Conflict of Sovereignty: Legislature or Judiciary?

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India has the largest democracy in the world. After ruling the subcontinent for over two hundred years, the British surrendered power and India became a free country. India adopted the path of parliamentary democracy. The British parliamentary system left a lasting impress on it; due to the colonial legacy the framers of the Indian Constitution borrowed this system primarily from England.[2] The freedom of the judiciary was taken from the USA. The USA did impart considerable power to the judiciary and made the judiciary free of the biased influence of the executive and the legislature.

Parliamentary democracy, which is the basic foundation of our Constitutional setup, presupposes the sovereignty of the people. As a prerequisite for a functional parliamentary democracy, the Constitution of India has provided for' 's*eparation of powers'* for securing the basic rights of the people. It lays down the structure and defines the limits and demarcates the role and functions of every organ of the state, including the judiciary, and establishes the norms for their inter-relationship, checks and balances with a very important object of ensuring that the power is not concentrated in any particular organ of the state, which can assume undesirable proportions.

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[2] Narain Dutt, "The Office of Profit in the Constitution Perspective", Mahila Vidhi Bharti, Delhi, July-September 2006, Ank 48, p. 234.

Independence of the judiciary is essential for upholding the rule of law.[3] The grave problem, however, that courts are often faced with is this: on the one hand, the Constitution is the supreme law of the land and, on the other hand, in the garb of interpreting the Constitution, the court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people. The court certainly has power to decide constitutional issues. However, as pointed out by Justice Frankfurter in *West Virginia State Board of Education vs. Barnette* 319 U.S. 624 (1943), since this great power can prevent the full play of the democratic process, it is vital that it should be exercised with rigorous self restraint.

Separation of powers

The philosophy behind the doctrine of judicial restraint is that there is broad separation of powers under the Constitution, and the three organs of the State, the legislature, the executive, and the judiciary, must respect each other, and must not ordinarily encroach into each other's domain, otherwise the system cannot function properly. Also, the judiciary must realise that the legislature is a democratically elected body, which expresses the will of the people (however imperfectly) and in a democracy this will is not to be lightly frustrated or thwarted.

In *Asif Hameed vs. The State of J&K*, AIR 1989 S.C. 1899 (paragraphs 17 to 19), the Indian Supreme Court observed: "Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive, and judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp the function of another. While exercise of powers by the legislature and executive is subject to judicial restraint, the

[3] K.G. Balakrishnan, "Executive to Blame for delayed justice", The Tribune, April 10, 2007, p. 10

only check on our own exercise of power is the self imposed discipline of judicial restraint."

So checks and balances with separation of powers is one of the most characteristic features of our Constitution. The powers of the three pillars must be balanced and none of these should be in excess of the others. In 1690, John Locke wrote in his second treatise of civil government, 'It may be a great temptation to human fragility, apt to grasp power, for the same person who have the powers to make laws, to also have in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws that they make, and suit the law, both in the making and execution, to their own private advantage.'

The Constitution of India defines powers, delimits jurisdictions and demarcates responsibilities of each organ. As regards the relationship between the Parliament and the Judiciary, both are under constitutional obligation not to encroach upon each other's jurisdiction. Under the provisions of the Constitution, the parliament is not sovereign and the judiciary (Supreme Court) is not supreme except in its own domain. The parliament and the judiciary come into contact with each other in many ways. Their interface and interrelationship, therefore, assumes greater significance.

In *Marbury vs. Madison* (1803), Chief Justice Marshal while avoiding confrontation with the government of President Jefferson, upheld the supremacy of the Constitution. Even in *Divisional Manager, Aravali Golf Course vs. Chander Haas* (2006) the Indian Supreme Court observed: "Judges must know their limits and not try to run the government. They must have modesty and humility and not behave like Emperors. There is broad separation of powers under the Constitution, and each of the organs of the state must have respect for the others and must not encroach into each other's domain."

Indian constitution is typical because of the adoption of *parliamentary and federal* features simultaneously. Parliamentary form of government hints at legislative supremacy. But the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Indian constitution.

Legislature and Indian Constitution

Under the scheme of our Constitution, Parliament being the supreme legislative body has been accorded the pre-eminent position in our polity. Several constitutional provisions amply demonstrate this. Reflecting the hopes and aspirations of the people, the Parliament, over the years, has truly become a people's institution *par excellence*. Being the supreme law-making body in the country, Parliament discusses, scrutinizes and amends the drafts of various legislations if necessary, and thereafter it puts seal of approval.

