A Tug Of War Between Parliament And Judiciary: A Constructive Appraisal To The Game Of Supremacy

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Abstract

Under the British Parliamentary system, Parliament is sovereign. There are completely no restrictions on its powers, at least in theory, in as much as there is no written Constitution, and the Judiciary has no power of judicial review of legislation made by the law-making bodies and In the United States, the Supreme Court with its power of judicial review and interpreting the Constitution has implicit supremacy.In India, the Constitution has reached at a middle path and a compromise between the British parliamentary sovereignty and American Judicial Supremacy. Here, the doctrine of sovereignty of parliament is associated with the British parliament while the principle of judicial supremacy with that of the American supreme court.Just as the Indian parliamentary system varies from the U.K system, the scope of judicial review power of the supreme court in India is narrower than that of what in U.S. Therefore, the makers of the Indian constitution have chosen the suitable combination between the British parliamentary sovereignty and the American judicial supremacy. The Supreme Court on one hand, can declare the parliamentary legislations as unconstitutional or ultra vires through its power of judicial review. The Parliament, on other hand, can amend the constitution through its constituent power. The conflict for the thrust of supremacy between the Parliament and Supreme Court cannot be disregarded as to the fact that this conflict resulted into the evolution of many prominent and prodigious doctrines such as, to name a few, Doctrine of Basic Structure, essence of the word 'law' under Article-21 i.e. the due process of law etc. This research paper identifies and deals exhaustively with such conflicts between the Parliament and the Supreme Court along with the evolution of the constitutional dogmas.

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Introduction

The matter of parliamentary sovereignty versus judicial supremacy has been a topic of heated academic debate over the last few years. It has trained the minds of legislators, jurists, politicians and non-professionals as well through-out the world. The cohorts of complete independence of judiciary argue that in the lack of an impartial, independent and supreme judiciary, democracy cannot succeed. In contrast to this view, supporters of parliamentary supremacy track the concept that judicial supremacy which is conveyed in the form of judicial review, is discordant with a democratic government because the significance of majority rule lags behind by the limited unelected judges who are not directly answerable to people.

It is usually assumed that in a democratic country like India, with a written constitution, both the legislative and judicial organs are supreme for the appropriate functioning of the largest democracy of the world. At certain point, we may think that neither legislature nor judiciary can claim sovereignty in isolation. Both should work in collaboration with each other, avoiding clash or collision. Both should ponder the problems and escalate the roles played by each other. Each of them has its allocated role to perform under the Constitution, which is essential for democracy. Both have reviewed and amended their stands, rulings, laws and pronouncements numerous times. Moreover, all this is inescapable. Legislature is revoking and modifying earlier laws, introducing new ones regularly. Judiciary is also playing its own part by announcing some laws or parts there of as unconstitutional. Thus, there is misperception and instability all the time. A sort of enmity and competition has on-going between the two most important organs of the government. For the triumph of democracy both should act in collaboration and understanding, keeping in view the common welfare of the people.

Consequently, the scorching issue for scholars of social sciences today is whether the judiciary should have over-ruling power over Parliament. If the parliament enacts any law for economic and social raise of the people and the formation of a socialist pattern of society, the judiciary should not strike down such Acts and stand in the way of development. The Parliament embodies the verdict of the electorate and its members actually replicate the will of the masses. Therefore, any effort to control parliament would mean throttling democracy. But, in a socio-culturally segmented or varied society like India where minority rights may be

overstepped under the majority rule if an independent, impartial and sovereign judiciary does not have a look over the events of the parliament

In the United Kingdom, the parliament is ultimate and the absolute judiciary still forms a part of the legislature. Though, the judges there have freedom to give decisions without terror or favour on matters coming to them. Not only due to the limitations of a federal structure, the fathers of the American constitution also had a very sturdy faith in the judiciary hence, an independent judiciary was recognized in that country. They were persuaded that if any fetters are placed on the independence of judiciary, the civil rights and freedoms of people might be threatened. If practice is any guide, the Supreme Court has unvaryingly shown a high degree of independence in awarding judgements, various of them working against the government. Likewise, in many other countries including India the unbiased and independent judiciaries have been playing an vital role in obtaining social justice by using the power of judicial review over legislative or administrative actions. This prodigious power of judicial review to dismantle an act of the parliament headed to some scholarly debates over the delinquent of supremacy between the main organs of the government in recent years. Therefore, prior to looking at the details on the explicit jurisdiction, it would be more suitable to discuss the theoretical and historical background of the controversy over the sovereignty between the two organs of government.

