



Email: editorijless@gmail.com

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(Law)

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LAW: THE CONFLICTING PERSPECTIVES BETWEEN INDIAN JURISPRUDENCE AND LEGISLATURE

Sri Smarak Bal

Singapore International School
National Highway No. 8, Post Mira Road
Dahisar, Mumbai, India
E.mail-smarakbal@gmail.com



Sri Smarak Bal

ABSTRACT

The Indian Constitution provides for a broad structure where there is separation of power between the parliament, executive and the judiciary; with no organ arrogating to itself absolute supremacy. The paper brings out how over the years Right to Property and its egalitarian distribution through Land Acquisition Acts (LAA) has become vexatious and attracted judicial flak from time to time. From a conservative stand in Sankari Prasad Case where parliamentary supremacy was accepted, the Golaknath Case was a watershed moment, in denying the Parliament the power to amend the Fundamental Rights. The subsequent judgement of Kesavananda Bharati Case inked the basic structure doctrine, paving the way for Parliament to amend fundamental rights including the Right to Property. The paper also brings out a parallel debate on what constitutes a “due process” of law which has not been firmly embossed in our constitution. The Maneka Gandhi Case clarified non arbitrariness, rule of law and fairness as the sine-qua-non of “due process” doctrine. The Minerva Mills Case, brought out in the paper is the final nail in stemming parliamentary effort to take away the power of judicial review power and arrogating to itself the British model of parliamentary supremacy. The paper avers that while the Supreme Court has been generally firm in asserting the basic tenets of democracy like supremacy of the Constitution, rule of law and limited power of the parliament to emasculate its contours. However, the NJAC judgement has put the clock back on the basic structure doctrine by giving an impression that the court is essentially trying to foster judicial cronyism in the matter of appointment of judges by forsaking a broad based committee system in the matter of judicial appointment. There is a need to restore the checks and balances of the three organs of the government so that the democratic governance finds true fruition.

Keywords: Basic Structure, LAA, Rule of Law, Due Process, NJAC

Introduction

The entire concept of a government is based of separation of power wherein the legislature has the power to legislate and amend the Constitution and the judiciary has the authority to interpret the constitutionality of the amendment or the legislation. The never-ending struggle for the

supervision of the constitution arose from issues regarding the right to property which was a fundamental right under Article 31, Part III of the Indian Constitution until 1978. After independence when the constitution took effect, several agrarian land reform legislations were passed, depriving several landlords of their existing land holdings. They then filed petitions in the high courts in regard to the infringement of their fundamental right to property. These events caused the invalidation of the Bihar Land Reforms Act, 1950 by the Patna High Court in 1951, which was followed by the passing of the Constitution Act of 1951 by the constituent assembly which made two basic provisions: Article 31(b) that introduced the Ninth Schedule to the Constitution which said that any law inserted into the Ninth Schedule cannot be challenged with regard to the hindrance of fundamental rights. There have been several landmark cases involving the spat between legislative authority to amend and the way the judiciary has looked at them.

This paper thus intends to (a) Bring about the evolution of jurisprudence over the years (b) To give a flavour of substantive cases that have questioned the validity of constitutional law/ amendment (c) The way forward for the basic structure doctrine.

Evolution of Jurisprudence

Jurisprudence in India dates back to the Bronze Age, wherein, it existed in the form of religious and philosophical prescriptions of the Vedic ages, seen in the Upanishads and many other religious texts. Legal systems were in fact a vital component of the Indus valley civilisation and outlined justice and equality for the common mass. Post the Vedic ages, secular law was seen to take distinctive procedures as it married into different dynasties of the vast nation, portraying the legal systems of various religions. Remarkable legal systems and secular courts in the course of Indian history were clearly seen during the reign of The Mauryas and The Mughals, which have founded and facilitated the very base and the growth of the Modern Indian judiciary.

These differences in the territorial legal systems of various dynasties at continuous conflict, was gradually eradicated in the British- Indian era, wherein the mayor courts were set up in 1726, right after the British east India company was granted charter by king George I. These legal systems followed the common-law system; which was based judicial precedents. They came to be known as procedural law. The mayoral courts were then replaced with supreme courts, and the mayoral courts were then converted into high courts, through patents sanctioned by the Indian high courts act passed by the British parliament, after the power had shifted from the company to the throne, due to the first war of independence in 1857. Law started to be coded with the forming of the first Law Commission. Thomas Babington Macaulay, the Indian Penal Code was drafted and brought into force by 1862. The Code of Criminal Procedure was also drafted by the same commission, primarily giving rise to the existing Indian judicial system.

Post-independence, the jurisdiction of the Privy Council in regard to appeals from India, was abolished. Furthermore, when secularism comes into picture the criminal procedure courts dispensed with separate criminal courts which were prevalent for Hindus and Muslims however, in respect of personal laws, the Britishers left it un touched sensing the sensitivity of different religious communities, which implies that the base of the legal Indian system underwent prominent changes during the British reign wherein the concept of communal laws and communal courts were dispensed, but the personal laws were not hindered with even after the post-independence era, during the drafting of the constitution, personal laws were separate for Muslims and Hindus, which as a matter of fact still remains a loophole in the Indian constitution.

