

# An analysis of discrepancy between Judiciary and legislature over sharing of power under Indian constitution.

---

*In the light of: Kesavananda Bharati Case (AIR  
1973 SC 1461)*

**Trijeeb K. Nanda**

LL.M in Access to Justice (2014-15)  
School of Law Rights and constitutional Governance  
(TATA INSTITUTE OF SOCIAL SCIENCES)

12/22/2014

## *Introduction:*

---

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens *inter alia*: JUSTICE, social, economic and political; EQUALITY of status and of opportunity. But curiously enough, the people have kept no such power with themselves under the constitution to avail the above mentioned goals. All the power under the constitution is distributed among the legislature, executive and the judiciary. As all the power is vested among the three organs of the state, they are under a positive obligation to fulfill the promises. Thus, a harmonious relation between these organs of the state is *sine qua non* for the interest of the people and the country. But, since the commencement of the constitution, some sort of discrepancy is apparent in the functioning of these organs.

In this paper, I will make an attempt to investigate the cause of the incongruity among these organs, particularly between the legislature and judiciary, and how it affects the interest of the people of India. In this respect, *KesavanandaBharaati case* is of paramount importance and a critical analysis of the same is very essential. Thus, considering the instances since the commencement of the constitution, which led to the emergence of this case, I will make a critical analysis of KesavanandaBharati case.

*Kesavanandbharati case* is unique in many respects. It's a case decided by the largest ever bench (of 13 judges) of Supreme Court. In 1 case 13 judges gave 11 judgment. It dealt with some important issues relating to independence of judiciary, power of parliament under the constitution, fundamental rights of the people, relationship between fundamental rights and Directive principle of state policy, the philosophy of constitution and its basic features. However, the prime issues was regarding the "power of parliament to amend the constitution." The apex court through 11 judgment decided the case with a narrow majority of 7:6. The outcome of this decision is also widely discussed and appreciated by the legal fraternity of our country. It is said that, "***this is the case that saved Indian democracy***".

Before analyzing the issues, arguments and the opinion advanced in the case, it's important to briefly discuss the background which led to the emergence of this fundamental question, because in my opinion *Kesavananda Bharati* case must not be read in isolation.

### *A Brief History from 1950 to 1973:*

---

After independence, in pursuance to the promises made in regard to agrarian reforms. As a move towards egalitarian society, several states enacted zamindari abolition and land reforms laws. But soon after the commencement of the constitution these laws were challenged in the court of law. And the court, at the instance of land holders struck down the Zamindari Abolition Acts on the ground that they violated right to property and other fundamental rights guaranteed by the constitution<sup>1</sup>.

As a result of these judicial pronouncements, the legislature amended the Constitution in the year 1951, which inserted Ninth Schedule<sup>2</sup>. To ensure that agrarian reform must not be frustrated by judicial intervention<sup>3</sup>.

Though, the SC upheld the constitutionality of 1<sup>st</sup> Amendment Act<sup>4</sup> yet by interpreting Art.31(2) in *Bela Banerjee*<sup>5</sup> case said that the law seeking to provide for the acquisition of private property for public purpose had to provide for compensation which must be a just equivalent what owner had been deprived. As this view of the SC made it almost impossible to do land reform, the parliament enacted the constitution (Fourth Amendment) Act to invalidate the decision of SC. Again in *Vajravelu*<sup>6</sup> and the *Metal Box company case*<sup>7</sup> SC invalidate the Amendment by saying that, till the

---

<sup>1</sup> . *Kameshwar Singh V State of Bihar*, in this case the Bihar Land Reforms Act 1950 was challenged. Patna High Court held this piece of legislation as violative of Article 14 as it classified the zamindars for the purpose of payments of compensation in a discriminatory manner.

<sup>2</sup> the Constitution (First Amendment) Act, 1951

<sup>3</sup> Article 31-B was inserted by the First Constitutional (Amendment) Act 1951 which states that without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provisions is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force

<sup>4</sup> *Sajjansingh v state of Rajasthan*, AIR 1964 SC 464

<sup>5</sup> . *State Of West Bengal vs Mrs. Bela Banerjee*, 1954 SCR 558

<sup>6</sup> . 1965 SCR (1) 614

<sup>7</sup> . 1969 SCR (1) 750

word compensation is there property cannot be acquired except on payment of “just equivalent” it led to the enactment of the 17<sup>th</sup> Amendment<sup>8</sup> to the constitution. But very soon this Act was challenged in **Sajjansinghcase** , however it was upheld.

As the imposition of ceilings on holding of land through 17<sup>th</sup> Amendment severely threaten the interest of Large land holders once gain the validity the Act was challenged on the ground of lack of amending power in parliament with regard to fundamental rights. This time, in the case of **Golaknath v. State of Punjab** the court overruled *Sankiriprasad* and *Sajjansingh* case and held that parliament has no power to amend fundamental rights Apex court gave the reason that:--

- Art.368 prescribed only the procedures of amendment and does not give any powers to parliament to amend the constitution.
- Parliament derives power of amendment from Art.245 of the COI, thus its subject to Art.13 (2).

