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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can

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Assistant professor of Law

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Avinash Kumar



methodology and teaching and learning.

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

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JUDICIARY VS. LEGISLATURE

A TUSSLE FOR SUPREMACY

*Author: Amit Sharma,
Advocate (B.Com., LL.B.),
District and Sessions Court, SBS Nagar.
Mob. 9855620369, Email- advsharmaamit82@yahoo.in*

*Co-Author: Gaganjot,
BA.,LL.B. (Hons.) 5th year,
School of Law, Lovely Professional University.
Mob. 9501538787, Email- gaganjot231099@gmail.com*

ABSTRACT

The Legislature and the Judiciary, both are under the Constitutional obligation to not to encroach upon each other's spheres. But in actual, what we see is that this scenario is not in existence since the beginning of the Democratic Government of India. The Doctrine of Separation of Powers which is considered to be as the part of the basic structure of the Constitution is not followed in its true sense. There are many instances that witness that fact and would be discussed and elaborated thoroughly into the research report.

The Research Report which is going to be prepared would elaborate on the conflict between both these organs in depth, this research project is ought to find out the reasons, beliefs and also the extent to which that conflict is going. And in addition to that, the report would elaborate many such instances which lead to the rise of controversies between them which led to the ultimate competition between the both as to establish that which one is Supreme in its own entity over the other.

Keywords- *#Judiciary #Legislature #Conflict #Fight #Constitution #SeparationofPowers #FundamentalRights #RuleofLaw*

INTRODUCTION

The Legislature, Executive and Judiciary are the three main pillars of the Indian Democracy. The Constitution of India explicitly demarcates the powers, jurisdictions and limits of all these and also mentions the responsibilities to be undertaken by them. Though, the Constitution not directly/ vividly abided to its rigidity under the Constitution of India because the Doctrine of Separation of Powers is not directly stated under the Constitution as it is followed in the U.S. But the system of checks and balances has been embedded in such a way that there is no water tight compartmentalization between all these- Legislature, Executive & Judiciary. Art. 121 & 122 of the Indian Constitution sets some reasonable restrictions on both the Legislature as well as the Judiciary not to unreasonably interfere into each other. Art. 121 of the Indian Constitution¹ states that the conduct of the judges of the Hon'ble Supreme Court of India as well as the High Courts can't be discussed into the Parliament except in the cases of Impeachment motions moved against the judges. Similarly, Art. 122 of the Indian Constitution² prohibits the Judiciary not to inquire into or question upon the proceedings going on into the Parliament. So, there is a proper demarcation of both the organs of the Government.

The Parliament, being the Supreme Law making body is authorized to formulate and amend the laws as per the needs of the society and time but only according to the provisions enshrined in the Constitution of India and the laws which are passed by the legislature should not be *ultra vires* and for that only, the role of Judiciary comes upon.

The Courts are competent to strike down the provisions/ laws/ amendments which are *ultra vires* i.e. which are against the Constitution. The same is conferred to the Courts under a power namely "Judicial Review" which is more accurately described as

"Constitutional Review" under which the Judiciary reviews the laws and actions passed by the Government to determine that whether they're Constitutional or not & this power is confined to the Judiciary under the ambit of Art. 13 of the Indian Constitution³.

As per the Constitutional Scheme in India, both the Parliament and the Judiciary are Supreme in their respective spheres. But in actual, many a times there's conflict arises between the

¹ Art. 121 of the Indian Constitution, available at: <https://indiankanoon.org/doc/598239/> (Visited on March 07, 2023).

² Art. 122 of the Indian Constitution, available at: <https://indiankanoon.org/doc/1283667/> (Visited on March 07, 2023).

³ Art. 13 of the Indian Constitution, available at: <https://indiankanoon.org/doc/134715/> (Visited on March 07, 2023).

Judiciary and Legislature. When the laws passed by the Legislature are declared as *ultra vires* by the Judiciary then they try to nullify the decision by passing some laws/ amendments which nullifies the decision given by the Court.

There are a number of instances that indicate that there are some conflicts going on between both the wings of the Government which is actually deteriorating the essence of the doctrine of Separation of Powers as the conflicts for establishing supremacy on one another is rising rapidly and the spirit of working independently is getting affected by the same.

HISTORICAL BACKGROUND

In India, basically we see that the Constitution framers have framed the provisions of the Constitution in such a way that in actual, though we have the concept of Separation of Power but that doctrine is not abided in its form of rigidity as that of the U.S.A. So, we can say that actually there's Separation of Functions prevailing more and the demarcation of powers and authorities is being made for all the 3 golden pillars of the democracy i.e. Legislature, Executive and Judiciary. Since the commencement of the Constitution from Jan. 26, 1950, this system is followed.

