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PARLIAMENTARY SOVEREIGNTY V. CONSTITUTIONAL SUPREMACY

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Current Scenario:

Parliamentary supremacy has never been as prominently highlighted as it is now, thanks to the comments made by the Hon'ble Vice President on various occasions. Here are the statements that shed light on this matter:

A) During the 83rd All India Presiding Officers Conference in Jaipur on January 10, 2023, the Hon'ble Vice President stated, "In a democratic society, the supremacy of the people's mandate should be the foundation of any basic structure. Therefore, the primacy and sovereignty of Parliament and the legislature are inviolable."¹

B) On February 3, 2023, the Vice-President referred to Parliament as the "North Star" of democracy.²

However, these comments and assertions have faced criticism from several legal scholars in India. This paper aims to explore the concept of Parliamentary Sovereignty, Constitutional Supremacy, and their relevance in the Indian context.

Introduction to these Concepts:

I) What is Parliamentary Sovereignty?

Parliamentary Sovereignty, also known as legislative supremacy, is a principle of constitutional law observed in some parliamentary democracies. According to this principle, Parliament holds supreme

¹ Vice President Secretariat Press Release, Link- <https://pib.gov.in/PressReleasePage.aspx?PRID=1890297>

² The Hindu Daily, Feb. 3, 2023, Link- <https://www.thehindu.com/news/national/parliament-is-the-north-star-of-democracy-vice-president/article66467335.ece>

authority over all other branches of government, including the executive and judiciary.³ The concept of Parliamentary Sovereignty was articulated by AV Dicey, who stated that Parliament has the right to create or abolish any law and that no other person or body has the authority to override or invalidate legislation passed by Parliament.⁴

The key features of Parliamentary Sovereignty can be summarized as follows:

- Parliament can modify or repeal any law.
- There is no distinction between constitutional law and ordinary law.
- No higher authority can deem laws passed by Parliament illegal or unconstitutional.⁵

The concept of Parliamentary Sovereignty has a unique historical background. It traces back to the trial, conviction, and execution of King Charles I of England in 1649 for his alleged assault on Parliament during the Second English Civil War⁶. England experienced a period of republican rule under Lord Protector Oliver Cromwell, followed by the restoration of King Charles II in 1660. The Glorious Revolution, the election of the English Convention Parliament in 1689, and the ascension of William and Mary to the throne further solidified the supremacy of Parliament. The Bill of Rights Act of 1689⁷ was subsequently passed, establishing parliamentary supremacy.

II) Constitutional Supremacy:

Constitutional Supremacy, also known as Constitutional Democracy, differs from Parliamentary Sovereignty as it places constraints on the powers of Parliament through a written constitution.⁸ In most constitutional democracies, if a citizen believes that a law violates any provision of the constitution, they can challenge it in a court of law. The courts have the authority of judicial review to determine the constitutionality of legislation. If a law is found to be in violation of the Constitution, the court can nullify it.

The basis for Constitutional Supremacy in the United States is the Supremacy Clause, found in Article

³ United Kingdom Parliament, Official website.

⁴ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885), 10th ed., 1959, London: Macmillan, pp 39–40

⁵ *ibid.* 4

⁶ Sovereignty, Supremacy and the Origins of the English Civil War, D Alan Orr, Introduction.

⁷ 1 Will & Marr Sess 2 c 2, Citation.

⁸ The Concept of the Supremacy of the Constitution, Jutta Limbach, Pg. 1

VI, Clause 2 of the Constitution⁹, which states that the Constitution, federal laws, and treaties are the supreme law of the land. Similarly, Canada transitioned from Parliamentary supremacy to Constitutional supremacy¹⁰ with the adoption of the Canadian Charter of Rights and Freedoms in 1982.

While justifying the Supremacy Clause, Alexander Hamilton, in Federalist Paper¹¹ No. 33, states that-"A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed."

Judicial Review:

Judicial review is a process by which the judiciary reviews and evaluates the constitutionality of, in some countries, government actions, whereas, in some countries, the legislation.

