Kesavananda Bharti Case: A Political Fight masqurading in Legal Garb

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ABSTRACT:

Separation of power to an extent that all democratic machineries function with utmost efficiency is a utopian dream. Where there is power, there is struggle for it. Power binds and breaks, and when the struggle of power is between the organs of government, namely, legislature, executive, and judiciary, it becomes a threat to democracy. Absolute separation of power is impossible and difference of opinion among the three pillars is natural. However, these differences must not turn into fights. Such conflicts or latency of such conflicts are often explicitly visible between the legislature and the judiciary. An example of such a fight or struggle for supremacy is the *Kesavananda Bharati v. State of Kerala* (1973, Supreme Court of India). This case not only overruled or nullified several judgements and provisions of Constitutional Amendments but also changed the course of Indian Judiciary. Thus, this case is of paramount importance not just for lawyers but also for students and scholars in the social sciences. This papers along with legal aspects of the cases also explores the political angle of the case. The paper also elucidates the conflict both inside and outside court. The paper mentions how Indira Gandhi government tried to influence the judiciary and made several changes in the structure and functioning the apex court.

Judicial activism is the new buzz word which is all over the media and internet nowadays. Even though the term has been getting popularity in the last couple of years, it existed for eons. Judiciary in India is independent and free from direct influence of legislature or executive pillar of democracy. But the fact is, even though judiciary from outside seems utopian, it is not free from internal conflicts and clashes among judges. Recently, four senior-most judges of the Apex Court held a press conference which was unprecedented.[1] But the matter of fact is, several clashes among the judges have taken place even earlier, but none of the judges had come out in public to express the same. Such brawls are not only among judges but also between judiciary and the legislature. With the recent judgement on privacy[2], Aadhar Judgement or upcoming judgement on Babri Masjid, government is always a stakeholder and when judiciary's decision and Parliament's opinion differ, a squabble is natural. However, when this squabble converts into a fight, it becomes a threat to democracy.

Kesavananda Bharati case is the epitome of such fights. Whenever the topic of amending power of Constitution comes up, *Kesavananda Bharati case* is relied upon. Legal aspects and the implications of *Kesavananda Bharati case* is well known and is a commonplace. This article focusses more upon the '*politics*

[1]https://www.ndtv.com/india-news/for-first-time-ever-4-senior-supreme-court-judges-to-address-media-1799152.
[2] Justice K. S. Puttaswamy(Retd.)& Anr. v. Union of India & Ors., Writ Petition (Civil) No 494 Of 2012

of the case rather than the legal aspect'.

Kesavananda Bharti case[3], popularly known as, '*the case that saved democracy*', is regularly discussed and debated among legal scholars, advocates and law students in law schools. Oft-times, the debate is over the legal standpoint of the case. The thirteen-judge bench case was much more than a legal skirmish and this article will reflect the politics that went on, inside and outside the court during hearing the case.

It all began with ***Golak Nath v. State of Punjab***[4] ***('Golak Nath'),*** an eleven-judge bench decision, declared that Parliament cannot amend the fundamental rights enshrined in Part-III of the Constitution. This landmark judgment was later, in 1973, overruled by Kesavananada Bharti verdict. But during the period between Golak Nath and Kesavananada Bharti judgment, judiciary and Parliament were in a constant scrimmage and struggle for supremacy. *Golak Nath* by limiting the power of the Parliament to amend the Constitution, overruled the decisions of ***Shankari Prasad v. Union of India***[5] and ***Sajjan Singh v. Union of India***[6], which upheld the Parliament's power to amend the fundamental rights by 1st, 4th, and 17th Constitutional Amendments. ***Golak Nath***, by 6:5 ratio held that fundamental rights are '*primordial rights necessary for the development of the human personality*' and were given '*transcendental position*' in the Constitution. Alongside, Nath Pai, an eminent socialist MP, moved a Bill in the Parliament to amend the Constitution to nullify *Golak Nath*. This case polarised the judiciary into, those who supported '*unlimited power of the Parliament to amend the Constitution*' and those who believed that the Article 368 posed an inherent and implied limitation to the amending power of the Parliament. Since the legislators were the stakeholders, they advocated for the former side.

