LEGISLATURE *V.* JUDICIARY

By

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The Magna Carta:

…here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.

…Winston Churchill 1956

…King John of England agreed, in 1215, to the demands of his barons and authorized that handwritten copies of Magna Carta be prepared on parchment, affixed with his seal, and publicly read throughout the realm. Thus he bound not only himself but his "heirs, forever" to grant "to all freemen of our kingdom" the rights and liberties the great charter described. With Magna Carta, King John placed himself and England's future sovereigns and Magistrates within the rules of law.

India has one of the oldest legal systems in the world. Its law and jurisprudence stretches back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. India's commitment to law is created in the Constitution which constituted India into a Sovereign Democratic Republic, containing a federal system with Parliamentary form of Government in the Union and States, an independent judiciary, guaranteed Fundamental Rights and Directive Principles of State Policy containing objectives which though not enforceable in law are fundamental to the governance of the nation.

The application of judicial review to determine constitutionality of the legislation and to review the executive decisions, sometime creates tensions between the Judge and the legislative and the executive branch and such tension is natural to some extent.

Introductory remarks:

May 2003 – In the history of independent India there have been instances where two principal organs of the State, namely the Judiciary and the Legislature have been at loggerheads with each other. In 1967, on one such occasion the Supreme Court (SC) in the *Golaknath v. State of Punjab,* took away the amending power of Parliament by giving the 'fundamental rights' a transcendental position, making them immune from amendment. Subsequently the Parliament asserted its authority by suitably amending Article 13 and Article 368 of the Constitution in 1971 to empower itself to amend the fundamental rights. (Article 368 deals with the amendment of Constitution). This was upheld by the SC in the famous *Keshvananda Bharti v. State of Kerla* case (1973). But in this case the Judiciary ruled that the amending power of the Parliament is not absolute, and such amendments can not destroy the basic feature of the Constitution. As a result of this judgment, the balance of power that was visibly tilted towards the Judiciary in the *Golaknath* case came to a semblance of order.

During *Indira Gandhi's* regime the 42nd amendment Act of the Parliament brought about a sweeping change in the provisions of the Constitution. Under this amendment Article 368 which gives amending power to the Parliament was so modified that any further amendment of the Constitution would be

immune from being questioned in a Court of law. This period witnessed a tilt of power in favour of the Parliament. However the balance between the two organs was again restored by the *Minerva Mills* case in 1980, where the SC ruled that the 'judicial review', being a basic feature of Constitution, could not be taken away by the Parliament by amendment of Constitution. A key implication of this judgment is that the SC had empowered itself to sit on the judgment over any law passed by Parliament or any amendment done, to see their constitutionality.

Very recently, the SC's verdict on the amendment of the Representation of People's Act (RPA) has wrong-footed the nation's lawmakers. The issue is that of the right to information of voters about candidates' credentials. The Supreme Court has all along been maintaining that the 'Right to know 'is a fundamental right flowing from the 'Freedom of Expression' guaranteed under Article 19(1)(a) of the Constitution. To this effect, in May 2002 in a landmark judgment the SC made it mandatory for the candidates contesting elections to furnish information regarding their criminal antecedents assets and liabilities and their educational qualification. Following the ruling the Election Commission directed the Returning Officers to ensure such disclosure from the candidates during the filing of their nomination papers.

In response however the political parties, in a rare unanimity, suggested that the ruling Government being about an alternative proposal for electoral reforms. The Government brought the Representation of Peoples (Amendment) Ordinance, which was also eventually passed by the Parliament as an Act. The amendment mandated giving details of only such criminal cases in which cognizance has been taken; it provided for disclosing the assets and liabilities of only the elected candidates, that too only to the Presiding Officer of the House. The Government's Bill also dispensed the need for disclosing the educational qualification altogether. Clearly the intent was to dilute the SC's ruling.

Several petitioners challenged the amendment to RPA Act (look here for a information about the poll reforms campaign). In its ruling on March 13 2003, the SC declared the Government's amended electoral reform law unconstitutional, thereby restoring its earlier verdict.

As far as separation of powers is concerned, the Judge should make sure that each of the other branches operates within the boundaries of the law and judicial review. Judicial activism has to be controlled and properly canalized and the Courts have to function within established parameters and constitutional boundaries. When the Executive and Legislatures are failed to discharge their duties, judicial activism will continue to play an important role.

According to the Constitution, Parliament and the State Legislature in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the Judiciary, the power to adjudicate upon the constitutional validity of a laws. If a law made by Parliament or the State Legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or *ultra virus*. The Parliament vests with the power under Article 368 to amend the Constitution and it gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence and the apex Court pronounced that Parliament could not damage or alter the basic features of the Constitution under the pretext of amending it.

