# LEGISLATUE, EXECUTIVE & JUDICIARY V. TIME COUNT VIS-À-VIS INDIAN CONSTITUTION

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The constitution of India is the supreme law of the land, which is fundamental in the governance of India. It should be able to adapt itself to the changing needs of the society. Sometimes under the impact of new powerful social and economic forces, the pattern of government will require major changes. Keeping this factor in mind the Draftsman of the Indian Constitution incorporated Article 368 in the Constitution which dealt with the procedure of amendment. Due to Article 368 the Indian Constitution can neither be called rigid nor flexible but in fact it is partly rigid and partly flexible. The three wings of government competed among themselves to defeat the purpose of the Constitution by committing mockeries in every meadow. Yet, on close examination it will be seen that there were compelling circumstances which led to the Constitutional amendments. While some amendments were a natural product of the eventual evolution of the new political system established under Constitution in 1950, there were others necessitated by practical difficulties.

The first Amendment took place in June, 1950. The question whether Fundamental Rights can be amended under Article 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*[1]. It challenged the validity of first Amendment to the Constitution.

Thereafter, the Supreme Court in *Golaknath v. State of Punjab*[2], applied the doctrine of Prospective Overruling and held that this decision will have only prospective operation and, therefore, the first, fourth and seventeen Amendment will continue to be valid.

Here comes the question of Constitutionality of prospective overruling. The Court overrules a law because it is void, and a void law cannot do anything as it never exists as a law of the Nation. Who will answer the time count spectrum involves in this aspect; the Legislature,

[1] A.I.R. 1951 S.C. 455 (India).
[2] 1967 A.I.R. 1643, 1967 S.C.R. (2) 762 (India).


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Executive or Judiciary? Who will be held liable for the unfortunate things happened upon the basis of such void law? At this juncture, we could depend upon the Constitution for finding an answer. The bills passed by the Legislature should be presented to the President under Art. 111 and to the Governor under Art.200 for assent. Then only it becomes a law. This is an intrinsic check of the constitutionality of the newly passed bill. The president could either give his assent or withhold his assent, as the case may be. If necessary the President could seek the advice of the Attorney General for cross checking its Constitutionality. The Governor has the option to reserve the bill for consideration of the President also. Even if the council of ministers is advising the President to assent the bill, it is not binding upon the President as he has taken oath to preserve, protect and defend the Constitution of India. Then how can he assent an unconstitutional bill which would violate his oath. If deems fit, the President could even consult the Supreme Court for finding its constitutionality. The prevailing provision is that the advice given by the Supreme Court is not binding on the President. How can it be allowed? This is an area of research where one should conduct an in depth study. Thus the Judiciary should be entrusted with the duty to pre-view all bills passed by the legislature before making it a law. Then the country would not witness any unconstitutional laws establishing over the people. It is always better to have a check regarding the Constitutionality of a policy before its implementation, because it would answer the time count spectrum enshrined in our Constitution. In overruling matters, the Courts should have the courage that the acts have been done on reliance upon a particular law in force at that time. Nevertheless, correcting the errors of law as a result of the Amendment has now been done. This is what the courts should do, when they are overruling a law, instead of prospective overruling[3].

In order to remove difficulties created by *Golaknath's* decision Parliament enacted the twenty fourth Amendment. The validity of the twenty fourth Amendment was challenged in the case of *Keshavananda Bharati v. State of Kerala*[4]. It challenged the validity of the Kerala Land Reforms Act, 1963. The court held that under Art. 368. Parliament is not empowered to amend the basic structure or framework of the Constitution.

Thereafter, the Constitution (thirty-ninth Amendment) Act, 1975, was passed during the regime of Mrs. Indira Gandhi as the then Prime Minister of India. It was a ridiculous act done by the

[3] H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 1287 (N M Tripathy, Bombay, 4th edn. 1991).
[4] (1973) 4 S.C.C. 225 (India).