In this case, the court treated Property Rights as transcendental and inalienable human rights.

And made an Austinian interpretation of the constitution and overlooked the welfare of the people at large. By curtailing the amending power of the parliament the Apex court not only made the constitution a static document but also indirectly made the Directive Principle of State Policy irrelevant. Furthermore on the issue of compensation the 11 judge bench of Supreme Court in the ***BnakNationalization case***<sup>9</sup> reiterate the decision of ***Vajravelu case*** with a majority of 10:1. and in Privy Purse case it rejected a presidential order abolishing titles, privileges and privy purses of India's erstwhile princely rulers.

#### ✓ **Parliament Reacted through Amendment :**

In response to the decision of above three cases the Parliament of India enacted 24<sup>th</sup> , 25<sup>th</sup> and 29<sup>th</sup> Constitutional Amendment Act.

- ❖ **24<sup>th</sup> Amendment Act:** this amendment was actually enacted to abrogatethe judgment. The Act *inter alia* made two important amendment:

---

<sup>8</sup> Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.

<sup>9</sup>. R C Cooper V. UOI ,1970 SCR (3) 530

I. In Art 13, clause.4 was added which states that” **Nothing in this article shall apply to any amendment of this Constitution made under Article 368.**and,

II. In Art.368 in the marginal note in place of “Procedure for Amendment of the constitution” it added “**Power of Parliament to amend the Constitution and procedure therefore.**” and the Word “Constituent power” is also added in Art.368(1).By this the parliament intended to convey that now the power to amend the constitution is a “Constituent power” and not derived from Art.245. And 2ndly amendment is not law within the meaning of Art.13, thus parliament has every right to amend every part of constitution including part III.

❖ **25th Amendment:** curtailed the right to property, and permitted the acquisition of private property by the government for public use, on the payment of compensation which would be determined by the Parliament and not the courts. The amendment also by inserting a new provision (i.e.Article.31A) exempted any law giving effect to the article 39(b) and (c) of Directive Principles of State Policy from judicial review, even if it violated the Fundamental Rights. Thereby Parliament invalidate the decision of bank nationalization case.

❖ **29<sup>th</sup> Amendment:** By the Constitution 24<sup>th</sup> Amendment act, 1972, the kerla land reforms Amendment Act, 1969, and the kerla land reforms Amendment Act, 1971 was included in the 9<sup>th</sup> schedule to grant them immunity from attack.

### *Kesavanand Bharati case: A critical analysis*

---

❖ **Brief fact:**

In this there were Six writ petition and all the six writ petitions involve common questions as to the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution. The original writ petition was filed by KesavanandaBharatiSripadagalvar under Art.32 of the COI for enforcement of his Fundamental rights under Arts.25,26,14,19(1)(f) and 31 of the COI. He prayed that the provisions of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act 1969 (Act 35 of 1969) be declared unconstitutional, ultra vires

and void. During the pendency of the cases the 24<sup>th</sup>, 25<sup>th</sup>, and 29<sup>th</sup> amendment was added thus the petitioner challenged the constitutional validity of all these amendment.

❖ **Issues Before the court:** the core issue before the court was ----

**“What is the extent of the amending power conferred by Article 368 of the Constitution, apart from Article 13(2), on Parliament”?????**

❖ **Arguments Advanced**

**i. On behalf of the Petitioners:**

the petitioners it is urged that the power of Parliament is much more limited. The petitioners say that the Constitution gave the Indian citizen freedoms which were to subsist for ever and the Constitution was drafted to free the nation from any future tyranny of the representatives of the people. It is this freedom from tyranny which, according to the petitioners, has been taken away by the impugned Article 31C which has been inserted by the Twenty-fifth Amendment. If Article 31C is valid, they say, hereafter Parliament and State Legislatures and not the Constitution, will determine how much freedom is good for the citizens.

**ii. On behalf of the Respondent :**

The respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one-party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under Article .368

❖ **Opinion of the court :**

- I. Six Judges<sup>10</sup>, including the CJI accepted the submission of the petitioners, and held that the Fundamental Rights, being part of the essential elements or basic features of the Constitution could not be abrogated or emasculated by the exercise of the power of

---

<sup>10</sup> . Namely, Sikri, C.J., and Shelat, Grover, Hegde, Reddy and Mukherjea, JJ.,

amendment under Article 368. They conceded, however, that reasonable abridgement of the rights, as distinct from their abrogation or emasculation will be permissible under that Article.

- II. Six other Judges<sup>11</sup>, held that there were no limitations or restrictions of a substantive nature on the exercise of the power of amendment under Article 368.
- III. *Khanna, J., wrote an opinion the tenor of whose reasoning ran counter to that of the opinions of the six Judges led by the Chief Justice, and also rejected the doctrine that certain "essential elements" or "basic features" of the Constitution could not be abrogated by amendment. He specifically held that the right to property could be so abrogated, and expressly stated that Fundamental Rights are not entitled to be treated differently from the other provisions of the Constitution. However, he also held that what he called the "basic structure or framework of then Constitution" could not be abrogated by the exercise of the power of amendment under the Constitution.*

***Implied limitation on the amending power of the parliament:***

The court by referring to the proviso of Art.368 observed that certain Provisions directly affect the interest of the state (like Arts. 54, 55,) are included in the proviso and amendment of the same required state consent. But some provisions which are closely related to the provisos above mentioned (like Arts.52 and 53) are not there in the proviso to Art. 368. Thus there exist an element of implied limitation to the parliament's power to amend the constitution.

