

THE ROLE OF SUPREME COURT OF INDIA IN DEVELOPMENT AND PROTECTION OF THE INDIAN FEDERALISM

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ABSTRACT

India had a centralized unitary state at the time of Independence. After independence when the constituent assembly met for the drafting of the constitution, they had discussions and deliberation on whether the federal structure is desirable or a unitary structure. The constituent assembly came with a conclusion in which they adopted a structure with a strong centre and a state with limited powers but the structure was termed as federalism. The reason for the inclusion of federalism was to accommodate the diverse population of the country. But the structure of federalism was very complex due to identity politics and the regional identities. The Supreme court of India and the High Court which were established are the guardians of Indian Constitution and has a huge contribution in the development of the Indian federalism. The most important power that these court have is the power of judicial review beyond legislative and executive which further goes to the constitutional amendments also. The constitutional and extra- constitutional factor like the formation of new states, demarcation of boundaries and the growth and increase of regional parties has brought many issues. The issues brought conflicts between the centre and the states and at times the centre became so powerful that the Courts had to come to the picture and interpret the concept of federalism and the concept of distribution and sharing of powers. In this paper the author shall discuss the evolution and the development of federalism in India. The role of the Supreme court and the High Court in defining and interpreting the concept of federalism. The author shall also look into various cases laws where the Supreme court has played the pivotal role in the protection of the structure of federalism.

Key words: Centralized, Federalism, Diverse Population, Identity Politics, Judicial Review.

I. INTRODUCTION

The judiciary of the country plays a pivotal role in the interpretation and application of law and also acts as the protector of the constitution. It also adjudicates the disputes between one or more citizens also between the states and the citizen and also at times disputes amongst the states. The function of the judiciary is to look into the proper prevailing of rule of law and to protect the fundamental rights of the citizen if encroached by the state. India has a written constitution so an additional burden lies with the courts to look into the independence of different organ of government and whether the

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government is running according to the law. In a federal structure, the Judiciary has the additional responsibility to act as an arbitrator to the disputes between the centre and the state. A federal government is a legalistic government where there is a huge adherence to law and for the smooth functioning of the centre and the state government there is a distribution of power amongst them. The distribution of power creates certain complexities amongst the centre and the state and which also give rise to disputes and altercation and which would be adjudicated by the judiciary and they act as the independent organs who would scrutinize whether any one of them has gone beyond the power vested or not. Justice Untwalia has compared judiciary to “a watching tower above all the big structures of the other limbs of the state” from which it keeps a watch like sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the constitution, the constitution being supreme”.

India had a centralized unitary state before Independence, but after independence when the constituent assembly while drafting the constitution adopted a federal structure with a strong centre and a limited power to the states. The Supreme Court and the High Court has played a crucial role in the development of Indian Federalism. The most important weapon that is vested on them is the power of judicial review as they are the guardian of the constitution. The formation of states on the basis of language and with the growth regional parties has changed the nature and characteristics of federalism in India and this has also paved the way for disputes between the centre and states or amongst the states. The role of the court become more important as the disputes are often brought to the courts where the courts play a role of explaining them their functions and roles and also preserve the autonomy of the states. The case of *Keshavananda Bharati v. State of Kerala*², where the Supreme Court has enlarged its power of judicial review beyond legislative and executive actions to include constitutional amendments which therefore vests huge power on the courts. The inclusion of constitutional amendments made the courts an extra powerful institution and also made the parliament and executive organ little fragile. The constitution has given very strong unitary features and if any time the country tries to tilt to its unitary feature than the court acts as a saviour and constantly checks and balances it. The court has tried to make balance between a majority government and a federal structure of the constitution.

II. HISTORY AND DEVELOPMENT OF FEDERALISM IN INDIA

The formation of Andhra Pradesh in the year 1952, on the basis of language further sowed the seeds of regionalism and the demand of separate state. Then the State Reorganization Commission was brought in the year 1953 to look into the demand of autonomy or formation of new states on the basis

² AIR 1973 SC 1461

of language. The report of the commission accepted the linguistic homogeneity and which was approved by the central government as well. The formation of states on linguistic lines increased the demand of autonomy and regional movement grew at a rapid pace. The reorganization of states and the despite over 105 amendments there are not many changes in the federal structure.