I) Countries with Parliamentary Sovereignty:

In countries with Parliamentary Sovereignty like England, judicial review operates against the backdrop of parliamentary superiority.¹² The courts in England have gradually gained control over the interactions between government agents and citizens. Over time, administrative powers were delegated to local authorities, leading to the development of the ultra vires doctrine and principles of natural justice.

In countries with Parliamentary Sovereignty, such as England and jurisdictions following the Westminster model, the concept of judicial review emerged against the backdrop of the supremacy of Parliament.

⁹ United States Constitution, created Sept. 17, 1787

¹⁰ Part I of the Constitution Act, 1982

¹¹ Link- <https://guides.loc.gov/federalist-papers/text-31-40#s-lg-box-wrapper-25493387>

¹² The Rule of Law and Parliamentary Sovereignty by T.R.S. Allen, Oxford University Press.

After the transition from monarchy to parliamentary supremacy¹³, the courts, particularly the King's Bench, gained more control over the interaction between government agents and citizens in England. Throughout the 19th century, as administrative powers shifted to elected local authorities, the courts developed doctrines like *ultra vires* and principles of natural justice¹⁴. These principles were later extended to the central government as it grew in the latter half of the century.

While Parliamentary Sovereignty has been a fundamental principle in England, there have been cases challenging its absolute authority. One notable case is the Bonham case, where the court found in favor of Dr. Bonham¹⁵ against the Royal College of Physicians. Chief Justice Coke reasoned that when an Act of Parliament contradicts common law or common right, the common law can render it void.

Dr. Bonham's Case: A changemaker

Even though the principle of Parliamentary Sovereignty originated in England, there have been cases holding otherwise. One such case is the famous Bonham case.

Dr Bonham had obtained a doctorate in medicine from the University of Cambridge and set about practicing his profession in the city of London. This provoked the ire of the Royal College of Physicians, which had been granted by letters patent issued by King Henry VIII the power to fine any person who practiced as a physician in London and surrounding areas who had not been admitted into the College. The terms of the patent were confirmed by two statutes.² Half of the fine was payable to the College and half to the Sovereign. Those who defaulted in paying the fine could be imprisoned. This was the fate that befell Dr. Bonham, who appeared before the College for examination in 1606 and was found to be deficient in medical knowledge. Nevertheless, he continued to practice. The College fined him and then, when he refused to pay the fine, imprisoned him.

The Court found, 3–2, for Dr. Bonham. In his judgment, Chief Justice Coke reasoned that by benefitting from any fines it imposed, the College was acting not only as a judge, but also as a party in its own cause — contrary to an established maxim of common law. He wrote:

¹³ Act of Settlement of 1700, citation- 12 and 13 Will 3 c. 2

¹⁴ Origins in various Indian, Greek, and Roman documents. Also propounded in Magna Carta

¹⁵ 77 Eng. Rep. 638, Thomas Bonham v College of Physicians

“.....And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.”¹⁶

In the 20th century, the central government in England consolidated political and administrative power. During the Second World War, there was a concentration of power in the executive branch¹⁷, which persisted for some time. However, the case of *Ridge v. Baldwin*¹⁸ in 1963 revived the principles of natural justice and contributed to the development of administrative law based on the ultra vires doctrine.

In countries like England and other common law jurisdictions following the Westminster system, "judicial review" refers to the higher courts' authority to review the lawfulness of administrative decisions, actions, or omissions related to public functions.¹⁹

In some jurisdictions, courts also have the statutory power to issue declarations of incompatibility or inconsistency, as seen in the Human Rights Act²⁰. In Canada, prior to 1982, Parliamentary supremacy prevailed until the adoption of the Canadian Charter of Rights and Freedoms. This constitutional supremacy granted courts the power to strike down laws that violated the charter.²¹

II) Countries with Constitutional Supremacy:

However, in the United States, judicial review in these countries can be used to challenge the constitutionality of legislation passed by Parliament. The court's role in judicial review is supervisory²², focusing on determining the lawfulness of decisions or actions or legislation rather than replacing them with its own.

¹⁶ Pollard, David (2007) ISBN:978-0-19-928637-9.

¹⁷ California Law Review, Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today, Amanda L. Tyler, dated June 2019

¹⁸ [1964] AC 40

¹⁹ Judicial Review & Parliamentary Supremacy by David Collins, Duke University.

