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CONSTITUTIONAL LEGITIMACY AND JUDICIAL REVIEW: FROM KESAVANANDA BHARATI TO IR COELHO CASE

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INTRODUCTION

The Constitution of a nation connotes a structure of fundamental principles that are legitimately expected to protect the will of the people. The principle of constitutional legitimacy concerning actual justice has the purpose of creating good law.⁴⁰ Corollary to this structure, the constitution of India in Part III envisages Fundamental rights for the citizens of India. Justice Subba Rao connoted these fundamental rights characterized as “primordial rights necessary for the development of human rights”.⁴¹

One of the fundamental rights in the constitution under Article 31-B was introduced to bring agrarian reforms in 1951 through the first constitutional amendment. As expected, aimed to protect the land under the control of zamindars and give power of acquisition to the appropriate government. Article 31B is also seen as the highlighted provision of Part III of the Constitution of India because it initially constituted 13 land reform laws and protected them from the purview of judicial review. However, surprisingly the scope of the schedule has been stretched down as broad as adding reservation, trade, and industries, counting to 284 laws in the ninth schedule. The reason is questionable in itself as from time to time the laws of different subject matter which intended to escape Part III were dumped into Schedule 9 and it otherwise came to be known as the ‘Constitutional Dustbin’.⁴²

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⁴⁰ A Natural Law Theory of Constitutional Legitimacy: The Basic Structure Doctrine and "Good Reasons for Action", 5.2 CALQ (2021) 11.

⁴¹ Golak Nath v. State of Punjab, (1967) 2 SCR 762.

⁴² Rajeev Dhavan, Constitutional Dustbin, TIMES OF INDIA, (Jan. 22, 2007), <http://timesofindia.indiatimes.com/edit-page/Constitutional-Dustbin/articleshow/1359898.cms>.

The Backstory of Basic Structure

It is pertinent to note that Article 31B lacks clarification on the nature of laws that can be placed under the concerned schedule, along with this there existed an ambiguity over the scope of inserting ninth schedule laws as a constitutional amendment under Article 368. Therefore, the scope of it when challenged in the court of law the Supreme Court in the case *IC Golak Nath & Ors v. State of Punjab*⁴³ came out with the decision that constitutional amendment should be connoted as law, falling within the scope of Article 13 of the constitution, so that such an amendment abridging the Part III can be declared void. However, the struggle did not end but elevated with the 24th Constitutional Amendment giving constituent powers to parliament.

Thereafter, another Constitutional Amendment to Ninth Schedule inserted two acts of land reforms namely, the Kerala Land Reforms Amendment Act, 1969, and the Kerala Land Reforms Amendment Act, 1971. The amendments challenged in the case of *Kesavananda Bharati v. State of Kerala*⁴⁴ overruled the *Golak Nath Judgement*⁴⁵ and held that the parliament cannot change the basic structure of the constitution, limiting the transgression of power by Parliament and redefined the constitutionalism as a spirit of Indian democracy. Interestingly the doctrine of basic structure which was conceptually conceived as the essence of constitutionalism has not been structuralized yet, however, there exists a skeleton built, reiterated by the apex court in several cases.

The concerned analysis would try to find the scope of extension of the basic structure of the constitution with the help of the landmark judgment of *IR Coelho v. State of Tamil Nadu*.⁴⁶ In this case, the apex court dealt with fundamental questions of whether the parliament immunizes legislation from the test

of constitutionality by putting them into the Ninth Schedule, the extent to which Article 31-B provides immunity from the doctrine of basic structure, and its scope of judicial review. In the lieu of the judgment, it is pertinent to understand whether the doctrine of basic structure could be accepted as a full-fledged doctrine of judicial review and whether such an extension of judicial review in the blanket of basic structure led to the conflict of interest between the judiciary and parliament.

Scope of Extension of Judicial Review: IR Coelho Case

The Court on the ground of validity propounded that any amendment made to the Constitution by inserting laws in the ninth schedule has to be compulsorily examined based on the essential feature of the Constitution. This examination takes the discourse over to the extent to which Article 31-B provides immunity to laws of the Ninth Schedule. The court noted the history of the need for agrarian reforms and the challenge which the reforms faced on the ground of legality.

Further, the court also observed that the judicial interpretation of fundamental rights in the lieu of the case *Minerva Mills Case*⁴⁷ where the court struck down the excess of amendment power as violative of basic structure applies to this question. The court also noted that any law passed and inserted into the ninth schedule after the *Kesavananda Bharati case*⁴⁸ has to comply with the test of basic structure and relied on the case of *Bhim Singhji*⁴⁹ wherein the court declared Section 27(1) of Urban Land (Ceiling and Regulation) Act, 1976 as violative of Article 14 and 19(1)(f) of the constitution. Based on the observation of the Hon'ble Supreme Court any law or constitutional amendments compulsorily need to satisfy the essentials of basic structure doctrine evolving with cases. Therefore, it is clear to say that the immunity provided by Article 31-B is limited with an intent

⁴³ Golaknath v. State of Punjab, *supra* note 2.

⁴⁴ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

⁴⁵ *Id.* at 4.

⁴⁶ IR Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

⁴⁷ Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625.

⁴⁸ Kesavananda Bharati v. State of Kerala, *supra* note 5.

⁴⁹ Bhim Singh v. Union of India, (1981) 1 SCC 166.

to protect only the laws of reformative objective, permitting amendment of fundamental rights subjected to the basic structure of the constitution.

