

CHAPTER-4

LANDMARK JUDGMENTS RELATED TO THE JUDICIAL REVIEW OF LEGISLATIVE ACTION (1950-1980)

The Supreme Court of India today wields a degree of power that many foreign legal observers would find extraordinary and unusual. The court's initial assertion of the basic structure doctrine and power of parliament to amend the constitution in the late 1960s and early 1970, was a response to the central government's efforts to insulate land reform and other economic legislation from judicial review, through the addition of a new section- the Ninth schedule to the Indian constitution.¹

Within the past two decades, the Indian court wrested control over judicial appointments from the executive from and assumed a important role in policy making in the areas of affirmative action, environmental policy, education and development.

What make the expansion of judicial power in Indian so remarkable is that the Indian Court has overcome important political and structural constraints to emerge as an important institution of governance in modern India. Although the Indian Supreme Court was armed with the power of judicial review, appellate jurisdiction over the state High Courts, advisory jurisdiction through presidential references of issues, and original jurisdiction based on article 32 which allows for direct suits in the Supreme Court to enforce the fundamental rights provision, and empowers the Courts to issue writs to enforce these rights three important aspects of India's political structure and historical legacy limited the courts development early on.²

First, under the original scheme of the constitution, framers of Indian constitution in constituent assembly, the court was intended to be a junior subservient institution, whose decisions could easily be overridden by the parliament through constitutional amendments process by simple majorities, second the constituent assembly placed important limits on the power of the Indian Court, including eliminating a due process clause from the final draft of article 21 to prevent the court from reviewing the socialist pattern regime's redistributive, collectivist, and economic policies as well as reviewing the government provision for preventive detention.

Third British legacy of *Austinian positivism* followed in Indian because so many of India's early jurists were schooled or trained in England meant that India's early jurisprudence would be limited by more formalist modes of constitutional interpretation.³

This present work traces the origins and development of the concept of Judicial Review in India and its relation with basic structure doctrine, fundamental Rights, from the battle over through the Court's landmark decision from A.K. Gopalan to Minerva Mills. And then proceeds to examine the development of the doctrine to the present.

A.K. Gopalan Case-

Since A.K. Gopalan case up to this date and has brought out the development of judicial construction of the constitution and Doctrine of Basic structure. The Indian constitution, while establishing a constitutional rule of law, nonetheless authorizes the national government to use preventive detention to aid in the defense and security of nation consequently Supreme Court of India, though time to time asked to strike down laws authorizing preventive detention laws because there as acts are against soul of the constitution. At that time, Supreme Court's follows the American due process of law. Accordingly following the wording procedure established by law. The court rejected a substantive challenge to a preventive detention law allowing detention without trial in the case of A.K. Gopalan V. State of Madras and upheld the first national preventive detention act. In this case, the court was confronted in the question of relation between 19 and 21 but the majority of judges was in favour that Article 19 could not applied in the domain. According to some scholars, the decision in Gopalan's case, judiciary was in favour of narrowing the scope of judicial review and follows the procedural law not substantive. The Gopalan approach adopted by court during 1950 to 1970. But A.K. Gopalan approach is not an overwhelming approach to govern the relation between article 19 and 21.⁴

The Cooper Case-

In *R.C. Cooper V/s Union of India*, A.I.R. 1970 S.C. 564, 608. The Supreme Court in the case wanted to nullify the effect of the fourth Amendment and this case was about the Nationalization policy of congress government. Petitioner filed the suit against the central government for arbitrary policy which is against fundamental rights like article 19/21 and

14 also. Cooper decision began a new era in the interpretation of fundamental rights and prepared a clear pathway for integrated application of fundamental rights.

In this case the court stipulated that the adequacy of compensation and in takings would be non-justiciable. In *R.C. Cooper V/s Union of India*, the court invalidated the Bank Nationalization Act passed by Indira Gandhi's government on the grounds compensation, and constituted hostile discrimination by imposing restrictions only on certain banks. The court went on rule that it could hold that regulations were not "reasonable" under article 31(2) of the constitution where those regulations failed to provide adequate compensation. In another challenges, to the Gandhi government effort, the Court in *Madhev Rao. Scindia V. Union of India* (A.I.R. 1971 S.C. 530, 658.) Invalidated the Gandhi government's effort to abolish the titles, privileges and privy purses of the former rulers of the princely states.

In response to these decisions of Supreme Court, Indira Gandhi dissolved the Lok Sabha early which was the first time in Indian political history, and openly campaigned against the Court, promising the citizens to provide economic justice and social security and poverty alleviation.⁵

Golak Nath Case-

In this case the issue was that in front of Supreme Court that whether parliament can amend the constitution under article 368 was unlimited. In *Shankari Prasad V/s Union of India* (1952) 1 S.C.C.R. 89) a challenge to the first amend Act, the petitioners argued that the new amendment violated article 13 (2) which prohibited the government from passing any law that was against the spirits of PART-III of the constitution. However, the court rejected this argument and declared that, there is clear difference between ordinary law made in exercise of legislative power, and constitutional law made in exercise of constituent power.⁶

Similarly in *Sajjan Singh V. State of Rajasthan (1965)* 1 S.C.R. 933 the court adjudicated a challenge to the validity of the seventeenth Amendment in the case, the court, reaffirmed its earlier decision in *Shankari Prasad*.

