Administrative Development: A Journal of HIPA, Shimla. Volume VII (2), 2020.

# TUSSLE BETWEEN JUDICIARY AND EXECUTIVE: THE HEGEMONY OF CENTER IN INDIAN FEDERALISM

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***Abstract***

*Federalism desires that the government should have three organs of government-executive, legislature and judiciary. The three organs of government are limited to its respective sphere of activity and not be able to encroach upon the independence of jurisdiction of another. The theory of separation of power belongs to the functional aspects. The whole idea is based on the maxim that power should be a check to power. Indian federalism have a written constitution in which powers and authorities of every organ are defined and delimited by the constitutional documents. In practice, the legislature [Parliament] and judiciary are controlled in an extra –legal way by the executive. The present paper shows that how the hegemony of the executive over the judiciary became the real cause of tussle among them. The present paper discussed that how a majority government turned into authoritarian regime and controlled both Parliament and judiciary. The present paper also discussed the areas in which the jurisdiction of judiciary encroached by the executive and how judiciary defends itself from the executive encroachment. The present paper was entirely based upon the secondary data. The secondary data relating to the study were collecting from various authentic books of renowned authors and websites.*

***Keywords:*** *Federalism, Organs, Power, Authority, Parliament, Executive, Judiciary, Encroachment, Government, Constitution.*

## Introduction

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The constitution of India divided the power and authorities among three organs of government –executive, legislature and judiciary. The constitution of India is the fundamental law of the land; its provision are enforceable by the court. The judiciary is the guardian of the fundamental Rights and interpreter of the constitution. The tussle between judiciary and executive began when the judiciary defended the fundamental Rights in the Golak Nath Case [1967] against the supremacy of legislature[Parliament] established by the executive under the leadership of Mrs. Indira Gandhi ,the Prime Minister of India. Mrs. Indira Gandhi in her next move had got the three arbitrary constitutional Amendment Acts in 1971. The judiciary in response established the 'Doctrine of Basic Structure' of the constitution through the Kesavanda Bharti case[1973]. Mrs. Indira Gandhi move next step forward and broke the convention of principle of seniority in appointment in higher judiciary and appointed her favored Justice A.N. Ray as Chief Justice of India by superseding his three senior colleagues in 1973.As the result the superseding three judges resigned against favoritism in judiciary.

Again in 1977, Mrs. Indira Gandhi superseded justice H.R. Khana and appointed Khana's junior justice M.H. Baig as the Chief Justice of India. The interference in appointment and transfer of judges in higher judiciary became a routine process in authoritarian regime of Mrs. Indira Gandhi. In the 1990s, the judiciary established the Collegium System through the Second Judge Case[1993] and further strengthen it through the Third Judge Case[1998] to shield judiciary from executive interference in matter of appointments and transfers of judges in higher judiciary. In 2014, the executive passed the National Judicial Appointment Act [NAJC],2014 in Parliament to replace the two decades old Collegium System but the Supreme Court ruled out NAJC,2014 and declared it unconstitutional. This paper is detail analysis of areas in which tussle between executive and judiciary exits in Indian federalism. This paper particularly focused on the role of dominant parties and authoritarian regimes to began and deepen the tussle between judiciary and executive in India.

**Major reasons for tussle between Executive and Judiciary**

The power of the Indian Supreme Court are comparable to those of its United States counterpart, including broad original and appellate jurisdiction and the right to pass on the constitutionality of laws passed by the Parliament. In the exercise of its power, however, the court has been at the center of major two controversies concerning the constitutional and political order in India .Two such controversies have been especially persistent and have had broad ramifications .One concerns the efforts by the court to give priority to the Fundamental Rights provisions in the constitution in case where they have come into conflict with the Directive Principles ,which especially the broad ideological and policy goals of the Indian state and to which the executive and legislature have often given priority. The second concerns the court's power of judicial review of legislation passed by Parliament, which have on numerous occasions led to stalemates that point to a constitutional contradiction between the principle of Parliamentary sovereignty and that of judicial review.

