticism, particularly by those who expected that it would lead to 'fossilisation of the Constitution'. It was not only contrary to the intention of the founding fathers of the Constitution but it bears out to be incompatible with the current and potential future compulsions of the social situation. The Constitution endowed the Parliament with both constitutional and constituent personalities. A relevant question that came to the fore was whether the word 'law' used in Article 13 would include laws enacted by the Parliament in exercise of its Constituent power as derived from Article 368 or would refer to laws made by the Parliament in exercise of its legislative power as enlisted in Article 245, 246 and 248.

This distinction between the two types of 'law' viz., legislative and constituent power was not observed by the Supreme Court in the Golak Nath case. It rather decided that the word 'law' under the Constitution should embrace both types of law. Such a mechanistic interpretation of the word 'law' not only militated against expressed intention of the framers of the Constitution but it also went against the essence of an emerging polity.

#### **A. Political Consequences of the Verdict**

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<sup>4</sup> 1967 AIR 1643

In the Golak Nath vs. The State of Punjab case of 1967, the Supreme Court overturned its earlier decision regarding the absolute power of the Parliament to amend the Constitution. The Supreme Court in its judgement stated that:

Parliament does not enjoy an unlimited power of amendment and Parliament cannot amend Fundamental Rights so as to take away or abridge these rights. The amending power of Parliament is limited in view of the provisions of Art. 13 of the Constitution. Thus the verdict in GolakNath case led to direct conflict of power between the Parliament and Judiciary.

### **B. Authority of the Parliament stultified**

In the wake of the Golak Nath case, there occurred simultaneously, a rise in political radicalism and political instability in various parts of the country. A new dimension was added to the problem of political particularism and instability by the national spilt of the Congress. Sharp differences at the national level of the party were aggravating state level politics into state conflicts. This situation continued for some time but it became uncontrollable when there was an open split between Prime Minister Indira Gandhi and the organizational leaders on the issue of finding a successor to Zakir Hussain as President of the Indian Republic.

To offset the challenge, the Prime Minister resorted to two well- calculated steps viz. Bank Nationalisation and Abolition of Privy purses. The purpose of these moves was to 1) counteract the challenge of the rival organizational leaders and 2) to mobilise the progressive forces in her favour both within and outside the Congress that in turn would ensure her continuance in power. She did garner support for the radical policies from the progressive forces in the Parliament however the victory was short-lived as the constitutionality of both these enacted legislations was challenged in the Court and both were declared void.

In the R.C. Cooper v. The Union of India (Bank Nationalisation case) was declared void

With this decision of the Court the powers of the Parliament again received a great setback. But a more severe blow to the Parliamentary power came when the Court made a decision in the Privy Purses Case in 1970. The Court struck down the President's order derecognising the rulers en masse. It was entirely outside the article 366(2). The right to privy purses was properly covered by meaning of the terms used in Article 19 and 31 of the Constitution and thus entitled them to the protection given by these articles. Thus the Supreme Court's decision in Golak Nath, Bank Nationalisation and the Privy Purse Abolition cases had severely debilitated the Parliament from forging any social action. Naturally the only means available to the Parliament in the face of the Courts behaviour was ink constitutional amendments.

All these instances were symptomatic of the deep political malaise that had crept in India's Political system. The series of defections and splits in the Congress Party and the assumption of a political role by the Supreme Court greatly marred the consensus on social issues. All these had

the effect of blurring the boundaries between the Court and the Parliament (**Zink and Dawes, 2016**).

## **2. The 2nd Period- Post Golaknath Scenario – Kesavanand Bharti’s Case**

The period between 1967 -1973 was one of great constitutional conflict, with status of right to property and issues of the guardianship of the Constitution dominating political and judicial debates. This period commenced with the GolakNath case which ‘marks a watershed in the history of Supreme Court of India’s evolution from a positivist court to an activist court. In this case the concept of implied restriction on the power of the Parliament was recognized and to some extent legislative supremacy was curtailed.

