SANITY OF CONSTITUTIONAL GOVERNANCE IN INDIA

- A Juridical Landscape

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Abstract

Every national legal document is a living organism, it must also be allowed to grow, develop and change like any other living thing in tune with the changing phenomenon, but in the name of change, it must not be allowed to destroy the document. During the passage of time, the scope of judicial review *inter alia* judicial activism has ever been expanded because of its peremptory nature in a parliamentary democracy, and mistrust between the elected legislature and unelected judges of the Supreme Court has also been increasingly witnessed, specially in the matter of the constituent power. The article dwells upon the relative implications of basic structure doctrine propounded by judiciary and also probable premises for unabated mistrust lingering between the two constitutional pillars. It also focuses on the emerging concept of juridical landscape in the light of sustaining a meaningful constitutional government without scarifying the vibrant democracy.

Key words

Constitutional democracy, contesting primacy, derivative power, quasi-constituent power, judicial craftsmanship, decisional law, judicial activism, safety-valve, judicial landscape, sacrosant, sine qua non

Introduction

Constitutional governance is to have a competent legislative body, representing the mandate of the general masses, which is supposed to make and unmake laws as per the will of the people. Working of Indian parliamentary democracy shows that there was no visible distrust over the issue of primacy between legislature and judiciary in the matter of constituent power till the end of 1960s. However, the doctrine of basic structure, as laid down by the apex court of India in the case of Kesavananda Bharati (1973), has invariably limited the legislative power but interestingly, it has also unlimited the power of judicial scrutiny. During the passage of time, the conflict between the political executive and the Supreme Court over the issue of constituent power has often been witnessed in India as one the serious constitutional debates ever since 1970s. Though the actual legitimacy of holding a final say, in a parliamentary democracy, lies with the elected legislature, it's the unelected judges of the apex court of India, who are mandated to review the actions of both legislature and executive as per the Constitution and rule of law.

Understanding the amenability of constitution

History reveals that the working of a constitutional governance in India virtually relies on the unabated exercise of prerogative power by the parliament. Accepting the constituent power of a national legislature as *sui juris*, there was no conflicting issue of primacy over the constituent power between the legislature and judiciary till the end of the Nehru regime. Even though there were some conflicting issues of such nature between the two organs of the state, the constitutional courts refrained from interfering into matter. discontents between the two emerged out every now and then in the post-1965, especially in the matter relating to the constituent power. Every legal system across the world strongly emphasizes on the relative significance of provision for amendment included in the national constitution. It is worth mentioning the proposition of John Burgess, a constitutional expert, who observed that a complete national constitution shall consist of amending power with the accomplishment of future changes in the constitution, and he also further stated that it is equally importance of such provision being incorporated in every modern constitution. Having learned the future socio-political and legal implications of the law of the land, the framers of Indian Constitution inserted Article 368 in the Constitution conferring repository power on the parliament to amend and delete any provision of the national legal document. In this regard, the view of H.E. Willis, another constitutional expert of USA, who observed that the doctrine of amenability of constitution is grounded on the doctrine of sovereignty of people, and if no provision for amendment is provided, there would be a constant danger of revolution, and on the contrary, if the process of amendment is too easy, there would be another danger of too hasty action.

It can be noted that the term amendment procedures, as prescribed in Article 368 of the Constitution, seems to carry all shades of meaning, such as alteration, revision, amend, repeal, deletion of any provision of the Constitution through the constitutional process. Nevertheless, the Constitution has to be amended so as to meet the needs of the dynamic society and also to maintain socio-economic and political solidarity of the country. In the word of H.M. Seervai, a constitutional expert, he opined that the power to frame the constitution is the primary power and the power to amend the constitution as the derivative power, the amending power under Article 368 stands to be higher than the judicial and executive power but lower than the constituent power in true sense. He further pointed out that the parliament is not authorized to discharge the constituent power unlike the Constituent Assembly, but it can exercise as a quasi-constituent power under Article 368 of the Constitution. It is apparent that during the passage of time, Article

368 of the Constitution has become a breeding ground for conflict between the parliament and judiciary, especially in dealing with the constituent power.