Parliamentary Democracy In India

India has a mix system of government. The mix system combines two standard models: the British customs, drawn upon parliamentary dominance and treaties, and American principles keeping the supremacy of a written constitution, the separation of powers and judicial review. The two models are self-contradictory since parliamentary sovereignty and constitutional supremacy are irreconcilable. India has diverse imprints in her constitution of both the British and American principles. In other words, following the implementation of the 1950 Constitution, India has developed a completely changed politico-constitutional arrangement with appearances from both the British and American constitutional practices. The individuality lies in the fact that, despite being parliamentary, the Indian political arrangement does not solely correspond with the British system merely because it has adopted the federal principles as well, it can never be totally American since parliament in India stays to remain sovereign. As a mix political system, India has backed to a totally different politico-constitutional arrangement, labelled as parliamentary federalism, with no

parallel in the history of the development of a constitution. Centered on both parliamentary practices and federal principles, the political system in India is therefore a theoretical riddle underlining the hitherto unknown dimensions of socio-political history of nation-states gulping the British traditions and American principles.

The Constitution of India offers for the system of Parliamentary democracy both at the Centre and in the States. This Parliamentary Government is the utmost difficult system to work. It has succeeded in very rare countries and the trend today definitely is towards a strong executive which can control the commotion and turmoil of political life and the marvelous challenge of the modern world.

The most important development in India's constitutional history is the alliance of a parliamentary form of government that generally corresponds with the Westminster model. What is similarly striking is the development of federalism in India in spite of parliamentary government that, in its standard form, succeeded within a unitary system of government. Whereas Britain is recognized as a classical model of parliamentary government, the United States is always stated to as an ideal form of federal government. The Constituent Assembly while deliberating on the form of government for independent India was in favor of administrative federalism, which they presumed was appropriate for a steady political authority. Owing to radical changes in India's political quality in recent times, parliamentary federalism has transformed to a significant extent and the growing importance of constituent state in governance at the national level has shaped conditions for legislative federalism suggestive of alike and meaningful representation of the units in federal policymaking.

As a form of government, the democracy which is envisioned is a representative democracy and the people of India are to use their sovereignty through a parliament at the centre and Legislature in each State, which is to be elected a universal adult franchise and to which the real executive, namely the Council of Ministers, shall be accountable for the popular House. The Parliament is the nerve centre of the national activities. It is through Parliament that elected representative of the people ventilate people's grievances and opinions on various issues, scrutinizes the functioning of executive both on the floor of the House and through special committees constituted for the purpose and enacts laws.

Judicial Review And The Indian Constitution

American constitutional thought and the work of the U S Supreme Court had a thoughtful impact on the minds of the makers of the Indian Constitution. They selected for the British parliamentary system but deliberately adopted the American model of a judicially enforceable Bill of Rights and a federal system with the Supreme Court to have the jurisdiction of both the Union and the States within their respective spheres. Nonetheless the 'due process clause,' one of the foundational concepts of the U. S. constitutional system, was not integrated in Indian Constitution. In the growth of the doctrine of due process the United States Supreme Court has not accepted a constant view at all and the results are contradictory. In post-independence India, the addition of explicit provisions for 'judicial review' were required in order to give weight to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who directed the drafting committee of our Constituent Assembly, had defined the provision linked to the same as the 'heart of the Constitution'. Article 13(2) of the Constitution of India proposes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned command shall, to the amount of the contravention, be void.

Legislature, executive and judiciary under the Constitution are to use powers with checks and balances, but not in water-tight stiff mould. In India, by basis of Article 13 (2) the Supreme Court can exercise the rule of judicial review. Judicial review in India contains of three aspects that judicial review:

i. of legislative action,
ii. of administrative action,
iii. of judicial decisions.

The Constitution of India offers for judicial review under Article 13(2). The Supreme Court has marked that judicial review is a fundamental feature of the Constitution. The power of judicial review by courts therefore is not subject to change and thus has been effectually taken out of the arena of Parliament's power to amend or in any way abridge. The judiciary has avowed a "hands-off" command to the legislature.

