THE TUG OF WAR BETWEEN THE JUDICIARY AND THE LEGISLATURE WITH RESPECT TO ARTICLE 368 OF THE CONSTITUTION OF INDIA

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INTRODUCTION

The Constitution of India lays down the basic framework on which the Indian polity is run and also furnishes guidance for the same. An ideal Constitution is one which is dynamic in nature. One of its major features should that it is capable of adapting itself in accordance to the changing needs of the society. Keeping this salient, essential and critical factor in mind, the Draftsmen of the Indian Constitution had incorporated Article 368 which dealt with the procedure of the amendment. Article 368 gives our Constitution a unique feature where it is neither entirely rigid nor flexible, but rather a distinct combination of both.

The contradiction between the principles of ‘parliamentary sovereignty’ and ‘judicial review’ that is embedded in India’s Constitution has been a source of major controversy over the years. The amending power of the Parliament under the Indian Constitution is the main area which has lead to most serious disagreements between the Parliament and Judiciary, the conflict involving Parliamentary Supremacy on one hand and the Judicial review of the scope and extent of the power and the manner in which such power is to be exercised on the other.

The paper shall discuss about one such tussle between the Parliament and Judiciary on the issue of the Parliament’s authority or capability (under Article: 368) to amend Fundamental Rights prescribed in Part III of the Constitution of India which ultimately led to the 24th Amendment Act, 1971 and subsequently to 42nd Amendment Act, 1976.
THE NEED FOR THE POWER TO AMEND THE CONSTITUTION

First and foremost, it is important to understand the purpose and the need behind incorporating an article in the Constitution to provide the Parliament with the power to amend laws of the Constitution and for this, it is quite necessary to refer to the Constituent Assembly Debates (CAD).9 Pdt. Jawaharlal Nehru emphasized on the fact that though the Constitution of a nation is required to be a permanent and solid structure, he admitted that it is anything but permanent.10 The Constitution should have requisite flexibility to some extent in order to enable the parliamentarians to have an imperative opportunity to bring about changes in the law which are in consonance with the changing needs of the society.11 Dr. P.S. Deshmukh also supported this view and was of the opinion that the administration would be the one to bear the brunt and suffer the most if the amendment procedure was rigid.12 Another member of the Constituent Assembly, Brajeshwar Prasad believed that the Constitution would be able to stand the test of time only if it would be flexible and also that rigidity proves to be a hindrance for progressive legislation or gradual innovation.13

Flexibility depicts only one side of the coin. If the Constitution would be extremely pliable, then it would be very easy for the ruling party to amend laws according to its whims and fancies.14 Therefore, to keep a check on such abuse of power, the judiciary has been vested with the authority to adjudicate upon the constitutional validity of all the laws and strike down any law which blatantly violates the provisions of the Constitution.15 Thus, the Constitution makers had provided a check and balance method to restrict the wide array of the powers of the Parliamentarians and often, there is a clash between the two.16

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10 Retrieved from http://164.100.47.132/LssNew/constituent/vol7p4.html
11 Ibid
12 Ibid
13 Ibid
14 Ibid
16 Supra note 5
One such tussle arose regarding the Parliament’s power to amend the Fundamental Rights conferred to all the citizens in Part III of the Constitution.\(^\text{17}\)

**Shankari Prasad vs Union of India AIR 1951 SC 455**

The issue first surfaced in *Shankari Prasad vs Union of India*.\(^\text{18}\) In this case, the validity of the Constitution (First Amendment) Act, 1951 was challenged on the grounds that the Art. 31A and 31B which were inserted by this Act purported to abridge the Fundamental Rights under Part III.\(^\text{19}\) It was contended that even though the Parliament has the right to amend the provisions regarding Fundamental Rights, they amendment should nonetheless be in accordance with the Art. 13(2).\(^\text{20}\) This contention was rejected by the 5-Judges Bench stating that although the First Amendment Act abridged the Fundamental Rights, they should not be looked under the light of the provision of Art. 13 (2).\(^\text{21}\) Justice Shastri, while delivering the judgement ordained that although “Law” must include constitutional laws as well but there is a clear distinction between an ‘ordinary law’ and a ‘constitutional law’ where the former is made in the exercise of legislative power and the latter is formulated in the exercise of constituent power and thus, an amendment is not a law within the meaning of Art. 13(2).\(^\text{22}\) Dicey’s doctrine of Parliamentary sovereignty was upheld and implemented in this case.\(^\text{23}\) Shastri J. conceded that an amendment under Art. 368 is Parliament’s exercise of ‘Sovereign Constituent’ power and that the Constitution makers had no intention to make the Fundamental Rights immune from any sort of Constitutional amendment.\(^\text{24}\)