Landmark judgements

Sankari Prasad Singh Deo vs Union of India (1951)

This authoritarian use of legislative power was then countered in the court in the *Shankari Prasad vs the union of India* case wherein the land lords, did not challenge any laws added into the ninth schedule but challenged the very amendment with Article 13(2) of the constitution that prohibits the parliament from making any "laws" that abridges fundamental rights and in this case

laws include legislations and amendments as well. However, the five-panel judge of the supreme court rejected the entire argument of the *Shankari Prasad* case, following strict procedure, the panel threw light upon the provisions made by the constitutional scheme that facilitates a clear demarcation between ordinary law which is made by legislative power and constitutional law which is made by constituent power and the summary of the supreme court's decision was that amendments did not constitute under the word law and therefore could not be reviewed by the courts.

Sajjan Singh vs State of Rajasthan (1964)

In *Sajjan Singh vs the state of Rajasthan* the seventeenth amendment that inserted 44 laws into the ninth schedule was challenged. Instead of questioning as to how the parliament could amend fundamental rights the case questioned the parliament's failure to follow procedure while making amendments to the constitution in regard to the validity of the constitution act of 1964. This argument was also unanimously dismissed by a panel of 5 judges due to following procedure.

I.C. Golaknath vs State of Punjab (1967)

However, this raised a very important question as to if the parliament could actually amend fundamental rights which was raised again in the *I.C. Golak Nath vs state of Punjab* case wherein landlords challenged the validity of the 1st 4th and 17th amendments made to the constitution. However, this time the panel of 11 judges examined whether constitutional amendments can abridge fundamental rights, including ordinary laws (legislations) and amendments and with a wafer-thin majority of 6 to 5 the court decided constitutional amendments also fell under the purview of "law" under Article 13(2) and courts could review such amendments if they infringed with the fundamental rights of a citizen. The court finally understood that the fundamental rights of the nation happened to be preternatural and invulnerable that for the first time in Indian history, procedural law paved way to a land mark case of *kesavananda bharati vs the union of India*.

Kesavananda Bharati vs State of Kerala (1973)

His holiness Swami Kesavananda Bharati Sripadagalvaru was the head of *Edneer math (religious institution)* in Kerala. Kesavananda Bharati was adversely affected due to the Kerala land reforms act, 1963 and he challenged these reforms in 1970. During these proceedings, the parliament passed the constitution act of 1972 (twenty ninth amendment) which inserted certain land reforms to the ninth schedule that further affected kesavananda bharati and hence the constitutional validity of the twenty fourth, twenty fifth and twenty ninth amendments were challenged in the case of *Kesavananda Bharati*. By the end of the case it was understood that the supreme court had to reconsider their decisions made in *Sajjan Singh* and *Shankari Prasad* and the question that arose is how much amending power can the parliament have with respect to Article 368 and was this power unfettered or could be subjected to judicial review. A thirteen-judge bench was set up for five months to decide the amending power of the parliament that stood to define constitutionalism and exercise of democratic power in India and finally concluded again, with a wafer thin major of 7 to 6 that the parliament can amend fundamental rights under Article 368 of the constitution until it does not hinder with the basic structure of the constitution. This was adapted from the basic structure doctrine that was formed due to the contributions of Professor Dietrich Conrad which states that the basic features (in this case the fundamental rights of constitution) cannot be hindered or altered through any means (amendments) and it also throws light on a concept of separation of powers where no organ of the government should dominate over the other.

Maneka Gandhi vs Union of India (1978)

While the never-ending conflict between the legislature and the judiciary continued, the Indian legal system, for the first time took a judicial decision, ignoring procedure and considering merits of a decision or commonly known as due process which is more prominent in American jurisprudence. It is the "legal requirement" that the state must respect all the legal rights that are owned by the person of the state. It balances the law of the land and subsequently protects the individual from it. In the *Maneka Gandhi vs the union of India* case, Mrs Gandhi's fundamental

rights were questioned due to various acts of the constitution. Mrs Gandhi was issued a passport on the 1st of June 1976 under the passport act 1967. On the 2nd of July 1977 the regional passport office of Delhi issued a letter to Mrs Gandhi regarding the withdrawal of her passport, and requesting her to return the passport in the next 7 days under section 10 (3)(c) of the passport act which states that *"The passport authority may impound or cause to be impounded or revoke a passport or travel document if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public"*. Mrs Maneka Gandhi wrote a letter to the passport office asking for a copy of the reasons for such an order. Since the Ministry of external affairs refused to produce any reason it compelled Mrs. Gandhi file a petition in the Supreme Court challenging this order of the Indian government. Her plea was that it violated her fundamental right guaranteed under Article 21 of the Indian constitution. She had questioned whether the right to go abroad is a part of the fundamental right to life and liberty, and subsequently whether section 10(3)(c) directly violates Article 14, 19(1) (a) and 21 of the Indian constitution. Instead of following direct procedure the Supreme Court for the first time looked at the merits of a decision and asserted that the fundamental rights of the constitution are not exclusive but interrelated. The court further observed that the fundamental rights should be interpreted in a manner that it expands its realm; rather than constricting its meaning. The court observed that *"personal liberty makes the worth of the human person"* and *"travel makes liberty worthwhile"* and finally the court considered the merits of a decision and considered traveling abroad as a part of Article 21 and section 10(3)(C) of the passport act 1976 does not violate Article 21 as it is prescribed under the provision that principles of natural justice are applicable in the exercise of impounding a passport and thus the Maneka Gandhi case acts as a bench mark in the development of constitutional law.