**Scope of judicial review in India**

The power of judiciary to review and determined validity of a law or any order may be described as the power of judicial review. As the guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country .The Supreme Court is not only the guardian of the constitution, but it is also interpreter of the fundamental laws. The Indian Constitution guarantees trial "according to the procedure established by law'" and has thus relieved the Supreme Court of a tremendous amount of work which the prototype in the United States has to do in interpreting the due process of law. Judicial review in India has two prime functions. Firstly, legitimizing government action and secondly, to protect the constitution against any undue encroachment by the government. There are several specific provisions in the Indian constitution guaranteeing judicial review of legislation such as Article 13, 32,131-136,143, 145,226,246,251, 254 and 372.

**The period of harmony between Executive and Judiciary: 1950-1965**

During the period 1950-1965, the question of the amendability of fundamental Rights came before the Supreme Court in two different cases, namely, Shankri Parsad Vs Union of India [1950] and Sajjan Singh Vs State of Rajasthan [1965]. The position of Supreme Court remained unchallenging to the powers of Parliament to amend the constitution during the period 1950-1965. Due to this the executive and judiciary did not face any conflict regarding Constitutional Amendment Acts.

During the period 1950-1965, the Law was as follows:

i) Constitution Amendment Acts are not ordinary laws and are passed by Parliament in exercise of its constituent powers as contradistinct from ordinary legislative powers.
ii) There is no limitation placed upon the amending power ,that is to say , there is no provision of the constitution which cannot be amended .The terms of article 368 are perfectly general and empower Parliament to amend the constitution without any exception whatever.
iii) Fundamental Rights guaranteed under the constitution (Part III) are subject to Parliament's power to amend the constitution.

**The beginning of tussle between Executive and Judiciary**

The tussle between executive and legislature began during the period of Mrs. Indira Gandhi as Prime Minister of India .In 1967, the opposition parties persuaded the Chief Justice of the Supreme Court, K.Subba Rao, to be their Presidential candidate against Indira's candidate Dr. Zakir Hussian .He immediately agreed and resigned. A few days before his resignation he had presided over a bench that had delivered a judgment over famous Golak Nath Case (1967) that had radically circumscribed Parliament's power to amend the constitution .According to it Parliament could go on amending all other parts of the constitution but no longer the Chapter guaranteeing Fundamental Rights (Part III).To do that, the judgment said, a

new Constitutional Assembly would have to be convened. This was unacceptable to Mrs. Indira Gandhi, and she did not hesitate to say so .She argued that the will of the people, expressed through the elected Parliament, must prevail, as it had in the preceding seventeen years. Here were the seeds of conflict between the executive and the judiciary.

**Golak Nath Vs State of Punjab (1967)**

The Supreme Court by a 6:5 majority reversed its earlier decision and held that the fundamental Rights enshrined in the constitution were transcendental and immutable, that article 368 of the Constitution laid down only the procedure for amendment and did not give to Parliament any substantive power distinct or separate from its ordinary legislative power ,that a Constitution Amendment Act was also law within the meaning of article 13 and such Parliament could not take away or abridge the fundamental rights even through a Constitution Amendment Act passed under article 368.

Until 1967,the Supreme Court accepted the view that an Act amending the constitution was not 'law' in definition of article 13(2).But, in the Golak Nath Case(1967), the Supreme Court ruled by a majority judgement that an Act amending the constitution was also 'law' under this definition and therefore subject to judicial review. Article 13 says that any law which contravenes the Fundamental Rights shall be void.

The Supreme Court was attacked when it pronounced its famous judgement in Golak Nath Case (1967).The Government responded through the Twenty fourth Amendment Act, 1971, to remove all doubts regarding the power of Parliament to amend the constitution including the Fundamental Rights.