Under the urge to prove its supremacy, Parliament came up with many constitutional amendments. The 24th amendment brought in some changes in Article 368 and 13 expressly displacing the reasons on which Golaknath’s judgement was based. Basically it intended to eliminate the mischief of Golaknath. 25th amendment amended Article 31 and introduced Article 31 C for giving higher sanctity to Directive Principles of State policy than fundamental rights. 26th amendment abolished privy purses and thus rendered Madhav Rao Scindia’s case ineffective. 29th amendment further added two Kerala acts to 9th schedule to grant them immunity from attack. These amendments being over-ambitious were inevitably challenged in Kesavanand case and other petition.

It is interesting to note here that even Sikri C.J. and Shelat J. who were part of the majority judgment in Golknath’s case did not express any opinion on the Article 368 but sub silentio overruled Golknath’s case judgement. It needs to be noted that it was during this period that the phrase 'basic structure' was introduced for the first time by M.K. Nambiar and other counsels while arguing for the petitioners in the Golaknath case, but it was only in 1973 that the concept surfaced in the text of the apex court.

### **2.1 Amendatory conquests by the Parliament: Reasserts its Power with the Twenty-Fourth Amendment**

Since the Judiciary had created so many bottlenecks in the way of realising the social objectives, it became stifling for the Parliament to work effortlessly. In order to overcome this immobility, the Government resorted to the method of appealing to the electorate to seek their mandate. Soon after the elections the Government introduced the Twenty Fourth Amendment Act 1971, the amendments sought to overrule Golak Nath, and establish parliamentary sovereignty, by conferring upon the parliament the power to amend any part of the constitution including fundamental rights, and thereby excluding judicial review.

The Act declared that Article 368 of the Constitution:” shall be renumbered as clause (2) thereof and (a) for the marginal heading shall be substituted, namely “Power of the Parliament to amend

the Constitution and Procedure thereof and (b) before clause (2) so renumbered the following clause shall be inserted namely,

“(1) Notwithstanding anything in this Constitution Parliament may in exercise of its Constituent Power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article”, and (c) in clause (2) so renumbered for the words “ it shall be presented to the President for his assent and upon such assent being given to the bill the words “ it shall be presented to the President who shall give his assent to the Bill and thereupon shall be substituted (d) after clause (2) so renumbered, the following clause shall be inserted, namely

“(3) Nothing in article 13 shall apply to any amendment made under this article.”

b) The act further added clause (c) to article 31 which gave a certain legal footing to the Directive Principles of State Policy. the new clause said : “Notwithstanding anything contained in Article 13 no law giving effect to the policy of the State towards securing the principles specified in clause(b) or clause(c) of article 39 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 article 14, article 19 or article 31 and no law containing a declaration that it is for giving effect to such policy shall be called into question in any court on the ground that it does not give effect to such policy.

The Constitution Twenty-Sixth Amendment act 1971 was intended to terminate the royal vestiges of India’s old princely States. The act provided:

“(a) The Prince, chief or other person who at any time before such commencement was recognised by the President as the successor of such Ruler shall on and from such commencement, cease to be recognised as such ruler or the successor of such ruler.:

(b) On and from the commencement of the Constitution (Twenty –Sixth Amendment ) act 1971 privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished and accordingly the ruler, referred to in clause (a) or any other person shall not be paid sum as privy purse.”

The Constitution Twenty –Ninth amendment act, 1972 placed some laws made by the Kerala Government in regard to land reforms into the IX schedule of the constitution.

Thus, soon after the Congress returned to power with a resounding majority in the 1971 Lok Sabha Elections, an array of amendments were made to the Constitution to meet the judicial bottlenecks created to the power of the Parliament.