The court in *Golak Nath* case nullify there earlier judgments by a 6 to 5 ruling and declared that that parliament cannot enact constitutional amendments that violate the

fundamental rights provisions of the constitution. Writing for the majority, Chief Justice K. Subha Rao held that Article 368 did not actually confer the power to amend the constitution, but it is just procedures for amendment. He asserted that 368 were ordinary laws under Article 13 and thus could be subject to judicial review. In this case Supreme Court of India, postulated the doctrine of prospective overruling which means that ruling would and apply to future amendments, and that the first, fourth and seventeenth Amendment though deemed to be unconstitutional, would remain in effect, In this case Supreme Court of India, widened the scope of Judicial review of legislative action.⁷

Keshvanand Bharti Case-

This case known as the fundamental rights case. In Keshavananda case, a thirteen- judge bench of the court heard a series of challenges to the twenty fourth twenty fifth, and twenty ninth Amendments in when Keshevanand Bharti was being decided, the congress party led by Mrs. India Gandhi had on our whelming majority in the new parliament. Some legal scholars was also in favour of parliamentary supremacy and against the decision of Keshvanand Bharti case they argued this decision of Supreme Court is against sovereignty of state and sovereignty rests with the people which manifests in Preamble as well as constitution itself. In this case, leading justices of the court were clearly divided in two groups, several justices like Hedge, So she let and Grover reasserted their power to challenge the government's amendments to the constitution, while others Ray and Bhagwati disagreed and sided with the governments, justifying their positions. When government responded to its defeat in Keshavenanda decision by passing over the three most senior justice hedge, Grover and shelat and appointed justices A.N. Ray one of the dissenters, for the position. The three senior most judges resigned their post and this act was against the independence of Judiciary. The clash between parliament and the Supreme Court on the right to property was continued until 1978 when that right (Article 31) was deleted from the chapter on Fundamental rights by the constitution (44th Amendment 1978).

What was striking about the Keshvanand decision was that it represented a direct challenge to the Parliament Supremacy. It manifested that Gandhi's congress party sought a mandate for the reassertion of parliamentary supremacy in matter of basic structure of the constitution and in this case, Court considered fundamental right as the part of basic structure. In terms of its historical importance, most scholar of Indian constitutional law

today here recognized and noted the significance this moment in India's political and constitutional history, though the immediate reaction to the decision was more hostile.

Indira Nehru Gandhi V. Shri Raj Narain (1975) and Emergency Period-

This was the most important decision of Supreme Court of India during the emergency period. The case was involved a challenge to the thirty ninth Amendment enacted in response to a decision of the Allahabad Court set aside Indira Gandhi election on the ground that her, election. Campaign had committed a corrupt practice. The amendment added six new clause to article 329 (A). because of this decision Indira Gandhi declared national emergency on June 25, 1975, in addition to appealing the High Court's decision to the Supreme Court. Part of the thirty-ninth Amendment was enacted to retroactively validate Indira Gandhi's election by superseding the applicability of all previous election laws and immunizing all election involving the prime minister or speaker of the Lok Sabha from Judicial Review.¹⁰

The five judge bench in Indira Nehru Gandhi which comprises of four Justices ("Chief Justice Ray", Justice M. Beg, K.K. Mathew, and Y.V. Chandrachud) ultimately accepted and applied the basic structure doctrine, with four out the five justices voting to invalidate clause four of Article 329 (A). Justice Khanna observed in this case that these clause violated the basic structure doctrine and fundamental rights of the Indian constitution, by contravening the democratic set up of the constitution and 'Rule of Law' given that democracy requires that "elections should be free and fair": In contrast, justice Chandrachud invalidated the clause on the grounds that it violated the basic structure in that it represented "an outright negation of the right to equality" and as "arbitrary and calculated to damage or destroy the rule of law". Justice Ray and Mathew held that article 329 A was invalid "because constituent power cannot be employed to exercise judicial power".¹¹

During the emergency period, parliament passed or enacted several laws for curtailing the power of Supreme Court and but restrictions on the use of judicial review of legislation. The main purpose of these constitutional amendments was the elimination of judicial review of several laws violating the fundamental rights.¹²

Because of these decision, Supreme Court maintained the heart and soul of the constitution and safeguarded the fundamental rights of the citizens and put restrictions on amending power of the parliament.

