A CRITICAL EVALUATION OF JUDICIAL PREDOMINANCE OVER CONSTITUENT POWER

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ABSTRACT

The Indian Constitution is the supreme law of the land. It provides for an independent judicial system wherein law courts function in a hierarchical manner. Our Constitution serves as a backbone to the working of the three branches of Government- Legislature; Executive and the Judiciary. As far the drafting of laws, rules, bills and enactments are concerned, much power is endowed upon the Legislature. However, there always arises a room for clash when these laws are adjudicated by the Judiciary. The question of which branch of the government shall prevail has always been a matter of debate and this bone of contention is left to be resolved by taking into account our constitutional principles and provisions.

Keywords: Constitution, Legislature, Judiciary.

I. Introduction:

The Indian Constitution envisages three branches of Government i.e. Legislature, Executive and Judiciary. Efficient governance of our country depends upon the co-ordinated working of these important institutions. Indian Constitution adopted the French concept of separation of powers, the English concept of Supremacy of Law and Independence of Judiciary. Where the powers are separated among these sectors of Government, much importance is given to an independent working of Judiciary and also Law being the most supreme entity. The Parliament/ the Legislature is subject to restrictions circumscribed by the supreme law of the land i.e. our Constitution enjoys supremacy only to the extent provided in the Constitution. Therefore, the role of Courts is to resolve disputes, interpreting laws, defending the Constitution and safeguarding rights and freedoms of citizens. For this, a requirement thus arises for a separate, independent and unique Constitutional organ. Therefore, it is much evident in modern day Constitutions where Judicial Independence is prioritised by highlighting special provisions and machinery to safeguard the Judiciary.

The judiciary is the final interpreter and the guardian of the Constitution.[1] In a Federal Constitution, the judiciary is constituted as the ultimate authority to restrain from exercising absolute, capricious and arbitrary power. The Legislative action of majority has to undergo the scrutiny of the legal elite, the judiciary. The human rights are secured and the tyranny of the majority is contained by Judicial Vigilance, that is to say, the legislative and executive actions are counter-checked by judiciary. Democracy has no alternative but to accept the Courts as the sentinel and the guardian of liberty and freedom.[2]

The concept of judicial review encompasses the power of Judiciary to review legislative actions and Judiciary thus enshrining the principle of Rule of Law and maintaining separation of power principle at the grassroots level.[3]

[1] *http://www.legalservicesindia.com/article/2166/Independence-of-Judiciary.html,* last accessed on 14/10/2023 at 02:56pm.
[2] Paras Diwan, Indian Constitution – A Document of people's Faith and Aspiration 1981 Edition, Allahabad Law Agency at 333, 339.
[3] Parliamentary Supremacy and Judicial Review: Indian Perspective September 15, 2018, 3:14 pm IST Anand Nandan in Les Avis | India | TOI *https://timesofindia.indiatimes.com/blogs/les-avis/parliamentary-supermacy-and-judicial-review-indian-perspective/*, last accessed on 07/10/2023 at 11:17am.

II. Constitutional mandate on judiciary:-

As stated above, Supremacy of Law is well adhered in our Constitution. To safeguard this principle, an independent organ becomes indispensable. Therefore, an independent Judiciary, having the power of 'Judicial review' is a prominent feature of our Constitution.[4] Judiciary is the ultimate organ of government that interprets laws and safeguards the rights of people. The Supreme Court of India took all this into account in the judgment reported in the case of ***State of Kerala v A Lakshmi Kutty***[5] stating that "*Special responsibility devolves upon the judges to avoid an over activist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the government*." The judges should not enter the fields constitutionally earmarked for the legislature and the executive. Judges cannot be legislators, as they have neither the mandate of the people nor the practical wisdom to understand the needs of different sections of society. They are forbidden from assuming the role of administrators; governmental machinery cannot be run by judges as that is not the intention of our constitution makers.[6]

Judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable in courts, against any organ of the government, legislative or executive. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India today who is aggrieved because the Supreme Court invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.[7] Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[8]