²⁰ 1998 c. 42, Passed as envisaged by EU Convention on Human Rights.

²¹ Section 4 and 10 of Human Rights Act, 1998

²² The Super The Supervisory Power of the Supreme Court of the Supreme Court by Amy Coney Barrett, Notre Dame Law School.

The American version of judicial review, as established in *Marbury v. Madison*²³, survived due to various factors. Chief Justice Marshall's involvement in the case created a conflict of interest²⁴, but the doctrine was not invalidated. Jefferson and his administration saw advantages in allowing the doctrine to stand, as long as they could control the appointment of jurists exercising judicial review²⁵. The federal government also found judicial review appealing as it asserted federal authority over the states.

Judicial review in the United States has been used sparingly, with judges exercising caution in striking down congressional statutes that violate the Constitution²⁶. This approach has helped maintain public confidence in the federal judiciary and the legitimacy of judicial review. Landmark cases like *Brown v. Board of Education*²⁷ and *Obergefell v. Hodges*²⁸ have further reinforced the value of judicial review in protecting constitutional rights.

III) Judicial review in India

The judiciary acts as a custodian, ensuring the government's actions are in accordance with the Constitution and protecting the fundamental rights of citizens²⁹. The concept of parliamentary supremacy and constitutional supremacy coexist in the Indian context, shaping the relationship between the legislature and the judiciary³⁰.

During the initial years³¹ after India's independence, the relationship between Parliament and the judiciary was harmonious and cordial. However, the turning point came in the second phase (1967-1972)³² with the *Golak Nath* judgment. The judgment stated that Parliament cannot amend Part III of the Constitution and emphasized that an amendment is a "law" within the meaning of Article 13(2). This led to a clash between the judiciary and Parliament, as it restricted the power of the legislature to amend the Constitution.

²³ 5 U.S. 137, United States Supreme Court

²⁴ As incoming President Jefferson was his political rival.

²⁵ A practice that is used even today.

²⁶ A Preference for Deference? The Supreme Court and Judicial Review by Robert M. Howard and Jeffrey A. Segal, *Political Research Quarterly* Vol. 57

²⁷ 347 U.S. 483, United States Supreme Court.

²⁸ 576 U.S. 644, United States Supreme Court.

²⁹ Report, Department of Legal Affairs Of India, Link- <https://legalaffairs.gov.in/sites/default/files/chapter%207.pdf>

³⁰ PARLIAMENTARY SOVEREIGNTY VS. JUDICIAL SUPREMACY IN INDIA by D. C. Chauhan, *The Indian Journal of Political Science*, Vol.74

³¹ First Phase from 1947 to 1967

³² *Ibid.*,30

The third phase (1973-1979)³³ marked a significant milestone in defining the balance of power between Parliament and the judiciary. The case of *Keshavananda Bharati v. State of Kerala*, decided by a 13-judge bench, established the basic structure doctrine. This doctrine enables the judiciary to review constitutional amendments that abridge the basic structure of the Constitution. It was a landmark judgment that affirmed the judiciary's role as the protector and interpreter of the Constitution.

The fourth phase³⁴ (1980-present) witnessed further developments in the relationship between Parliament and the judiciary. In the *Minerva Mills* case³⁵, the court struck down certain provisions of the 42nd Amendment to the Constitution, restoring the balance of power between the executive and the judiciary. The court emphasized the importance of preserving the basic structure of the Constitution and preventing any arbitrary exercise of power.

Therefore, in the Indian system, parliamentary sovereignty is not absolute³⁶. While Parliament holds significant legislative power, it operates within the boundaries set by the Constitution. The concept of constitutional supremacy ensures that the government's actions are subject to judicial review and scrutiny. The judiciary plays a crucial role in upholding the Constitution and safeguarding the rights and liberties of individuals.

Other controversial moments in the Post 1980 era:

- 1) **44th Amendment Act:** In the post-1980 era, several important cases and events have shaped the interaction between Parliament and the judiciary. One such significant event was the adoption of the 44th Amendment Act in 1978, which restored the primacy of fundamental rights over parliamentary sovereignty. This amendment rectified some of the issues raised by the *Golak Nath* judgment³⁷ and reaffirmed the judiciary's authority to review constitutional amendments.