To determine whether the law in the ninth schedule violates basic structure or not, it is to be tested whether the law 'abridges' or 'abrogates' the basic structure. Wherein, abridgment is considered permissible that certain fundamental rights may be violated without affecting the basic structure. For the same, the court relied on *Minerva Mills Ltd. v. Union of India*⁵⁰ that "the total deprivation of fundamental in limited areas can amount to an abrogation of fundamental rights just as partial deprivation in every area can." However, in addition to this, the court also laid down certain other principles of validity. The court laid down the impact test to determine the validity of the challenge i.e., the validity of every constitutional amendment has to be judged on its merit.⁵¹ But the main aim of the court concerning the validity of constitutional amendment under the ninth schedule was to ascertain the mandate of the doctrine of basic structure.

The court in the case consequently brought clarity to the interpretational difference to the test of the validity of the word 'law' concerning a constitutional amendment and an amendment to the ninth schedule. The constitution amendment shall be tested based on the basic structure whereas the constitutional amendment in the ninth schedule to answer the violation leading to abrogation of basic structure. In the end, the case of *IR Coelho v. State of Tamil Nadu*⁵² in itself became a precedent in premises that Articles 14,15,19 and 21 are part of the basic structure of the constitution.

Another concern of the court concerning judicial review was essentially discussed in this case i.e., the exercise of the power of judicial review, using which the judiciary can declare

the legislative enactments and actions under the ninth schedule as unconstitutional. As earlier, it was the significance of judicial review of upholding the rule of law because of which a huge number of laws were dumped into the ninth schedule as an escape route. In this case, substantial observation over basic structure was enunciated to reiterate judicial review as an integral part of the constitutional scheme. So could the immunity provided under Article 31-B escape the judicial scrutiny, was answered negatively and held by the hon'ble court that fundamental rights being the basic structure are inevitable and if infringed would invite judicial scrutiny. Therefore, if the legislature feels the need of amending the Constitution, its power is limited and does not constitute a real plenary power. Hence, the blanket immunity to eliminate Part III under Article 31-B has to be compulsorily unveiled by the judiciary using the 'right test', as a part of the basic structure.

Implications of Judicial Review on Parliamentary Sovereignty

The concept of judicial review (judicial supremacy) and parliamentary sovereignty is the basic principle enshrined in the doctrine of constitutionalism. Considering the objective of constitutionalism which is to ensure limitation on the exercise of the arbitrary power of government, the two principles conflict with each other. In the case of India, it is constitutional supremacy taken as the most suitable and accepted principle wherein all the organs of the government owe allegiance to the set of principles in the constitution.⁵³ For instance, to understand the allegation of the transgression of parliamentary sovereignty by the judiciary, it is important to consider the changing nature of society with its transitional implications over the old hierarchical positions. Along with it, the concept of separation of power also plays a vital role when it comes to judgments declaring constitutional amendments or laws as unconstitutional under

⁵⁰ *Id.* at 64.

⁵¹ MP JAIN, INDIAN CONSTITUTIONAL LAW, 1335, (Lexis Nexis 2016).

⁵² *IR Coelho v. State of Tamil Nadu*, *supra* note 7.

⁵³ Indrani Kundu, Constitutionalism to Transformative Constitutionalism: The Changing Role of the Judiciary, 11 INDIAN J.L. & Just. 347 (2020).

the garb of judicial review. However, such judicial scrutiny is not appropriate to be asserted as ultra vires or illegal but a subordinate power under the constitutional scheme of independence of the judiciary. As held by Hon'ble Supreme Court in the case of *S.P. Gupta v. UOI*⁵⁴ that the gems of the constitution i.e., the principle of rule of law and independent judiciary make each other meaningful, by limiting the organs of the state within the boundaries of the law. Therefore, the concept of judicial review becomes a significant symbol of executing constitutional schemes.

On the other hand, when we talk about separation of power, it is prevalently said our constitution has meticulous definitions of functions of organs of state and hence, does not recognize the doctrine in its absolute rigidity. The principle of separation of powers came to examination in the case of *Bhim Singh*⁵⁵ wherein it was held that the model of modern governance does not allow strict separation of power due to affirmative responsibilities for the welfare of the nation. Thereby, the constitutional provisions neither prescribe a rigid form of separation of power nor prohibits accommodations for overlapping parliamentary sovereignty.⁵⁶ However, the test for violation of the separation of powers would be of utility in the case of the removal of constitutional accountability or check and balances. Summarizing back and forth judicial independence has performed a great role in the protection of basic structure using tools like the judicial review.

Conclusion

The scope of judicial review in the purview of basic structure is far extendable if we take into consideration the past experience of escaping the obligations of fundamental rights through the route of ninth schedule. The Hon'ble Supreme Court took painstaking efforts to define basic structure to limit the power of

organs of state in substantial number of cases. In this ongoing process of evolution of basic structure, the judiciary has been alleged with conflict of interest with parliament. To this, the landmark judgements states allowance of overlap of power by one organ lying within the limits of constitutional accountability.

⁵⁴ *S.P. Gupta v. Union of India*, 8 1981 Supp SCC 87.

⁵⁵ *Bhim Singh v. Union of India*, (2010) 5 SCC 538.

⁵⁶ *Sovereignty, Judicial Review and Separation of Power*, (2012) 7 SCC J-1.