The seven judge bench of the Supreme Court declared in ***P Ramachandran Rao v. State of Karnataka***[9] that *the primary function of the Judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation.*

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[4] Basu, D.D., INRODUCTION TO THE CONSTITUTION OF INDIA, 22nd Edition,2015, Chapter 4 at p.43(2nd Para).
[5] 1986 SCC(4) 632
[6] *https://www.lawctopus.com/academike/judicial-activism-constitutional-challenges-india/*, last accessed on 17/03/2024 at 07:45 pm
[7] Supra note 4 at p.42
[8] ***G.C.Kanungo v.State of Orissa***, (1995) 5 SCC 96: AIR 1995 SC 1665;
State of A.P. v. K.Mohanlal, (1998) 5 SCC
[9] (2012) 9 SCC 430

But they cannot entrench upon in the field of legislation properly meant for the legislature. It is no difficult to perceive the dividing line between permissible legislation by judicial directives and enacting laws – the field exclusively reserved for the legislature.[10]

The Supreme Court recently noted in ***Indian Drugs & Pharmaceuticals Ltd v. Its Workmen***[11] **t***hat "the Supreme Court cannot arrogate to itself the powers of the executive or legislature… There is broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits*".

One of the most important milestone judgements of the Indian Judiciary is that of the Supreme Court's decision in ***Keshavananda Bharati v. State of Kerala***[12] wherein the apex court held that the Parliament under Article 368 can amend any part of the Constitution excepting the basic features. This case gave the evolution of the Basic Structure Doctrine which has become the biggest hurdle for the legislature in maintaining parliamentary supremacy.

In ***Maneka Gandhi v. Union of India***[13], the Supreme Court gave one of the most forward views which are upheld even in the present day views of liberty, fairness and reasonableness. The right to life and personal liberty was extended not only to arbitrary executive action but also to legislative action. The Supreme court emphasised that procedure established by law should be reasonable, just and fair and shall be free from arbitrariness and unreasonableness.

In ***R C Cooper v Union of India***[14]**,** the legislative competence of Parliament to enact the Banking Companies (Acquisition and Transfer of Undertakings) Act, known as the Bank Nationalisation Act, was in question. The Supreme Court struck down the Act primarily on the ground of unreasonableness that the restriction imposed on the banks to carry on "non-banking business" in effect made it impossible for the banks, in a commercial sense, to carry on any business at all.

In the judges transfer case ***S P Gupta v Union of India***[15]**,** the court while dealing with the question of the meaning of the word "consultation" as set out in Article 124(2) of the Constitution held that in the matter of the appointment of judges, the executive is supreme and

[10] Supra note 6
[11] (2007) 1 SCC 408
[12] (1973) 4 SCC 225
[13] (1978) 1 SCC 248: AIR 1978 SC 597
[14] (1970) 1 SCC 248: AIR 1970 SC 564, 593ff
[15] (1982) 2 SCR 365

is not bound by the views expressed by the Chief Justice of India or the other judges of the SC. However, this view has been overruled in ***Supreme Court Advocates-on-Record Association v Union of India***[16] to ensure judicial supremacy in the appointment of judges.

A debate which still persists ***is whether Judiciary falls within the ambit of State under Article 12 of the Constitution***. No mention has been made about Judiciary in Article 12. In ***Parmatma Sharan and Another v. The Hon'ble Chief Justice, Rajasthan High Court***[17], it was held that when Chief Justice of the High Court or Supreme Court appoints officer of the Court in the exercise of his power of appointment and the appointment made by him contravenes the Fundamental Rights, they may be challenged in the Court because when Chief Justice of the High Court or Supreme Court makes appointment for officer of the Court, the exercise of his power of appointment, he acts in administrative capacity and therefore, he is included within the meaning of term "State" under Article 12. Therefore, it is understood that when Judiciary acts in its **judicial capacity** it is **not state** under article 12, but when Judiciary acts in **administrative capacity or rule making body** it is included within the meaning of "other authorities" and therefore, it is **state** under article 12.

