

ROLE OF JUDICIARY AS THE GUARDIAN OF CONSTITUTIONAL SUPREMACY

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Introduction

The Constitution in every country is the highest law of the realm, but the question is how to maintain and protect its supremacy? Some believe it is the duty of the judiciary while others believe it to be the obligation of the parliament through political process.¹ While the former interprets the law and decides whether a bill passed by parliament is legitimate, the latter, sworn on oath to uphold the constitution through its action. Rule of Law is the essence of any constitutional democracy. When rule of law prevails the result is Constitutional Supremacy. In this paper the effort is to trace the role of the judiciary in maintaining Constitutional supremacy.

Constitutional Supremacy: Meaning

Constitutional Supremacy requires all constitutional entities to follow the Constitution's provisions.² It is a philosophy according to which the "Constitution is the supreme law of the land, binding on all state organs, including Parliament and the State Legislature." They must act within the constraints imposed by the Constitution, and their every action must be justified by the

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¹ Monsoor T., Supremacy of the Constitution. (1991) 2 DULJ 123

² I.R Coelho v. State of Tamil Nadu (2007) 2 SCC 1

Constitution.³ The concept or idea of supremacy of the Constitution goes back to the 18th century when the American Constitution became the first constitution to recognise itself as “*the supreme law of the land*” under Article VI para 2, also known as “Supremacy Clause” which provides: “*This constitution, and the laws of the United States which shall be made in pursuance and all treaties made, under the authority of the United States, shall be supreme law of the land; and the judges in every state shall be bound thereby anything in the constitution or law of any state to the contrary notwithstanding.*”⁴

In *Marbury v. Madison*,⁵ the practice of Judicial review was for the first time introduced and resultantly, an act of congress was held invalid on the basis of a constitutional infringement. Justice Marshall observed:

“That the people had an original right to establish for their future Government such principles, as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they

³ Dhanapalan V., *Basic Structure of the Indian Constitution- An Analysis*, (2014) 8 SCC J-1

⁴ Available at <https://constitutioncenter.org/media/files/constitution.pdf>, Article VI, para 2 , American Constitution, 1787, Last accessed on 23, January, 2022

⁵ *Marbury v. Madison*, 1 Cranch 137 : 2 Lawyers Edition 60 (1803).

proceed is supreme, and can seldom act, they are designed to be permanent."⁶

Justice Geroge Whythe in the opinion of the Court of Appeals observed :

*"Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."*⁷

Constitution of Bangladesh under Article 7(2) provides "This constitution is, as the sole expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."⁸ In India, Article 13,⁹ provides any law which violates part III i.e. Fundamental Rights under the constitution would be void, thus paving way for Judicial Review in India.

According to Beg J.,

"The theory of the Constitution's supremacy is thus far from novel. It is implicit in the concept of the 'auguster thing' that lays behind Parliament or the King and is sought to be enshrined in a country's Constitution. Judges, who are entrusted with the

⁶ *Ibid.*

⁷ Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782)

⁸ Const. of the People's Republic of Bangladesh, 1972 , Art. 7

⁹ India Const. Art. 13

authority and responsibility of upholding the Constitution, act as mouthpieces for what political theorists like Bosanquet refer to as the Real Will of the People.”¹⁰

Judiciary as the Guardian of the Constitutional Supremacy

According to Dicey, “This system (American Constitution), which makes the judge the guardian of the Constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.” Judiciary in India is considered as the Guardian of the constitution and accordingly, it also attains the role of protector of Constitutional Supremacy. The judiciary becomes the Constitution's protector when a Constitution is justified, that is, when it can be enforced in a court of law. When the constitution provides for the separation of powers not only between the three parts of government, but also between the union/national level and the state, the control of the judiciary becomes more paramount.