Notwithstanding the First Amendment, the agrarian legislative measures adopted by the States were effectively challenged in the High Courts and two further amendments were passed to save the validity of those measures namely, the Constitution (Fourth Amendment) Act, 1955, which amended article 31-A and the Constitution (Seventeenth Amendment) Act, 1964, which amended article 31-A, again and subsequently added 44 Acts to the Ninth schedule.\(^\text{25}\)

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\(^\text{17}\) Retrieved from [http://www.constitutionnet.org/vl/item/basic-structure-indian-constitution](http://www.constitutionnet.org/vl/item/basic-structure-indian-constitution)

\(^\text{18}\) *Shankari Prasad vs Union of India AIR 1951 SC 455*

\(^\text{19}\) Ibid

\(^\text{20}\) Ibid

\(^\text{21}\) Ibid

\(^\text{22}\) Ibid

\(^\text{23}\) Ibid

\(^\text{24}\) Ibid

\(^\text{25}\) Supra note 1 ([http://www.legalserviceindia.com/article/170-Article368.html](http://www.legalserviceindia.com/article/170-Article368.html))
In *Sajjan Singh v. State of Rajasthan* case\(^26\), the decision given in *Shankari Prasad vs Union of India*. The Chief Justice Gajendragadkar, while delivering the majority view, concurrently deduced that the words "amendment of this constitution" in Art. 368, simply and unambiguously meant amendment of all the provisions of the Constitution and therefore, it would not be reasonable to hold that the word "law" in Art. 13(2) is inclusive of Constitution Amendment Acts passed by the Parliament under Art. 368.\(^27\) He further pointed out that even if the powers to amend the fundamental rights were not included in article 368, Parliament could by a suitable amendment assume those powers.\(^28\) Hidayatullah J. and Mudholkar J. held dissenting opinions.\(^29\) The former had a hard time accepting the view that the Fundamental Rights were not fundamental but were within the power of amendment which was a common feature of all the other provisions of the Constitution as well.\(^30\) This was so, because apparently the Constitution provided so many assurances in Part III.\(^31\) According to Mudholkar J., the word "law" in Art 13 (2) included an amendment to the Constitution under Art. 368 because this particular article does not mention or provides an insight as to when Parliament while making an amendment to the Constitution, assumes a different capacity of a ‘constituent body’.\(^32\)

**I. C. Golaknath & Ors. V. State of Punjab & Anrs. AIR 1967 SC 1643**

The doubts raised by the minority judges (Hidayatullah J. and Mudholkar J.) regarding the appropriateness and correctness of the decision given in *Sajjan Singh v. State of Rajasthan* case were addressed by an 11 judges bench of the Supreme Court in the case of *I. C. Golaknath & Ors vs State of Punjab & Anrs.*\(^33\) In this case, First, Fourth and Seventeenth Amendments to the Constitution to the extent that they affected fundamental rights was challenged.\(^34\) A majority of six judges adjudicated that the Parliament had absolutely no authority to amend any provision regarding the provisions enumerated in Part III of the Constitution with respect

\(^{26}\) *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845
\(^{27}\) Ibid
\(^{28}\) Ibid
\(^{29}\) Ibid
\(^{30}\) Ibid
\(^{31}\) Ibid
\(^{32}\) Ibid
\(^{33}\) *I. C. Golaknath & Ors vs State of Punjab & Anrs* AIR 1967 SC 1643
\(^{34}\) Ibid
to abridging the Fundamental Rights. The judgment of three of the dissentients, (Wanchoo, Bhargava and Mitter JJ.) in this case was delivered by Wanchoo J. where he observed that Art. 368 carried the power to amend all parts of the Constitution including the Fundamental Rights. They reaffirmed the correctness of the decisions in cases of Shankri Prasad and Sajjan Singh.

The problem then arose before the judges with the majority opinion that if the First, Fourth and Seventeenth Amendments were to be invalidated, it would take a toll on social and economic affairs but the court considered itself to be under an obligation to ameliorate the errors. This lead the court to adopt the doctrine of prospective overruling wherein, the three constitutional amendments concerned would continue to be valid and the decision to the effect that Parliament had no power to amend the provisions of Part III would operate subsequently after this judgement.

The majority judgment of Subha Rao C.J. in consonance with "policy and doctrinaire decision to favour Fundamental Rights" accepted the following propositions:

(i) Article 368 with its marginal note "Procedure for amendment of the Constitution" dealt only with the 'procedure’ for amendment. Amendment was a legislative process and the power of Parliament to make amendments was contained in Article 248 as well as in Entry 97 in List I of the Seventh Schedule (the Union List) which confer residuary legislative powers to the Union Parliament.

(ii) An amendment to the Constitution, whether under the procedural requirements of Art. 368 or under any other article, is made as part of the normal legislative process. It is, therefore, a "law" for the purpose of art. 13(2).

