Parliamentary Sovereignty versus Constitutional Supremacy

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Abstract

The democracy in India can best be described as representative Parliamentary democracy. The concept of Parliamentary Sovereignty is related with the supremacy of legislature, which holds that the legislative body has absolute sovereignty. It implies that the legislature is supreme over other organs of the Government, like Judiciary and Executive. It also holds that the Legislative body may change or repeal any previous legislation and so it is not bound by any written law. The Parliament in India in view of federal structure and in norms of written Constitution is not supreme, unlike British Parliament. In this paper some questions related with Constitutional Supremacy and Parliamentary Sovereignty are discussed. These are: What is the reality of British political system regarding the doctrine of Parliamentary Sovereignty? Is the Parliament of Britain really sovereign? What is the position of Indian political system with respect to Constitutional Supremacy and Parliamentary Sovereignty? How Constitutional Supremacy is related to Judicial Supremacy and Parliamentary Sovereignty.

KEYWORDS : Parliament, Sovereignty, Constitution, Supremacy.

The first and foremost feature of Indian Political System is that the sovereignty of the State lies among its citizens. Also it is true that our Constitution is the supreme law of the land and all state and Government organs along with the citizens of the country are bound by it and they must act within the limits laid down by the Constitution. This is called the doctrine of Constitutional supremacy. There are certain preconditions of the doctrine of Constitutional supremacy. First, the Constitution must be written and rigid, so that no one can dissolve it easily. Second, there should be difference between ordinary law and constitutional law. It implies that there should be different procedure to pass the Constitutional law and all other laws should be in line with the Constitution of the country. Third, since the constitutional law is supreme, it cannot be challenged in the Court of law. Fourth, The Constitutional law will prevail in the condition of any contradiction between ordinary law and the Constitutional law.

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The Constitutional Position of British Parliament

The powers of British Parliament are vast and unlimited in principle. It can make laws, levy taxes, declare war and peace, and control all Governmental machinery by supervision. It can dethrone Kings; it can abolish the Kingship.

" The Sovereignty of Parliament," said Dicey, " is from a legal point of view the dominant characteristic of our political institutions," and the principle of Parliamentary Sovereignty, he added,' ' means neither more nor less than this, namely, that Parliament thus defined has, under the British Constitution, the right to make and unmake any law whatever; and further no person or body is recognized by the law of England as having a right to override and set aside the legislation of parliament" [1] Dicey, thus set the following propositions: —

(1) That there is no law which Parliament cannot make; and

(2) That there is no law which Parliament cannot unmake.

From the above two follows the third:

(3) That there is under the British Constitution no marked or clear distinction between laws which are fundamental or constitutional and laws which are not; and

(4) That there is no authority recognized by the law of Britain which can set aside and make void such legislation and finally Dicey added that

(5) That Parliamentary Sovereignty extends to every part of the King's Dominions. [2]

From the above description, it can be said that British Parliament can legislate any law as it pleases and the courts must interpret and apply the laws enacted by the Parliament. As there is no formal distinction between Constitutional law and other laws, the Parliament is both the legislative body and Constituent Assembly as well and that’s why the Parliament can make or abrogate any law by same procedure. An act of Parliament cannot be called in to any court of law. Also it cannot be called invalid as no law exists in Britain higher than that made by Parliament. Equity and common law, which are the oldest and most fundamental to British Constitution, cannot overrule the laws enacted by the Parliament. If two laws passed by the Parliament conflict each other, a more recent Act of Parliament takes precedence over a less recent and supersedes any earlier statutory provisions inconsistent with it. One more aspect of British Parliamentary Sovereignty is that the Executive in Britain has not the power of issuing decrees which have the force of law save in so far as that power is conferred on it by Parliament itself and so can be taken away by Parliament." Neither through the Royal Prerogative nor by any other means can any legal limitation be placed on Parliament. As a corollary, the right to impose taxes resides with Parliament alone. Again, Parliament alone has the right to legalise the past illegalities. Legally, therefore, Parliament can make or unmake any law, destroy by statute the most firmly established convention or turn a convention into a binding law, and legalise past illegalities reversing the decisions of courts. It even has power to

prolong its own life by legislative means beyond the normal period of five years as determined by the Parliament Act, 1911. [3]

Limitations over the Sovereignty of British Parliament

The above concept of Parliamentary Sovereignty described by Dicey and other Constitutional experts is only legal one. It does not have any connection with the reality of British Political System, as the reality of actual political life in Britain is that a legal truth very often turns out to be a political untruth. Parliament cannot do any and everything, and make or unmake any kind of law. There are many moral and political checks which limit its powers. The first limitation to the Parliamentary Sovereignty is the public opinion. Democracy is a Government by consent and the laws in a democratic Government must necessarily be the according to the will of people. If they are not the Sovereign may take its revenge. The Parliament cannot pass a law which is against the facts of nature or against the codes of public or private morality. Similarly the Parliament cannot enact any law, which is against the established customs of the country. Even the concept of Parliamentary Sovereignty in Britain is the result of well established customs.