But these amendatory conquests by the Parliament were extremely short-lived. The Supreme Court again barged into its territory by questioning the validity of the Twenty fourth, Twenty-fifth and Twenty-ninth Constitution amendment Acts in the case of Kesavanand Bharti v. The State of

Kerala in 1973. In this case the court by a majority of 7 to 6 judgement held the twenty-fourth and twenty-fifth amendments as valid but declared the provision of clause added to article 31 as void. The court in essence reversed its earlier position adopted in the Golak Nath case and accepted the stand taken by the Parliament. While endorsing the stand that parliament had the authority to pass an amendment relating to the part on fundamental rights, the Supreme Court at the same time reiterated the view that amendments still fell under the purview of judicial review.

This time they skilfully curbed the power of the Parliament by devising an innovative caveat called “the Basic Structure” which was immutable. The aim of this doctrine was to preserve the basic and quintessential features of the Constitution in order to maintain its character as an effective instrument of our sovereign democratic republic capable of securing justice, liberty, equality and fraternity, as laid down in the Preamble of the Constitution. The Court went unimpeded in exercising its reviewing authority in striking down the last clause in the first paragraph of the new article 31(c). This clause was considered to be an infringement of the jurisdiction of the court. The Court refused to be browbeaten to the position that no judicial review of any legislation could be undertaken if the said legislation was intended to give effect to the Directive Principles of State Policy. With this the audacious Supreme Court once gain reasserted its legitimacy.

## 2.2 Kesavanand Bharti versus State of Kerala

This is a landmark case in the history of constitutional amendment in India with profound implications for Indian polity. It was the judicialization of mega-politics in India. It means “infusion of judicial decision-making and of court like procedures into political arenas where they did not previously reside.” While the case in itself was very complex, it was still of momentous significance in many respects. With this case a new concept germinated in the field of constitutionalism called the Basic structure. Moreover the decision given in this case became a constitutional benchmark for the Supreme Court of Bangladesh which adopted it<sup>5</sup> and for some High Courts in Pakistan<sup>6</sup> as well.

The doctrine has been shot to limelight for a number of reasons and the issues that come under its fold are vast. In various court verdicts the doctrine has been invoked in cases on as diverse issues as election law, secularism, property rights, freedom of expression, federalism and so forth. With the exposition of this doctrine the Court has fundamentally altered the meaning of the Indian Constitution. This judgement became all the more relevant as it reallocated power between various branches of the government.

To the minds of the classes and the masses this doctrine appears to have replaced Parliamentary sovereignty and separation of powers with Judicial Supremacy. In the course of elaborating on the

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<sup>5</sup> *Anwar Hossain Chawdhary v. Bangladesh*, 41 DLR 1989 App Div 165

<sup>6</sup> *Darwesh Anbey v. Federation of Pakistan*, PLD 1980 Lah 206; *Suleiman v. President*, *Special Military Cant.*, NLR 1980 Cir. Quetta 873

content of the basic structure of the constitution, the Supreme Court seems to have taken the view that, contrary to the claims of the framers of the, the Directive Principles of State Policy are equally basic to Indian constitutionalism as fundamental rights. The interpretation or the transformation of the doctrine has been critically analysed. Detractors see it as judicial usurpation of Parliamentary sovereignty and an illegitimate attempt to place the directives at par with the fundamental rights. However the supporters of the basic structure doctrine believe that “The basic structure doctrine was developed as a rare residuary power to be used by the Court to control the excesses of a transitory majority<sup>32</sup> and as a legitimate form of pressure on the State to accomplish policy goals to ameliorate the conditions of vulnerable groups within the society by insisting that Directive Principles be thought of as being par with fundamental rights.”

All judges held that 24th amendment is valid as Article 368 confers power to amend all or any of the provisions of constitution. Majority of judges held that judgment in GolakNath case was wrong and that the power to amend was very much there under Article 368. Seven judges took the view that basic structure<sup>33</sup> cannot be amended. The basic structure doctrine was defined and it was held that the power to amend is channelized and limited.