CONSTITUTION (TWENTY-FOURTH AMENDMENT) ACT, 1971

36 Ibid
37 Ibid
38 Ibid
39 Ibid
40 Ibid
41 Ibid
42 Ibid
Thus, the Supreme Court had overruled its own decisions decreed in the previous judgements. To overcome the decision in this case, the Constitution 24th Amendment Act was passed in 1971. Following are the amendments which were sought by this amendment:

1. It added a new clause (4) to Art. 13 which provides that 'nothing in this article shall apply to any amendment of this Constitution made under Art. 368.'

2. The amendments brought about by this Act in Art. 368 are:
   i. It substituted a new marginal heading to Art. 368. In place of the old heading "Procedure for amendment of the constitution", it now reads "Power of Parliament to amend the Constitution and procedure thereof."
   ii. It inserted sub clause (1) in Art. 368 which states that "notwithstanding anything in this Constitution, Parliament may, in exercise of its constituent power may amend by way of addition, variation, or repeal any provision of this Constitution in accordance with the procedure laid down in article."
   iii. It substituted the words "it shall be presented to the President for his assent and upon such assent being given to the Bill" with the words "it shall be presented to the President who shall give his assent to the bill and thereupon". Thus, it is obligatory rather than discretionary for the President to give his assent to the bill for amending the Constitution.
   iv. It added a new clause (3) to Art. 368 which provides that "Nothing in Article 13 shall apply to any amendment made under this article."

*Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461*

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43 Supra note 1
44 Constitution (Twenty-Fourth Amendment) Act, 1971
46 Ibid
48 Ibid
49 Ibid
50 Ibid
51 Ibid
52 Ibid
Inevitably, the constitutional validity of 24\textsuperscript{th}, 25\textsuperscript{th} and 29\textsuperscript{th} Amendments Acts was challenged in \textit{Kesavananda Bharati v. State of Kerala}.\textsuperscript{53} It was heard by a Bench consisting of thirteen Judges, presumably with a view to wielding more authority than that of the Bench of eleven Judges which heard the \textit{Golaknath} case.\textsuperscript{54} The court by majority overruled the Golaknath case which denied Parliament the power to amend Fundamental Rights of the citizens.\textsuperscript{55} They held that Article 368 contained the procedure as well as the power to amend the Fundamental Rights even before the 24th Amendment.\textsuperscript{56} This case also evolved the “\textit{Doctrine of Basic Structure}” where the Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and also that it could not use its amending powers under Article 368 to ‘damage’, ‘weaken’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or framework of the Constitution.\textsuperscript{57}

This decision was not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.\textsuperscript{58}

\textit{Indira Nehru Gandhi v. Raj Narain, AIR 1975 SCC 2299}

In the case of \textit{Indira Nehru Gandhi v. Raj Narain}, the Supreme Court again had the opportunity to pronounce on the Basic Structure of the Constitution.\textsuperscript{59} Parliament had passed the Constitution (Thirty-ninth) Amendment Act, 1975, which eliminated the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha.\textsuperscript{60} In place of the Supreme Court, a body constituted by Parliament would be vested with the power to resolve such election disputes.\textsuperscript{61} Section 4 which inserted Article 329-A of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law.\textsuperscript{62} Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after

\textsuperscript{54} \textit{Ibid}
\textsuperscript{55} \textit{Ibid}
\textsuperscript{56} \textit{Ibid}
\textsuperscript{57} \textit{Ibid}
\textsuperscript{58} \textit{Supra note 1}
\textsuperscript{59} \textit{Indira Nehru Gandhi v. Raj Narain}, AIR 1975 SCC 2299
\textsuperscript{60} \textit{Ibid}
\textsuperscript{61} \textit{Ibid}
\textsuperscript{62} \textit{Ibid}
striking down clause (4) of Article 329-A, on the ground that it was beyond the amending power of the Parliament as it destroyed the basic feature of the Constitution by curbing the power of the judiciary to adjudicate in election dispute.\textsuperscript{63}

**CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976**

After the decisions delivered by the Supreme Court in *Kesavananda Bharati* and *Indira Nehru Gandhi* case, the Constitution (42nd Amendment) Act was passed in 1976.\textsuperscript{64}

- Section 4 of this Act stated that words “the principles specified in clause (b) or clause (c) of article 39” shall be substituted by “all or any of the principles laid down in Part IV”.\textsuperscript{65}
- This Act made the power of Parliament supreme in matters relating to the amendment of the Constitution through Section 55 of the said Act wherein it added two new clauses, namely, clause (4) and (5) to Art. 368 of the Constitution.\textsuperscript{66}
  - Clause (4) of Art. 368 stated “No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.” This clause asserted the supremacy of the Parliament in terms of its amending powers.\textsuperscript{67}
  - Consequently, Clause (5) of Article 368 stated, “For the removal of the doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”\textsuperscript{68}