The Legislature and the Judiciary, both have got their duties to fulfil and the Constitution makers have distributed the powers in such a scrupulous way that it has made the judiciary competent enough to struck down the unconstitutional laws and amendments made by the Legislature.

Checks and Balances

The system of checks and balances is followed since the commencement of the democratic government of India. This system has made the situation of interference as a natural phenomenon in the working of both the organs as if the system of checks and balances would not have been there, then there would be chances of turning of the democracy into dictatorship. Only the Judiciary has got the ultimate independency to act freely as the judiciary is an organ which is confined with the duties of giving justice to all and to protect the rights of the citizens of the country. And, if it is suppressed by any other organ or is under any power or influence then there might be chances that the people would be deprived of getting justice. Since then the system of flexible Separation of Powers is followed along with the system of checks and balances.

RESEARCH METHODOLOGY

The research methodology which is being used for the preparation of this Research Paper is Doctrinal Research. The data gathering and identification of the concepts is done with the help of Primary and Secondary sources which includes-

- *Library sources/ Reports/ Internet Sources.*
- *Case Laws/ Judgments.*
- *Propositions.*
- *Case Studies.*

The data is analyzed by grouping the information on the basis of its collection and testing of hypothesis to reach to a tentative conclusion. The adequate analysis is framed after collecting the appropriate data on the concerned research topic.

RESEARCH OBJECTIVES

In this research report, a detailed analysis would be done concerning the conflict arising between the Legislature and Judiciary by stating the instances which depicts a fight between both the organs of the government. The following objectives are to be achieved through this research which are of utter importance-

- ✓ *To find out the tussles emerging between Legislature & Judiciary.*
- ✓ *To gather data from the Primary and Secondary sources which corroborate the concerning issue.*
- ✓ *To thoroughly discuss and analysis the data obtained.*
- ✓ *To recommend appropriate solutions to prevent the conflict between the Judiciary and Legislature.*

STATEMENT OF PROBLEM

In India, we see that there are three golden triangles/ pillars of the government on which the whole administrative structure relies and the country is governed accordingly.

Each pillar of the government is vested with their own work i.e. The legislature is empowered to formulate laws & policies, the executive is empowered to implement

those laws and the judiciary is assigned with the utmost important work i.e. to interpret those laws and to adjudicate the matters in accordance with the laws passed by the legislature. This doctrine is called 'Separation of Powers' and is not specifically mentioned in the Indian Constitution but from the interpretation of the text of the Constitution we can guess the intention of the Constitution framers & draw the inferences from both the text and context of the wording of the Constitution. So, this doctrine is considered to be as the part of the basic structure of the Indian Constitution.

The duty of Legislature is to create those laws which are consistent with the provisions of the Indian Constitution as any law inconsistent with the provisions of the Constitution would be declared as *ultra vires*. Then, the duty of Judiciary is to review/ check that whether those laws are *intra vires* or not i.e. whether the laws/ amendments passed by the Parliament are consistent with the provisions of the Constitution or not?

And, that is the exact point where the conflict begins to rise between the Legislature and the Judiciary because at that point when the Judiciary finds that the particular law or amendment is inconsistent with that of the provisions of the Constitution, the Judiciary declares the law/ amendment as unconstitutional and then the Legislature again passes some laws/ orders which further nullifies the decision of the Judiciary & in this way a tussle begins between both the organs as both tries to establish their supremacy over one another in the context that which one is going to survive over the other?

So, this is what the reason continuous arise of the various controversies and conflicts between the Judiciary and the Legislature on certain occasions.

HYPOTHESIS

The Judiciary as well as the Legislature, both are assigned with their tasks respectively and a proper demarcation of their powers is done by the Constitution itself. But, in actual we see that both the wings of the government are not working independently. Somehow or the other both tries to interfere in the working of each other and that disturbs the essence of the doctrine of 'Separation of Powers'.

When the Legislature is passing a particular law, the Judiciary reviews it and if it finds that the particular law *ultra vires* then it declares that law as unconstitutional and nullifies & scraps that law. And, in giving answer of that to the Judiciary, the Legislature passes counter laws which

again nullifies the decision of the courts. This ultimately leads to the controversies between both the wings.

This conflict is not a new phenomenon in India, this conflict is arising since the beginning of the democracy in India and since then, on many incidents, the Judiciary & Legislature, both have tried to meddle between the tasks of each other in the emulation of establishing that which one is exalted over the other.

LITERATURE REVIEW

India's administrative and governmental structure is such that even if there's a separation of powers between all the three wings of the government, even that it could not be that too strict that it becomes difficult to perform their tasks efficiently.

