Parliamentary Supermacy and Judicial Review: Indian Perspective

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The Judiciary, Legislature and Executive are the three pillars on which the effective functioning of the Government rests. A balance as opposed to conflicts is very necessary to achieve the ultimate public welfare and smooth functioning of the constitutional machinery. India, on the contrary, bears the supremacy of the Constitution where the powers of the Parliament are circumscribed within the four walls set by the Constitution and yet provides for striking a balance between the various pillars without any encroachment on each other's area and providing effective governance.

Judicial review encompasses the power of judiciary to review actions of legislative and judiciary thus enshrining the principle of Rule of Law and maintaining separation of power principle at the grassroots level.

Thus, the main frame within which the judiciary limits are circumscribed consist of judicial review of administrative and legislative actions and scrutinizing several constitutional amendments in the light of constitutional provisions thereby protecting the sanctity of the Constitution and protecting the fundamental rights of the citizens.

Judicial review is a strong tool to keep a check on public bodies and rendering their accountability if their decisions or policies go outside the powers that have been specified in the Constitution. It maintains effective checks and balances by controlling unriddled, arbitrary or unjust acts taken on behalf of the Executive and the Legislature.

The concept of judicial review traces its roots in the US landmark case Marbury v Madison (1803) whereby the

concept gained its full-fledged acknowledgement. Article III of US constitution provides that “Judicial power of US include original, appellate jurisdiction and matters arising under law and equity jurisdiction incorporates judicial powers of the court. Article VI provides “Constitution of US is the supreme law of the land”.

In UK, there is no written Constitution, so the concept of Judicial review could not get into limelight and was constrained only to secondary legislation, and not Primary Legislation except giving weightage to certain Human Rights or respecting the individuality of the person.

The Canadian Judicial review came into existence through Canadian federal Constitution where the imperial Parliament enacted the British North America Act. Then the Canadian Charter of rights and freedoms in 1982 encompassed several issues pertaining to academics, politicians and media.

India resorted to Parliamentary form of government as opposed to Presidential form of government whereby each head of the government must render its accountability. Being under the clutches of British Government in the initial years, judiciary adopted a pro-legislative approach in its various decisions but later between 1970-1975, more than 100 laws were made by the state which were held unconstitutional by the Parliament.

In the Keshvananda Bharati Case, the Judicial review was ultimately held to be the basic structure of the Indian Constitution. Same view was reiterated in S.P. Sampath Kumar v Union of India. Justice PN Bhagwati, relying on Minerva Mills Ltd (1980) 3 SCC 625 declared that it was well settled that Judicial review forms the basic structure of our Indian Constitution.

The Kihoto Hollohanv Zachillur 1992Supp(2) SCC 651, 715, para 120 held invalid para 7 of 10th schedule regarding non-

review of the decision of speaker/ Chairman on the question of disqualification of judicial review of MLA and MP's.

In L.Chandra Kumar v UOI (1997) 3 SCC 261, the Supreme Court held that power of judicial review under Article 32 and 226 is an integral and essential feature of the basic structure of our Constitution.

Judicial review thus formed a specific and special tool in the hands of the judges whereby unlawful actions of the legislative and executive could be quashed.

Rule of law has been very well explained by Lord Hoffman- "There is however another relevant principle that must exist in a democratic society. That is rule of law…..The principles of judicial review give effect to the rule of law. They ensure that the administrative decisions should be taken rationally, in accordance with a fair procedure and within powers conferred by the parliament.".

In USA, Justice Marshall declared-"the legislature has no authority to make laws repugnant to Constitution and in the case of constitutional violation, the court has absolute and inherent rights to invent the system of judicial review which was already in process of evolution.

Again, in Mc Culloch v Maryland5, Justice Marshall expanded the powers of Federal government by Doctrine of Implied powers and declared the statute of Maryland as unconstitutional.

The extent of judicial review occupies a vital place deeply rooted in the Indian Constitution and is enshrined in Articles 13, 32, 131-136, 142, 143, 226 and 246.

The US constitution does not expressly mention judicial review but in 1787, powers were given to the judges to render any ultravires provisions to constitution unconstitutional; it was acted in case of Hilton v Virginia (1796) and later it was exercised in Marburry v Madison (1803).

Art VI of section 2 “This Constitution and the law of US which shall be made in pursuance thereof and all treaties or which shall be made under the authority of US shall be supreme law of land and judges in every state shall be bound thereby, anything in the Constitution or law of any state to the contrary notwithstanding”.

The Vth Amendment further strengthened the judicial review under the umbrella of due process of law that means life, liberty or property cannot be taken or deprived without due process of law and cannot be subjected to unfair, arbitrary means of legislature, executive and judiciary.

In Canada, the Judicial review provides that a court has the power to set aside a decision for an error of law, absence of evidence and unauthorized exercise of power.

Sovereignty encompasses a capacity enjoyed in certain area. It includes political autonomy though the sovereign state actions are under public scrutiny.

The sovereignty explained in terms of Parliament is called as Parliamentary Sovereignty. There can be two-fold approach to this supremacy – one may provide absolute supremacy keeping the Parliamentary view or decision to the final say in matters of removing dark shadows arising out of difficulty in constitutional interpretation, and another view keeping or upholding the parliamentary sovereignty in one area while in other areas the role of parliament may be restricted or limited.

Parliamentary sovereignty has been very well interpreted by AV Dicey-

“The Principle of Parliamentary Sovereignty means neither more or less than this: namely that Parliament thus defined has under the English Constitution, the right to make or unmake any law whatever and further no person or body is recognized by the law of England having a right to override or set aside the legislation of Parliament.”