India has a parliamentary federal structure consisting of states and Union Territories. There is a three-tier structure of government including union, state government and the local government added by 73rd and 74th amendment of the constitution in the year 1992. The federal structure was included in the Indian Constitution to accommodate the diverse population of the country. A distinct feature of the Indian Constitution is the emergency power i.e., National Emergency (Article 352), An emergency in the state in the event of breakdown of constitutional machinery (Article 355 and 356) and financial emergency (Article 360). The emergency power of the constitution gives more power to the union.

The law-making power has been divided between the union and the states through list which is in the seventh schedule of the constitution. The list is clearly divided as union list, state list and concurrent list. The union has a power to shift certain areas from the state list to union list. For example, industry and mines, education, forests to concurrent list from state list. In order to amend the division of power as done by the constitution requires a constitutional amendment under Article 368. The citizen has no role to play in the amendment of the constitution but the court are the interpreter and the guardian of the constitution. The amending power was first discussed in *I.C. Golaknath v. State of Punjab*³, which was changed in *Keshavananda Bharati v. State of Kerala*⁴, in which it was held that Parliament can amend any part of the constitution but the basic structure of the constitution cannot be destroyed. The first amendment added in the ninth schedule to the constitution was immune from judicial review by the *Keshavananda* judgement had brought ninth schedule under judicial review and the view was again supported in *I.R. Coelho*⁵ case. Many items that are in the state list has been times and again been shifted to concurrent list so that parliament also may have an upper hand to legislative over the subjects. Most amendments are done when there is a majority government and many amendments happened during one-party Congress rule. The major shifting from state list to concurrent list happened in the pretext of socio-economic planning under the centre. Another provision in context to federal structure is Article 275 of the constitution where the central grant-in-aid is provided to the states. The 73rd and 74th amendments gave powers to the village councils and municipalities in twenty-nine subjects to rural bodies and eighteen to urban bodies. It was a new era in the concept of federalism.

III. ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF FEDERALISM

³ AIR 1967 SC 1643

⁴ AIR 1973 SC 1461.

⁵ AIR 2007 SC 861

India's judiciary is in integrated system which is divided into different courts with the individual autonomy of the higher court and the lower courts. The main role of the courts is to interpret the constitution and to safeguard the basic essence of the constitution. In the case of *Keshavananda Bharati* the supreme have clearly mentioned that the basic structure of the constitution cannot be amended and also in cases such as *S.R. Bommai V. Union of India*⁶ Supreme court has stated that the declaration of president rule under Article 356 of the constitution is under the judicial review of the court. The constitution which is the most important document of a state, which demarcates the power of the different organ of the government. The judiciary plays a pivotal role in interpretation and the development of federalism in India through judicial decisions and the power of judicial review. The Supreme Courts is the highest apex body, then comes the High courts and the district courts. The constitution has entrusted the Supreme Court and High Courts with original and appellate jurisdiction in Article 131 and 131 (A), 132 and 134 (A) of the constitution. The original jurisdiction of the Supreme court is majorly with regard to centre- state disputes, inter state disputes with regard to division of power and distribution of power and also with the violation of fundamental rights of citizen. The appellate jurisdiction of Supreme court is appeals from high courts in civil, criminal and other proceedings and also if the high court certifies that the issues/ case requires a need of interpretation of the constitution as it raises a substantial question of law. The special leave to appeal can also be filed in the Supreme Court with regard to any order passed by any court and tribunal in India. The parliament can enlarge the jurisdiction of Supreme Court in relation to union list and can also be enlarged with new jurisdiction in context to state and concurrent list. The Supreme court is also vested with advisory jurisdiction and can issue writs for the enforcement of fundamental rights. The Supreme Court of India is also a highest court of appeal in constitutional, civil and criminal cases. The judicial decisions were centralized during the Nehru era and the cases related to fundamental rights were dealt more than the protection of the rights and powers given to the states by the constitution. The number of cases related to the distribution and interference of the states' rights could also sense the development of cooperative federalism in which states are under the compulsion to abide and follow the directions of the centre. The Supreme court has played an important role in sorting the differences of the centre and the states with regard to union-state relations. Court has also tried to protect and guard the lists that were given to the centre and the states for the purpose of distribution of power by the constitution. The court mostly deals with the federalism issue especially in the area of legislative power between the centre and the states. P.M. Bakshi observes that "Where the question arises of determining whether a particular subject mentioned is in one list or another, the court looks to the substance of the matter. Thus, if the substance falls within the union list, then the incidental encroachment by the law on the state list does not make it invalid".⁷