There can never be water tight compartmentalization of these organs as the democracy demands the system of checks and balances between them so that any of these organs should not become arbitrary and work on their free will in whatever way they want to.

These inferences have been formulated by **Phiroze K. Irani** in his *Journal article "The Courts and the Legislatures in India"*⁴ stated that it is really very difficult task to demarcate any line between the Judiciary and the Legislature where the final arbiter of the laws is Judiciary only. In this way it becomes difficult to make both of them to work independently because the laws framed by the Legislature are needed to be reviewed by the Judiciary only to check the consistency of the Laws with the provisions of the Constitution.

In "*Jurisdictional Conflict between the Legislature and the Judiciary*" by **Dr. A.K. Ghoshal**,⁵ the conflict between the Legislature and the Judiciary are corroborated with the help of case laws which actually tells us about how both the Legislature and Judiciary are trying to override each other to establish their superiority over the one another.

Walekar Dasharath, in his *Journal Article "Changing Equation between Indian Parliament & Judiciary"*⁶ has stated that the conflict between the Legislature and the Judiciary is

⁴ Phiroze K. Irani, "The Courts and the Legislatures in India" 14 *ICLQ* 950-968 (1965).

⁵ Dr. A.K. Ghoshal, "Jurisdictional conflict between the Legislature and the Judiciary" 26 *IJPS* 64-74 (1965).

⁶ Walekar Dasharath, "Changing Equation between Indian Parliament and Judiciary" 71 *IJPS* 163-167 (2010).

somewhat natural and somewhat desirable. He emphasized on the changing relations between the Indian Parliament and the Judiciary from the period of last 6 decades which contributed to the various aspects of the Constitutional Law as well as the field of the Social Sciences by studying the relations between both the organs changing overtime.

In the “*Judiciary vs. Legislature in India: Plea for Structural Reforms*” by R. Thandavan⁷, the demarcations of both the Judiciary and the Legislature are stated and also their basic structure is discussed along with the needs of structural reforms by stating the controversies arisen between them.

In “*The Courts over the Legislature*” by Shreeram Chandra Dash⁸, the Powers, rights and privileges given to the Parliament and to the Judiciary by the virtue of the Indian Constitution are discussed and the reviewing power of the courts is also discussed.

JUDICIAL TRENDS

As discussed above, we can see that the Executive powers of the government of the Union as well as the States are expressly mentioned by the Constitution itself by Art. 53⁹ & Art. 154¹⁰ of the Indian Constitution. But, there is no corresponding provision in the Constitution from which we could infer that the Legislature and Judiciary have also got their powers vested within their organs. Hence, we can say that there’s no rigid separation of powers between the Legislature and the Judiciary and this could also be the reason for conflict between both the organs because there’s not specific mention in the Constitution about ‘Doctrine of Separation of Powers’.

The tension between the Judiciary and the Legislature began from the very first amendment in the Indian Constitution in the case of *Champakam Dorairajan Vs. State of Madras (1st Constitutional Amendment)*¹¹. This case was concerned with the issue of Caste based reservations in the Educational Institutions. The Government of Madras reserved some seats in

⁷ R. Thandavan, “Judiciary v/s. Legislature in India: Plea for Structural Reforms” 47 *IJPS* 603-610 (1986).

⁸ Shreeram Chandra Dash, “The Courts over the Legislature” 25 *IJPS* 263-275 (1964).

⁹ Art. 53 of the Indian Constitution, available at: <https://indiankanoon.org/doc/1597349/> (Visited on March 07, 2023).

¹⁰ Art. 154 of the Indian Constitution, available at: <https://indiankanoon.org/doc/1597349/> (Visited on March 07, 2023).

¹¹ AIR 1951 SC 226

the medical and engineering colleges of the state on the basis of Religion, Race and Caste and this was challenged on the basis of its validity and the Constitutionality.

The Government took the shelter of Art. 46 of the Constitution¹² and defended itself by contending that the state is ought to promote the educational and economic interests of the weaker sections of the society (especially the Scheduled Castes/ Scheduled Tribes) with special care.

The Hon'ble Supreme Court scrapped the order by saying that this provision is violative of the Art. 15(1) of the Indian Constitution¹³ which guarantees equality and moreover, the Directive Principles of State Policy cannot override the Fundamental Rights.

Now, the Legislature came up with amendment which is known as The Constitution (First Amendment) Act 1951¹⁴ to Art. 15 and inserted Clause (4)¹⁵ into that which stated that the provision of general prohibition of discrimination cannot prevent the state from making any special laws for the upliftment of weaker sections i.e. SCs/STs . This amendment nullified the decision of the Hon'ble Supreme Court and the Legislature overridden Judiciary.