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Indian Legislature. Thereafter in *Indira Nehru Gandhi v. Raj Narain*[5], the Supreme Court struck down clauses (4) and (5) of Article 329A, as unconstitutional on the ground that they were outright negation of equality conferred by Article 14, a right which is basic postulate of our Constitution. Thereafter, the Constitution (Forty- Second Amendment) Act, 1976, was passed which added the two new clauses and Supreme Court in *Minerva Mills ltd. v. Union of India*[6], struck down the same. This decision ended the long controversy between the Courts and the Executive.

The legislature at times forgets that the Constitution is the supreme law of the land. At the same time, the Judiciary's Basic Structure doctrine is a ghost roaming around the corridors of Supreme Court. They ought to have appreciated that a legal challenge is based on the fact that it is by legal challenge that develops, that new dimensions in law itself are opened up, and new applications made of ancient principles.

Another disdain was the Constitution (Fifty- Second Amendment) Act, 1985, dealing with the disqualification of membership on ground of defection. In *Kanhiya Lal Omer v. R.K. Trivedi*[7], Supreme Court held that Schedule X acknowledges the existence of political parties and set out the circumstances when a member of Parliament or the State Legislature would be deemed to have defected from his Political Party. In this context it is worth mentioning that the vast majority of the Constitution altogether ignore the existence of parties, let alone their *participation in the formation of the will of the State and the process of political power in* general[8]. Political Parties operate in a complete constitutional vacuum. Obviously, in Indian Constitution also, the political parties are not at all recognized. Then from where did the Legislature derive the power to make such a policy which has been negated and outlawed by the Constitution. Why the Judiciary doesn't uses its inter-organ control over the Legislature to strike down an unconstitutional policy made by them. This is a daunting question which we have to answer in the present milieu.

Further, paragraph 7 of the Tenth Schedule which ousted the judicial review has been challenged in the case of *Kihota Hollohan v. Zachillhu*[9]. In this case, the Supreme Court

[5] (1975) A.I.R. 865, 1975 S.C.R. (3) 333 (India).
[6] A.I.R. 1980 S.C. 1789 (India).
[7] A.I.R. 1986 S.C. 111 (India).
[8] H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 1287 (N M Tripathy, Bombay, 4th edn. 1991).
[9] A.I.R. 1993 S.C. 412 (India).


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applying Doctrine of Severability held it severable from the rest of the schedule. How can the court find out a separate portion to be void from 'valid law'? Further a thorough analysis of paragraph 2 sub paragraph (2) would reveal that there is no intelligible differentia and the Act is biased towards independent member and therefore it is violative of Article 14 of the Constitution.

Over and above all, this particular amendment has been brought into effect by totally neglecting the time count. As per Article 368 of the Constitution, in addition to the special majority, ratification by not less than half of the State Legislature is necessary. But the Union Government presented the bill for assent of the President without obtaining the required ratification. In such a situation what would be the result if half of the State is stand against the particular Constitutional Amendment. Can the Union Government undo all the past action based on the same? Such disadvantageous and arbitrary moves would defeat the time count spectrum enshrined in the Constitution. As per the above discussion, we could very well say that the very legitimacy of the liberal Parliamentary structure and processes adopted by the Constitution has substantially been weakened and the claim of the legislators that they represent the people would no more be relevant.

It is highly pertinent that, due to the strict separation of functions backed up with adequate powers envisaged in the Constitution, it is not constitutionally permissible for any member of an elected Legislation body to hold or exercise any Executive power. The reason for the said proposition is that such a person would not be holding an office by reason of his appointment to that post by the Governor nor will he be holding the said office during the pleasure of the Governor. A custom or usage contrary to law is invalid. No custom or usage can justify or validate any act inconsistent with the express provisions of the text of the Constitution. By reason of Article 154, the Constitution has intended a clear separation of the Executive power holders from any connection with any other branch of the government. This arrangement is to work the mandate of Article 256 which provides a strong guarantee for the Rule of Law through *suo moto* affirmative action by the Executive of the State and of the Union. The Constitution would therefore not permit any executive power being available with any functionary of the State who will not be holding office during the pleasure of the Governor as contemplated by Article 310 (1) of the Constitution. Hence the present system of appointing the elected members of the Legislative Assembly/ Parliament as ministers stands unconstitutional, since they stand constitutionally disqualified from holding or exercising any executive power. Over and above


