

PARLIAMENTARY SOVEREIGNTY VERSUS JUDICIAL REVIEW – A TUG OF WAR IN THE DEVELOPMENT OF THE INDIAN CONSTITUTIONALISM

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Abstract:

India is one of the most successful democracies among the Third World countries. The civilizational values of India and the legacy of anti-colonial struggle are regarded as the perennial source of the ideology of the Indian State. These philosophical foundations are enshrined in the constitution of India. The Indian Constitution contains the provisions which could amend the Constitution from time to time to make it suitable for the new epoch and its emerging demands. In spite of such well-defined ideological and structural arrangements, the Parliament of India and the Supreme Court of India representing popular sovereignty and judicial review respectively engaged in jurisdictional conflicts. In this background, this article explores how these conflicts expose the majoritarian approach held by the dominant political dispensations in India and how the Constitutional structure evolved the doctrine of Basic Structure by reviewing the chronicles of the several amendments since the 1950s up to 1990s.

Key-words: *Liberal Democracy, Constitutionalism, Indian Constitution, Politics of Majoritarianism, Constitutional Amendment, Basic Structure of the Constitution.*

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Constitutionalism is one of the core principles around which modern liberal democracies like India revolve around. A Constitution is a document which embodies the fundamental law of the land and defines and determines the powers and functions of different organs of the State and their inter-relations. However, it is not a fixed document. A political society evolves with time and no constitution can stay same as it was envisaged at the time of its making. For a constitution to stay relevant and responsive to the needs of society and for the evolution of democratic values, a mechanism for amendment is required. Amending constitution reflects the ongoing challenge of balancing The Constitution of India is the product of the civilizational values that encouraged the grand legacy of anti-colonial struggle. Although the makers of the Indian Constitution were not elected by the people, yet they could represent almost every section of the Indians. It was introduced in 1950 as a monumental document that reflects the complexities of a great civilizational nation with enormous diversity. Its most significant feature is the capacity to incorporate the changes in the form of amendments, which allow it to evolve in response to changing social, political, and economic conditions. Article 368 of the Constitution provides for ‘addition, variation, or repeal of any provision of the Constitution’. Thus, the Indian Constitution itself contains the mechanism for auto-correction by using it the rulers of this liberal democracy have amended it more than 105 times till date. This article explains the mechanism of Constitution amendment in India and reviews major amendments the provoked conflicts between the Parliament and the Supreme Court and ultimately gave birth to the doctrine of Basic Structure to safeguard the virtue of constitutionalism in India. For that purpose, this article deals with the conceptual and procedural analysis of constitution amendment with reference to the contest between the Supreme Court of India and the dominant political class in its Section I. And in Section II, some of the major amendments which led the contest between the court and the political class are reviewed to study the strength of Indian Constitutionalism.

Section I

The Indian Constitution empowers the Parliament power to amend the Constitution. But the Parliament cannot interpret the Constitution. The authority to interpret the Constitution lies with the Supreme Court of India as the federal court. The Parliament of India represents the popular sovereignty and therefore it can amend any part of the Constitution as per the Article 368 of the Constitution if necessary. The amendment procedures of the Constitution are categorized broadly into three categories based on the kind of majority required in the Parliament.

Firstly, in some cases amendments need just a simple majority of the members present and voting in both houses of Parliament to pass. Some of them are the changes to the Schedules or making new states etc. Secondly, most of the amendments to the Constitution need a special majority in

Parliament to pass. This means at least two-thirds of the members present and voting must cast their votes in favour of the proposal, and this majority must also be more than half of all members in each house of Parliament. When the amendment is related to fundamental rights, the distribution of legislative powers between the Union and State Governments, and other core constitutional provisions, this is followed. And thirdly, the amendments which affect the federal structure of the constitution not only require a special majority in Parliament but also ratification by at least half of the State legislatures. This provision is applied to the amendments that intend to change the powers of the Council of States, the allocation of tax revenues, principles of federalism or in the process for electing the President of India.

The amendment procedures followed by the Indian Constitution strike a balance between rigidity and flexibility. It has been crucial for a country like India, where different regions and communities have varying needs and concerns. Moreover, the experiment of liberal democracy in an erstwhile colony in Asia was not there before the fathers of the Indian Constitution. Therefore, they went for middle-path. However, the amendment procedure of the Constitution in India is not indifferent about the “Basic Structure of the Constitution”.

Although the Parliament can amend the Constitution if necessary, it is not authorized to do any change in the basic structure of the Constitution. Article 13 of the Constitution does not allow the State to make any law which “takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void”.(Sharma BK, 2002) Thus, the Constitution assigns the Supreme Court of India the power to review the functions of the Parliament and other legislative bodies and the executive authorities not to promulgate any law or administrative orders that may take away the Fundamental Rights.