In *Shankari Prasad Vs. Union of India*¹⁶ & *Sajjan Singh Vs. State of Rajasthan*¹⁷- *The 1st and 17th Constitutional Amendment* were challenged on their Constitutional validity and the question was that whether the Fundamental Rights can be amended under Art. 368 of the Constitution¹⁸ or not? So, here in both the cases we see that the Legislature was supported by the Judiciary where it was held that the 'Law' in Art. 13 is Ordinary Law made under the Legislature and not the Amendment. So, if the Legislature passes any amendment which abridges the Fundamental Rights, it would be valid. Therefore, the Parliament has the power to amend the Constitution.

¹² Art. 46 of the Indian Constitution, available at: <https://indiankanoon.org/doc/352126/> (Visited on March 11, 2023).

¹³ Art. 15(1) of the Indian Constitution, available at: <https://indiankanoon.org/doc/1942013/> (Visited on March 11, 2023).

¹⁴ The Constitution (First Amendment) Act 1951, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-first-amendment-act-1951> (Visited on March 11, 2023).

¹⁵ Art. 15 (4) of the Indian Constitution, available at: <https://indiankanoon.org/doc/251667/> (Visited on March 11, 2023).

¹⁶ AIR 1951 SC 458

¹⁷ AIR 1965 SC 845

¹⁸ Art. 368 of the Indian Constitution, available at: <https://indiankanoon.org/doc/594125/> (Visited on March 11, 2023).

The Hon'ble Supreme Court applied the *Principle of Harmonic Construction* between both the Art.13 as well as the Art. 368 of the Constitution because there is a conflict between the provisions of both the Articles.

The judgments were followed till the year of 1967 i.e. before the emerging of *Golaknath's Case*¹⁹. In that case, certain state acts were inserted in the 9th Schedule under the 17th Constitutional Amendment Act 1964²⁰ which again was challenged on the same ground that whether the Parliament under Art. 368, is having the power to amend the provisions of the Constitution even if the amendment overrides the Fundamental Rights or not?

The earlier decisions of the Hon'ble Supreme Court which were given in the favour of the Parliament that they have the authority to amend the Constitution in the *Shankari Prasad* and *Sajjan Singh's* cases were overruled by the majority of 6:5. It was held that the term 'Law' under the ambit of Art. 13(2)²¹ not only includes the ordinary law but includes every kind of law- Statutory & Constitutional Law as well as the Constitutional Amendments also and hence, any constitutional amendment violating Art. 13(2) would be void.

The effect of this judgment was Prospective and not the Retrospective under the *Doctrine of Prospective Overruling* invoked by the Hon'ble Chief Justice Koka Subba Rao. He imported this concept from the American Law and declared that the decision given in the *Golaknath's Case* will not affect the earlier amendments passed by the Parliament i.e. 1st, 4th & the 17th Constitutional Amendments respectively and these amendments will continue to remain valid. But from now, the Hon'ble Supreme Court curtails the power of the Parliament to make such amendments in the Constitution which subsequently infringes any of the Fundamental Rights of the citizens.

This judgment of the Apex Court again lead to the emergence of controversy between the Judiciary and the Legislature.

¹⁹ Golaknath Vs. State of Punjab, AIR 1967 SC 1643

²⁰ The Constitution (Seventeenth Amendment) Act 1964, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-seventeenth-amendment-act-1964> (Visited on March 11, 2023).

²¹ Art. 13 (2) of the Indian Constitution, available at: <https://indiankanoon.org/doc/134715/> (Visited on March 11, 2023).

DOCTRINE OF BASIC STRUCTURE

The Doctrine of Basic Structure was first evolved by the Hon'ble Supreme Court in the landmark case *Kesavananda Bharati Vs. State of Kerala*²² in 1973. A Special Constitutional bench of 13 judges was constituted to hear this case and this was the highest bench of judges in the judicial history of India.

This case is also known as the *Fundamental Right's Case* in which the legality of the Kerala Land Reforms Act 1963²³ was questioned. This case demarcated the amending power of the Parliament.

In that case, the validity of the *24th Constitutional Amendment Act 1971*²⁴ was challenged. Meanwhile, during the pendency of the petition, the Kerala Land Reforms

Act was amended in 1971²⁵ and was inserted into the 9th Schedule of the Indian Constitution by the 29th Amendment Act²⁶ to prevent them from being struck down by the Judiciary on the basis of their Constitutional validity. The Petitioner was allowed to challenge the 24th, 25th as well as the 29th amendment to the Constitution.

The question evolved under the Art. 368 was "*the extent to which the Parliament was authorized to amend the Constitution*". The Union contended that the amending power of the Legislature is unlimited and the Petitioner contended that the Legislature's power is wide but not unlimited. The uncontrolled power of the Parliament was controlled by the establishment of Doctrine of Basic Structure.