⁶ AIR 1994 SC1918

⁷ P.M. Bakshi, *The Constitution of India*, 246–7 (New Delhi: Universal Law Publishing, 2013), 12th ed.

In *F.N. Balsara*⁸ that deal with Bombay Prohibition Act 1949, the act precedes the 1950 constitution of India and the case was decided with reference to Government of India Act, 1935. The main issue in the case was whether Bombay Prohibition Act 1949 falls under the entry 31 s (production, manufacture, possession, transport, purchase, and sale of intoxicating liquor and narcotics drugs) the provincial list of powers or entry 19 of central list of power (import and export across customs frontiers as defined by the Dominion Government of India). The federal court applied the doctrine of pith and substance and ruled in favour of provincial government. The decision of the court recognises the distinct areas of centre and state jurisdictions and the constitution has explicitly stated that in concurrent list, union law shall prevail unless the state has made law with the prior consent of union executive. The court has interpreted the residuary powers of the union parliament to the extent to include everything that is not in the state list and Article 248 has clearly given power to the parliament to make laws in respect to matters not included in concurrent and state list. This has been seen in the judgement of the nine- judge bench in *Attorney General for India v. Amrat Lal Prajivandas*⁹ and followed by *Union of India V. H.S. Dhillon*¹⁰ it was held that the parliament has a power to enact laws relating to foreign exchange, smuggling and security of generic state matters. The court has applied the principle that where the legislative competency of the parliament is under consideration, the court will have to check whether the statute is related to state list. If it is not related to state list, then the parliament has a sole power to enact the statute under Article 248 of the constitution. The many provisions of the state list have been shifted to union list an also to concurrent list. The court don't use a single line of interpretation and rule sometimes in favour states or sometimes centre. A law related to Uttar Pradesh Sugar industry in *Tika Ramji*¹¹ was under consideration by the court. The production, supply and distribution of goods such as sugar is in Entry 27 in the state list and is also a subject of entry 33 in concurrent list which gives power to the parliament to make laws "expedient in public interest." Therefore, the court held that U.P. Sugar Factory Act of 1953 was valid as it confined to regulation and supply of sugarcane and not with controlling and licensing the sugar factories. In *West Bengal v. UOI*¹², the constitutionality of Coal Bearing Areas Act, 1957 was challenged. The state had a contention that land come under state list and the Supreme court held that the state rights is subject to union right and national interest. The states can impose tax on the goods but the discrimination of trade and commerce coming from the other states which curbs the freedom of trade, commerce and intercourse cannot be imposed. In *state of West Bengal v. Kesoram Industries*¹³ the coal, brick- field and minor minerals which were the subject of state list are also the subject of union power to regulate for national interest. The disputes as to the armed forces special powers act, 1958 was challenged in

⁸ SC 318: 1951.

⁹ 1994 5 SCC 54.

¹⁰ A.I.R. 1972 SC 1061: 1972

¹¹ A .I.R. 1956 SC 676

¹² AIR 1241 1963

¹³ 2004 10 SCC 201

Naga Peoples' Movement of Human Rights v. Union of India¹⁴The act had given special powers to armed forces in the north eastern states and the case involved about the federal issue of relationship between entry 2 A in the union list ((deployment of police or military in aid of civil order) and entry 1 of the state list (public order). On the federal part, the entry 2A in the union list that was added by the 42nd Amendment (1976) and made the police power of the state, earlier an exclusive state jurisdiction, subordinate to the union's power to deploy armed forces or central paramilitary forces in a state was changed without the approval of state government. The court clearly mentioned that if the legislation falls within the periphery of state legislature than thing which cannot be done directly cannot be done indirectly.