This position constitutional position was held against the very first amendment to the Indian Constitution in 1951 in the famous Shankari Prashad Case to argue that the said amendment sought to curb the right to property as enshrined in Article 31 of the Constitution. But the Supreme Court of India ruled out this contention and interpreted Article 13(2) of the Indian Constitution and held that the said Article restricted the “ordinary law” to take away the Fundamental Rights enshrined in the Constitution. A Constitution Amendment Act was not such “ordinary law” and therefore, the Parliament could amend the Fundamental Rights.

This dichotomy between the transcendental position of the Fundamental Rights and parliamentary sovereignty took a different turn when the Supreme Court of India overruled its earlier position in the Shankari Prashad Case in the Golaknath v. State of Punjab in 1967. In this landmark verdict, the Supreme Court of India gave the Fundamental Rights a ‘transcendental position’. According to the Court, Article 368 of the Constitution was not meant for doing away with the Fundamental Rights.

This position of the Supreme Court of India ultimately led the Court to promulgate the idea of ‘basic structure of the Constitution’ in its most famous *Kesavanand Bharati v. State of Kerala* Case in 1973. This was mainly due to the arbitrary interference of the Parliament to dodge the verdict of the *Golaknath* Case in the form of the 24th Constitution Amendment Act in 1971. This Amendment Act altered the original position of the Article 13 and Article 368 of the Constitution. As a result, the Amendment Acts promulgated by the Parliament were separated from the “ordinary law” which were referred so by Article 13. And therefore, the Amendment Acts promulgated by the Parliament would not come under the Article 13 of the Constitution. Thus, the then political class sought to establish parliamentary sovereignty and subjected the Constitution of India at the mercy of the them. In *Kesavanand Bharati v. State of Kerala* Case in 1973 the Supreme Court of India on the other hand, neither defended the ‘transcendentality’ of the Fundamental Rights as per the verdict of the *Golaknath* Case nor endorse the legacy of the 24th Constitution Amendment Act of 1971. According to it, the Parliament could amend any provision of the Constitution including the ones from Chapter III related to the Fundamental Rights but it had no authority to overrule the ‘Basic Structure’ of Constitution’ defined by the Supreme Court of India. Thus, it promulgated the doctrine of the ‘Basic Structure’ of Constitution’ and reasserted the authority of judicial review of the Supreme Court. The Supreme Court maintained the same position in the *Minerva Mills v. Union of India* in 1980 and *Woman Rao v. Union of India* in 1981. Section II of this article explains the context of such position of the Court focusing upon the efforts of the political class to play with the ‘Basic Structure’ of Constitution’ of the Constitution in the form of amendments.

Section II

As stated earlier, in spite of the dynamic nature of the Constitution and the formal safeguards in the form of Article 13, debate on the ‘threat against constitution’ was perceived immediately after the introduction of the Constitution. The first amendment to the Indian Constitution in 1951 was challenged in the *Shankari Prashad* Case with the argument that the said amendment sought to curb the right to property as enshrined in Article 31 of the Constitution. Although the Court overruled the challenge by differentiating “ordinary law” and Amendment Acts, the story did not end there. In the *Golaknath* Case, the same apprehension aroused and the Court took a different position by declaring the Fundamental Rights were not subject to amendment. Subsequently, the *Kesavanand Bharati* maintained a balance and promulgated the ‘Basic Structure’ of the Constitution. When the ruling class of India introduced bulk of amendments in the mid-1970s, the Forty Second Constitution Amendment Act, criticisms poured in. It was alleged that the Forty Second Constitution Amendment Act was a “mini-Constitution”. This amendment destroyed the scope of judicial review by inserting Clause 4 in Article 368 which reads: “No amendment of this Constitution (including the provisions of Part III)...shall be called in question in any court on any ground”. The ruling party introduced it

for the purpose of “perpetuating the rule” and they had “scant regard to democracy, judicial independence etc.” (Sharma BK, 2002) In this context the *Minerva Mills v. Union of India* case declared that Clause 4 of Article 368 was void and upheld that the doctrine of Basic Structure of the Constitution should apply to all the Amendment Acts passed by the Parliament of India after pronouncement of verdict of the *Kesavanand Bharati Case* on 24/04/1973.

However, the Supreme Court did not define the Basic Structure of the Constitution in any of these verdicts. It just clarified the following points regarding it:

1. Fundamental Rights were subject to amendment unless otherwise such amendment acts to the Fundamental Rights were considered to abrogate / destroy the Basic Structure of the Constitution.
2. If any amendment to the Constitution abrogated/ violated the Basic Structure of the Constitution, the Court should declare them as void by applying the power of judicial review.
3. If an amendment act passed after the pronouncement of verdict of the *Kesavanand Bharati Case* on 24/04/1973 and abrogated the Basic Structure, then only the Court would declare it void. In other words, the verdict of the *Kesavanand Bharati Case* could not be applied retrospectively to earlier legislations.

