



SEPARATION OF POWERS: IS IT A DOUBLE EDGED SWORD

By Arpit Sharma & Ritik Sharma
From Symbiosis Law School, Noida

ABSTRACT

Recent politico legal developments in India have now, initiated a new debate upon the Independence of Judiciary. Though the question is not new but the epoch is a new era. There are indications of colorable readings of law by the administrative authorities in the judicial foyers coupled with the efforts by the Parliamentarians to reign in the raging horse of justice jockeyed by the activist Judges. The episodes of Justice Kehar upholding the judicial hail by defuncting the National Judicial appointment commission(NJAC) Act¹ and the recent one of 4 Judges citing autocracy of the Judicial administration ask for fresh constitutional Harmony. But how to achieve that is a key question. There is conflict of Article 368, the Basic structure Fabric² and Parliamentary Supremacy to legislate under Article 248 which needs to be resolved. The paper proposes to delve into the passages of harmony amongst conflict.

INTRODUCTION

There should be government by law rather than the wills & whim of the official. Our constitution under certain provisions clearly recognizes three co-equal branches of the government. It is true that all the three branches are supreme within their own respective spheres & it is also true that no democracy & no constitution give absolute power to legislature or judiciary. It is a well- recognized premise that the

consolidation power by one branch of government is anathematic to the very idea of democracy. We'll be dealing with case laws, as in many of the situations there are conflict between the Judiciary and Legislature as they try to give the judgment or legislations which are not in the purview of each other's jurisdiction which it is deleterious to our democracy.

Parliament's Powers and Privileges

Legislative Powers- Parliament enacts laws, exercises oversight over the Executive, sanctions government expenditure and represents citizens. It also has the power to amend the Constitution. Note that Parliament has the power to legislate on matters related to the Judiciary such as its powers, jurisdiction, organization and service conditions of judges. It also has the power to remove judges on grounds of proved misbehavior or incapacity.

Immunity from court proceedings- To grant Parliament autonomy in its functioning, the Constitution guarantees certain protections to parliamentary proceedings and those participating in them. It bars the courts from examining validity of parliamentary proceedings on grounds of irregularity of procedure. The courts also cannot hold any person liable for any material that is published under the authority of Parliament.

Judiciary's Responsibilities and Powers

Judiciary Powers:- The Judiciary adjudicates disputes and administers justice under criminal law. In addition, the



higher judiciary acts as the custodian of the Constitution because it is responsible for its interpretation and enforcement. The higher judiciary also has the power to strike down laws of Parliament and actions of the Executive as invalid, if they violate the Constitution.

Judicial independence: - The Constitution creates a structure to protect judges from being influenced by Parliament and the Executive. Further, a higher court judge can only be removed by Parliament on grounds of proved misbehavior or incapacity during his term of office. Similarly, Parliament's power to fix judges' conditions of service is limited to the extent that they cannot be reduced after his appointment.

Legislature and Judiciary the Story of Conflict

Legislature is not merely a law making body. Lawmaking is but one of the functions of the legislature, primary being the delivery of Justice through fair legal policies being the prime representative of the people. In most democracies, legislatures are losing central place due to nepotism and colorable policies. On the other hand Judiciary is the arm of government which ensures delivery of justice to people through judicial review of legislative and executive misconduct. Justice delivery needs to be fair for which the judiciary has been given independence from other organs. The constitution empowers the Judiciary with a great degree of Independence and envisions Supreme Court to be protector of constitution.

For analyzing that how the Judiciary and legislature intersperse in each other's operation, we first need to acknowledge the wrangle between both of them. We'll get know the main toiling done by them which deduce that Parliament is a law making body and Judiciary interpret and apply the rules. The muddle which we postulate in milieu of India is that, they are interrupting in each other's drudgery.

Judicial activism was basically introduced by Justice P.N Bhagwati which observed that judicial activism means that instead of judicial restraint, the Supreme Court and other lower courts become activists and compel the authority to act and sometimes also direct the government and government policies and also administration.

When we see the previous Judgments and case law we get to know that the dividing line between the legislature and judiciary is getting blurred. Discussing the case of Vishaka vs. State of Rajasthan, the Supreme Court framed guidelines on how sexual harassment at the workplace needs to be addressed by employers.¹ In another case, the court gave directions to state governments to set up various authorities to decide appointments, transfers and complaints related to police.⁴ In 2011 the court directed that a law on hawking and street vending be made by June of that year for Delhi⁵. In the year 2016, the Supreme Court also imposed a cess on the registration of diesel vehicles in the National Capital Region.⁶ Note that the Constitution mandates a tax may be

¹ Vishaka vs State of Rajasthan, (1997) 6 SCC 241.



imposed only by a law framed by Parliament⁷. The Judiciary has generally issued such directions under Articles 32 and 142 of the Constitution. These provisions empower the Judiciary to protect fundamental rights and issue any order to do complete justice.