This Amendment sought to put an end to any controversy as to which is supreme, Parliament or the Supreme Court.\textsuperscript{69} It was urged that Parliament represents the will of the people and if

\begin{itemize}
  \item \textsuperscript{63} Ibid
  \item \textsuperscript{64} Constitution (Forty-Second Amendment) Act, 1976
  \item \textsuperscript{65} Ibid
  \item \textsuperscript{66} Ibid
  \item \textsuperscript{67} Ibid
  \item \textsuperscript{68} Ibid
  \item \textsuperscript{69} Retrieved from http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf
\end{itemize}
people desire to amend the Constitution through Parliament there can be no limitation whatsoever on the exercise of this power.\textsuperscript{70} This amendment removed the limitation imposed on the amending power of the Parliament by the ruling of the Supreme Court in \textit{Kesavananda Bharati’s} case.\textsuperscript{71} It was reasoned that the theory of ‘Basic Structure’ as invented by the Supreme Court was vague and would end up creating difficulties.\textsuperscript{72} The amendment was intended to rectify this situation.\textsuperscript{73}

\textbf{Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625}

Subsequently, the validity of Section 4 and Section 55 of the 42\textsuperscript{nd} Amendment Act, 1976 were challenged in \textit{Minerva Mills Ltd. v. Union of India}.\textsuperscript{74} In this case, it was contended that Sections 4 and 55 of the said Act damaged the Basic Structure of the Constitution.\textsuperscript{75} Section 4 was held to be unconstitutional by majority of 4:1 on the ground that amendment made to Article 31C vastly extended its scope from protection of laws made for the purposes of Article 39 (b) and (c) to all the Articles under Part IV from challenge on the ground of Article 14 and 19.\textsuperscript{76} This gave absolute supremacy to Directive Principles of State Policy mentioned in Part IV over Fundamental Rights conferred in Part III which is against the ‘basic structure’ of harmony and balance between the two.\textsuperscript{77}

Regarding the validity of Section 55 (which added clauses (4) and (5) in Article 368), the Hon’ble Court unanimously held it to be unconstitutional on the ground that the Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features.\textsuperscript{78} The limited power of a donee cannot by the exercise of the same be converted into an unlimited one.\textsuperscript{79} Thus, clause (5) was declared as unconstitutional on the ground of damaging the basic features of the Constitution. The same fate was met by clause (4) which barred judicial review in cases

\begin{itemize}
\item \textsuperscript{70} \textit{Ibid}
\item \textsuperscript{71} \textit{Ibid}
\item \textsuperscript{72} \textit{Ibid}
\item \textsuperscript{73} \textit{Ibid}
\item \textsuperscript{74} \textit{Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625}
\item \textsuperscript{75} \textit{Ibid}
\item \textsuperscript{76} \textit{Ibid}
\item \textsuperscript{77} \textit{Ibid}
\item \textsuperscript{78} \textit{Ibid}
\item \textsuperscript{79} \textit{Ibid}
\end{itemize}
of constitutional amendments was held unconstitutional as it sought to make the entire Part III unenforceable and thus, enlarge the power of the Parliament limited by Article 13. The Court reasoned that if a constitutional amendment goes beyond the pale of judicial review then ordinary laws made in pursuance thereof will escape judicial scrutiny by virtue of protection offered by such an omnipotent amendment. Hence, such a clause was in transgression of the limitations on the amending power and hence unconstitutional.

CONCLUSION

The researcher has only covered one of the many facets where the fight between the judiciary and the Legislature has surfaced. There are many other similar dimensions where this tussle exists (e.g., provisions regarding reservation). What is crucial to note here is that it has turned into a competition between the legislature and the Judiciary as to which of the two is supreme. While this seemingly never ending tussle is in continuance, it is the individuals, the citizens of this very nation for whom these two separate organs have been instituted who are getting sidelined. The people of this country are living in the shadows of ambiguity and uncertainty because at the end of the day, it’s the people who are forced to bear the brunt of the clash.

It is imperative for the Parliament and the Judiciary to work in harmonious construction and not be at each other’s throat and only then will the citizens be able to recognize their rights and these two institutions would be able to reflect and serve justice in its essence.

The evolution of the Doctrine of Basic Structure in Kesavananda Bharati v. State of Kerala, proved to be pivotal point. This Doctrine is of prime importance as it prevents the Parliament from having unconditional and unrestrained power. A certainty that has manifested out of

80 Ibid
81 Ibid
82 Ibid
83 Supra note 9
84 Supra note 9
85 Supra note 9
86 Supra note 9
87 Supra note 9
88 Supra note 9
89 Supra note 9
90 Supra note 53
this tussle between Parliament and the judiciary is that all laws and constitutional amendments are subject to judicial review and the laws that transgress the basic structure are prone to be struck down by the Supreme Court.\footnote{Ibid}