

Role of Fundamental Rights in Balancing Powers between The Legislature, The Executive And The Judiciary

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I. INTRODUCTION

It is a well-known phenomenon that endless powers in the hand of an individual or a group of individuals, implies, in general, misuse of that power over others. The assembly or building of any democratic government is based on its three organs i.e., the legislature, the executive and the judiciary. Undoubtedly, the three branches are of great significance. Separation of power ensures the prevention of the autocracy. 'Legislature' is a term used for representation of elected representatives, whose primary function is to make law. 'Executive' is responsible for executing and implementing laws. 'Judiciary' primary focus is on ensuring that laws are compiled in accordance to the requirement. All three of these have their own separate, distinct powers and needs to work in their own sphere to prevent trespass into other. However, at the same time, the power is not absolute in nature. The framers of the constitution preferred it not to be rigid, rather adaptable to different circumstances.

Interestingly, Unlike, United States of America, Australia etc., the constitution of India does not clearly talks about the separation of power¹. There is no express provision of separation of power. But at the same time, it creates required democratic balance among different divisions of the government. Separation of power is recognised as a basic feature of Indian Constitution by the Supreme Court. In other words, it forms an essential constituent of rule of law.

Lord Acton words "*Power corrupts and absolute power tends to corrupt absolutely*", needs to be highlighted. Separation of power also in a way ensures check and balance. The power of each branch is kept under surveillance by the powers of the other two branches.

II. CONSTITUTIONAL POSITION

Article 50 states that the state shall take steps to separate the judiciary from the executive. There need to be separate judicial services which are free from executive control². The Governor has to make the appointments not in consultation with the High Court as it should be under the Constitution, but in consultation with the committee constituted under the rules. Chief Justice of India has upper hand in the appointment and transfer of the Supreme Court and High court judges.³

¹ Ram Krishna Dalmia v. Justice Tendolkar 1959 SCR 229, see also Ram Jawaya v. State of Punjab, AIR 1955 SC 549 and Jayanti Lal Amrit Lal v. S.M. Ram, AIR 1964 SC 649

² Chandra Mohan v. State of U.P., AIR 1955 SC 1987;(1967) 1 SCR 77.

³ Supreme Court Advocates on record Assn. v. Unioin of India, (1993) 4 SCC 441, 550; AIR 1994 SC 268.

Article 122 and 212 provides for the immunity of legislatures from judicial control in respect of the proceedings in the court. The scrutiny by the court is prohibited if complaint is merely against the procedure.⁴ Similarly, article 121 and 211 provides for restriction on discussion by legislature regarding the judicial conduct of the judges of Supreme Court and High Court. Also, article 361, provides that president and governor during the whole of their tenure cannot be subjected to any judicial proceedings.

Separation of powers between the three branches of the government can also be construed as a consequence of principle of equality which is enshrined in the **article 14** of the Indian Constitution. In other words, breach of separation of power amounts to denial of equality under fundamental right. This itself highlights the importance of the concept of separation of powers.

The intention of separation of judiciary is to ensure that it does not take decision under the influence of legislative. Moreover, it is imperative in a democracy, that unheard voices and voices of weaker sections of the society are not suppressed by the influential ones. Supreme court, after playing interpretive role for couple of decades after independence, has stood against legislative and executive, both excess and ineffectiveness. The judiciary has an interest in ensuring that there is effective participation from all groups. Independence of judiciary helps in ensuring the rule of law along with realizing human rights and the prosperity and stability of a society⁵.