Articles 105 and 122 of the Indian constitution clearly restrict the judiciary from intervention in the business of the legislature. Article 122 (1) states, 'The validity of any proceedings in parliament shall not be called in question on the ground of any alleged irregularity of procedure.' Article 122 (2) explains, 'No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.'

Article 105 explains the powers and privileges of parliament and its members; and Article 194 replicates the same provision for the legislative assembly and its members. Article 105 (1) gives freedom of speech in parliament and Article 105 (2)

gives judicial immunities to the conduct and behaviour of any member of parliament: 'No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee therefore, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.' Article 194 (2) grants the same immunities to the members of the state legislative assembly. Article 105 (3) reads 'In other respects, the powers, privileges and immunities of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution Forty-fourth Amendment Act 1978.' Before this amendment, it was provided that powers, privileges, and immunities of parliament and its member shall be those of the House of Commons as it was before the commencement of the Indian constitution.

Judicial precedents on the issue of parliamentary privileges and judicial immunities to proceedings of the legislature suggest divided opinion. In *PV Narasimha Rao v. State* (1998) the Supreme Court took the position as per Article 105 (2): 'The bribe-taker MPs who have voted in Parliament against the no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a Court of Law for alleged conspiracy and agreement.' However, 'The bribe-takers could be proceeded against by Parliament itself.' This judgement clearly established that parliament is the sole arbitrator of its business and proceedings and the judiciary cannot come in this matter. This judgement has not been superseded by another judgement reversing the position.

The judicial interpretation of powers and privileges of the legislature and its member has not been consistent. In a special reference no. (1) 1964, the Supreme Court observed that the legislature in India unlike the House of Commons does not enjoy

the power to regulate its own constitution. Hence, the Indian legislature (Article 105 [3] and Article 194 [3]) does not have the same powers and privileges as enjoyed by the House of Commons.

On the basis of the above judgement, the Punjab and Haryana High court in a judgement (1977) decided that article 194 (3) does not give the legislative assembly the power to expel its member. The court observed that the power of the House of Commons to expel its member arises from its privilege to regulate its own constitution. Since, it is not available to Indian legislature; the latter is not privileged to expel its member. The Madras and Madhya Pradesh High courts took the opposite position and argued that the Indian legislature was empowered to expel its member as a part of its disciplinary jurisdiction.

The parliament is expected to keep in view the judicial pronouncements and rulings. This assumes importance due to three reasons. *Firstly,* the power of the judiciary to interpret the parliamentary legislature, to give meaning to the words used in a statute and to fill in the gaps, *secondly*, the judicial power to declare a statute unconstitutional and *thirdly,* tine power of the courts to invalidate constitutional amendment.

Judiciary and Indian Constitution

The Judiciary provides the people the necessary *"auxiliary precaution"* required to ensure that the government functions in favour of the people, for their upliftment and for the betterment of society. The Constitution also accords an important place to the Judiciary, with the Supreme Court at the apex of the judicial system. The Supreme Court, in addition to being the final court of appeals- civil and criminal- has exclusive original jurisdiction in disputes between the Union and the States and

between two or more States *inter se*;[4] and is the ultimate arbiter in all matters involving the interpretation of the Constitution. It has also extensive writ jurisdiction for the enforcement of fundamental rights[5], and an advisory jurisdiction on a question of law or fact referred to it by the President[6].

The power of judicial review conferred upon the Supreme Court and the High Courts ensures that both Legislature and Executive act in their respective spheres of jurisdiction and also they do not act in defiance of the Constitution. It also guards, protects and enforces the fundamental rights guaranteed to the citizens by the Constitution. The Supreme Court has indeed declared judicial review to be one of the basic structures of the Constitution which is to be regarded as sacrosanct. Judicial power is the power to interpret the constitution and laws and apply them, and to decide controversies arising between state or private parties.

Judicial power also includes the power to take corrective action whenever other branches of the government fail in their duty to respect the rights of the citizens and protect them. Judicial determination of whether the other branches of government are, or are not, functioning in favour of society cannot be said to constitute "lawmaking", but is a proper exercise of judicial discretion where standards established by the constitution are not met.

Parliament or Judiciary - Which is supreme?

As per the Constitutional scheme, both Parliament and Judiciary are supreme in their respective spheres. Various constitutional provisions do not leave any scope for confrontation between the two important organs of State. Indeed, the harmonization

[4] Art. 131.
[5] Art. 32
[6] Art. 143

of the principles of Parliamentary Sovereignty and Judicial Review is a unique feature of India's Constitution.