The second limitation to the principle of Parliamentary Sovereignty is the theory of Rule of Law which is an important feature of British Constitution. The Rule of Law means that the ordinary law of the land is of universal application, that there is no exercise of arbitrary authority, and that there is no division into separate systems of law, one for officials and another for the ordinary citizens. It also carries with it the rule that the remedies of the ordinary law will be sufficient for the protection of the rights and liberties of the citizens, and, there is nothing in Britain as the Fundamental Rights. The Rule of Law is closely interwoven with the supremacy of Parliament.

Sovereignty of Parliament and the Rule of Law remarks Barker, “are not only parallel; they are also interconnected, and mutually interdependent. On the one hand, the judges uphold and sustain the sovereignty of Parliament, which is the only maker of law that they recognise (except in so far law is made, in the form of ‘case law’, by their own decisions); on the other hand Parliament upholds and sustains the rule of law and the authority of the judges, who are the only interpreters of the law of the land." [4]

While discussing the question of Sovereignty of Parliament, Herman Finer says, “All is true except that, in fact, there are limitations in practice to the authority of Parliament, limitations that are embodied in the authority of the electorate, mediated or not through the political parties. The sovereignty of Parliament is limited by the power of the people—but by no other instrument." [5]

In this way The Sovereignty of Parliament has become an organic principle of British Constitution. But it is also true that this sovereignty is a legal one and not political one. In practice, Parliament in Britain means the house of commons, as the second Chamber (House of Lords) in Britain is powerless and House of commons acts according to the will of Prime Minister and the council of ministers as they are the powerful members of majority party so the Parliament enacts only those laws which are proposed by the ruling party or in other words Prime minister and his council of ministers.

The Position of Parliament in India

Though the Constitution of India has adopted the language of Britain in describing its Legislature at the Centre, and has made the President, like the Monarch of that country, a constituent part of Parliament, yet the Indian Parliament is not sovereign Legislature like the British Parliament. It functions within the bounds of a written Constitution setting up a federal polity and a Supreme Court invested with the power of judicial review. The legislative competence of Parliament is limited, during normal times, to the subjects enumerated in the Union List and the Concurrent List in the Seventh Schedule of the Constitution. Besides, its supremacy within its own sphere of jurisdiction is limited by the Fundamental Rights guaranteed to the citizens in Part III of the Constitution. Article 13 Clause (2) prohibits, subject to specified restriction, the State from making any law which would take away or abridge any of the Fundamental Rights. Where the State makes a law in contravention of the Fundamental Rights, that law shall, to the extent of contravention, be void. [6]

Parliamentary Sovereignty versus Judicial Supremacy

India has often witnessed conflict between Parliamentary Sovereignty and Judicial Supremacy and most of the time the Judiciary has won. Some critics call it as the tyranny of unelected by undermining the elected.

This conflict took place in late sixties and the central issue of the conflict was fundamental rights. Absolute or unrestricted rights are not possible. This is the position in Britain, although there are no constitutional guarantees of fundamental rights in that country.[7] In the United States there are no direct restrictions imposed by the First Ten Amendments which determine the American Bill of Rights. But under the doctrine of Police Power the Supreme Court has recognised the inherent power of the State to impose such restrictions on Fundamental Rights as may be deemed reasonable to protect the common good. The Constitution of India, on the other hand, imposes direct limitations on Fundamental Rights. Ambedkar, while introducing the Draft Constitution and supporting the restriction clauses, maintained, "what the Draft Constitution had done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights."[8] Courts in India cannot, therefore, question the propriety of legislation once it has been established that it is within the competence of the legislature to make such a law or in any way to modify its effect on the ground that it seeks to "unduly restrict personal liberty." [9]

Thus the Constitution of India did not recognize the judicial supremacy against the supremacy of Legislature, although the Constitution gave Judiciary the power to review legislation repugnant to the Fundamental Rights. The position before February 1967 was that Parliament would abrogate or abridge Fundamental Rights by amending the Constitution under the provisions of Article 368 and thereby override the unwholesome decision of the Judiciary simply by securing the requisite special majority, which the Congress Party had commanded in Parliament all those years. In 1961 and 1963, the Supreme Court declared that the Kerala and Madras Land Reform Acts, which provided for a ceiling on land holdings, were bad. In the wake of these declarations the Seventeenth Amendment was enacted in 1964 whereunder 44 laws