His Holiness Kesavananda Bharati Sripadagalvaru, was a religious priest in Kerala. He challenged the constitutional validity of 29th Constitution (Amendment) Act, 1971 by which Kerala Land Reforms Act, 1969 and Kerala Land Reforms (Amendment) Act, 1971 were put in the IX Schedule of the Constitution. Even though the case is widely known as Kesavananda Bharti case, most of what he did was, lend his name. Once, he told his lawyers that he was getting needless attention in newspapers.[7] With the case in the Apex Court, not only Keshavananada Bharati's case was for the decision but the fate of several previous decisions was on the table, including ***Madhav Rao Scindia v. Union of India***[8] and the *24th, 25th,26th and 29th Constitutional Amendment Act*s. The 24th Constitutional Amendment Act conferred the Parliament complete power to amend the fundamental rights and thus provided the Parliament unlimited power over the Constitution. In 25th Constitutional Amendment Act, the government under the chair of Prime Minister Indira Gandhi replaced the

[3] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[4] (1967) 2 SCR 762.
[5] 1952 SCR 89.
[6] (1965) 1 SCR 933.
[7] T R Andhyarujina, Kesavananda Bharati Case: The untold Story of Struggle for Supremacy by Supreme Court and Parliament (Universal Publications (Reprint 2016)).
[8] (1971) AIR 530.

word 'compensation' to 'amount' to evade any judicial review over the amount of compensation paid.

As the elections were nearing the Congress Party felt that the restrictions on them by the judiciary will dwindle their supremacy in the eyes of the citizens. Further, the restriction on Parliament's power to amend the Constitution will pose hinderance in executing the principle agenda of the Congress, *'GarbiHatao'*. Irrespective of that, Congress won the elections with 352 seats out of 518.

Congress had thus regained their power at the Center. Prior to *Golak Nath*, the appointments of judges to Supreme Court were made by the Central government on the recommendation of the Chief Justice. But after *Golak Nath*, the government reduced the CJI to mere rubber stamp who now had just a consultation role and the government became the ultimate decision maker. The Government formed the Gokhale Committee, headed by then Law Minister H. R. Gokhale, a lawyer, political leaders and jurists, to appoint judges to the Supreme Court.[9]

Justice P Jaganmohan Reddy, who himself was part of the *Kesavananda Bharati* bench in his autobiography wrote regarding the committee formed, "*these three ministers set out to advice the Prime Minister to introduce Constitutional amendments so as to vest the executive with full powers by overruling Golak Nath's case and to appoint judges who were committed to a policy as highlighted in Parliament during the debate on this aspect."*[10]

The constitution of the bench for hearing Kesavananada Bharati was also very peculiar. The Government specially appointed judges before the Kesavananda Bharati's hearing began. The government appointed Justice D. G. Palekar, whom Mr. Gokhale knew very well. Justice H R Khanna was also appointed by the government. Justice Mathew and Justice Beg were appointed by the government on the direction of Prime Minister Indira Gandhi.[11] Justice Dwivedi and Justice Bahuguna were relatives of a minister of Indira Gandhi government. Justice Dwivedi openly said that he was going to the Supreme Court to overrule *Golak Nath*.[12] It was conspicuous that the appointments to Supreme Court were after foreseeing the possibility to overrule *Golak Nath* and provide the Parliament with unlimited power to amend the Constitution. Prior to the elections, Justices Sikhri, Shelat, Hegde, and Grover had **pronounced judgments which were anti-government in *Bank Nationalization case*[13]**, ***Madhav Rao Scindia v. Union of India*[14]** and of course the ***Golak Nath***. But, since these four were the senior-most judges of the Supreme Court, the government could not do much about them. Thus, Kesavananda Bharati bench was composed of 13 judges, namely, CJI S. M. Sikri, Justices J. M. Shelat,

[9] *Supra* note6.
[10] P Jaganmohan Reddy, The Judiciary I Served, p.218, 226, 227.
[11] *Supra* note 6.
[12] *Ibid*.
[13] AIR 1970 SC 564.
[14] (1971) 1 SCC 85: AIR 1971 SC 530.

K. S. Hegde, A. N. Grover, A. N. Ray, P Jaganmohan Reddy, D. G. Palekar, H. R Khanna, K. K. Mathew, H. M. Beg, S. N. Dwivedi, A. K. Mukherjea and Y. V. Chandrachud.

This bench was thus polarised into 'pro-government' and 'anti-government'.

The case went on for 66 days and on 25th April 1973, CJI Sikri retired. And, all said and done, *Kesavananda Bharati case* put a limitation on the Parliament's power to amend the Constitution. The basic structure of the Constitution could not be amended by the Parliament, whatsoever. This historic judgment was given on 24th April 1973. Granville Austin in his book wrote that the Kesavananda Bharati judgment "*was a masterpiece of unintentional timing, for it gave Mrs. Gandhi a cause and an enemy in her quest for renewed power".*[15]

Government appointed Justice A. N Ray as the next CJI, superseding the seniority of Justices Shelat, Hegde and Grover. By this, the true colour and intention of the government were evident. This move was unprecedented and what was more unprecedented but natural was, all the three senior-most judges resigned on 26th April 1973, the day Justice Ray was sworn- in as the Chief Justice of India. Generally, the government announces the new CJI well before the retirement of the present CJI. But this time government purposefully delayed the announcement to wait for the judgment to be pronounced. The three senior-most judges applied for 10 days' leave to the President after they came to know about Justice Ray's appointment as CJI.[16] The government justified the supersession by quoting Law Commission Report of 1959 which stated, "*It was necessary to appoint a Chief Justice of ability and experience but also a competent administrator. It is, therefore, necessary to have a healthy convention that appointment to the office of the Chief Justice rests on special considerations does not as a matter, of course, go to the senior-most puisne judge*".[17] This became a precedent when seniority of Justice Khanna was also superseded.