The actual debacle between the two organs began to roll out in Goloknath's case (1967) when the apex court by majority of 6:5 overruled the Sankari Prasad's judgment (1951) declaring that the parliament has no power to take away or abridge the fundamental rights, enshrined in the part III of the Constitution. Subsequently, in Kesavananda's case (1973), the same court by majority of 7:6 overruled the decision of Goloknath's case stating that parliament can't alter the basic structure doctrine of the constitution while exercising its power under Article 368. The top court culled out the theory of basic structure by interpreting the constitutional text and by following the decisional laws. Such implied judicial limitation on amending power of the legislature was epitomized by the necessary implications while balancing the constitutional governance.

Basic structure doctrine protecting temple of justice

In the early 1970s, when the Congress party, led by Indira Gandhi, had an overwhelming majority in the parliament, the judges were apprehensive of a radical change likely to be happened in the constitutional governance of India. As such, the judgment of Kesavananda's case was even termed as a coup by the judges to wrest supremacy from the parliament, and subsequently, the political executive of the ruling government , as a retaliatory action, broke the judges' seniority convention by appointing Justice A.N. Ray, who was in the fourth in seniority list, as the Chief Justice of India. Eventually, such deliberate political executive action compelled the three senior most judges of the apex court to resign from their respective judgeship's in protest. At that point of time, the court's verdict had not only ignited the political executive to take up such drastic measures, but also made an attempt to get the basic structure doctrine rescinded by making an effort to set up a constitution bench comprising of another thirteen judges for reconsidering the earlier decision; however, it could not be materialized as it was expected to be. Multiple apprehensions with a sense of mistrust, especially on the part of the political executive, invariably grew up as the judiciary had begun to restrain the parliament from further mutilation of the law of the land.

In aftermath, a new constitutional jurisprudence was manifested by the judicial craftsmanship of the apex court, and the same doctrine has also been used by the judiciary in striking down the legislative actions in subsequent years upholding the rule of law and supremacy of the Constitution. Having failed to get the basic structure doctrine either judicially overruled or politically distorted, the then responsible government made many attempts to erase it through the constitutional amendments process as well; however, their abortive efforts could not succeed as being *ultra vires* to the Constitution, specially on the ground of breaching the basic structure

doctrine. One may wonder the reason why such an embarrassing situation occurs between the legislature and judiciary only when the ruling political party has occupied an overwhelming majority in the parliament. Despite the enormous implications, the basic structure doctrine remains as a touchstone and also an undisputed benchmark for the court to test the constitutionality. Judiciary as an impartial and independent organ of the state is to act as the custodian of the constitution, watchdog of the government and also a fearless protector of human rights of individuals. Most importantly, the laws relating to the basic structure doctrine aim to protect the temple of justice as well.

Premises of mistrust and conflict

Probable reasons for having witnessed mistrust and conflict between the political executive and the judiciary may be because of multiple factors; viz, the very existence of inherited Westminster model of parliamentary supremacy even after seven decades of Indian independence without much changes. Whereas the other possible factors may be based on substantial testimonies of past experiences encountered by the political executive. One of such glaring examples is that the apex court of India has not yet defined clearly the term"basic structure doctrine" instead, it has ever been expanding the said doctrine in accordance with its judicial perspectives. For instant, in Indira Gandhi's case (1975), the apex court interpreted democracy, free and fair election, equality and separation of powers as included in the basic structure of the constitution. Again, in Minarva Mill's case (1980), the court held that harmony between fundamental rights and directive principles of state policy is the basic structure. In similar way, the same court further held in L. Chandra kumar's case (1997) that the power of judicial review is a part of the basic structure. Subsequently, in number of decided cases of the top court, judicial review has also been termed as a feature of the basic structure.

Another debacle between political executive and judiciary broke out when the apex court categorically reasserted its independent status and position in a number of decided cases reaffirming its concomitant autonomy relating to appointment of judges to the higher courts as an integral part of the basic structure doctrine as well; viz, in S.P.Gupta's case (1982) commonly known as First Judges' case, Supreme Court Advocates on Record's case (1993) known as Second Judges' case and Third Judges' case (1998). Therefore, the decisional laws of the apex court virtually allow to expand multiple features of basic structure doctrine with larger judicial perspectives that has eventually led to galvanize the room for mistrust between the legislature and judiciary. S.P. Sathe, an eminent jurist, also observed that the basic structure doctrine is

essentially a counter-majoritarian check on temporary legislatures in India. The reason being is that the original constitution reflects a national consensus; that is why the temporary legislative body can't go against the national consensus. In a way, it is relatively significance to cite the debate on judicial review reflected in the Constituent Assembly in which those members of the Assembly representing the minority people were apprehensive of majoritarian rule implicit in the system, and as a result they also wanted to have more and greater say for the courts than the parliament.