In *Shankari Prasad v. Union of India*⁶, the constitutional validity of article 31-A and 31-B which provided protective umbrella to acts included under section 9 of the constitution, were challenged on the ground of being violative of fundamental rights. It was argued that article 13 of the constitution provides, that the laws inconsistent with the fundamental rights are void. The Supreme Court held that there is no limitation on the amending power of Parliament and it could amend any provision of the Constitution including fundamental rights. This power of the legislature is vested in article 368. In *Sajjan Singh v. State of Rajasthan*⁷, the court approved the view in *Shankari Prasad* and held that there is no limitation on the amending power of Parliament. In *I.C. Golak Nath v. State of Punjab*⁸, the court overruled their opinion held in *Ram Jawaya v State of Punjab*⁹ and cited that the constitution had created legislature, executive and judiciary as three major instruments and expects them to perform their work without stepping into the jurisdiction of either. It was ruled that, article 368 does not confer the power to amend constitution but merely provides the procedure for the same. Judges highlighted the importance of fundamental rights by stating that they cannot be restricted even after unanimous approval of both upper and lower houses. Fundamental rights enjoy a place of prominence and are natural rights. The judgement was further modified in *Kesavananda Bharti v State of Kerala*¹⁰. The validity of 24th and 25th amendments was challenged in this case. Majority of the judges upheld the validity of 24th amendment which overruled

⁴ Powers, Privileges and Immunities of State legislatures, re, AIR 1965 SC 745(1965) 1 SCR 412

⁵ Stephen G. Breyer, Comment, Liberty, Prosperity, and a Strong Judicial Institution, 61 LAW & CONTEMP. PROBS. 3 (Summer 1998)

⁶ AIR 1951 SC 455

⁷ 1965 AIR 845, 1965 SCR (1) 933

⁸ AIR 1967 SC 1643

⁹ AIR 1955 SC 549

¹⁰ AIR 1973 4SCC 225

*Golaknath v State of Punjab*¹¹ and agreed that Parliament has power to amend any provision of the Constitution including fundamental rights. 25th amendment is about the introduction of article 31C. It provides for alternative of total abrogation of article 14, 19 and 31. However, in the exercise of amending power Parliament cannot damage or destroy the basic structure of the constitution.

In *Minerva Mills Ltd. and Ors. v. Union Of India and Ors.*¹², the Supreme Court invalidated clause 4 and 5 of Article 368 as violating the basic feature of limited amending power. Justice Chandrachud, held that ‘Parliament has the right to make alterations in the Constitution so long as they are within its basic framework’. This case, particularly highlighted the importance of fundamental rights and construed them partially, as a part of basic structure. The power of parliament to amend constitution is not an absolute one and the Supreme Court has the power to intervene regarding the same. The courts have the authority to pronounce over the validity of laws.

The concept of directive principles cannot be over emphasized over fundamental rights. The harmony between the two is an essential element of Indian constitution which needs to be maintained. Accordingly, to say that the directive principles give an authority to take away fundamental rights for the purpose of achieving what is directed by the former, is in contradiction with the latter.

III. JUDICIAL INDEPENDENCE AND ACTIVISM

The importance of “judicial independence” along with the doctrine of “separation of power” is “elevated to the level of basic structure of the Constitution and is the very heart of constitutional scheme”¹³. The concept of Judicial Activism is nowhere mentioned in the constitution. Judicial activism is all about the power of the Supreme Court and High Courts to declare laws inconsistent with the provision of the constitution as void. It is through Public Interest Litigation (PIL) that the concept of Judicial Activism has flourished in India. The power of judicial review which is an imperative part of basic structure is conferred under article 32 and 226 for Supreme Court and High Court respectively. It was in *AK Gopalan v. State of Madras*¹⁴, the court for the first time primarily interpreted FR’s. The Supreme Court held this act constitutionally valid except some provisions. This act expired in 1969, and before it expired, it was amended for 7 times. Petitioner he had given various dates showing how he had been under detention since December 1947. While he was thus under detention, under imprisonment the convictions were set aside. He challenged the legality of the order as it was contended that 1950 Act contravenes the provisions of article 13, 19 and 21 and provisions of that Act were not in accordance with article 22 of the Constitution, specifically article 19 and 20. In *Kharak Singh v. State of UP*¹⁵, the constitutional validity of Uttar Pradesh Police regulations which conferred powers upon the police officials was questioned. It was argued by the petitioners that right provided under article 19(1)(d) and 21 were being violated under chapter 20 of the regulation act. The court observed that state needs to ensure that fundamental rights under both articles are not infringed, by showing the presence of law to validate the same.