“A closer examination of the institutional roles of constitutional courts in India suggests that we need to broaden our understanding of supremacy and constitutional guardianship to include a broader range of roles that courts play in enshrining constitutional norms, principles, and rights as core or basic features that the government cannot change.”¹¹ “The United States judicial supremacy paradigm is founded on the Court's interpretive

¹⁰ Justice Beg M.H., Indira Nehru Gandhi v. Shri Raj Narain & Anr., AIR 1975 SC 2299

¹¹ Mate M., Judicial Supremacy in Comparative Constitutional Law, Tulane Law Review (Vol. 93:392)

supremacy as the exclusive and final interpreter of the Constitution. Other constitutional systems, such as India, Germany, and Turkey, have constitutional courts that have a much greater role in judicial review of constitutional modifications and the creation of constitutional norms and principles.”¹²

While the United States Supreme Court lacks the authority to declare amendments unlawful, it has arguably limited the scope of constitutional amendments through its narrow interpretations.¹³

In a federal system, the judiciary acts as an Empire or arbiter and exercises the power known as judicial review. Judicial review is a mechanism in the hands of the court for upholding the Constitution's supremacy.¹⁴ Whenever there is a written Constitution imposing legal limitations upon the organs of the government, there must be an interpreter of the Constitution and that function must be entrusted to the judiciary which alone is competent to interpret legal instruments.

In India, there are explicit Constitutional provisions, namely *Articles 141 and 144*, which empower the Supreme Court as the final interpretation of the Constitution, and such interpretation is binding on all organs of the government. It may be said that “the concept of limited government and judicial review constitutes the essence of Indian constitutional system and

¹² *Ibid.*

¹³ *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), and *Boerne*, 521 U.S. 507

¹⁴ *Pai V.S., Working of the Constitution Check and Balances*, Eastern Book Company Ed. 2014. Pg 12

it involves three main elements: a written constitution setting up and limiting the various organs of government, the Constitution functioning as a superior law by any organ of government may be prevented or restrained and, if necessary, annulled". This sanction, in the modern constitutional world, is known as 'Judicial review', which means that, all government agencies, including the legislature, can have their acts declared invalid by a court of competent jurisdiction, on the ground that it is repugnant to the Constitution.¹⁵ The Israeli Supreme Court in *United Mizrahi Bank Ltd. v. Migdal Village*,¹⁶ aptly observed that "Judicial Review is the soul of the Constitution itself" and "Judicial review" is available in the vast number of modern democratic nations.¹⁷

*"No feature of the government of the United States has awakened as much curiosity in the European mind, caused so much discussion, received so much admiration and been more frequently misunderstood than the duties assigned to the Supreme Court and the functions which it discharges in guarding the Ark of the Constitution."*¹⁸

Since *William Marbury v. James Madison*,¹⁹ it has been considered the duty of every judge in the United States to treat any legislation void which violates the Constitution. In India also the judiciary follows the same functions as in the USA.

¹⁵ Pai V.S. Constitutional Supremacy A Revisit, Oak Bridge Publishing Ed. 2019 pg. 149

¹⁶ HCJ, 6821/93

¹⁷ *Ibid.*

¹⁸ Supra at 3

¹⁹ 2 L Ed 60: 5 US 137 (1803)

Judicial Supremacy v. Constitutional Supremacy

In its initial form, the Indian Constitution established a political structure based on parliamentary sovereignty, with many similarities to the British system. This included giving Parliament the right to modify the constitution. By having world largest written constitution providing judicial review power in the hands of independent judiciary with wide jurisdiction including original, appellate and especially writ jurisdiction, the constitution have presented a system with characteristic of “legitimate constitutionalist system” and the possibility of an “activist judiciary” that could broaden the role of the Indian constitutional courts in Indian politics. The issue of constitutional interpretation boils down to the question of original intent.

The Constitution operates as a limitation on all organs which includes the judiciary, otherwise the judiciary would become supreme outside the constitution. In *State of Rajasthan v. Union of India*,²⁰ (Assembly Dissolution Case) P. Bhagwanti J. observed:

“... the Constitution is suprema lex, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of that authority...It is for the Court to uphold

²⁰ (1977) 3 SCC 592

the constitutional values and enforce the constitutional limitations.”²¹

In *Minerva Mills Ltd. & Ors v. Union Of India*,²² Supreme

Court observed,

“The Constitution is supreme lex, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution.”²³

Judicial Review power of judiciary, therefore, does not mean “supremacy of the judiciary” but that of the Constitution.