Since the legislature represents the people, controls the government and makes law, no one can interfere with its freedom and authority to do so. The judiciary has to adjudicate disputes, interpret the Constitution, "declare the law" and pass the necessary order "for doing complete justice". The Supreme Court is the final authority for interpreting and pronouncing on the provisions of a law. Any law which violates constitutional provisions is invalidated. The power of judicial review has always been there with the Supreme Court and cannot be taken away. The executive operates and enforces the law made by the legislature. However, a number of occasions have come in the parliamentary history of our country when there is a tug of war between the legislature and the judiciary. In fact the tug of war between the executive government and courts has occurred ever since the courts have been established.

In India, the courts started invalidating the agriculture and land reform acts after independence in the name of violation of the fundamental right to property; on this there was conflict between the government and the judiciary. Consequently, the First Amendment was made in 1951, by which the Ninth Schedule was added and a provision was made that the laws given in this Schedule will not be subject to judicial review. In the context of the Ninth Schedule of the Indian Constitution, Prime Minister Jawaharlal Nehru said: "It is not with any great satisfaction or pleasure that we have produced this long Schedule. We do not wish to add to it for two reasons. One is that the Schedule consists of a particular type of legislation generally speaking, and another type should not come in. Secondly, every single measure included in this Schedule was carefully considered by our President and certified by him….." But, instead of repealing the Ninth Schedule the powers were included in this Schedule for their political use.

In the *Golaknath case* the Supreme Court gave the judgement that chapter three of the Indian Constitution dealing with the fundamental rights of Indian citizens cannot be amended. The judgment in this case was considered to be a case of judicial over-activism to some extant. During the Emergency, the authority of the judiciary was undermined and was made subservient to the legislature and the executive. The judges whose judgments were not liked by the executive were transferred or denied promotion or even reverted. The 42nd Constitutional Amendment Act was also passed putting new limitations on the judiciary. However, after the Emergency, the 44th Constitutional Amendment Act was passed which restored the position of judiciary. Creating a stir in Indian politics, the Supreme Court gave its historic judgment on the *Keshavananda Bharati* case in 1973. In this case the Supreme Court held that Parliament cannot change the Basic Structure of the Constitution. The judgment was criticised saying that the judiciary had crossed its limits. When the 39th Amendment was carried out in the Constitution making the provision that the election of the Prime Minister cannot be defied in the Court, the Supreme Court invalidated it by declaring it violative of the Basic Structure of the Constitution.

In this way, in 1985 there was again a tug of war between the government and judiciary regarding the Anti-Defection Act. The Chairmen of Assemblies were given the power to decide the issue of defection of political parties. After the decisions of the Chairmen of Assemblies like those of Mizoram, Goa, Nagaland, Manipur and UP on the issue, these were challenged in the courts. As a result many kinds of disputes cropped up.

There remained constant tension between the judiciary and legislature in regarding some issues which are as follows:

1. Confrontation of Parliament and judiciary in relation to reservation, the question of creamy layers.

2. Opposition by the Supreme Court to the sealing operations of commercial premises in unauthorised areas of Delhi.

3. The Supreme Court's interim stay on the 27 per cent OBC quota in institutions of higher education.

4. The Lok Sabha Speaker's refusal to expel some MPs for taking bribes to put questions in Parliament. .

5. The decision of the Andhra Pradesh Governor to grant pardon to a Congress leader was sought to be nullified by the Supreme Court. Besides the Supreme Court said that the power of the President and the Governor regarding the grant of pardon should be in the preview of the judicial review.

6. The judgment of the Supreme Court that in corruption issues there is no need to take permission to file case against a corrupt Chief Minister, MP and bureaucrat.

7. The recommendation of President's Rule in Bihar by the Governor was declared unconstitutional by the Supreme Court.

8. According to the Supreme Court, the decision of the Speakers of Assemblies should come under judicial review.

9. Growing confrontation between the judiciary and Parliament in regard to the Ninth Schedule being brought under judicial review.

Thus it is obvious that the conflict between the judiciary and Parliament about the constant enhancement of their respective powers has grown with the passage of time. Prime Minister Manmohan Singh told the Chief Ministers and Chief Justices of the High Courts in the conference on Administration of Justice on Fast Track Issue*: "The dividing line between judicial activism and judicial overreach is a thin*

one….a takeover of the functions of another organ may, at times, become a case of over-reach."[7] But the Chief Justice of India, K.G. Balakrishnan, declared that tension between the judiciary on the one hand and the legislature and the executive on the other was *"natural and to some extent desirable".*

Such comments considerably accentuated the dispute over judicial activism. The comment of Prime Minister Manmohan Singh was viewed in the context of introduction of various pieces of legislation nullified by the Supreme Court last year. The ban on several pieces of legislation in the Ninth Schedule, the constitutional invalidation in relation to 27 per cent reservation of the OBC quota in government aided educational institutions, the Muslims in UP being declared non-minority by the Allahabad High Court, the expulsion of 12 MPs from Parliament being declared valid by the Supreme Court etc. are also to be included in this backdrop. It is clear that the Prime Minister expressed his political views rising above party politics and Balakrishnan said how invalid and irresponsible criticism can prove to be harmful. The views of both should be discussed cautiously.