In *Shankari Prasad v. Union of India*, 1951 Parliament has absolute power to amend the Constitution including fundamental right provisions under Article 368 of the Constitution⁸. In *Golak Nath v. State of Punjab*, 1967 earlier decision reversed to say that power to amend the Constitution has limitations, and fundamental rights cannot be taken away or abridged.⁹ 24th Constitutional Amendment Act, 1971 Parliament amends Article 368 to provide that Parliament has constituent power to amend any provision of the Constitution, by way of addition, variation or repeal. In *Keshavnanda Bharati v. State of Kerala*, 1973, 24th Constitutional Amendment Act held as valid. Parliament has power to amend any provision including fundamental rights, but this power is subject to inherent limitations. Parliament cannot use this power to change the basic structure or framework of the Constitution.¹⁰ In *Indira Gandhi vs Raj Narain*, 1975 After Allahabad High Court invalidated Ms. Indira Gandhi's election on grounds of corrupt practices, the 39th Constitutional Amendment Act, 1975 was enacted to exclude judicial review in election disputes involving the Prime Minister. SC held that power of judicial review cannot be taken away as it is key to democracy¹¹. 42nd Constitutional Amendment Act, 1976 Parliament amends Article 368 to

bar courts from exercising judicial review over constitutional amendments, and provide that there will be no limitations on power to amend. *Minerva Mills vs Union of India*,

⁴ *Prakash Singh vs Union of India*, Supreme Court, Writ Petition (Civil) No. 310 of 1996, September 22, 2006.

⁵ *Gainda Ram vs Municipal Corporation of Delhi*, Supreme Court, Writ Petition (Civil) No. 1699 of 1987, October 8, 2010.

⁶ *MC Mehta vs Union of India*, Supreme Court, Writ Petition (Civil) No. 13029 of 1985, August 12, 2016.

⁷ Article 265, Constitution of India.

⁸ *Shankari Prasad vs Union of India* AIR 1951 SC 458.

⁹ *Golak Nath vs State of Punjab* AIR 1967 SC 1643.

¹⁰ *Kesavananda Bharati vs State of Kerala* AIR 1973 SC 1461.

¹¹ *Indira Gandhi vs Raj Narain* AIR 1975 SC 2299.

1980, 42nd Constitutional Amendment Act held invalid. Power of judicial review and a limited amending power are basic features of the Constitution.¹²

Seeking the above mentioned case laws we deduce that to amend the constitution we need Parliament, in the case of



Vishaka v. State of Rajasthan the Supreme court give guidelines but giving guidelines is the work of Parliament, also in many other cases, acknowledged above the court got involved in the jurisdiction of Parliament by enunciating that they can do it under the power of judicial activism. But the court got involved in the ambit of legislature in some cases because they were violating the basic structure of the constitution and Supreme Court being the guardian of the Constitution cannot let this happen due to which it have to interrupt in the working of Parliament. In the case of Indira Gandhi vs. Raj Narain, the parliament introduced a bill which was regarding the removal of Judicial review but if this bill was passed then the legislature can make whatever law which they want to make but it was not appropriate and the Supreme court quashed the bill by saying that this is a clear violation of the basic structure of the constitution.

Present Scenario of Politico Legal Fiasco

In the case of Salim Khan v. State of Maharashtra (Salman Khan hit and run case) it was clearly visible that the verdict given by the judge will be against Salman Khan. Later just in a day presiding judge was given transfer orders and the case was given to some other judge through political approach. This was clear violation of the law because, as per the law prior notice of transfer should be given and proper transfer procedure should be followed. This is construed as serious violation of Article 222. Also

NJAC was declared unconstitutional by Supreme Court as there was rock-bottom pellucidity in the appointment of Judges and the old collegium system was implemented. Sometimes legislature has to pass certain bills and make certain laws which may be different from the strict guidelines of the legal values and the constitution, but morally correct for the welfare of the people at that period of time. In such cases, the judiciary deals with the legislature in a strict way and questions the socialistic manner of government and reaction of legislature towards the judicial interpretations of the constitution. The clash here emerges when the judiciary experiences a need for a new law and legislature is reluctant to it. The judicial

¹² Minerva Mills vs Union of India AIR 1980 SC 1789

attitude towards the legislative privilege, legislature enjoys the privilege of law making and the judiciary has to follow and protect those laws, whether they are in favor or not. Also the legislature thinks that they should be true arbitrator of the constitution because they have the power to amend the constitution. That is why the legislature feels greater urge to amend the constitution to nullify the effects of some judicial decisions.

CONCLUSION

The historical discourse reveals the Supreme Court as an institution that gained strength and emerged powerful post emergency, a period during which image of the Indian State including the judiciary was tarnished. This fractional



epoch displayed that political interference can impose infamy and loss of faith on the constitutional watch dog. Apart from this the legislative and executive apathy are other two naked truths which cannot be ignored. As a testimony to that we have social rights jurisprudence developed post emergency by the Hon'ble Supreme Court. This reposes the faith of common man in the last knight of Indian Constitution. In the light of above it can be ascertained that reformation of Judicial setup must be devoid of any political agenda which of course can happen by providing a better competitive environments in the legal field and removing the political involvements in appointments of legal importance at State level and National Level. Especially the alleviation of counsels in high courts and supreme courts which presently is the root cause of nepotism in the Judiciary.

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