Most importantly seven of the thirteen Judges including Chief Judge in *Kesavananda Bharati* case[1] the Supreme Court recognized

1. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

this concept for the first time that basic structure of the Constitution cannot be destroyed. This as a path breaking judgment which gave birth to the "Doctrine of basic structure".

Thereafter, the apex Court with 6:5 majority reversed its position in *Golaknath v. State of Punjab* case,[2] the Article 368, which contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power). Thus the apex Court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13(2). The apex Court further held that some feature of the Constitution lay at its core and required much more than the usual procedures to change them.

Earlier serious attempts were made through 24th, 25th and 42nd constitutional amendments to establish supremacy of Parliament over the Judiciary. The federal Constitution of the United States is organized on the principle of supremacy of the Constitution. Its Supreme Court, therefore, enjoys absolute and extensive power of judicial review. No law of the land is beyond judicial scrutiny. In the case of Indian Constitution is typical because of the adoption of parliamentary and federal features simultaneously. Parliamentary form of Government hints at legislative supremacy. But the federal nature of the Constitution make it imperative that the highest Judiciary is able to exercise the power judicial review, however, Articles 105 and 122 of the Indian Constitution clearly restrict the Judiciary from intervention in the business of the Legislature.

Further in a recent case *Coelho v. State of Tamilnadu*,[3] the Apex Court held that any law placed in the Ninth Schedule after April 24, 1974 when *Kkeshwanand Bhariti's* judgment was delivered will be open to challenge, even though an act is put in 9th schedule by a constitutional amendment and its provisions would be open to challenge on the ground that they destroy or damage the basic feature, if the Fundamental Rights are taken away or abrogated pertaining to the basic feature of the Constitution.

The Parliament insists that it being the sole custodian of its rights and privileges since the Articles 105 and 122 of the Constitution clearly restrict the Judiciary from intervention in the business of the Legislature but these rights and privileges of the House and its Members are left un-codified. With regard to the judicial activism it has given us some very good case laws, even led to revolutionary changes in the society, but its consistency needs to be questioned. Therefore, the principles of separation of powers are kept in the forefront and the Judge should make sure that each of the other branches operates within the boundaries of the law and judicial review or codify the powers, privileges and immunities of each House of Parliament and its Members.

In conclusion the view of Prime Minister Dr. *Man Mohan Singh* is worth observing which is as follows:

> On August 4th 2007 Prime Minister *Man Mohan Singh* asked the Judiciary and Legislature to 'actively engage in finding meaningful and widely acceptable solutions to social challenges confronting the nation'. He was speaking on the occasion of the golden jubilee celebrations of the Indian Law Institute.
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> "Many of our problems are peculiar to our society. We will have to be innovative

2. *Golaknath v. State of Punjab*, AIR 1967 SC 1643

3. *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 8617

to find solutions to our problems", *Singh* said.

"The country is facing a number of social challenges and the Judiciary, Legislature Members of the Bar, legal academia and scholars must actively engage in finding meaningful and widely acceptable solutions" the PM said in a veiled indication towards a slew of issues in which the Judiciary and the Legislature have come to confront each other.

Starting from SC notices to Lok Sabha Speaker who had refused to accept or reply in the issue of expulsion of 11 MPs in the cash-for query issue, and from the demolition and sealing order on unauthorized construction which was responded to by the Government with a moratorium law, to the OBC reservation which is now pending in the apex Court, the Judiciary and the Legislature recently have hand conflicting views.

In an indirect reference to the OBC quota issue the PM said "we must critically examine the devices of affirmative action that we have deployed in our country and their real impact on the evolving social order the opening up of the field of high education to private players and the changes it has brought about."

However he hastened to add that the Supreme Court, through its judgments, "has from time-to-time, addressed critical problems and provided leadership to our society by coming up with highly original and innovative ideas".

Singh stressed on "equity" especially in an "increasingly liberalized society" and called for "solutions through the engagement of Legislature and Judiciary".

Chief Justice of India *Y.K. Sabharwal*, in his address, placed the ball in the Court of the Legislature by saying "lay should conform to the socio-economic requirements to meet the aspirations of the changing society".

WOMEN RESERVATION AND CONSTITUTIONAL RIGHTS

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Article 14 of the Constitution deals with "equality before law" and it is based upon the natural justice. The equality clause in this Article requires that all persons subjected to any legislation should be treated alike under like circumstances and conditions. Equals have to be treated equally and unequal ought not to be treated equally. This cannot be destroyed even by the amendment under Article 368.

Article 15 deals with "prohibition of discrimination" on ground of religion, race, caste, sex or place of birth or any of them. Article 14 is a general Article giving the equality to every citizen and non-citizen of India and the Article 15 is a particular right. The incorporation of Articles 14 and 15, the centuries ages slavery like life of women was thrown out and a new life of equal rights with men have been accorded. After the Constitution of India the women began to exercise equal rights with men. The Article simply say that women should be given equal rights. Further Article 15(3) empowers the