The Constituent Assembly while deliberating on Article 21 of the Constitution pertaining to the question of primacy between legislature and judiciary, there were two dividing views among the members of the Constituent Assembly in this matter; viz, one view preferred to grant supremacy to the legislatures for being the elected representatives and other view representing the minority people preferred to give the judiciary with the authority to sit in judgement over the will of the legislatures under the purview of judicial scrutiny. The chairman of the Drafting Committee, Dr. B.R. Ambedkar, was himself not free from such dilemma about the wisdom of giving unlimited constituent power to legislature; he further observed that however good a constitution may be, it is sure to turn out bad, because those, who are called to work it, happen to be bad. However, bad a constitution may be, it may turn out to be a good if those, who are called to work it, happen to be a good lot. (CAD,Vol. Xl, p.975)

In a way, deliberate avoidance of using the term "due process of law" in Article 21 of the Constitution by the Constituent Assembly that had invariably narrowed down the scope of judicial review. Interestingly, in the early decades of independent India, the apex court interpreted the term "procedure established by law" as prescribed in Article 21 faithfully to the intention of the framers of the Constitution as a positivist court; however, in the post -1967, more particularly in the post-Maneka Gandhi's case (1978), the top court has become more than an activist court by transforming the American "due process clause" into Article 21 of the Constitution. In the aftermath, the constitutional court has become an important power-centre of democratic governance through its medium of judicial review *inter alia* judicial activism. As such, the Indian court is, perhaps the only court in the world that can not only question the validity of executive action but can also strike down the impugned Constitution Amendment Acts passed by the parliament. It is worth mentioning some of the judgments of the apex court of India that have strongly worded for safeguarding the intrinsic fundamental rights of citizens and also attempted successfully to rescue from thwarting the common will of the people by the unwarranted

legislative intervention. The apex court in Indira Gandhi vs Raj Narain (1975) upheld the Allahabad High Court judgement invalidating the Indira Gandhi's winning the election and also barring her from holding any elected public post for six years. The said decision of the court fomented a serious political crisis as well that had, subsequently led to proclamation of national emergency in 1975 on the ground of internal disorder. By resorting to the constituent power of the parliament, the 39th Constitution Amendment Act, 1975 was passed by the parliament inserting Article 329A in the Constitution that had diluted the standing apex court's verdict of Indira Gandhi's election case. The said Amendment was challenged in the court of law on the ground of distorting the basic feature of the constitution, laid down in the Kesavananda Bharati's case; further, the court held the impugned Amendment Act as unconstitutional and void thereby leading to deletion of Article 329A by the 44th Constitution Amendment Act, 1978.

Judicial landscape and constitutional governance

Union government, during 2012-2013, made an attempt to take away the National Judicial Collegium, which was set up in accordance with the Supreme Court's verdicts for appointment of judges to the higher courts, by introducing a National Judicial Appointments Commission Bill (NJAC Bill) in the parliament, however, it could not succeed. Later, in 2014 when NDA got victory with thumping majority, they again revived the NJAC Bill and got enacted the same as the 99th Constitution Amendment Act, but within no time the constitutional validity of the said Amendment Act was challenged its constitutionality in the apex court. Eventually, the court by majority of 4:1 struck down the 99th Constitution Amendment Act on the ground that no parliamentary majority can amend the Constitution so as to alter the basic structure of the constitution. The court also further held that such Constitution Amendment Act giving politicians and civil society a final say in appointment of judges to the higher courts violates the independence of judiciary *inter alia* the basic structure doctrine. It was also strongly observed that judiciary can't risk being caught in a web of indebtedness towards the government. Upholding the independence of judiciary and ensuring the court as the sole fundamental key for sustaining a vibrant democracy, the said Amendment was declared as unconstitutional and void. The court explored that democracy can be strengthened only when judiciary is allowed to fulfil its constitutional obligations.