The Indian Judiciary has immensely contributed to the evolution of Public Interest Litigation. In ***Bandhua Mukti Morcha v. Union of India***[18]**, the Supreme Court observed that the** *right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy. Various issues on environmental jurisprudence have been taken up and have rendered the widest interpretation in its course of judicial activism.*

In ***M.C.Mehta v.Union of India***[19] *popularly known as the Oleum gas leak case, the Supreme Court adhered to the principle of 'Absolute Liability' to make good for the loss caused. It is through this concept of activism which has led the judiciary to award compensations and benefits to people against whom constitutional wrongs have been committed by state actors.*

III. Highlighting conflict of constituent power:-

The harmonisation, which our Constitution has embedded between Parliamentary Sovereignty and a written Constitution with a provision for judicial review, is a unique

[16] AIR 1994 SC 268
[17] AIR 1964 Raj 13
[18] 1984 AIR 802, 1984 SCR (2) 67
[19] 1987 SCR (1) 819, AIR 1987 965

achievement of the framers of our Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them.[20]

There may be two justifiable grounds of having created mistrust between the political executive and the judiciary. First is that the issue of supremacy of Parliament over the Judiciary was repeatedly sought to be established by means of Constitutional amendments under Article 368. Secondly, the basic structure doctrine evolved by the Judiciary implies a limited constituent power of elected legislatures but on the contrary, confers unlimited judicial power of scrutiny.

During the passage of time, Article 368 has become one of the breeding grounds of contesting primacy between the Parliament and the Judiciary over the constituent power. The actual debacle between the two organs began to surface in ***Golak Nath v. State of Punjab***[21] when the Supreme Court by majority of 6:5 overruled ***Sankari Prasad's case***[22] judgement declaring the Parliament has no power to take away or abridge the fundamental rights enshrined in Part III of the Constitution. Later, in ***Keshavananda Bharati v. State of Kerala***[23], the apex court by majority of 7:6 overruled the decision of ***Golak Nath***[24] stating that Parliament cannot alter the basic structure of the Constitution while exercising its power under Article 368. The Supreme Court strictly adhered to the theory of basic features of our Constitution by interpreting both the Constitutional text and norms enunciated by the Judiciary. Such limitation on amending power of the Parliament was glorified by incorporating necessary implications developed during the working of Constitutional governance. Again in ***Minerva Mills v. Union of India***[25], the Supreme Court held that the harmony between fundamental rights and directive principles of state policy comes as important element of basic structure.

In similar manner, the Court in ***L.Chandra Kumar v. Union of India***[26] that judicial review is also a basic structure. Subsequently, in number of decided cases of the Apex Court, judicial review has been termed as basic structure. Even the Presidential orders under Article

[20] Supra note 4 at p.43(5th para)
[21] 1967 SCR (2) 762: AIR 1967 SC 1643
[22] AIR 1951 SC 455
[23] Supra note 12
[24] Ibid
[25] AIR 1980 SC 1789
[26] (1997) 3 SCC 261: AIR 1997 SC 1125

356 of the Constitution in ***S.R. Bommai v. Union of India***[27] and also in ***Arunachal Pradesh's case***[28], the Supreme Court of India resorted to basic structure doctrine to justify those executive actions thereby allowing to apply the same doctrine to ordinary legislations as well as executive actions. Such judicial landscape has also been perceived by many jurists as unwarranted. According to renowned jurist, Professor Upendra Baxi, the constituent power in India, in such situations, must be shared between the Parliament and the Supreme Court.

Another facet of hiatus between political executive and judiciary broke out when the apex court categorically reasserted independence of Judiciary with its concomitant autonomy in appointments of higher courts judges as an integral part of the basic structure in a series of decided cases, such as in ***S.P. Gupta v. Union of India***[29] commonly known as the First Judges' transfer case, in ***Supreme Court Advocates on Record v. Union of India***[30] known as the Second Judges' case and in ***Third Judges' case***[31].