The privileges of Parliament are often mentioned in any discussion. It is said that the privileges of the Indian Parliament are not similar to those of the British Parliament according to the Indian Constitution. The British Parliament has expelled its several members and even today, if it likes, it can do so but the question is not of privileges, it is a question of aptness or obligation because the democratic form of system has been adopted in India.

The opinion of the people is supreme in a democracy. The people are sovereign and their power cannot be reduced but the people themselves do not use this power. They use it through their elected representatives. If the people themselves use their

[7] Manmohan Singh, "Line Between activism and over-reach thin: PM to Bench", The Indian Express, April 9, 2007, p. 1.

sovereign power, lawlessness will spread in the country. Thus the sovereignty of the people has been changed into the sovereignty of Parliament. But the Supreme Court is not such a body as can dishonour Parliament or consider Parliament to be of no consequence. The Supreme Court analysed the laws terminated by Parliament on the judicial basis. As Edmund Burke also said, *"The fire-alarm at midnight may disturb your sleep, but it keeps you from being burned at night."* In the same way, the Supreme Court cooperates in the activities of the other organs of the state to ensure the control and balance available in a developing democracy.

It can be said that the unelected judges availing so many powers and refusing to heed the intentions of the elected representatives is undemocratic. But it is also true that the division of powers among the organs of government is the fundamental feature in the Constitution of India and this should be maintained because the Constitution does not give unfettered power to any organ. Just as parliament is supreme in Britain, similarly the Constitution is made sovereign in our country. Therefore, just as the judiciary has supreme rights in its sphere in the same way the legislature is also supreme in its sphere under the Articles 122 and 212. So the supremacy of the Supreme Court ends where the supremacy of Parliament starts.

In the parliamentary history of India it has happened several times that when the legislature or the executive failed in its constitutional duties, then the judiciary had to interfere to safeguard the provisions of our Constitution and in public interest. As corruption is rampant among top bureaucrats and political leaders, the increased expectation of common man from the judiciary can easily be understood. However, it must also be realised that unless different organs of the Constitution cross the limits of each other, there is no possibility of a real tug of war between them.

Despite the fact that the legislature and the judiciary are kept separate from each other, both are intimately related.

Judicial Functions of the Legislature:

Some legislatures of the world have direct judicial power. The use of Lords, for example, is the highest court of appeal in the U.K. The senate of America acts as the highest court of impeachment for high officials. The Indian parliament also has the authority to impeach President of the Republic.

The judges in some countries can only be removed on the recommendation of the legislature. In India, for example, the judges of the Supreme Court and High Courts can be removed from service by the president on receipt of an address passed by the Parliament by its two- thirds majority to this effect. The Parliaments hear appeals in election cases. They try their members for breach of privileges. They may order arrest and try private citizens for breach of privileges of the Parliament. There is no appeal to courts against such decisions.

Legislative Functions of the Judiciary:

The judiciary in modern states is playing a vital role in the process of law making. The judiciary adds flesh and blood to the dry bones of laws by their interpretations and judgments. The Supreme Court of America has done a lot in this respect, it has removed all the flaws and filled in all the gaps of the original; constitution. So great is the law making role of the Supreme Court of America that Laski called it the continuous constitutional convention and the third chamber of the American Legislature. The judges of the Supreme Court have changed the constitution beyond recognition.

The judges also make laws by way of judicial precedents. These are established when a novel case comes up before them and no reference is available in the existing body of laws regarding that particular ease. Judgement in such cases is given by judges according to the spirit of justice, enquiry and fair-play.

Such a judgement becomes a judge made law or a judicial precedent. These serve as laws proper because future cases of similar nature are derided in the light of judicial precedents already established.