Constitutional Guardianship: “The Basic Structure Doctrine”

The origin of “the Doctrine of Basic Structure” can be credited to the confrontation that country saw between the courts and the National Government led social reform initiatives in the 1960s and 1970s.²⁴ During this spell, the Apex Court upheld, “the First and Fourth Amendments in *Shankari Prasad v. Union of*

²¹ *Ibid.*

²² (1980) 3 SCC 625

²³ *Ibid.*

²⁴ *Supra* at 11

India,²⁵ in 1951, and later, the Court upheld the Seventeenth Amendment in *Sajjan Singh v. State of Rajasthan*²⁶ in 1965.” In *Golak Nath v. State of Punjab*,²⁷ Apex Court declared “the power to review and invalidate constitutional amendments under Article 13”, wherein the majority, led by Chief Justice K. Subba Rao, observed that, “under Article 13, definition of *laws* to include constitutional amendments.”²⁸ After the *Golaknath*’s judgment, the parliament introduced “twenty-fourth, twenty-fifth, and twenty ninth Amendments which aimed at overriding the Supreme Court’s decision in *Golak Nath* and immunizing legislation from judicial review.”

In the prominent decision in *Kesavananda Bharati v. State of Kerala*,²⁹ the Apex Court, “redefined its own role as a constitutional guardian, in asserting the basic structure doctrine and the power to review and invalidate constitutional amendments on substantive grounds.” This astounding judgment, which spanned nearly 1000 pages and included eleven different opinions of learned judges; In a 7:6 majority ruling, the bench overturned its earlier decision in *Golak Nath* case and held that “Parliament could amend the fundamental rights provisions.” However, the Court found that under Article 368 of the Indian Constitution,

²⁵ (1952) SCR 89 (1951)

²⁶ (1965) 1 SCR 933

²⁷ (1967) 2 SCR 762

²⁸ *Ibid.*

²⁹ (1973) 4 SCC 225.

“Parliament could not enact constitutional amendments that altered the basic structure of the Indian Constitution.” Chief Justice Sikri opined that “the basic structure” included, “(1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the legislature, the executive and the judiciary; (5) Federal character of the Constitution.”³⁰

A five judge bench of the Apex Court in *Indira Nehru Gandhi v. Shri Raj Narain*,³¹ also known as “Election Case”, applied “the basic structure doctrine in determining the validity of the 39th Amendment, 1975 which inserted Article 329A in the constitution.” The Apex Court, acting as custodian, overridden the aforementioned amendments and expanded the previous decision in the *Kesavananda Bharti*’s case by “promulgating doctrinal principles that identify those that make up the basic structure characteristics.” Justice Khanna opined “the provision in the amendment adding Article 329A violated the basic structure of the Indian Constitution by contravening the democratic set-up of the Constitution and the rule of law because democracy requires that elections should be free and fair.”³²

Apex Court in *Minerva Mills v. Union of India*,³³ applying the “doctrine of basic structure”, overruled “sections 4 and 55 of

³⁰ *Ibid.* at 274.

³¹ (1975) Supp. SCC 1

³² *Ibid* at 114-15 (Khanna, J.)

³³ (1981) 1 SCR 206

the 42nd Amendment to Constitution, 1976” as violative of the basic structure and spirit of the constitution.³⁴ “Section 4 amended Article 368 so as to subordinate the fundamental rights in Articles 14 and 19 to the directive principles and section 55 amended Article 31C to provide that no law enacted to advance the directive principles could be challenged in court as violative of the fundamental rights in Articles 14, 19, or 31.”³⁵ Chief Justice Chandrachud leading the majority reaffirmed, “the basic structure doctrine and held both sections 4 and 55 unconstitutional, ruling that these provisions sought to expand Parliament’s amending power to enable the government to abrogate the Constitution or destroy its basic features, given that a limited amending power is one of the basic features of Indian Constitution.”³⁶