Thus, judicial review is a extremely complex and emerging subject. It has its origins long back and its scope and range varies from case to case. It is deliberated to be the basic feature of the Constitution. The court in its exercise of its power of judicial review would keenly guard the human rights, fundamental rights and the citizens' rights of life and liberty as also

numerous non-statutory powers of governmental bodies as concerns their control over property and assets of various kinds, which could be used on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

The restrictions on the power of judicial review are a recurring theme in the evolution of our Constitution. In some of its eminent judgments, the Supreme Court has clear the outline of sovereign power as spread amongst the three branches of Government namely, the legislature, the executive and the judiciary.

In the early years post-independence, the Supreme Court tried to its attack a balance between the much-needed programmes of economic and social reform (for example, land reform and land redistribution) on the one hand and creating the credibility of the newly-born Indian State. It tried to endorse the rule of law and respect the rights conferred under laws that preceded independence and the very Constitution itself.

During the first pair of decades when, for all useful purposes, India was working as a de facto one-party political system. The Supreme Court engrossed on promoting the values of constitutionalism, separation of powers and checks and balances above and in each organ of the State. The Supreme Court and the High Courts were ever-vigilant in their analysis of executive actions, hence confirming to the public necessary protection against extremes of authority or abuses of power. They were equally cautious in their review of legislative actions, both in respect of law making as well as in harmonizing legitimate parliamentary powers, (required for the effective functioning of Parliament) with parliamentary privileges, remarkably that of punishing for contempt.[2]

In the times thereafter, the Supreme Court twisted its attention towards the frequency with which the Parliament was amending the Constitution using the supremacy of a single political party at both the national and state levels to the maximum. The Court expanded upon the distinction between the constituent and legislative power.[3] Furthermore, as the judiciary and the Indian political system developed, the Supreme Court decisively established the primacy of the Constitution through its enunciation of the basic structure doctrine, thereby upkeep those features that are inherent in the Constitution from being changed through the mere exercise of legislative power.[4]

[2] (AIR 1965 AII 349).

[3] (AIR 1967 SC 1643)

[4] (AIR 1973 SC 1461).

Synthesis Of Parliamentary Sovereignty And Judicial Supremacy: The Indian Scenario

The simple question in the struggle between Parliament and Judiciary is "Do we have the Rule of Law or the Rule of Men?" Throughout the first 17 years of the Supreme Court's presence, when it was apparently in its restrained period, it struck down 128 pieces of legislation. Of the first 45 constitutional amendments, about half were meant at curbing judicial power. The 104th constitutional amendment is intended to reverse the result of the Inamdar Case, in which the Court lined unconstitutional the central government's effort to change who is known to half of all the seats in private organizations of higher education each year and to set the dues that these schools could charge.

If the frequency of amendments intended to reverse Apex Court's decisions is significant, so is the legislative postulation that amendments are needed at all. Court decisions may enrage Parliament, in other words, but Parliament thinks that they cannot just be ignored. Even through the 1975-77 emergency, the government took care to restrain the authority of the courts by formally legal means. This deference has guaranteed that even constitutional amendments have not been able to change the basic structure of the Constitution and the formal distribution of powers within it.

In the initial post-independence years, the Supreme Court tried to chunk land-reform legislation, effectively denied that the Constitution requires practical due process, and gave serious scrutiny to government guideline of publications. The government's answer was typically to pursue a change in the letter of the Constitution, which helps to clarify why India's basic law is so heavily amended. Through the late 1960s and early 1970s, the judiciary struck down foremost planks of Indira Gandhi's development agenda, containing her scheme for nationalizing the banks. This age also saw the Court mark its first strong privilege that Parliament may not, even via amendment, supersede the fundamental rights elaborated in part III of the Constitution. Later, the Court would spread and revise this claim to contend that the legislature may not, through amendment, supersede the "basic structure" of the Constitution. Yet when Prime Minister Gandhi affirmed her State of Emergency on 25th of June 1975, suspended Article 21 of the Constitution and had hundreds of people imprisoned by executive order, the Supreme Court overridden 9 High Courts and upheld her actions.