**Birth of Doctrine of Basic Structure of the Constitution**

Kesavananda Bharti & others Vs Union of India (1973) is a land mark judgement of the Supreme Court of India that outlined the 'Doctrine of the

Basic Structure' of the constitution . The Kesavananda Bharti case (1973) was the culmination of a serious conflict between judiciary and the government, then headed by Mrs. Indira Gandhi. In 1971, Mrs. Indira Gandhi had got the constitution ( Twenty fourth Amendment ) Act ,1971, to restore to Parliament the power to amend fundamental rights, the constitution (Twenty fifth Amendment) Act ,1971, to overcome the legal problems she had faced while nationalizing the Banks and the constitution (Twenty sixth Amendment) Act,1971, to abolish purses of Princes. These arbitrary constitution amendments were challenged by Kesavananda Bharti, the head of a math in Kerala, and several coal, sugar & running companies. On the other side, was not only the Union of India but almost all the states which had also intervened.

This case was heard by the largest ever constitutional Bench of 13 judges headed by the Chief Justice S.M.Sikiri. The judgement by seven to six majority was that Parliament could amend all parts of the constitution but subject to the condition that its 'basic structure' was not destroyed.

Justice S.M. Sikiri had tried to tabulate the doctrine of basic structure of the constitution as follows:

i. Supremacy of the Constitution.
ii. Republican and democratic form of government.
iii. Secular character of the Constitution.
iv. Separation of power.
v. Federal character of the Constitution.

The Supreme Court delivered this land mark judgement just a day before Sikiri's retirement. The Supreme Court clearly mentioned that basic structure of the constitution could not be destroyed. Mrs. Indira Gandhi got annoyed and decided to bypass the three senior judges and appointed A.N. Ray as the next Chief Justice of India. Justice A.N. Ray was the most senior among the six judges that had decided in the government's favour and the three superseded judges voted against the government. This was

the first time that the convention of principle of seniority in appointment of judges in higher judiciary was ignored. The three superseded judges resigned against favoritism and ignoring merit.

**Suspension of authority of Judiciary to adjudicate election disputes**

In 1971, Raj Narian, the Grand Alliance's candidate in Rae Bareli, filled an election petition against Mrs. Indira Gandhi in Allahabad High Court. Justice Jagmohan Lal Sinha, holding her "guilty" of "corrupt practice", declared her 1971 election invalid and debarred her from office for six years on 12 June 1975. Mrs. Indira Gandhi appealed in the Supreme Court for a "complete and absolute stay" of Justice Sinha's judgement. Justice V.R. Krishana Iyer delivered his eagerly awaited order on 24 June 1975. He rejected Indira's plea and gave her only a "conditional stay" under which she could remain in office of Prime Minister and even speak in Parliament but could not vote. This was clearly embarrassing for her and so at the midnight hour of 25 June 1975, she declared Emergency that suspended Indian democracy and made the fundamental rights inoperative for the duration .For the future, again retroactively, she took away from the Supreme Court the authority to adjudicate election disputes relating to the President, the Vice-President, the Prime Minister and the Speaker of the Lok Sabha and transferred it to "a body to be appointed by Parliament".

**Suspension and revival of judicial review**

Following the decision of Kesavananda Bharti Case(1973), clauses (4) and (5) were inserted in article 368 by the constitution (Forty second Amendment ) Act,1976 during the Emergency to dilute the limitation of "basic feature" to the amending power of Parliament. These clauses says that (a) there are no limitations, expressed or implied, upon the amending power of Parliament under article 368(1), which is a 'constitutional power" , and that (b) a constitutional Amendment Act would not be subject to judicial review on any ground. Therefore, it suspends the scope of judicial review in constitutional Amendment Acts.

*Minerva Mills Vs Union of India (1980)*

In Minerva Mills Case (1980), the Supreme Court held clause (4) and (5) inserted in article 368 by the constitution (42nd Amendment ) Act,1976, as void, on the ground that this amendment sought to totally exclude judicial review, which was a 'basic feature' of the constitution. Thus, Minerva Mills Case(1980) revive the scope of judicial review. This case is also known as revival of judicial review.