Under the rubric of implied limitation, through extra constitutional construction, the apex court of our country evolved the doctrine of basic structure.

---

<sup>11</sup>. Namely, Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.,

## Conclusion

---

My views in this case is little different from the main stream approach to the interpretation of this case. In my opinion, this case is overrated in the Indian judicial discourse. My understandings about this case are based on the following basic themes:

- ❖ 1case, 1 court and 11 judgment (why)?????
- ❖ the case that redefined the Indian democracy
- ❖ Basic structure : a vague doctrine
- ❖ A negotiation between judiciary and legislature over sharing power under the constitution.

→ The decision of the court is seen as a great check to the arbitrary action of the parliament to destroy the Indian democracy and constitutional values. But an introspection of the causes that led to the respective amendment as discussed above gives an altogether different view. It's the judiciary through a conservative and positivist interpretation obstructed the social welfare measures in India. The judiciary gave a lot of importance to the individual rights, like right to property of big land owner and undermined the promises made in the preamble regarding the establishment of a Social welfare and egalitarian society. As well as the constitutional goals enshrined in the directive principle of state policy.

→ In this case, the bench was of 13 judges and 11 judges wrote their own judgment. Naturally, it generate a question WHY? Because the Apex court of a country is seen as a whole. But when every judge gives his own judgment, it leaves room for many doubts. The judges are supposed to interpret the law and do justice on the basis of sound legal reasoning. When the fact, law and arguments are same how there can be 11 different judgments?? And how the conscience of the constitution appealed the highest interpretative authority to make 11 different moral reading.

→ A close analysis of the decision of this case reveals that through this case some sort of negotiation was made between Supreme Court and the Indian parliament over exercise of power. Because:-

- ❶ **Firstly**, the court overruled the decision of *Golaknath* case. And the court upheld the constitutionality of all the Constitutional amendments, except the second part

of Article 31C which was brought through 25<sup>th</sup> Amendment. Thus now it's clear that, Amendment are not law within the definition of Art.13. Parliament derives its powers to amend the constitution from Article.368 and not Art. 245, thus not subjected to Art.13 (2). In this way court accepted that parliament has every right to amend any provisions of the constitution.

❸ **Secondly**, through an extra constitutional interpretation, the court with a narrow majority of 7:6 comes to a conclusion that, there is an implied limitation to the amending power of the parliament. And evolved a vague doctrine named as Basic Structure of the constitution to keep some power with it under the constitution. The court held that the parliament can't amend the basic structure of the constitution. Thus now the basic question is, what is the definition of Basic structure? All the judges who were in majority illustrated some concept under the constitution as the basic features of the constitution. And the illustration of basic features given by the judges who were in majority are not same.

❸ **Thirdly**, the court never defined what Basic Structure is, what they said is the court will decide it from time to time. Which means the judges are omniscient and no other people have the right and capacity of understanding.

- So now if the judges are themselves not clear what is the basic features is all about, which is visible from their own enumeration. And claiming the power to decide what is basic feature and what is not, in future. Are they not demanding some extra-constitutional power to have a say in the matter of amendment to the constitution from the parliament???
- Furthermore, a bare reading of various basic features enumerated by different judges shows that they may come in conflict with each other. For example, the mandate to build a welfare state may come in conflict with essential features of individual freedoms. In such circumstances which basic feature will prevail? At this juncture one may argue that, the court will decide it on the basis of majority opinion. With due respect to the court, I would like to say that, without any sound legal reasoning and justification if the court relies in the majority opinion. Then the court has no right to say that a majoritarian approach of the parliament may destroy the constitution through amendment, thus, there should be some limitation. Because the consensus of the people is with the legislature and court.
- Many of the judges justified the limitation on the parliament's amending power of constitution on the argument that, a majoritarian approach of the legislature may pose a

potent threat to the very concept of democracy and constitutionalism. But the court quite interestingly didn't make any stand on 9th schedule and Article.31B. The parliament under Art.31B of the constitution may save any law in 9th schedule, and can immune it from judicial review. It's not declared as violative of the Basic structure doctrine. It clearly shows that the court was not concerned about the Indian democracy, rather it was concerned about its share of power under the constitution.

- It is said that, Kesavanandbharati is "*the case that saved the Indian democracy*" but in my opinion this is *the case that redefined Indian democracy* . This is because, the essential element of every democratic form of govt., be it direct or indirect democracy, is Govt. of the people and by the people (*if not for*). But, through judicial legislation by creating a vague doctrine , the Apex court made an attempt to established the "government of the judges"
- Finally to conclude, I would like to say that, all the institution be it judiciary, legislature or the executive no one is concern about the right of the common people of this country. They are only concern about their power. The only purpose of these institutions is to institutionalized injustice.