The Court by majority overruled the judgment of *Golaknath's Case* in which the Parliament was prohibited to amend the Fundamental Rights of the people. It was held that though the Parliament has the power to amend the Constitution but it doesn't has the power to 'weaken', 'damage', 'change', 'abrogate', 'destroy' or 'alter' the basic structure of the Constitution.

²² AIR 1973 SC 1461

²³ Kerala Land Reforms Act 1963, available at: http://www.sanchitha.ikm.in/sites/default/files/KeralaLandReformsAct_1963.pdf (Visited on March 11, 2023).

²⁴ The Constitution (Twenty-Fourth Amendment) Act 1971, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-twenty-fourth-amendment-act-1971> (Visited on March 11, 2023).

²⁵ The Kerala Land Reforms Amendment Act 1971, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-twenty-fourth-amendment-act-1971> (Visited on March 26, 2023).

²⁶ The Constitution (Twenty-Ninth Amendment) Act, 1972, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-twenty-ninth-amendment-act-1972> (Visited on March 26, 2023).

So, the Parliament can make the amendments but the basic structure of the Constitution needs to be maintained and it cannot be changed anyway. This decision of the Supreme Court limited the powers of the Parliament and the Judiciary established its authority over the Legislature in this case which brought a landmark change & a turning point in the Constitutional History of India.

Indira Nehru Gandhi Vs. Raj Narayan²⁷ - This was the case which actually led to Emergency in India and the period was known as the *Darkest hour of the democracy*. This was the first time in the history of India that the election of a Prime Minister was set aside by the Judiciary. This was also the first case in which the Doctrine of Basic Structure given in the *Kesavananda Bharati's Case* was followed for the first time.

In this case, the election of the Prime Minister Indira Gandhi was challenged by his opposing candidate Raj Narayan in the Allahabad High Court contending that she has won the elections by infringing the code enshrined in the *Representation of People Act 1951*²⁸ as her election campaigns were personally assisted by the government officials and has distributed the commodities like liquor, blankets etc. amongst the voters to gain the votes and the campaign expenses which were worth Rs. 35,000.

Hon'ble Justice Jagmohan Sinha of the Allahabad High Court declared the election of Prime Minister Indira Gandhi as void due to corrupt practices followed in the election campaigns. Then, Indira Gandhi made an appeal against the order of the Allahabad High Court into the Supreme Court but at that time, the Court was on vacation so it ordered conditional stay.

After that, Indira Gandhi declared National Emergency throughout the territory of India and meanwhile, to nullify the decision of the Allahabad High Court, passed the ***39th Constitutional Amendment Act 1975***²⁹ which introduced Art. 392A into the Indian Constitution.

It stated that the election of the Prime Minister and the Speaker cannot be challenged in any court of law. This amendment was highly criticised by everyone and was challenged in the Hon'ble Supreme Court. The Court held this amendment as unconstitutional.

Minerva Mills Vs. Union of India³⁰ (***42nd Constitutional Amendment, 1976***)

²⁷ AIR 1975 SC 865

²⁸ The Representation of the People Act 1951, available at: <https://indiankanoon.org/doc/320017/> (Visited on March 26, 2023).

²⁹ The Constitution (Thirty-Ninth Amendment) Act 1975, available at: <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-thirty-ninth-amendment-act-1975> (Visited on March 26, 2023).

³⁰ AIR 1980 SC 1789

The 42nd Amendment Act 1976³¹ came into picture after the cases of Kesavananda Bharati and Indira Nehru Gandhi. This amendment brought Clauses (4) & Clause (5) to the Art. 368 of the Constitution. These provisions ended the limitation on the Parliament for amending the Constitution by the way of any addition, variation or repeal of any particular provision. This provision set the Parliament free to amend the Constitution according to their sweet will & removed the limitation imposed on the amending power of the Parliament.

The matter was brought before the Supreme Court challenging the validity of this amendment that if that provision would be enacted, then it would destroy the doctrine of 'Basic Structure' which is already established by the court that no amendment could take place which affects the basic structure of the Constitution. It also stated that the Parliament cannot have unlimited amending power so that it starts working arbitrarily and damage the Constitution.

The Clauses (4) & (5) of Art. 368 were violative on the ground that-

- ✓ They gave unlimited power to the Parliament to amend the Constitution the way they want.
- ✓ It restricted/ barred the Judiciary from any Judicial Review.

The Apex Court by majority, struck down the Clauses (4) & (5) of the Art. 368 inserted by the 42nd Amendment by stating that these are violative of the basic structure of the Constitution. Also, the Court held that it cannot be deprived of their power of Judicial Review.