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all, the executive power vests with the President/ Governor as the case may be. The council of ministers is to aid and advice in the discharge of function only, not in the exercise of powers. The Council cannot bind the President/ Governor in the exercise of powers; more especially these powers are discretionary in nature. The exercise of discretion at the dictate of another is a recognized abuse of discretion.

Timeliness of addressing problem is vital as timing is important in successful policy making. If a problem is addressed too late, it may be more difficult to solve. The courts do not control when they will confront policy issues as they do not control their own agendas. Let's analyze a situation for effective understanding. Suppose a particular law is challenged on the ground that it violates Article 14, in the Supreme Court under Article 32 of the Constitution of India. The first step is it will issue notice to the State. Even if a stay application accompanies the petition, the Court may not grant stay at the first instance. It is a discretionary power vested in it. Now the question arises whether this approach is in conformity with the provisions of Article 14. If we analyze again the 'time count' enshrined in Article 14 then one will definitely take the view that there is absolutely no discretion that allows the Court to procrastinate. Now here comes the question of precision of the reasoning done by the judges and whether it should be inductive or deductive[10]. The answer lies here that the judicial reasoning should always be approximating the 'is' to the 'ought.' In inductive reasoning the 'ought' is approximated to the 'is' and in deductive reasoning the 'is' is approximated to the 'ought.'[11] Hence it should always be deductive.

Now a thorough analysis of the present mode of functioning of Indian Judiciary would give a lot of insights into the panic state of affairs. It means whether all the functions done by a judge is judicial functions? The judicial function is the process of deductive reasoning leading to the delivery of judgment after analyzing the facts and circumstances of individual cases. All other functions are administrative in nature. Now coming back to the time barrier aspect, there are umpteen numbers of typical errors committed by our apex court in the matter of policy control function.

[10] Julius Stone, *Social Dimensions of Law And Justice* (Universal Law Publishing Co. Pvt. Ltd. Delhi, Chapter 13. p.597).
[11] Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press, 2nd edn., pp.18, 1965).


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*Mohini Jain v. State of Karnataka*[12], as popularly known as the 'capitation fee case' is a typical error of the apex court in policy control function. It took five years for admitting the case. The Supreme Court disregarded the time count in the power spectrum which should answer to Article 14 of the Constitution.

In *Balaji v. State of Mysore*[13] the Supreme Court lost its direction. The judgment delivered is only a dispute settling mode and not policy control function.

In *A.R. Antulay v. R.S. Nayak*[14], the court laid down guidelines for speedy trial of accused in criminal case but it declined to fix any specified time-schedule for conclusion of criminal proceedings which is again a defeat of the time count.

In *K.P.S. Gill v. State (Admn. U.T. Chandigarh)*[15], the court totally disregarded the compulsions of Article 14. It took 14 years to reach the conviction, which totally defeated the time count in the spectrum. The poignant aspect is that even after the elapse of thirteen years, none of the six counts in the spectrum has been answered.

In *Tilokchand v. H.B. Munshi*[16], the Supreme Court observed that 'there appears to be some confusion about the scope of Article 32.' In *P.S. Sadasiwaswami* v. *State of Tamil Nadu*[17], the Supreme Court opined that 'inordinate delay in invoking the jurisdiction of the Court may be good ground for refusing to grant relief.' These statements by the Apex Court clearly show the lack of scrupulous reading of the Pat III of the Constitution in consonance with Article 32 and 226. This article gives the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. The protection given by Article 14 gives neither any discretion to the courts nor any time limit, in matter of violation of fundamental rights.