**Evolution of Collegium System in Indian judiciary**

The collegium system of appointment of judges is popularly referred as judges selecting judges. The collegium system is the Supreme Court's invention. There is no mention of collegium system either in the original constitution of India or successive amendments. The judges of the Supreme Court are appointed by the President under Article 124(2) of the Indian constitution. From 1950 to 1973, the practice has been to appoint the senior most judge of the Supreme Court as Chief Justice of India. But the appointment and transfer of judges in the Supreme Court and High Courts became a matter of controversy between judiciary and executive since 1973.

Mrs. Indira Gandhi pioneered the operation to take over the judiciary. She superseded those who opposed her. The controversy began when she appointed A.N.Ray as the Chief Justice of India and superseded three senior judges in 1973. Justice A.N. Ray was the most senior among the six judges that had decided in the government's favour in Kesavananda Bharti Case (1973). The superseded three judges resigned against favouritism in judiciary. The Supreme Court Bar Association also condemned the move and said in a resolution that the government's action is purely political and has no relation to merit. There was further onslaught on judicial independence when Justice H.R. Khana was superseded in early 1977 for his courageous dissent in habeas Corpus Case because Center government was not satisfied with the Khana's idea of right to life and

liberty .After some judges were superseded in the appointment of the Chief Justice of India in the 1970s and attempt was made subsequently to effect a mass transfer of High Court judges across the country, there was perception that independence of judiciary was under threat. This resulted in a series of cases over the years.

*The First Judge Case (1981)*

In the First Judge Case (1981) also known as S.P. Gupta Vs Union of India (1981), the Supreme Court ruled that the "consultation" with the Chief Justice of India in the matter of appointments must be full and effective .However, it rejected the idea that the CJI's opinion should have primacy. The Apex Court declared that the "primacy" of the CJI's recommendation on judicial appointment and transfer can be refused for "cogent reasons". The Supreme Court held 4:3 majority that word "consultation" does not mean "concurrence" in the Article 124 and Article 217.

*The Second Judge Case (1993)*

In the Second Judge Case (1993) also known as The Supreme Court Advocates on Record Association Vs Union of India (1993), the Supreme Court introduced the Collegium System holding that "consultation" really meant "concurrence". The Supreme Court reversed its earlier ruling and change the meaning of the word consultation to concurrence. It added that it was not the CJI's individual opinion but an institutional opinion. Hence it ruled that the advice tendered by the Chief Justice of India is binding on the President in matters of appointment of the judges. It says that CJI only need to senior -most judge. The majority verdict gave back CJI's power over judicial appointments and transfers. "The role of the CJI is primal in nature because this being a topic within the judicial family, the executive can't have an equal say in the matter", the verdict reasoned. The President is reduced to only on approver. The Second Judge Case (1993) established the Collegium System a three members judicial body comprised of Chief

Justice of India and two of his colleagues. The functions of Collegium concerns with appointments and transfers in the higher judiciary.

*The Third Judge Case (1998*

The Third Judge Case (1998) is not a case but an opinion delivered by the Supreme Court of India responding to a question of law referring the Collegium System, raised by then President of India K.R. Narayanan, in July 1998 under his constitutional powers .The Third Judge Case (1998) expanded the Collegium to a five member body, comprising the Chief Justice of India and four of his senior-most colleagues. The Court opinion that the consultation process to be adopted by the Chief Justice of India does not constitute the consultation process. He should consult a collegium of four senior most judges of the Supreme Court and even if two judges gave an adverse opinion, he should not send the recommendation to the government. The Court held that the recommendation made by the Chief Justice of India without complying with the norms and requirements of the consultation process are not binding on the government.