The decision given in the Minerva Mills Case brought clarity to the Doctrine of Basic Structure which subsequently arisen into the tensions between the Parliament and the Judiciary and lead to conflict between both the wings of the government.

Mohammed Ahmed Khan Vs. Shah Bano Begum³²

This case is commonly referred to as Shah Bano case and is the landmark case from the perspectives of Muslim Laws as well as the Constitutional Law. This case was proved to be the most controversial maintenance suit in India.

In April 1978, a 62 year old Muslim woman filed a suit against her husband Mohammed Ahmed Khan, a renowned lawyer in Indore, Madhya Pradesh, claiming alimony/ maintenance from him for her as well as her 5 children. She filed maintenance under *Sec. 123 of the Code of Criminal Procedure, 1973*³³.

³¹ The Constitution (Forty-Second Amendment) Act, 1976, available at: <http://legislative.gov.in/constitution-forty-second-amendment-act-1976> (March 26, 2023).

³² AIR 1985 SCR (3) 844

³³ Sec. 123 of The Code of Criminal Procedure 1973, available at: <https://www.kaanoon.com/indian-law/crpc-123/> (Visited on March 26, 2023).

Mohd. Ahmed Khan contended that according to the Muslim Law, the husband is only required to pay the maintenance to the wife till the period of Iddat after divorce. (Iddat is a period after the death of the husband or after the divorce till she remarries). His argument was supported by the All India Muslim Personal Law Board and contended that the courts cannot interfere into the Muslim Personal Laws as if Shah Bano would be provided with the maintenance under Sec. 123 of CrPC then it would violate

The *Muslim Personal Law (Shariat) Application Act, 1937*³⁴ and the courts are ought to adjudicate the matters of divorce and the other family issues based on the laws of Shariat.

After hearing the contentions and arguments from both the sides, the court finally passed the judgment in the favour of Shah Bano and awarded her with alimony by stating that the Sec. 123 of CrPC applies to all the Indian Citizens irrespective of their caste or religion. So, Shah Bano is entitled to maintenance.

This decision of the Supreme Court was highly criticized by the rigid Islamists. After receiving huge pressure from the Islamic orthodoxies, the Congress with absolute majority, passed the *Muslim Women (Protection of Rights on Divorce) Act, 1986*³⁵ which nullified the judgment of the Supreme Court given in the *Shah Bano's Case*.

Dr. Subramaniam Swamy Vs. Director, Central Bureau of Investigation and Ors.³⁶

The Supreme Court, in this case struck down the legal provision which required the prior sanction mandatory for conducting probe against the senior bureaucrats in the cases of corruption. Also, *Sec. 6A of the Delhi Special Police Establishment Act*³⁷ which granted the protection against any preliminary inquiry to the joint secretary and the above rank officers, was also held as unconstitutional by the Supreme Court. The Court held that it destroys the very essence of the Art. 14 of the Indian Constitution³⁸

which provides for the equality before law. The court established that no matter whether a person is a common citizen or a public officer or a bureaucrat, a corrupt would be a corrupt

³⁴Muslim Personal Law (Shariat) Application Act 1937, available at: <https://indiankanoon.org/doc/1325952/> (Visited on March 26, 2023).

³⁵ Muslim Women (Protection of Rights on Divorce) Act 1986, available at: <https://indiankanoon.org/doc/1933289/> (Visited on March 26, 2023).

³⁶ [2005] CriLJ 1413

³⁷ Sec. 6A of the Delhi Special Police Establishment Act 1946, available at: <https://indiankanoon.org/doc/131125629/> (Visited on May March 26, 2023).

³⁸ Art. 14 of the Indian Constitution, available at: <https://indiankanoon.org/doc/367586/> (Visited on March 26, 2023).

only and the punishment would be same for all. No special treatment would be given to anyone if he's on a high rank post. Thus, the Supreme Court repealed those provisions lead down by the Legislature by declaring them as unconstitutional & overridden the Legislature.

In *Prakash Singh Badal Vs. State of Punjab*³⁹, the same principle was lead down that the persons of high rank who are using corrupt practices and are taking bribes cannot take the shelter of the provisions of any sanction before investigation against them under the *Prevention of Corruption Act*⁴⁰. These laws are enacted only to save those who are actually serving with honesty in their respective fields and to protect them from the undue harassment in the course of the bonafide discharge of their duties and not for the persons who are actually following the corrupt practices and when they are made to face the allegations of corruption, they try to hide themselves behind the smokescreen of legislations passed for the protection of the public servants.

This decision of the court was protested by the legislators but this decision was actually given by the judiciary in the purview of cleansing the toxic system of corruption and to distinct the corrupt ones from the bonafide ones.