Minerva Mills vs Union of India (1980)

On the 20th of August 1970 the Central government appointed a committee regarding to development regulation under the industry act of 1951 to carry a complete investigation of the mills as the government was under the opinion that there was a major drop in the volume of production in the mills. The said committee then submitted a report to the central government, using which under section 18(a) of the 1951 act authorised the national textile company limited to take over the management of Minerva mills with the argument that the way the affairs of the mills were previously handled were considered to be detrimental to the interest of the common public and the order was passed on October 19 1971. This undertaking was nationalised under the sick textiles undertaking act of 1974. The heads of the mills felt that their fundamental rights were violated and hence filed a case in the Supreme Court to check the constitutional validity of the sick textiles.

Conclusion

From the foregoing it is seen, there exists an ideological gap between the parliament and its very people who are affected by the government and that causes the conflict that has been the area of concern a controversy in this country, what hasn't clicked the human mind is our basic human nature. Till date, the parliament has been "check mated" by the judiciary for using authoritative means and making unconventional laws that indeed question the constitutional validity of the country and as a matter of fact the judicial system only seems to be impartial to its basic structure doctrine but it is not so. There are often instances where the court has gone beyond an impartial architecture and tried to dominate the executive as has been the case in the NJAC that is the national judicial appointment commission that was supposed to act as a supplant for the pre-existing collegium system. The collegium system comprises of judges of the supreme court that appoint new judges to the judicial system and the power to do so remains independent from the other pillars of the democracy. The NJAC has six members, with Supreme Court having three and CJI presiding, and the other three being Law Minister and two eminent persons to be selected by the PM and CJI. The amendment was approved by the Parliament overwhelmingly and ratified by the states. Yet it was

struck down, as the Court ostensibly wanted to have majority in the Committee, to have a decisive vote. Quite clearly, this goes against the grain of separation of power which is a basic structure of the Constitution. Ironically a Committee appointed to review the Constitution in 2002 had also recommended supplanting the Collegium system with a broad-based committee. While the Supreme Court has generally acted as a fair arbiter in balancing the urge of the Parliament to be absolutist with the anodyne of basic structure doctrine, the judgement on NJAC manifests a tendency to protect its turf, under the subterfuge of judicial independence. The famous Jurist Granville Austin had written that "India's founding father have spun a seamless web comprising social revolution, national unity and democratic stability". While unity and stability of Indian polity have been substantially ensured, the turf war between the Indian judicature and Parliament in the matter of social revolution viz. Socio economic justice remains a troubled terrain.

References

- [1]. Austin, G. (2014). *The Indian constitution- Cornerstone of a nation*. New Delhi: Oxford University Press, India
 - [2]. Basu, D.D. (2013). *Introduction to the Constitution of India*. Haryana: Lexis Nexis; Twenty-First edition.
 - [3]. C. Golaknath & Ors vs State of Punjab & Anrs.(With ... on 27 February, 1967. Retrieved from <https://indiankanoon.org/doc/120358/>
 - [4]. Jayal, N.G., & Mehta, P.R. (2012). *The Oxford Companion to Politics in India*. New Delhi: Oxford University Press, pp-80-97
 - [5]. Kesavananda Bharati ... vs State of Kerala and Anr on 24 April, 1973. Retrieved from <https://indiankanoon.org/doc/257876/>
 - [6]. Maneka Gandhi vs Union of India on 25 January, 1978. Retrieved from <https://indiankanoon.org/doc/1766147/>
 - [7]. Minerva Mills Ltd. & Ors vs Union of India & Ors on 31 July, 1980. Retrieved from <https://indiankanoon.org/doc/1939993/>
 - [8]. Mody, Z. (2013). *10 Judgements that Changed India*. New Delhi: Penguin Books India Pvt. Ltd.
 - [9]. Sajjan Singh vs State Of Rajasthan (With ... on 30 October, 1964. Retrieved from <https://indiankanoon.org/doc/1308308/>
 - [10]. Singh, M.P. (2013). *V.N. Shukla's Constitution of India*. Lucknow, India: EBC Publishing (P) Ltd.
 - [11]. Sri Sankari Prasad Singh Deo vs Union of India and State of ... on 5 October, 1951. Retrieved from <https://indiankanoon.org/doc/1706770/>
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