It seems that Parliament and the Supreme Court mainly differed in their respective approaches to important issues having bearing on socioeconomic transformation of society. A background study of numerous constitutional amendments discloses that these amendments were required by the urgency to counteract the effect of the decisions of the Supreme Court in a number of cases wherein the Court struck down reformist legislations, including land reforms ones, passed by the State legislatures, which were considered so vital for bringing about radical changes in our agrarian system and thereby reducing inequality in income and wealth, the Supreme Court itself altered its own decisions within a brief width of time on the similar issue. It is indoors the province of the Supreme Court to converse its earlier decisions. But regular shift in stand on the part of the apex court of the country leads to ambiguity, making it difficult for Parliament and the executive to tail a well-planned long-term strategy.

A Journey Through Various Judgments With Superseding Amendments

The conflict between Parliament and Judiciary has, in fact, revolved into a battle between Civil and Political Rights (FR) on the one hand and the Fiscal and Social Rights (DPSP) on the other hand, the Court upkeep the former one. Let's discuss with the help of certain followings cases.

Shankari Prasad Singh Vs. Union of India (1951)

In the case of Shankari Prasad, the problem was raised whether the 1st Amendment Act, 1951 pursuing to curtail the right to property was constitutionally invalid or not. The petitioner's argument against the legitimacy of the Act was that Article 13(2) prohibited enactment of any law abrogating a fundamental right. The court, however, excluded this argument saying that the word 'law' referred in Article 13 did contain only 'legislative law', that is the law made by the legislature normally, not the 'constituent law' i.e. a law prepared to amend the constitution.

Golaknath Vs. State of Punjab (1967)

A extremely confusing stand of the Supreme Court was seeming in a very sensitive field of constitutional structure, which is the restriction upon the power of Parliament to amend the Constitution. In Golaknath Case the Supreme Court held by a majority of 6 to 5 that Parliament had no power to alter any of the provisions of Part III of the Constitution so as to take away or curtail any of the Fundamental Rights protected therein.[5] The Supreme Court

[5] AIR 1967 SC 1643

held that in the framework of Article 13 of the constitution the law contains the amendments of the constitution with the outcome that Article 13(2) affects the amendment made under the Article 368. The effect of this majority judgement was to override its undisputed judgement in Shankari Prasad's case (1951) as well as its majority judgement in Sajjan Singh's case (1964). In these two cases the Supreme Court held that the terms of Article 368 were flawlessly general and authorized Parliament to amend the Constitution without any exemption whatever.

24th Constitutional Amendment in 1971

To get over the judgment of the Supreme Court in Golaknath case, the 24th Constitution Amendment Act was enacted in 1971. The 24th Amendment made alterations to Art. 13 and 368:

- **i.** A fresh clause was added to article 13: "(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."
- **ii.** Alterations were made to article 368:
  - **a.** The article was given a new contiguous heading: "Power of Parliament to amend the Constitution and procedure therefore."
  - **b.** A fresh clause was added as clause (I): "(I) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power alter by way of addition, variation or rescind any provision of this Constitution in accord with the procedure laid down in this article.
  - **c.** A new clause was added as clause (3): "(3) Nothing in article 13 shall apply to any amendment under this article."

Another alteration to the old article 368 (now article 368(2)) made it compulsory rather than discretionary for the President to give his assent to any Bill duly enacted under the Article.

Kesavananda Bharati Vs. State of Kerala (1973)

The constitutional legitimacy of the 24th amendment, along with the 25th and 29th Amendments, was confronted before the Supreme Court in Keshavananda Bharati case in 1973. The Supreme Court overturned its earlier ruling in Golaknath's case and sustained the validity of 24th Amendment, Parliament's power to alter the Constitution. But in the same case the Court framed the doctrine of 'basic features or structure of the Constitution'. Formerly these were unknown ideas in Indian political system. It was a judicially advanced

doctrine and the Supreme Court did not describe the 'basic structure'. The court held that the parliament's power of altering the constitution was always subject to implied restrictions. The phrase 'basic structure' continued delightfully unclear and has become subject to judicial interpretation. Obviously, the judgment of this case expressively increased the court's authority of judicial review.

A total vagueness prevailed about the ambit of parliament's power to alter the Constitution after the decision of the Supreme Court in Keshavananda Bharati case. The dominant situation is worse than the one shaped by the judgement in the Golaknath case in which the stand of the Supreme Court was flawless in one respect at least. But the judgement in the Keshavananda Bharati case provided an unclear and a subjective concept of the basic structure of the Constitution which seems to comprise the Fundamental Rights and which may also contain anything else which the Judges feel that it should include. Thus, the faith of the Constitution in respect of the most spirited power of amendment is thrown to the winds.