¹¹1967 AIR 1643, 1967 SCR (2) 762

¹²AIR 1980 SC 1789

¹³State of Bihar v. Bal Mukund Sah, AIR 2000 SC 1296, 1317 : (2000) 4 SCC 640

¹⁴1950 AIR 27 1950 SCR 88

¹⁵1963 AIR 1295, 1964 SCR (1) 332

Later, in *Satwant Singh Sawhney v. Union of India*¹⁶, the petitioner was asked to surrender his passport on the grounds of him leaving the country to avoid trial. The court in accordance to the binding precedence in relation to the liberty, ruled that the right to life and liberty under article 21 of the constitution can be taken only as per the due “procedure established by the law”. The court denied the govt. to seize the passport of the petitioner in the absence of any reasonable grounds. It was only after Satwant Singh judgement, that the Passport Act, 1967 was enacted which provided for how passport was to be enacted, seized and regulated. The principles of natural justice and fair procedure should be followed. In *Maneka Gandhi v Union of India*¹⁷, passport of the petitioner was seized under section 10(3)(c), and the reason for such seizure was not disclosed on public grounds. Since the act confers arbitrary powers with the passport authority it was held to be violative of article 14. Use of the word ‘personal liberty’ in article 21 involves the right to travel abroad. The procedure adopted in the said case was unfair and violative of article 21.

In *Union of India v. Association for Democratic Reforms & Ors*¹⁸, appeal was filed against the high court order which mandated election commission to disclose information publicly regarding candidate property, assets, criminal records etc. Supreme Court ruled that the right to know about candidates involves the right of voters to form opinion and accumulate information, which itself is a part of right to freedom of speech and expression construed under article 19(1)(a) of the constitution. Accordingly, the appeal was struck down. Elections possess with them the fundamental principles, values and belief of political ethos which forms the base of the political structure.

But the situation is not same in all scenarios. The judiciary must know its limits and recognise the concept of separation of power.¹⁹ It was held in *Indian Drugs & Pharmaceuticals Ltd v Workmen*²⁰ (daily wage-temporary employee-no wages-HC-considers them at par with regular employees, time, that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons. that the Supreme Court cannot secure the rights of legislative and executive. Practicing it for a long time may dilute the principle of checks and balance. Legitimacy of Judicial judgements is ought to be breached in case of excess of judicial overreach.

IV. CONCLUSION

Undoubtedly, Constitution is considered to be the law of the land. Within it, it is the concept of separation of power which ensures that there is government of law which prevails over the will of certain individuals. None of the wing is considered superior than other. Article 14, 19 and 21 of the constitution, commonly known as golden triangle, are amongst the most invoked fundamental rights against the arbitrary nature of the legislature. It is the duty of the judges to take on the validity of the laws. If the court is deprived of the same, fundamental rights possessed by the citizen of the country will become a mere adornment, simply because right without remedies are similar to writ in water²¹. However, in recent times, judicial activism is more of a considered as the interference in the working of legislature. The courts need to ensure that while

¹⁶1967 AIR 1836, 1967 SCR (2) 525

¹⁷1978 AIR 597, 1978 SCR (2) 621

¹⁸AIR 2001 Delhi 126, 2000 (57) DRJ 82

¹⁹Hindustan Times, June 15, 2007

²⁰(2007) 1 SCC 408.

²¹Minerva Mills Ltd. & Ors vs Union Of India & Ors, 1980 AIR 1789, 1981 SCR (1) 206

redressing PIL they do not encroach upon the grounds of legislature and executive which are reserved by the constitution. It is on each organ of the democratic government to respect the powers of the other. With the passage of more than sixty years, from the time when the constitution first came into operation, there is a requirement of robust interpretation of separation of powers for the purpose of ensuring proper guidance of the three branches. At the end of the day, the aim of very three organs should be to protect the fundamental rights of the people, which constitute the ark of the constitution.

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