Post- Emergency Period and Power of Judicial Review-

According to some scholars, Indian Judiciary is most active judiciary in the world. After the end of National emergency in 1977, Supreme Court was the ardent Championed of citizens rights and freedom and all fundamental rights. Because of activist approach of Supreme Court, *Upendra Baxi*, in an influential analysis, has interpreted that development as an attempt by the Court to regain legitimacy lost during its acquiescent response to the emergency.¹³

Because of these landmark judgments of Supreme Court and leading judges of that time, played a very important role for developing the new jurisprudence. Upendra Baxi has shown a strong incentive after the emergency for the egalitarian justices to redeem their reputations as supporters of constitutional rights.¹⁴

Maneka Gandhi V/s Union of India and Dynamic Approach of Supreme Court-

In famous case '*Maneka Gandhi V. Union of India* (A.I.R. 1978 Sc. 597). Supreme Court has assumed a new character and rejected the approach of A.K. Goplan case and followed the American due process of law. In this case, the issue was infringement of article 14 and 21 personal life and liberty and constitutional validity of an executive order and related provisions of the passport Act 1967 conferred undefined power of impounding and hence was violative of article 14. Since petitioner's freedom of speech and occupation was incidentally denied because of impaneling of her passport without any reasonable justification and it is against spirit of the constitution and violation of article 21 which is related to personal life and liberty and procedure established by law should be fair, just and reasonable and court declared that an executive order cannot infringed the personal right and freedom. Although Maneka Gandhi decision was criticized on the grounds that it is against the Parliamentary sovereignty and sudden change of judicial approach of the constitutional adjudication is against the norms of the

constitution. But apart from these criticisms, in this case, Supreme Court plays a very important role in refiguring natural justice.¹⁵

Bacchan Singh Case-

In, this case, judiciary adopted the Maneka Gandhi case approach and followed the natural justice and rule of "*Audi Alterm Partem*". In this case, the majority while upholding section 302 of Indian Penal code and 354 of criminal procedural code and elaborately the inter relationship between article 14, 19 and 21 in order to refine the approach of Maneka Gandhi case. While interpreting article 21 providing for procedure established by law, which is just, fair and reasonable, the Court analyzed the adequacy of procedural safeguards in case of death penalty under the new criminal procedural code, and in this case, the court reformulated that death penalty should be imposed only in rarest of rarest case.

Justice P.N. Bhagwati in his dissenting judgment made out his case for abolition of death penalty. It points out that value system responses and social philosophy of each judge would weigh on the court in deciding on the death sentence, leaving justice to the chance of court composition rather than a rule of 'law'.

Minerva Mills v/s Union of India (1980)-

Keshvanand Bharti decisions of Supreme Court considered as the boldest assertion of judicial authority in India. After this decision, the Supreme Court struck down the. Clause 4,5 of Article 368 inserted by 42nd amendment, on the ground that these clause destroyed the essential basic structure of the Indian constitution. This judgment of Supreme Court declared that "Constitution is supreme not parliament in India". With respect to development of the basic structure doctrine, the truly pivotal role may indeed be the court's twin decision in *Minerva mills and Waman Rao*, in which Court, reasserted the basic structure doctrine against arbitrary action of the executive and legislature and invalidating several emergency amendment that had limited or curbed the court's jurisdiction and power of judicial review.¹⁶

In Minerva Mills V. Union of India the court heard a challenge to the sick textiles Nationalization Act of 1974, which had been added to the ninth schedule of the constitution through the thirty- Ninth, Amendment which made for immunizing the Act

from Judicial review. The petitioners challenged the thirty Ninth Amendment passed during the emergency which had barred judicial review of constitutional amendments by amending articles 368(4) and 368(5) of the constitution. The Court nullified two provisions of the forty- second amendment, section four, which subordinated the fundamental rights in article 14 and article 19 to the directives principles, and section fifty five which provided that the validity of any constitutional amendments promulgated following the enactment of the forty- second amendment could not be challenged in any court, on any ground, and that the consistent power of parliament to amend the constitution was an unlimited one. Writing for the majority, Chief Justice Chandrachud reaffirmed the basic structure doctrine of Keshvanand, and found that both sections were unconstitutional in that they sought to expand the amending power to enable the government to repeal or abrogate the constitution given that a limited amending power is one of the basic gestures of our constitution and therefore, the limitations on that power cannot be destroyed. In holding that Justice Chandrachud observed that PART III and PART IV of the Indian constitution, which refer to fundamental rights and directives principles, respectively were of equal importance, and that his “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the constitution.” Justice P.N.s Bhagwati, in his concurring opinion, held that both a limited amending power as well as the power of judicial review of government actions, were part of the basic structure of the constitution.¹⁷

In “*Waman Rao V. Union of India*”, the court reaffirmed the basic structure doctrine and power of Judicial Review and announced that all enacted amendments after the Keshvanand Bharti decision including laws added to the Ninth schedule were subject of Judicial review under the basic structure doctrine.¹⁸

As one leading scholar and senior advocate observed, the court, decisions in *Minerva* the court the opportunity to regain the role of ‘sentinel’ which has suffered significant erosion during the emergency. Since 1980, the court’s application of the basic structure doctrine, while no doubt significant, has been limited.

During this period 1950 to 1980, Judicial review of legislation was at highest stage of Judicial indolence and protection of fundamental rights and judiciary has played a significant role.

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