Judges Transfer Case & 99th Constitutional Amendment 2014

The issue of appointment of the judges has become a controversial one between the Executive and the Judiciary as to who will be having more preference into the appointment of the judges of the Supreme Court as well as the High Courts.

In the *Judges Transfer Case I*⁴¹, the main controversy was revolving around the term "Consultation" in the Art. 124 of the Indian Constitution⁴². The Supreme Court made it open for the Government to override the opinion of the other functionaries for the appointment of the judges in reference to their consultation. So, the decision most probably was more inclined towards the Executive rather than the Judiciary.

But all the scenario of judicial appointments was changed when in 1993 in the *Judges Transfer*

³⁹ AIR 1987 P H 263

⁴⁰ The Prevention of Corruption Act 1988, available at: <https://indiacode.nic.in/bitstream/123456789/1558/1/A1988-49.pdf> (Visited on March 27, 2023).

⁴¹ S.P. Gupta Vs. Union of India, AIR 1982 SC 149

⁴² Art. 124 of the Indian Constitution, available at: <https://indiankanoon.org/doc/1164880/> (Visited on March 27, 2023).

*Case II*⁴³, a nine judges bench of the Hon'ble Supreme Court overruled the judgment given in S.P. Gupta's Case and established that the "Collegium" system of 2 senior judges headed by the Chief Justice of India would have primacy and authority for the appointment of the judges. Also, it was held that the recommendation of the Chief Justice of India is final.

And, then again in the year of 1998, the former President of India Mr. K.R. Narayanan made a reference to the Supreme Court under Art. 143(1) of the Constitution⁴⁴ to settle down the dispute related to the appointment of judges into the higher judiciary i.e *Judges Transfer Case III*⁴⁵. The result of this case was that the number of judges in the collegium was increased from 2 to 4 senior most judges and if 2 out of 4 judges have the adverse opinion, then the CJI cannot send the recommendation to the Government.

The Controversy began when the Legislature passed the 99th Constitutional Amendment Act 2014⁴⁶ and the *National Judicial Appointment Commission (NJAC)* was established for the appointment of the judges and the collegium system established by the Supreme Court was brought to an end. The amendment gave more power into the hands of the politicians and the civil society to make judicial appointments.

The amendment was challenged into the Apex Court on the ground of its Constitutional validity. The bench held the National Judicial Appointment Commission (NJAC) as "Unconstitutional & Void" and again restored the collegiums system and up till now, only this system is being followed for the higher judicial appointments.

In *Shreya Singhal Vs. Union of India*⁴⁷, the *Sec. 66A of the Information Technology Act 2005*⁴⁸ was declared as unconstitutional by the judiciary on filing of the writ petition when the two women namely- Shaheen Dhada and Rinu Srinivasan posted comments on Facebook and expressed their displeasure at the bandh called by the Mumbai Police in Nov. 2012 due to the death of renowned Shiv Sena chief Bal Thackeray. Those women were arrested under the Sec. 66A of the IT Act for sending offensive messages.

⁴³ Supreme Court Advocates-On-Record Association Vs. Union of India [1993 (4) SCC 441]

⁴⁴ Art. 143(1) of the Indian Constitution, available at: <https://indiankanoon.org/doc/210155/> (Visited on March 27, 2023).

⁴⁵ Re: Special Reference, AIR 1999 SC 1

⁴⁶ The Constitution (Ninety Ninth Amendment) Act 2014, available at: <https://www.scribd.com/doc/251446043/Constitution-99th-Amendment-Act-2014> (Visited on March 27, 2023).

⁴⁷ AIR 2015 SC 1523

⁴⁸ Sec. 66A of the Information Technology Act, available at: <https://cis-india.org/internet-governance/resources/section-66A-information-technology-act> (Visited on March 27, 2023).

The validity of the Sec. 66A of IT Act was challenged by Shreya Singhal (Indian Lawyer) into the Supreme Court and she filed against the Union of India for infringing

the Fundamental Right- Right to Freedom of Speech & Expression guaranteed to the Indian citizens under Art. 19(1)(a) of the Indian Constitution⁴⁹.

It was held by the Supreme Court that the provisions contained in this particular section are totally vague and are *ultra vires* as they are infringing the rights of the citizens to freely express their views and with that the Sec. 66A of The Information Technology Act 2005 was quashed by the Hon'ble Supreme Court on the grounds of its vague and ambiguous provisions as these were confronting with the Art. 19(1)(a) of the Constitution.

INTERPRETATION & ANALYSIS

From the above collected data, we could infer that there are always some kind of controversies and conflicts existing between the Legislature and the Judiciary and this is not a new phenomenon. The fight for establishing supremacy on one another is existing between both the wings of the Government since the 1st Constitutional Amendment has come into picture in *Champakam Dorairajan's Case*. Whenever the Legislature has tried to exercise its powers in excess or arbitrarily, then the Judiciary has interfered from time to time and there a number of landmark case laws and judgments to justify this fact.