The most important question in federalism is the imposition of emergency power on the state under Article 356 of the constitution. In the State of Rajasthan v. Union of India¹⁵, the Court viewed the whole question as a "political thicket" left by the Constitution to determination by the union executive. The Court conceded that Article 74(2), relating to the powers of the president, prohibited courts from examining the advice of the council of ministers to the president. However, the Court reasoned that it did not preclude judicial scrutiny of the president's action under Article 356 on the basis of other available information, because it is a constitutional function of the president, which is subject to judicial review. A shift in approach was suggested by A.K. Roy v. Union of India¹⁶, however the Supreme Court there pointed out that after the repeal of Clause 5 of Article 356 by the 44th Constitutional Amendment, the constitutional theory under which the Rajasthan case was decided "cannot any longer hold good." As noted above, S.R. Bommai v. Union of India¹⁷ marked a paradigm shift in judicial interpretation of the power of the union to take over the administration of a state under Article 356. In Rameshwar Prasad v. Union of India¹⁸, the Court extended the reasoning in S.R. Bommai and ruled that if a state assembly is unconstitutionally dissolved, the judiciary can revive the dissolved assembly. In this case, the Court restrained itself in view of the fact that the Election Commission had already notified the consequent elections. The use of Article 356 been under a control due to factors like fear of judicial scrutiny, transformation of the party system, the advent of coalition and minority governments, and an opposition majority in the federal second chamber

Another issue is increasing controversy over the treaty-making power, which is an executive act performed by the government of India on behalf of Parliament. However, Article 253 of the Constitution requires enactment of a law by Parliament to give effect to international agreements. In Maganbhai Ishwarbhai v. Union of India, the Court reasoned, "The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deal with a subject within the competence of the

¹⁴ 1998), 2 SC 109

¹⁵ AIR 1977 SC 1361

¹⁶ 1982 A.I.R. 710 1982 SCR (2) 272.

¹⁷ 1994 3 SCC 1

¹⁸ 2006 2 SCC 1

State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association, or other body.¹⁹

IV. CONCLUSION

The court has gained a lot of right and acceptance in the eyes of government and civil society after the post-internal emergency period. The balance of government institution has also changed and shifted since 1980s and after 1990s, the functioning of the system of government and the organ of government is constantly under check by the judiciary and has also become an important organ and is largely driven by it, whereas during the Nehru and Indira Gandhi era, it was mostly under the control of executive and legislature. The judgement in those times were mostly favouring the centralist values and decisions but in the recent times the court has act as a guardian and also protect and shield the list and the power given to the states and always act and favour the state when the centre tries to take control over the state administration especially with respect to emergency provisions. When ever there is a disagreement between the executive and parliament on one side and the constitutional court on the other side with regard to the amending power the constitutional courts are always on the have a higher authority and wins. Granville Austin figuratively argues that in the “struggle for custody of the Constitution, the Supreme Court has won.” He says that “despite occasional self-inflicted wounds, the Court has been the bastion of the Constitution. Parliament enjoys the authority to amend the Constitution. The court has the authority to measure amendments against the basic structure doctrine.”²⁰Pratap Bhanu Mehta concedes the contingent rise of judicial sovereignty but adds that “there is a profound inner conflict at the heart of India’s constitutionalism: the question, who is the Constitution’s final arbiter, admits no easy answer. The Court has declared itself to be the ultimate judge, and has even assumed the power to override duly enacted constitutional amendments. In India, Parliament and Judiciary have been and are likely to remain competitors when it comes to interpreting the Constitution.”²¹

¹⁹ A.I.R. 1969, Supreme Court: 784.

²⁰ Granville Austin, “The Supreme Court and the Struggle for Custody of the Constitution,” in *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, ed. B.N. Kripal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan, and Raju Ramachandran (New Delhi: Oxford University Press, 2000), 13.

²¹ Pratap Bhanu Mehta, “India’s Unlikely Democracy: The Rise of Judicial Sovereignty,” *Journal of Democracy* 18, no. 2 (2007): 74–5.