Khanna J. along with other six judges agreed with this theory. Rest of the six judges held that it is an absolute power in hands of the parliament. So Supreme Court with a majority of 7:6 decided that some parts of the constitution which gives it a meaning cannot be changed or amended.

However, only six out of the seven majority judges, with Khanna J. dissenting, held that fundamental rights form the basic structure of the constitution and hence are unamendable. So, again Supreme Court with a majority of 7:6 held that in the fundamental rights per se are amendable. So as far as the issue of amend ability of the constitution is concerned, it was held that constitution is amendable to the extent it does not affects the basic structure of the constitution. However this judgement was not specific as to what forms the basic structure of the constitution. Judges gave their own examples of basic structure and enumerated few of them but that list was not held to be exhaustive.

### **3. The 3rd Period: Post Kesavanand Bharti Judgment to Election Case**

for the first time, an amendment was challenged not on property issue or social welfare but with reference to the law designed for free and fair elections. Not only that the amendment decided an election dispute between two contesting parties but also decided a pending appeal in Supreme Court.<sup>7</sup> Analysing the decision, Mr. Seervai said that “the judgement in the Election case broke new ground which has important effects on Kesavanand Bharati case itself.” He further said that “no one can now write on the amending power without taking into effect of the Election case.”

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<sup>7</sup> *Indira Nehru Gandhi v. Rajnarayan*, 1975 AIR 865

The Constitutional (39th amendment) Act, 1975 which inserted Article 329A made an audacious attempt to silence the Judiciary. Through this amendment the Prime Minister's election was retrospectively taken out the jurisdiction of Courts and freed from ordinary election laws and it was also enacted that no election would be declared void by any court. Parliament also passed the Election Laws (Amendment Act), 1975 (Act 40 of 1975) by which electoral offences for which Indira Gandhi was disqualified under the Representation of the People Act, 1951 by the Allahabad Court were nullified by changing the law.<sup>8</sup>

Moreover in Kesavanand case basic question was regarding amendability of a fundamental right while here it was amendability of essential feature of representative government namely free and fair election. Although the amendment was upheld but the provision curbing Judiciary's right to keep a check on elections was struck down. The doctrine of basic structure was widened and it was held that free and fair election being a part of basic structure cannot be amended. Mrs. Gandhi's election was declared valid on the basis of the amended election laws.

#### 4. The 4th Period: Post Election Case

Unable to repudiate the doctrine of basic structure through the Judiciary, the 42nd amendment was enacted. The amendment in every sense reflected the anti-judiciary mood of Mrs. Gandhi. The amendment was introduced by Mrs. Gandhi in both the Houses as a means of 'throwing aside the constitution', which had in effect been the agitation before the declaration of the emergency. The amendment ousted the jurisdiction of the courts from deciding upon questions of election disputes. It also immunized constitutional amendments from being questioned 'in any court on any ground' and parliament's power to amend the constitution 'by way of addition, variation or repeal' was unlimited.

By amending Article 368, the 42nd Constitutional amendment made the amending power virtually absolute. After the decision in Kesavanand case, there was no doubt at all that amendatory power of Parliament was limited and it was not competent to alter the basic structure of the Constitution.<sup>9</sup> The Parliament, however, in order to reassert its supremacy in the field of amending power, passed the Constitution (42nd Amendment) Acts, 1976. The 42nd Amendment Act made significant changes in the structure of Art. 368 by inserting two new clauses viz., Clauses 4 and 5. This section was held to be beyond the amending power of the Parliament and void since it sought to remove all limitations on the power of Parliament to amend the Constitution and confer a power on Parliament to amend the Constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these clauses was to remove the limitations imposed on Parliaments' power to amend the Constitution through the Kesavanand case. The newly introduced clause 4 in Art. 368 sought to deprive the courts of their power to call in question any amendment