42nd Constitutional Amendment Act in 1976

After the judgment of the Supreme Court in Kesavananda Bharati case, the 42nd Constitution Amendment Act was approved in 1976. It added two fresh clauses, namely, clause (4) and (5) to Art.368 of the Constitution. It stated that there shall be no restriction whatever on the constituent power of parliament to alter by way of addition, variation or rescind of the provisions of the Constitution under this Article. This Amendment would put a conclusion to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) declared the supremacy of the parliament. It was advised that Parliament represents the will of the people and if people want to alter the Constitution through Parliament there can be no restriction whatever on the exercise of this power. This amendment removed the restriction imposed on the altering power of the Parliament by the ruling of the Supreme Court in Kesavananda Bharati case. It was said that the theory of 'basic structure' as designed by the Supreme Court is vague and will create problems. The amendment was planned to rectify this situation.

Conclusion: A Transition From 'Judicial Conservatism' To 'Judicial Activism'

The policy construction is the sole prerogative of the legislative and executive departments of the government. The judiciary just keeps watch whether the parliamentary enactments and

the executive actions are in harmony with the laws of the constitution. This discloses that neither the parliament and the cabinet nor the court can claim independently to be truly independent. The parliamentary form of government in India is thus a concession of powers of different organs of the government. Indian constitutional system accepts the via media between the American System of judicial supremacy and the English standard of parliamentary supremacy.

Judicial activism can mean numerous things: inspection of legislation to define constitutionality, the formation of law, and the exercise of policy prerogatives usually reserved for the executive. But whatever its form, judicial activism rises two questions: Is it legitimate? And is it operative? The democrat in all of us is rightly doubtful when a few people assume such broad powers over our destiny without much responsibility. At least, we cogitate, we can throw the politicians out once in a while, but judges are generally shielded from accountability. And it must be undesirable task for judges to steer a middle course between seizing too much power on the one hand, and doing too little to withstand the fundamental values of constitutional democracy on the other. Judicial activism is defensible to the extent that it aids to preserve democratic institutions and values. Court interventions could be judged fruitful if they were nurturing a constitutional culture wherein certain fundamental values and ambitions become authoritative constraints on the behavior of governments and citizens alike.

The so-called judicial activism cannot be an ancillary for executive in activism. Leaving apart the controversy whether the judiciary is infringing upon the field of the executive, the point is that the court cannot take over the role of the executive. The former absences the required expertise to do so and has not been allocated such role by the Constitution. The judiciary has to see whether any action or administrative order of the executive is in clash with the statute enacted by the legislature or any provision of the Constitution. It is none of the business of the court to implement the verdict or to oblige the executive to do the same as judiciary has been doing. There is difference between applying a law and executing an order. The court interprets the law and applies it to a given case and passes a suitable order in accordance with the law. The court has also an responsibility to ensure implementation of the order or decree. But that must be done in harmony with the prescribed methods. If the courts go on allotting directions to the executive in each and every matter, under pressure of endless flow of public interest litigations, this may unavoidably result in an ill-fated collision between the judiciary and the executive. The judiciary-executive conflict, like the judiciary-

legislature battle is not a desirable phenomenon for the smooth running of a constitutional government.

Justice Dr. A. S. Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, while speaking on "Judicial review – judicial activism – need for caution" said:"The legislature, the executive and the judiciary are three harmonized organs of the state. All the three are guaranteed by the Constitution. All of them swear to stand true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the protector of the Constitution, it is not implied that the legislature and the executive are not similarly to guard the Constitution. For the development of the nation, however, it is authoritative that all the three wings of the state function in comprehensive harmony."

The use of the control of contempt by the higher courts has frequently been uncalled for and unregulated. There are more examples of abuse of the contempt power than its use. Veteran journalist Kuldip Nayar states that "the unpalatable truth is that the judiciary, for certain years, has been struck with its own appearance of authority and truth." The governance of our Republic, in the entirety of administration, is entrusted in the trinity of executive, legislature, and the judiciary. In a democratic Republic like India the constitution is sovereign, and the rule of law needs that every organ of the state, follow the constitutional policy.