The Supreme Court in ***Indira Gandhi v. Raj Narain***[32]upheld the Allahabad High Court judgement of invalidating the Indira Gandhi's winning the election and also barring her from holding any elected public post for six years. The said decision of the Court culminated a serious political crisis that had, subsequently led to proclamation of national emergency (1975-1977) on grounds of internal disorder. By resorting to the constituent power of Parliament under Article 368, the 39th Constitutional Amendment Act was passed in 1975 inserting Article 329A in the Constitution that had diluted the standing Court's decision on the said case. The said Amendment Act was challenged in the Court on the ground of violation of basic structure doctrine laid down in ***Keshavananda's case***. Further, the Court held the impugned Amendment Act as unconstitutional and void thereby leading to the deletion of Article 329A by enactment of the 44th Constitutional Amendment Act, 1978.

One of the most recent and also important Constitutional developments is the 99th Constitutional Amendment Act which proposed for setting up of the National Judicial Appointments Commission (NJAC) in the Parliament for appointment of higher courts judges. The Act aimed to give politicians, legislatures and civil society a final say in appointment of

[27] 1994 AIR 1918: 1994 (3) SCC 1
[28] ***Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Legislative Assembly***, 2016 SC 694
[29] Supra note 15
[30] Supra note 16
[31] AIR 1999 SC 1
[32] 1975 SCC (2) 159

judges to higher courts. This violates the independence of judiciary and the basic structure doctrine at large. Taking into cognizance the principle of judicial independence and the role of courts in rendering efficient democracy, the said Amendment Act was struck down declaring it to be void and unconstitutional. The Court relied upon the notion of Judiciary as the institution which can uphold the very essence of supremacy of law and that it should be allowed to fulfil its obligations unhindered by other institutions of government.

IV. Conclusion and suggestions:-

The balancing between supremacy of the Constitution and sovereignty of the Legislature is well highlighted by the glorious provisions of Fundamental Rights which are envisaged in our Constitution. The principle of Independence of Judiciary is adopted by almost all civilised legal systems of the world. There always arises a need to maintain this independence undisturbed by other institutions so as to uphold Constitutional values and obligations.

The question, as to the primacy of Legislature and the Judiciary, will persist and it depends upon the facts and circumstances of the situation. There will be no remedy in this unending conflict and therefore the only solution is to foster harmony in interpreting Constitutional provisions.

Mention may be made of Pandit Jawaharlal Nehru who expressed on Article 21[33] in the Constituent Assembly Debates in the theme of parliamentary supremacy. He strongly debated that legislature must be supreme and must not be interfered with by the courts of law. This concept has been argued in the contrary in ***Maneka Gandhi's case***[34] where due process of law was followed in interpreting Article 21, bringing the right even against legislative/parliamentary action. Parliamentary supremacy laid down by the founding fathers of our Constitution, has thus been diluted in the past few decades by the concept of judicial review which is also one of the basic features of our Constitution.

In a written Constitution like the Indian Constitution where it is not so rigid, amendments and changes will take place according to changing times and needs. At the same time, it is also important to keep in view the basic structure doctrine so as to preserve our well established principles which our Constitution safeguards. The basic structure doctrine thus acts as check

[33] Constituent Assembly Debates, Volume IX, Part I, 10th September, 1949.
[34] Supra note 13

on legislative action. A principle like this if implemented thoughtfully will render stable Constitutional governance. In this process, harmony and balance are ensured so that the magnificent role of our Constitution does not become chaotic in the hands of both legislature and judiciary.

One great solution to overcome the conflict is to do away the culture of authority and resolve to stand united for the culture of justification and harmony. Also, one of the best suggestions in this regard is Co-operation between the two conflicting institutions. Instead of disputing on this never ending matter, it is high time to channel out and systematise interpretation and understanding Constitutional principles, policies so as to make sure that the Parliament and Judiciary almost refrain from conflicts relating to question of primacy.