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<sup>8</sup> T.R. Andhyarujina, *The untold story of 'Kesavanand Bharati' and the Basic Structure Doctrine survived and attempt*

<sup>9</sup> A.I.R. 1980 SC 1789

of the constitution. The court stated in this connection that the Constitution was founded on a nice balance of power among the three wings of the state, namely, the Executive, the legislature and the Judiciary. It is the function of the judges, nay their duty, to pronounce upon the validity of laws. Depriving the court of the power of Judicial Review will mean making fundamental rights “a mere adornment” as they will be rights without remedies. By virtue of this amendment a ‘controlled’ Constitution became ‘uncontrolled’. The newly added Cl.5 of Art. 368 demolished the very pillars on which the Preamble rests by empowering the Parliament to exercise its constituent power without any limitation. This clause even empowered Parliament to “repeal the provisions of the Constitution”. Parliament can thus abrogate democracy and substitute for it a totally antithetical form of government that can most effectively be achieved.

S.4 of the Forty second Amendment amended Art.31C as well. The unamended Article 31C was upheld in *Kesavanand* up to an extent. To that extent, Art. 31C would remain valid, but the new amendment vastly expanded the scope of Art. 31C, and this extension was now declared to be invalid as being it destroyed the basic or essential features of the Constitution, in so far as it totally excluded a challenge in a court to any law on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Art.14 or 19, if the law was for effectuating any of the directive principles. The majority judges insisted that fundamental rights occupy a unique place in the lives, of civilized societies; they constitute the ‘ark’ of the Constitution, “ The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution.”

However, *Waman Rao*’s case unanimously upheld *Minerva mill*’s judgement<sup>10</sup> that amendments to article 368 introducing clauses 4 and 5 are void and invalidated 42nd Amendment Act. It was further held in this case that all laws placed in 9th Schedule after *Kesavanand Bharti* judgement is also available for judicial review. This was further widened by *I.R. Coelho v. State of Tamil Nadu*<sup>11</sup> where the Supreme Court again applied the doctrine clearly elucidating the importance of retaining the basic features of the Constitution framed by our forefathers. It is agreed that the power of amendment is a very important power which is given to the Parliament. However, to determine the degree to which constitution can be amended is an equally important task.

**5. The 5<sup>th</sup> Period:** More Focussed on independence of Judiciary & Monopoly in Judges Appointments & over stretch of Art 142 even in policy matters.

5.1 The cases: *S.P. Gupta v. Union of India*-1981, *Supreme Court Advocates on Record Association v Union of India* -1993 (which actually laid foundation of Collegium system for

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<sup>10</sup> *Minerva Mills Ltd. and Ors. vs Union Of India and Ors.*, (1980)3SCC 625

<sup>11</sup> (2007) 2SCC

appointment of judges in High Courts & Supreme court and reduced Executive as just Post man), third case just reaffirmed above in re special Reference 1 of 1998.

5.2 In a collective order, On 16 Oct 2015 the Supreme Court by a majority of 4:1 struck down the NJAC Act 2014 & 99<sup>th</sup> Constitutional Amendment & restored the Judiciary supremacy i.e Collegium system in appointment of judges in Supreme Court & High Courts & again foiled the calculated constitutional amendment assault to replace the two-decade old collegium system.

5.3 For smooth functioning of the Karnataka State Administrative Tribunal & delay in new appointment of members by Govt, the Supreme court invoked Art 142 & directed the incumbent Judicial members of Tribunal to continue in office till further order in Krishna B V GOI W.P. (C) No. 829/2022.