## CONCLUSION/ SUGGESTION

[12] 1992 A.I.R. 18558 (India).
[13] A.I.R. 1963 S.C. 643 (India).
[14] A.I.R. 1988 S.C. 1531 (India).
[15] Appeal (crl.) 1032 of 1998 (India).
[16] 1970 A.I.R. 898 (India).
[17] 1974 A.I.R. 2271 (India).


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The present adversarial system should be replaced with inquisitorial system. Judicial process is essentially deductive reasoning and it is to tell authoritatively what the law is[18]. The judge shall take judicial notice of all law. But the adversarial system relies on the skill of the different advocates representing their party's position and not on judge, trying to ascertain the truth of the case. However, in inquisitorial system, the judge's task is to investigate the case before him, by approximating the "is" to the "ought", after the parties present the case.By virtue of Article 14 backed up with Article 256, there should be an affirmative action by the policy implementing organ. It should protect the citizens with its affirmative action, just like the ancient Indian system, where the spies of the king would gather information for the king without any invasive action. The present Indian legal system is continuing the colonial legacy where the ends justify the means, but since, we are now living under the umbrella of controlling Constitution, the means should justify the end. Hence there should be a routine supervision system by the State, which would save considerable amount of time and money.

The fundamental rights follow a common pattern. The right is first enunciated in absolute terms and the power is conferred, either expressly or by implication on the Legislature to restrict the exercise of the right for specific purpose such as public interest. When an enactment is challenged, what is really at issue is not whether the individual is entitled to the benefit of the particular right but whether the restriction is compatible with the constitutional provisions. By applying the presumption of Constitutionality to such cases, what the courts do is to require the individual to show legislative incompetence instead of, what the constitution requires, to call upon the Legislature to justify the restriction.There is then the question of burden of proof. By casting the onus on the petitioner that the restriction is unreasonable, the courts act contrary to the general rule of the Indian law of evidence that the burden of proof in any case is on him who would fail if no evidence is given on either side. As the constitution requires a legislative restriction to conform to a particular purpose, it is clear that it would be the legislature, who would fail if no explanation is given as to the reason for the restriction. The onus should therefore, be on the Legislature to show the rationality of the law. For this reason the concern remains now of questioning the constitutionality of the presumption of 'Legislative Wisdom' principle postulated by the Supreme Court[19]. Hence, whenever a particular law is challenged

[18] Benjamin N. Cardozo, *The Nature of Judicial Process* (Yale University Press, pp. 13, 1921).

[19] H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 1287 (N M Tripathy, Bombay, 4th edn. 1991).


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in the court, then the government may be given two days time to substantiate its action. As per the time count principle enshrined in Art.14, the court has no discretion to wait. It has to arrest the impugned state action immediately. Non action of the state itself violates equal protection of laws.

It is very sad indeed that the long delays in the disposal of cases and the very low rates of conviction in criminal cases and complete defeat of the Part III provisions caused by such delays have started shaking the faith of the common people in the judicial system one could gain encouragement from the system followed by the French administrative court in setting the time count for disposing the case.

On a simple scrutiny we could find that most of the judgments are mere massive assortments or transcripts which are disseminating the English proficiency of judges[20]. The funniest thing is that, the lion share of these bulky judgments only carries the texts and paragraph quoted from the past judgments. Ultimately, it results in landing nowhere, delivering nothing, achieving zilch instead of justice. The deprived person who fought the case for years by paying hefty amount to the lawyers, eventually, turns out to be a victim of the ignorance of the lordships who knows everything other than law and justice delivery system.

Access to justice should no more be a gimmick of procedures. In other words, according to our basic constitutional principles, the procedure cannot defeat the substance. The tendency to adhere to the procedural requirement, ignoring the spirit of law.

[20] Benjamin N. Cardozo, *The Nature of Judicial Process* (Yale University Press, pp. 13, 1921).


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