In *I.R. Coelho v. State of Tamil Nadu*,³⁷ the validity of laws put under the Ninth Schedule including the “Tamil Nadu Reservation Act” was challenged. The Apex Court in 9 Judge Bench decision held, any law placed in the 9th Schedule after April 24, 1974 when *Keshwanand Bharti*’s judgment was delivered can be challenged before the constitutional courts. They are open to challenge on the grounds that they pose threat to the “basic feature of the constitution” or when the fundamental guarantees are taken

³⁴ Andhyarujina T.R., *Judicial Activism and Constitutional Democracy in India* (1992) pg. 22

³⁵ *Judicial Activism: The Indian Experience* pg. 87

³⁶ *Minerva Mills*, (1981) 1 SCR at 240.

³⁷ AIR 2007 SC 1

away.³⁸ “The basic structure doctrine protects our basic rights and every acts of the Parliament is now subject to this doctrine, and put a full stop on the unconstitutional Constitutional amendments game of the Parliament in I.R. Coelho case where the Ninth Schedule was enacted with the purpose to give effect to laws relating to land reforms.”³⁹

In Supreme Court Advocates-on-Record Association v. Union of India,⁴⁰ Apex Court, invalidated both “the 99th Amendment to the constitution and the National Judicial Appointments Commission Act, 2014 and found that both the Amendment and the Act violated the basic structure and spirit of the Indian Constitution.”⁴¹ The decision suggested that the Court’s powers may be interpreted broader than previously believed by the court. The Court effectively upheld “the judicial primacy and the appointments system based on the recommendation of collegium as a basic feature or norm which is an unprecedented decision among constitutional courts worldwide.”⁴²

Conclusion

The pivotal fact is that Constitution itself empowers... judicial review, so that when the courts express their view as to the reasonableness of restriction imposed on the fundamental rights...

³⁸ *Ibid.*

³⁹ Ahmad B., The Doctrine of "Basic Structure" in the Indian Constitution : A Critique, 23 ALJ (2015-16) 203

⁴⁰ (2016) 5 SCC 1

⁴¹ *Id.* at 737.

⁴² *Supra Mate* at 11

they do so pursuant to power vested in them by the Constitution....which is not the supremacy of the courts but the supremacy of the constitution.”⁴³ The Apex Court today is the most dominant judicial body around the world. India is really unique in the governing role that the higher judiciary is playing in the democratic systems. The Indian constitution drafters have achieved what the world thought unfeasible and have established a nation where there is supremacy of the constitution in letter and spirit. In *Sushil Kumar v. State of Haryana*,⁴⁴ Supreme Court observed, “in judicial review proceedings, the Courts are concerned with the decision-making process and not the decision itself.”⁴⁵ And the process should be one which is within the constitutional limits. With the emergence of concept of basic structure doctrine the threat to Constitutional Supremacy have been put under a check. Although, this led to emergence of the debate of Judicial Supremacy with the sword of Judicial Review. Constitution is the manifest of the will of the people and in democracies the elected government acts represent it. But constraint on the governmental power by judiciary is mandated in the democracies for safeguarding the Constitution not judiciary must extend judicial restraint whenever necessary. It can be said

⁴³ Setalvad, *Common Law in India*, p. 197

⁴⁴ 2022 LiveLaw (SC) 64

⁴⁵ *Ibid.*

that “Judiciary is acting as the guardian of the constitution in India.”

As Cardozo quotes:

“You may say that there is no assurance that judges will interpret the mores of their day more wisely and truly than other men, I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the Constitution has lodged it in the judges. If they are to fulfil their functions as judges, it could hardly be lodged elsewhere. Their conclusion must, indeed, be subject to constant testing and retesting, revision and adjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom.”⁴⁶

⁴⁶ Cardozo N. B., *The Nature of the Judicial Process*, Yale University Press, (1921) pg 135-136