In a democracy, the people are paramount, and it is the inherent duty of the executive, legislature and judiciary to perform meaningful roles in making the life of the common man better. In many instances, the Supreme Court has faced criticism for "usurping" the power of the executive. However, what is most often overlooked by all critics is the fact that where is the common man to go, when the executive fails to perform its duties properly? In many instances, the people have been promised better amenities, towards which significant amounts of money have been spent. However, many of those promises have never been fulfilled, and, on occasion, private players have taken undue benefit of this. Given these circumstances, it is incumbent on the Supreme Court to take the necessary steps to alleviate the dismal conditions of the people, and pay particular attention to the dismally depressed.

The Supreme Court has been the doyen of Public Interest Litigation. It cannot be denied that as a power regulator, the Supreme Court has two functions: it limits government arbitrariness and power abuse, and it makes the government more rational and its policies more intelligent. The Public Interest Litigation system only furthers these and gives them true meaning. It is one of the many innovations that give life to the Supreme Court being the bulwark for the maintenance of democracy and a bastion of civil liberties. It is a potent instrument of social justice to bring about equality in result. It is used only after careful scrutiny of the issue at hand, and directions given only when necessary. It is often argued that the Supreme Court should maintain restraint and should not violate the legitimate limits in the exercise of its powers. However, this argument fails to recognize the constant failures of governance taking place at the hands of the other organs of State, and that it is the function of the Court to check, balance and corrects any failure arising out of any

other State organ. It is improper, therefore, to accuse the Court of taking unfair advantage of this instrument to further any vested interest.

The only function of the court is to protect the rights of the people, and all its actions are directed to further this function. It must be realized that before criticizing the court, which serves as the whip hand of the people towards any wrong being done by the State, the other organs of governance latter must make sure that their conduct is exemplary and without fault, so as to deserve the trust of the people.

The supremacy of the Constitution can be preserved in no other way except through the courts that would step forth and declare all acts "contrary to the manifest tenor of the Constitution void".

Conclusion:

Who is sovereign- parliament or judiciary? It is a superficial and hollow question that should never be raised or discussed. All institutions of governance owe their existence and power to that supreme document- the Constitution of India. One sovereign truth must be realized by all -*"Howsoever high you may be, the Constitution is above you."* This is the only way to preserve democracy in this country. The theory of 'continuing' sovereignty, as explained by Professor Dicey, is that there are no limits to the legislative competence of Parliament. Each Parliament is absolutely sovereign in its own time and may legislate as it wishes on any topic and for any place. That which has been enacted by Parliament has supreme force and cannot be invalidated or changed by any other domestic or external authority. Under popular sovereignty, the executive, legislative, and judiciary are mere agents of the people and the people's constitution. In performing their constitutional functions, the branches must interpret the constitution to ensure that their actions conform to the instrument. In the judicial context, a court must compare a statute in

controversy with the text of the constitution before giving effect to the statute. Judicial supremacy, as framed by the United States Supreme Court in *Cooper v. Aaron*, provides that "the federal judiciary is supreme in the exposition of the law of the Constitution."[8] Once the judiciary interprets a constitutional provision, neither the executive nor legislature can offer a competing interpretation in the performance of their constitutional duties. The matter is settled because the judiciary has spoken. Judicial supremacy places the Supreme Court in the position of Parliament. Having the final word in constitutional interpretation, the Court can make or unmake any law as it sees fit. Other than a very difficult amendment process, the people can do nothing to control it.

Judicial supremacy actually poses a greater danger to the people than a system of parliamentary sovereignty. At least members of the House of Commons are subject to popular elections. The Supreme Court is not subject to this check nor are most of the courts of last resort on the state level.[9] Impeachment, as suggested by Chief Justice Kirkpatrick, is seldom used and provides no real check on judicial authority. The eminent Indian legal scholar Upendra Baxi once memorably called judicial activism a dire cure for a drastic disorder: "chemotherapy for a carcinogenic body politic."[10]And certainly judges have an important role to play in strengthening our democracy. But they will have to exercise great discretion and resist the intoxication which comes from the view that judges are the last, best hope of the republic. As Judge Hand also observed, during a great world war in which freedom was at stake and just a few short years before India began its life as an independent republic:

[8] 358 U.S. 1, 18 (1958); *see also Baker v. Carr*, 369 U.S. 186, 211 (1962) (describing the Court as the "ultimate interpreter of the Constitution").
[9] Larry C. Berkson & Seth Andersen, Judicial Selection in the United States: A Special Report (American Judicature Society 1999) (noting that only 21 "states hold elections for judges on courts of last resort").
[10] Upendra Baxi, "Introduction" to S.P. Sathe, *Judicial Activism in India* (Oxford: Oxford University Press, 2001),

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."[11]

[11] Learned Hand, "The Spirit of Liberty," in Dillard, *The Spirit of Liberty,* 190.