In all the cases, we see that whenever the Legislature has passed any law or amendment which is violating the rights of the Indian Citizens, the Judiciary has declared that particular law or amendment as "Void & Unconstitutional" because the Art. 13 of the Constitution itself says that any law which is inconsistent with the Part III of the Constitution i.e. fundamental rights would be unconstitutional and would not be

enforceable and the task of protecting these rights is given to the Judiciary by the way of Writ Jurisdiction under Art. 32⁵⁰ (Supreme Court) & Art. 226⁵¹ (High Courts) of the Constitution of India.

⁴⁹ Art. 19 (1)(a) of the Indian Constitution, available at: <https://indiankanoon.org/doc/1142233/> (Visited on March 27, 2023).

⁵⁰ Art. 32 of the Indian Constitution, available at: <https://indiankanoon.org/doc/981147/> (Visited on March 27, 2023).

⁵¹ Art. 226 of the Indian Constitution, available at: <https://indiankanoon.org/doc/1712542/> (Visited on March 27, 2023).

Also, in most of the cases, we see that the issue has arisen in the context of the amendments passed by the Legislature and most of them are being passed to nullify the decision given by the Judiciary in the favour of the public. This is done in the landmark judgements given in the *Indira Nehru Gandhi and Shah Bano's cases* and So, the Legislature here tried to act like a bully and has tried to supersede the Judiciary.

We can see that interfere of the Judiciary into the law making power of the Legislature is also a kind of system of checks and balances where the Judiciary tries to defend the rights of the general public because ultimately there is the prevalence of Rule of Law in the Country and the Constitution is considered to be as the Supreme Law of India. And also, to the protect the Supreme Law of India i.e. the Constitution, the responsibility is confined to the Judiciary and that makes the interfere of Judiciary as somewhat "Natural" as there is no intentional interfere. The role of the Judiciary in the issues of law making only comes up when there is the violation of the Constitution. So, if any law or provision or amendment is proved to be inconsistent to that of the provisions enshrined in the Constitution, for sure it would be scrapped by the Judiciary in order to maintain the public order and the Unity, Sovereignty and Integrity of the Union of India.

CONCLUSION

A state is having the authority to create laws unless it is being restrained or prohibited by some provision enshrined in the Constitution. But, the supporters of the restriction theory suggests that such restrictions are also ought to be imposed within their sphere only and there should not be any restriction over the legislature beyond that specific limit. All of the administration of law revolves around a process which keeps going in a cycle. In short-

- ✓ The Legislature passes a law or amendment.
- ✓ If its constitutional, it is accepted by the people and is followed accordingly but if its infringing the rights of the people as well as the provisions of the Constitution, then it is being challenged into the court of law.
- ✓ Then the role of judiciary comes up. The judges, only after hearing the evidences corroborating to the issue of the case, declares that law as Unconstitutional.
- ✓ If that decision is accepted by the Legislature, then the Legislature is overridden by the Judiciary.

- ✓ If the decision is unacceptable to the Legislature, then in response to the Judiciary, they enact certain type of law which subsequently dilutes/ nullifies the judgment of the Judiciary.
- ✓ In this way, both tries to effectuate their superiority over each other.

Hence, the matter turns out to be a never ending conflict between both the Governmental organs as one organ supersedes the other. This tension is still prevailing between the Legislature and the Judiciary.

SUGGESTIONS

Need for Structural Reforms

To maintain harmony between the Legislature and the Judiciary, Structural Reforms is a need of the hour. The following suggestions might work for reforming the administrative system of both the golden triangles of the democracy-

- There should be coequality between both the organs. The Powers of both should be rigidly demarcated so as no question could be arisen against the power and authorities of any of them to promote smooth tasking. By this way, when both the organs will respect the authority of each other within their own spheres, then obviously the harmony would be resultant product.
- There should be a provision introduced into the Constitution which lays down that as to what extent the Legislature can make the amendments into the Constitution keeping in mind the previous judgments given by the Judiciary pertaining the amendment powers and procedure for the Parliament so that no such kind of instances arise again consequentially leading to tussles.
- The checks should also be placed on the Judiciary as well so that the Judiciary cannot use excessive powers against the Legislature by exercising the powers beyond its limits in the name of Judicial Activism. The limits of Judiciary also need to be adequately demarcated.
- In short, the Doctrine of Separation of Powers which was flexibly followed till now, needs to bring some rigidity in it so as to hamper the unnecessary interfere in the tasks of each other.

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