**National Judicial Appointment Commission (NJAC)**

In 2014, the executive under the leadership of Prime Minister Narendera Modi proposed National Judicial Appointment Commission (NAJC) which would have been responsible for the appointment and transfer of judges to the higher judiciary in India. The Commission was established by amending the constitution of India through the ninety-ninth constitution amendment with the constitution (Ninety-ninth Amendment) Act, 2014 passed by the Lok Sabha on 13 August 2014 and Rajya Sabha on 14 August 2014. The NAJC would replace two decades old Collegium System for the appointment of judges as invoked by the Supreme Court. Along with the constitution Amendment Act, the National Judicial Appointment Commission Act, 2014 was also passed by the Parliament and subsequently assented by the President of India on 31 December ,2014. The NJAC Act and the Constitutional Amendment Act came into force from

13 April 2015.The NJAC comprised of six members – the Chief Justice of India, the two most senior judges of the Supreme Court, the Law Minister, and two 'eminent persons '. The validity of these constitutional amendment act and the NJAC Act were challenged by certain lawyers, lawyers association and group before the Supreme Court of India through public interest litigation writ petitions. In a collective order , on16 October 2015 the Supreme Court by a majority of 4:1 Struck down the NJAC Act,2014 meant to replace the two decades old Collegium System. The Supreme Court withheld the NJAC as unconstitutional and void.

**Collegium System vs National Judicial Appointment Commission**

The judiciary withheld the NJAC as unconstitutional and void. The Supreme Court objects the inclusion of politician in the NJAC particularly the two eminent members from the society. These eminent persons are to be nominated for a three-years term by a Selection Committee consisting of the Chief Justice, the Prime Minister and the leader of the opposition in the Lok Sabha, and are not eligible for re-nomination. The Court blamed if politician are involved, what about judicial independence? Those against the NJAC argue that it will give the executive undue influence over the selection of judges.

The National Lawyers Campaign for Judicial Transparency and Reforms filled the review petition for re-consideration of the verdict delivered by five-judge constitutional bench. The review plea had claimed that the 2015 judgement of the top court was "unconstitutional and void". However , a five-judge bench headed by Chief Justice Ranjan Gogoi rejected the review petition on the ground of delay in filling review petition as well as on merit .The Supreme Court viewed that appointments and transfers of judges form "the roots of the administrative justice" and interference in that" does not urge well" for the institution.

The Central government has criticized Collegium System saying it has created an imperium in imperio (empire within an empire). On appointment

of judges through Collegium System, Law Minister Ravi Shankar Prasad said, “As Law Minister, I will not be a post office simpliciter. The Law Minister and the Law Ministry has a role as a stakeholder, obviously giving due regard and respect to the Collegium System. But as Law Minister, neither I nor my department will remain a post office. We have a stake and we shall continue to pursue that stake in consultation with the Supreme Court and High Courts to expedite appointments.” The Law Minister and the Law Ministry would no longer just receive and implement the Collegium’s recommendation.

**Conclusion**

Federalism believes in division of powers and authorities among three organs of government-executive, legislature and judicial. In Indian federalism every organ of government drives its powers and authorities from the written constitution .Every organ is independent in its own sphere but there is possibility of encroachment of powers and authorities of one over the other. The parliament is the source of the constitution and all constitutional Amendment Acts. The executive under the majority rule controls the Parliament and made arbitrary constitutional Amendment Acts to establish its dominance. The hegemony of executive turned into a tussle between executive and judiciary during the authoritarian regime of Mrs. Indira Gandhi in the 1960s and 1970s. The judiciary established and developed the doctrine basic structure of the constitution to defend the original constitution from the arbitrary constitutional amendments acts and to curtail the dominance of executive over the Parliament and judiciary. The executive not just made arbitrary constitutional amendments but also interfered in the matters of appointment and transfers of judges in higher judiciary. The present paper discussed that how the authoritarian regime made arbitrary constitutional Amendment Acts in its favour and interest. The present paper also discussed how judiciary counter the hegemony of executive through various landmarks judgements to protect the constitution as well as judicial integrity.

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