passed by both the States were included in the Ninth Schedule of the Constitution in order to maintain them valid. A good number of writ petitions challenging the competence of Parliament to enact the Seventeenth Amendment were moved in the Supreme Court. The Supreme Court by a 6-5 ruling on February 27, 1967 in the case of Golakh Nath versus the State of Punjab reversed its earlier decisions [10] and declared that Parliament has no power to abridge or take away Fundamental Rights by amending the Constitution under Article 368. Chief Justice Subba Rao, speaking for the majority, declared "The Constitution has given by its scheme a place of permanence to the fundamental freedoms. In giving to themselves the Constitution, the people have reserved the fundamental freedoms to themselves. Article 13 merely incorporates that reservation. The importance attached to the fundamental freedoms is so transcendental that a bill enacted by a unanimous vote of all the members of both Houses (of Parliament) is ineffective to derogate from its guaranteed exercise....." The Court rejected the Government's argument that if the power to amend the Constitution was not all-comprehensive, no way would be left to-change the structure of the Constitution or to abridge the Fundamental Rights even if the whole county demanded such a change. It was declared that "this visualizes an extremely unenforceable and extravagant demand; but even if such a contingency arises, the residuary power of the Parliament may be relied upon to call for a Constituent Assembly for making a new Constitution or radically changing it." [11]

The resultant position was that the amendment of the Fundamental Rights was not forbidden, but the Supreme Court reserved to itself the power of determining in each specific case whether the amendment in question took away or abridged those rights contained in Part III of the Constitution. Thus, the precariously balanced six to five decision established the supremacy of the Judiciary so far as Fundamental Rights were involved. The Supreme Court of India, like its counterpart in the United States, assumed the role of a super legislature because what is taken away by the Justices from Parliament is taken away from the people.

The Constitution (Twenty-fourth Amendment) Act, 1971, was enacted to get over the difficulty created by the Golak Nath case. The amendment empowered Parliament to abrogate any of Fundamental Rights including the right, under Article 32, to move the Supreme Court for the enforcement of Fundamental Rights. The validity of this amendment was questioned in the Supreme Court through a series of writ petitions. In Kesavananda Bharati v. The State of Kerala the Court reversed the Golak Nath case judgment by upholding the validity of the Twenty-fourth Amendment and thereby restored the supremacy of Parliament in regard to legislation on Fundamental Rights, a position that existed prior to 1967. But the Court also ruled that Parliament cannot alter the basic structure or framework of the Constitution. [12] What exactly did the basic structure mean, the Court said nothing about it. The term basic structure is a vague and general term and the Judges themselves did not offer a common agreed meaning. Some included Fundamental Rights and federation in the concept of basic structure while others include Parliamentary form of Government in it. Some law experts do not want to give the Parliament the power to amend the Fundamental Rights, while some others see no limit to the amending power of Parliament.

The Constitution (Forty-second Amendment) Act 1976, provided that Parliament had full power to amend the Constitution and no Amendment made under article 368 could be questioned in any Court on any ground. The validity of the Forty-second

Amendment was questioned and in May 1980 the Supreme Court struck down in the Minerva Mills case [13] Section 55 of the Amendment incorporated in Clauses (4) and (5) of Article 368 as it altered or destroyed the basic structure or framework of the Constitution. It was affirmation of the Kesavananda Bharati case (1973) judgment. Unless this Judgment is reversed by the Court on the review application of the Union Government or a new amendment of the Constitution is enacted and the Supreme Court upholds that amendment, the power of Parliament cannot extend beyond the limitations placed by the Constitution and the Supreme Court.

Conclusion

Democracy is the Government where the supreme and final authority lies among the citizens of the country. According to Subhash Keshyap Indian democracy can best be described as Representative Parliamentary Democracy. [14] Though India has adopted the Parliamentary Democracy following the British model, but there is a lot of difference between the position and the power of the legislatures of both countries because of different circumstances of both countries. Britain is a small country with unitary type of Government, unwritten, developed and flexible constitution and no power of judicial review so its Parliament can change its Constitution according to its will. The Judiciary of Britain has not any power to declare any law or any amendment to the Constitution void. In this way British Parliament enjoys full sovereignty, but this sovereignty is limited by the will of people, the doctrine of natural justice, well established customs and the theory of rule of law. Also the powers of British Parliament are enjoyed by the Prime Minister and his cabinet. On the other hand Indian Parliament is not as supreme as British one as its conditions are different from that of Britain. India is a vast country having a large population therefore it has adopted the federal form of Government. Besides this our Constitution is written as a mix of flexibility and rigidity. Our Judiciary also has the power of reviewing the laws and Constitutional amendments passed by the Legislature therefore Parliamentary Sovereignty in India is subject to Constitution of our country. This does not mean that Indian Parliament has very limited powers or it cannot amend the Constitution. Of course, it can and it may have to as life is ever changing and the law has to evolve with the changing times. In fact the procedures for amending the Constitution are set in article 368 of the Constitution. According to this article some articles of the Constitution can be amended by simple majority of the Parliament, some others can be amended by special majority (two third of present members and simple majority of the total members) and some other articles require ratification of half state assemblies including special majority of the Parliament to be amended. There is one more limitation to the power of the Parliament of India is that any amendment passed by it should not alter or destroy the basic structure of the Constitution. So we can conclude that Indian Parliament enjoys limited Sovereignty with comparison to that of British Parliament.

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