### **Row between the Judiciary and the Legislature post 2000**

Even post 2000 constant tensions between the Judiciary and the Legislature persist regarding issues like:

- i. Confrontation of Parliament and Judiciary in relation to reservation over the issue of creamy layers
- ii. Opposition by the Supreme Court to the sealing operations of commercial premises in unauthorised areas of Delhi
- iii. The Supreme Courts interim stay on the 27 percent OBC quota in institutions of higher Education
- iv. The Lok Sabha speakers refusal to expel some MP's for taking bribes for questions
- v. The decision of the Andhra Pradesh Governor to grant pardon to a Congress leader was sought to be nullified by the Supreme Court
- vi. The judgement of the SC that in corruption issues there is no need to take permission for a case filed against a corrupt Minister, MP and bureaucrats
- vii. Recommendation of President's rule in Bihar by the Governor was declared unconstitutional by the Supreme Court
- viii. Bringing the decision of the Speakers of Assemblies under the purview of judicial review.
- ix. Growing confrontation between the Judiciary and the Parliament in regard to the Ninth schedule being brought under the Judicial review.<sup>12</sup>

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<sup>12</sup> H.K. Dua, 9th Schedule rout plugged, *The Tribune*, January 15, 2007, p.10

Thus, it is obvious that the conflict between the Judiciary and the Parliament over the issue of enhancement of their respective powers has grown with the passage of time. On April 8, 2007 Prime Minister Manmohan Singh told the Chief Ministers and the Chief justices of the High Courts in the Conference on administration of justice on Fast track issue that” The dividing line between judicial activism and judicial overreach is a thin one.... A takeover of the functions of another organ may at times, become a case of over-reach”<sup>13</sup> This comment of Prime minister Manmohan Singh was viewed in the context of introduction of various pieces of legislation nullified by the Supreme Court last year. But the Chief Justice of India K.G. Balakrishnan, declared that the tension between the Judiciary on the one hand and the Legislature and the Executive on the other hand was “natural and to some extent desirable.”

## Conclusion

The study indicated that whenever the Legislature or the Executive failed to perform its constitutional duties, it was the Judiciary which came forward to safeguard the provisions of the Constitution. The doctrine of parliamentary supremacy as understood in England does not prevail in India except to the extent provided by the Constitution. The plea of the parliamentary supremacy is based on fallacious and misconceived assumption that Parliament as representative of the people can enact any law. The people of India in exercise of their sovereign power have distributed powers amongst all the three organs of government, the Legislature, the Executive and the Judiciary. The utmost need of the age is not the supremacy of any one organ over the other but mutual understanding and confidence between all the governmental organs. The Judiciary does not declare a law unconstitutional enthusiastically or willingly. This has been explained by the Supreme Court in the following manner:

“If then the courts in the country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit, but in discharge of a duty plainly laid upon them by the Constitution.”

The Legislature should also follow the same path. It is submitted however, that unfortunately the judicial pronouncements, have not been always hailed in good spirit. The important pronouncements have been nullified by hasty legislation or ordinance. The condition of tension and claim of supremacy by one organ over the other organs of the government is not appreciable.

## Way Forward

It is thus necessary that the Parliament should show due regard to the Judiciary and the Judiciary on the other hand should widen its outlook. Each branch should operate within democratic boundaries and should develop better awareness of social goals and objectives and respect for

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<sup>13</sup> Manmohan Singh, *Line between activism and over-reach thin: PM to Bench*, *The Indian Express*, April 9, 2007, p.1.

human rights and freedoms. The assumption that legislation is remedy of all evils is ill founded. The need of the time is the earnest implementation of laws and not domineering will of the parliamentary supremacy over Judiciary. The Constitution should be well balanced and in no case the balance should not be imperilled.

The seven judges' bench of the Supreme Court in U.P. Controversy case has aptly referred to the necessity of amicable relations among all organs of the government: "These two august bodies (the Judiciary and the Legislature) as well as the executive which is another important constituent of a democratic state, must function not in a spirit of hostility, but rationally harmoniously and in a spirit of understanding". In a nutshell the controversy between the Supreme Court and Parliament is a futile battle. They should rather be complementary to each other. The purpose of both the institutions should be to uphold democracy equality, liberty and fraternity.

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