Although the Supreme Court did not define precisely the Basic Structure, the following are generally pointed out by the legal luminaries (like Sharma BK, 2002) as the components of it on the basis of the verdicts indicated above:

- i) The Rule of Law
- ii) Equality
- iii) The doctrine of Separation of Powers
- iv) Supremacy of the Constitution
- v) Judicial Review
- vi) Federalism
- vii) Secular Character
- viii) Parliamentary System of Government
- ix) Free and fair elections
- x) Independence of Judiciary
- xi) The Sovereign democratic and republican nature of polity and
- xii) Limited power of Parliament to amend the Constitution

Thus, the Indian Constitution has exhibited the strength of resisting the vested interests by means of legal/juridical procedures as enshrined within it. It has evolved through long process during the last seventy-five years. As it is already discussed above that during the process of evolution, the Basic

Structure of the Constitution was evolved by the virtue of the intervention of the Supreme Court of India in 1973 through the Kesavanand Bharati Case. But the dominant political class of the country could not resist themselves to distort the Constitution. Some of the brazen attempts in this regard are:

i) **The 39th Constitution Amendment - an effort to establish authoritarianism:** In spite of the existence of the Basic Structure of the Constitution in 1973, the ruling dispensation of tried to institutionalize their vested political interests in India. One such brazen attempt was there in 1975 when the Allahabad High Court questioned the legitimacy of the election of the then Prime Minister of India, Mrs. Indira Gandhi, the ruling dispensation initiated the 39th Constitution Amendment Act in the Parliament. This amendment exempted the President, Vice President, Prime Minister, and Speaker from the jurisdiction of the courts, and they are to be decided by whichever authority the Parliament chooses. The amendment modified articles 71, 329, and Schedule 9 of the Indian constitution to achieve its desired goal. A new Article 329 A was inserted. Clause 4 of this Article declared that the election to the Prime Minister and others mentioned above “shall not be deemed to be void or ever to have become void on any ground.....and notwithstanding any order made by any court....declaring such elections to be void such election shall continue to be valid....and any such order shall be deemed to have been void.” (Sharma BK, 2002) Thus, the power of political majoritarianism intended to demolish the liberal democratic virtues.

At this juncture, the Supreme Court of India in the Indira Nehru-Gandhi v. Rajnarain Case-1975invalidited the Clause 4 inserted in the Article 329 A on the ground that this Clause was against free and fair elections in the country which was an ingredient of the Basic Structure of the Constitution.

ii) **To reject the Judicial Review in the 42nd Constitution Amendment Act:** Similarly, as mentioned earlier, since it brought a large number of amendments to the Indian Constitution, it is also known as ‘Mini-Constitution.’ It was also a reckless attempt on the part of the same ruling dispensation of the country to ‘revise’ the Constitution in terms of their convenience. The amendment came into force on 3rd January, 1977. The most humiliating effort in this Amendment Act against the democratic structure of the country was to curtail the power of judicial review from the Supreme Court of India. Article 368 was amended and two new Clauses 4 and 5 were inserted in it. According to Clause 4, no amendment of the Constitution whether made before the implementation of the 42nd Amendment Act or after it should be called in question by any court. Similarly, Clause 5 established unlimited power of the Parliament with respect to the amendment of the Constitution of India.

Thus, the power of majoritarianism was again used to nullify constitutionalism by the ruling dispensation of the country. Here also the Supreme Court of India interfered through the verdict of the *Minerva Mills v. Union of India* in 1980. Along with many other such authoritarian provisions, the Court rejected the Clause 4 and 5 in the Article 368 of the Constitution on the ground of the Basic Structure of the Constitution.

iii) **The Muslim Women (Protection of Rights on Divorce) Act in 1986: the Response of the Verdict of Mohd Ahmed Khan v. Shah Banu Begum Case 1985:** Shah Bano Begum, a 62-year-old was divorced by her husband in 1978 after 43 years of marriage. Her husband, Mohd Ahmed Khan offered minimal maintenance. The Supreme Court in its verdict held that all the divorced wives unable to support themselves should get maintenance from their erstwhile spouse. And this principle is applied to all citizens, regardless of religion, overriding personal law. This judgment was viewed by the orthodox Muslim groups as interference in *Sharia* law. In order to safeguard their vote bank, the then ruling dispensation brought the Muslim Women (Protection of Rights on Divorce) Act in 1986, which effectively restricted a Muslim woman's right to maintenance from her husband to only the 90-day i.e. the *iddat* period as per the dictate of the *Sharia* law. Thus, the role and functioning of the Supreme Court of India was overruled by applying the majoritarian mandate of the voters.

Thus, we can conclude that the conflict between the two major institutions like Parliament and the Supreme Court of India representing the democratic virtues like popular sovereignty and judicial review respectively was a phase of development of the Indian version of constitutionalism. This conflict exposed the nature of political dispensation of the respective time periods. How the majoritarian outlook of the ruling political parties encouraged them to trespass into the realm of judiciary and constitutional immunity is clear in the above discussion. In the 39th Constitutional Amendment Act in 1975, 42nd Amendment Act of 1976 and the enactment of the Muslim Women (Protection of Rights on Divorce) Act in 1986, the ruling dispensation clearly went against the Basic Structure of the Constitution. These are the eye-opener cases but they helped to consolidate a real democratic constitution in India with a firm legacy of constitutionalism committed to democratic ideal.

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