Fakhruddin Ali Ahmed, then President of India, declared National Emergency in 1975, on the recommendation of PM Indira Gandhi. PM tried to overrule the *Kesavananda Bharati case* by constituting another thirteen judge-bench. But this attempt failed miserably. On 10th and 11th November 1975, a 13 judge-bench was constituted to review the Kesavananda Bharati judgment and overrule it. But on the third day, the bench dissolved perplexingly.[18] There exists no official record about the constitution of the bench to overrule Kesavananada Bharati case. Indira Gandhi had put restrictions on Freedom of Press by declaring emergency. Therefore, Press was also restricted from publishing anything about Court judgments.

On 12th June 1975, Justice Sinha of Allahabad High Court held Indira Gandhi guilty of corrupt election practices under Section 123(7) of Representation of People Act, 1951. The Court disqualified her for 6 years.

[15] Granville Austin, Working a Democratic Constitution: The Indian Experience, p.198 (Oxford Univ. Press, 1999).
[16] *Supra* note6, at p.82.
[17] *Supra* note 6, at p.85.
[18] *Supra* note6, at p.88.

Further, in ***Indira Gandhi v. Raj Narain***[19]**,**Justice Krishna Iyer let Indira Gandhi to attend the Parliament as a member and as a Prime Minister without any vote pending the final decision in the election appeal. The next action of the PM was to proclaim National Emergency and enact Constitution 39th (Amendment) Act, 1975 which inserted Article 329A to the Constitution. By the virtue of the Amendment Act, Ms. Indira Gandhi was free to stand for elections. Ms. Indira Gandhi won the appeal she had filed in Supreme Court.

CJI Ray, ordered the constitution of thirteen-judge bench to hear arguments on two matters, namely, on Basic Structural Doctrine and on the correctness of Bank Nationalization case[20]. The hearing began on 10th November 1975.[21] But on the third day, within the first few minutes of the hearing, CJI Ray declared, "the bench is dissolved". This surprised many and people have different conception regarding the dissolution.

The 42nd Constitutional Amendment Act, 1976, section 55 amended Article 368, to give the parliament unlimited and unfettered power to amend any part of the Constitution, including Part III. Also, section 4 of the Amendment Act, which made substitutions in Article 31C on the Constitution, thereby giving any law in pursuance of any Directive Principle in Part IV of the Constitution from being challenged for being violative under Article 14, 19 and 31 of the Constitution. After the Emergency, during the power of Janata Party, the Amendment was challenged. The bench in ***Minerva Mills v. Union of India***[22] invalidated section 55 of the Amendment Act. Prior to that, CJI Ray retired and Indira Gandhi appointed Justice Beg as the new CJI, superseding the seniority of Justice H. R. Khanna.

Finally, in ***Waman Rao v. Union of India***[23] the Supreme Court made it clear that any Act or Regulation in the Ninth Schedule prior to April 24, 1973, will have immunity from being challenged for abrogating provisions of Part III. But the Acts or Regulations after 24th April 1973 will be subjected to judicial review based on the judgment of *Kesavananda Bharati case*.

The idea of basic structure was in depth discussed in several cases after the *Kesavananda Bharati case*. There is always a political fight involved in most of the significant Constitutional cases, whether it was the Triple Talaq case or the Right to Privacy case. The government has its own interest which may not be in consensus with the view of the judiciary. The framers of our Constitution wanted both the pillars of democracy to work for the welfare of the public. The judiciary protects the fundamental rights of every individual and legislature makes laws for the welfare of the individuals. *Kesavananda Bharati case* is not only significant for overruling decisions and repealing provisions of law but also it puts light on how parliament can influence the judiciary.

[19] Indira Gandhi v. Raj Narain, (1975) 2 SCC 159.
[20] *Supra* note12.
[21] *Supra* note16, at p.256-267.
[22] (1980) SCC 625: AIR 1980 SC 1789.
[23] AIR 1981 SC 271: (1981) 2 SCC 362.

At the same time, this case also reflects that even if powerful people like the Prime Minister and Law Minister are directly influencing the judiciary, principled judges of the judiciary can uphold Rule of Law and deliver justice, no matter what.