Thus, Dicey's view provides the supreme power to the Parliament enacting law on any subject matter and not bound by any predecessor or authority. The role of judges is only confined to interpretation of statute will and cannot reapply their precedents or earlier statutes. Thus, Dicey has rightly said- "True is what the Parliament doth no authority on earth can undo".

Thus, Dicey's definition disregarded distinctive features between fundamental or ordinary laws. It also portrays that Parliament is supreme and no law made by the Parliament can be declared void because it is unconstitutional, and the Parliament does not have the power to bind itself or its successor and it does not provide for any restrictions on Parliamentary powers.

The Indian Parliament is not supreme as the British Parliament as Indian Parliament works within the boundaries or peripherals set by the Constitution and there is American policy of judicial review in India, though it is not as wide as the American Constitution which follows due process of law as opposed to procedure established by the law as per Article 21 of the Constitution.

In UK, Parliament is given immense power to amend, repeal or modify the Constitution but in India there is difference between statutory law and constitutional law and special provisions are incorporated in the Constitution to make amendments as per Article 368. Thus, the power of the Indian Parliament is not unfettered as the British Power because it is circumscribed within the four walls of constitution.

Article 13 declares that the states must not make any laws inconsistent with part III of the constitution violating Fundamental Rights or that take away or abridge Fundamental Rights. Thus, the article provides a judicial review of the pre-constitutional and post constitutional laws providing a synchronizing approach to the provisions of the constitution.

Article 368 provides for amendment of Constitution which requires introduction of such bill in either house of the Parliament by a majority of total members and presentation to President who shall give his assent and in some matters like Articles 54, 55, 73, 162 or 241, representation of states in the Parliament requires ratification by not less than one half of the states. In Shankari Prasad v UOI (AIR 1951 SC 458) where the validity of 1st Constitutional amendment adding Article 31A and 31B was challenged.

The Supreme Court held that amendment power under Article 368 includes constitutional law also. Article 368 is general and empowers the Parliament to amend the constitution without any exception and it is the exercise of sovereign constituent power.

The same view was reiterated in Sajjan Singh v State of Rajasthan (1965) 1 SCR 933 whereby the amendment power under Article 368 included the power to amend Fundamental rights.

In Golaknath v State of Punjab (1967) 2SCR 762 it was provided that amending power of the Parliament does not include the power to amend Fundamental rights. Because of this decision, 24th amendment was introduced that added clause 4 to Article 13 providing nothing in this article shall apply to the amendment of the Constitution made under Article 368.

The Keshvananda Bharati v State of Kerala AIR 1973 SC 1461 provides that the basic structure of the Constitution cannot be amended.

In Indira Nehru Gandhi Vs. Raj Narayan (AIR 1975) SCC 2299, the theory of basic structure was applied and reaffirmed. In Minerva Mills v UOI, clauses 4 and 5 of Article 368 were inserted by 42nd amendment and they were struck down as violation of basic structure.

Sovereignty means the power to acquire and cede territory, but Parliament is not empowered to make a law in permitting cessation of a part or whole of the territory of the state as held in In Re: Berubari Union and Exchange of Enclaves, (1960) 3 SCR 250. The doctrine of separation of powers and supremacy of the Constitution is the basic structure of our Constitution. Parliament does not have any say in matters pertaining to the elections as the powers regarding such matters is vested with the election commission of India as per Article 324.

The expenses and salary of the Comptroller and Auditor General, Supreme Court Judges, members of UPSC etc. are charged out of the consolidated fund of India and Parliament does not have the power to diminish such allowances except during financial emergency. Parliament has limited sovereignty over union servants as they are elected at the pleasure of the President under Article 310.

Article 213 and Article 123 provide the legislative power of making ordinance to the Governor and the President.

Article 370 imposes restrictions on the Parliament for exercising its jurisdiction in Jammu and Kashmir awarding it a special status. In State of West Bengal v Subodh Gopal (1954) SCR 5e7, 626 it was held that courts can strike down a retrospective legislation if it unreasonably abridges fundamental rights of the citizens.

In A.K. Gopalan V State (1950) S.C.R. 88, 198 (Patanjali Shastri) J said- “There can be no doubt that the people of India have, in exercise of the sovereign will as expressed in the preamble, adopted the democratic ideal ….and in delegating to the legislature, executive and judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so called, I apprehend, because they have been retained by the people and made paramount to the delegated powers……”

Indian Parliament does not enjoy a supremacy over Indian Constitution and India strikes a balance of Judicial review of the Legislative enactments. But the three pillars: the executive, Judiciary and Legislature must work hand in hand and shall not encroach upon the rights of another person, but on the other hand, Parliament reserves the right to extend its jurisdiction to List I and List III and it also provides to act on behalf of two or more states as per Article 252.

It also maintains its right to act during the period of emergency as per Article 250 and solves water disputes among the states as per Article 262. Article 253 provides for implementation of International Treaties as held in Vishaka's case by the Supreme Court.

In India, Parliamentary Powers derive their mandate from the Constitution and parliament has no unfettered or arbitrary jurisdiction to override the constitution The question is not of Parliamentary Supremacy or Judicial Supremacy, rather the question is of striking the balance between the two so as to have a democratic set up where the public interests are not violated.

The verdict of the Supreme Court on the 99th Constitution Amendment Act and the National Judicial Appointments Commission (NJAC), declaring them to be ultra vires the Constitution is another glaring example when any parliamentary act is overturned as unconstitutional on the principle of judicial review.

The recent judgement of the Supreme Court on the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 and the populist response of the Parliament in enacting Section 18A in the said Act which virtually circumvents the diktat of the judgment passed by the Supreme Court are the challenges which 'judicial review' keeps on facing and have been great source of inspiration for constitutional experts to ponder upon