It is quite apparent to note the relative values of the apex court judgment laid down in A.K. Gopalan's (1950), in which the court held that judiciary is to uphold the supremacy of the Constitution. The will of the people, as reflected in the decision of the elected representatives, is also subjected to the will of the Constitution which are normally found to be reflected in the

verdicts of the unelected judges of the apex court; therefore, it is imperative for all the stakeholders of a democratic government to abide by the fundamental text of the constitution coupled with the constitutional norms glossed by the court. Since the constitution of India is itself considered to be the act of revolution, it is expected the court to discharge its inherent judicial powers as and when elected legislatures resort to such unwarranted action in the name of majoritarian rule. Mukul Rohatgi, the then Attorney General of India stated that the NJAC judgment was a flawed judgment ignoring the unanimous will of the parliament, half of the states' legislatures and the will of the people for transparency in judicial appointment. On the contrary, he further observed that the supreme law of the land has given the power of judicial review to the unelected judges of the superior court to declare constitutionality of a legislative enactments, once it is found to be violative of the basic structure law. Justice R.M. Lodha, the then former CJI pointed out that once the legislature has done a legislative act, the constitutionality of such act can only be decided through the process of judicial review and there can be no rule of law without such a provision. He further stated that the NJAC verdict of 2015 demonstrated the constitutional compliance but not the judiciary flexing its muscles to knock out the people's will. According to Upendra Baxi, an eminent academician and jurist, he opined that in such situation, the constituent power in India must be shared between the parliament and the apex court.

It is also interesting to mention that Presidential orders pertaining to proclamation of emergency under Article 356 of the Constitution were challenged in S.R.Bommai's case (1994), Bihar"s case (2005), Uttarkhand's case (2016) and in Arunachal Pradesh's case (2016) among others, in which the apex court has not only acted as a watchdog by applying the law of basic structure doctrine but also justified the presidential orders. Further, the court has allowed to apply the same doctrine to ordinary legislation as well. However, such a judicial landscape has been perceived by many jurists as unwarranted. One may also refer to the recent decision of the apex court laid down in state of Tamil Nadu's case (2025) in which the Governor of Tamil Nadu kept ten bills, passed by the State Assembly, with him without taking any decision on them for many years. Instead of giving assent as per Article 200 of the Constitution, the Governor sent them to the President of India for consideration; however, those bills were sent to the President only after the Tamil Nadu government approached the apex court. The court further held that action of Governor in sending the bills to the President at that stage to be unconstitutional and thereby struck it down. The court also struck down the action taken by the President on those bills by invoking its power under Article 142 of the Constitution and also declared those bills rejected by the President be deemed to have assented to. It seems that the apex court virtually relied on legal

principles " no exercise of power under the Constitution is beyond the pale of judicial review". The court also observed that there is no reason to exclude the discharge of function by the Governor and President under Articles 200 & 201 of the Constitution from the purview of judicial review. Despite the criticisms from different quarters, the court gave the responses by highlighting the inherent meaning of judicial review and also amplified dimensions of it in Articles 200 &201 of the Constitution with the objective of preventing the subversion of constitutional order. It is, perhaps the first case in the history of Indian constitutional democracy where the bills passed by the state legislature and withheld by the President have been declared as assented by the court. Such a pro-active judicial approach indicates that independence of judiciary is a safety-valve to a constitutional government whereas the principle of checks and balances among the organs of state is sine qua non of democratic governance.

Conclusion

It is the prerogative function of the elected legislature to enact, amend and delete laws; however, written constitution puts limitations on every organ of state thereby making the government as a limited government. Parliamentary democracy without the scope of judicial review is not at all a democracy, and the principle of checks and balances among the organs of state is sacrosanct in a constitutional government as well; therefore, any autocratic method of saving democracy, that may be resorted to by the elected legislature in the name of democratic governance, shall be subjected to judicial review beyond any doubt. In a way, the will of the people, as reflected in the decision of the elected legislature, is also kept under the scanner of the will of the Constitution that needs to be precisely redefined and reinterpreted by the court in accordance with the law of the land. Since the Constitution *per se* is an act of revolution, judiciary is expected to discharge its inherent constitutional obligations in meting out the emerging challenges.

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