³³ *Ibid.*,30

³⁴ *Ibid.*,30

³⁵ *Minerva Mills v UOI*, AIR 1980 SC 1789, Supreme Court of India.

³⁶ *Ibid.*,30

³⁷ *Golak Nath v. State of Punjab*, 1967 AIR 1643, Supreme Court of India.

- 2) **Striking down important legislations:** In subsequent years, there have been instances where Parliament and the judiciary have disagreed on various matters. These disagreements often arise when the judiciary strikes down laws or executive actions deemed unconstitutional or in violation of fundamental rights.
- 3) **The Supreme Court's intervention in matters of corruption and governance³⁸:** Over the years, the judiciary has played an active role in combating corruption and promoting good governance. The court has intervened in cases related to electoral reforms, the appointment of public officials, and the implementation of anti-corruption measures. These interventions have sometimes been perceived as encroaching upon the domain of Parliament and the executive, leading to debates on the separation of powers.
- 4) **NJAC issue; The National Judicial Appointments Commission (NJAC) case:** In 2015, the Supreme Court struck down the constitutional amendment³⁹ establishing the NJAC, a body intended to play a significant role in the appointment of judges. The court held that the NJAC would compromise judicial independence and the principle of checks and balances. This decision sparked a debate on the separation of powers and the role of Parliament in judicial appointments.
- 5) **The Aadhaar case⁴⁰:** In 2017, the Supreme Court delivered a landmark judgment on the Aadhaar program, a unique identification system in India. The court upheld the constitutional validity of Aadhaar but imposed certain limitations and safeguards to protect citizens' privacy rights. This case highlighted the judiciary's role in balancing individual rights with the government's objectives and raised questions about the scope of Parliament's power in enacting legislation that affects fundamental rights.

It is worth noting that while conflicts between Parliament and the judiciary arise from time to time, the relationship between the two institutions is not characterized solely by confrontation. There are instances of collaboration and synergy as well. Parliament has the authority to amend laws and enact new legislation, and the judiciary often interprets these laws and provides clarity on their constitutionality. This interplay helps refine the legal framework and ensures the effective functioning of the democratic system.

³⁸ Anti- Corruption Litigation In Supreme Court of India by Arghya Sengupta,2006

³⁹ 99th Constitutional Amendment Act,2014

⁴⁰ K.S. Puttaswamy v UOI, (2017) 10 SCC 1, Supreme Court of India

In summary, the relationship between Parliament and the judiciary in India is dynamic and complex. While there have been instances of disagreement and conflict, both institutions play crucial roles in upholding the constitutional values and safeguarding the rights of citizens. Their interaction helps maintain a system of checks and balances, ensuring that the principles of democracy, rule of law, and protection of fundamental rights are upheld.

Suggestions over the Recent tussle between the Executives and the Judiciary

The tussle between the Parliament and the judiciary in India has been the subject of debate and discussion. While both institutions are essential pillars of democracy, clashes between them can arise due to differences in interpretation, jurisdictional boundaries, and the exercise of power. Here are some key suggestions to address and manage such tussles:

1. **Clear Jurisdictional Boundaries:** Clearly defining the jurisdiction and powers of both the Parliament and the judiciary is crucial to avoid conflicts. Establishing well-defined boundaries will help prevent encroachment and ensure a smooth functioning of both institutions.
2. **Effective Communication and Collaboration:** Encouraging regular communication and collaboration between Parliament and the judiciary is vital. This can be achieved through structured dialogues, joint committees, and consultations on issues where both institutions have a stake. Constructive engagement can foster understanding and reduce the potential for conflict.
3. **Strengthening Judicial Independence:** Upholding the principle of judicial independence is essential to maintain a healthy balance between the Parliament and the judiciary. Safeguards such as appointment processes, security of tenure, and adequate financial resources for the judiciary are crucial to protect it from undue influence.
4. **Enhancing Legislative Scrutiny:** The Parliament can play a more active role in scrutinizing proposed legislations for constitutional validity and potential conflicts with judicial pronouncements. Conducting thorough reviews and seeking expert legal opinions can help avoid situations where laws are struck down by the judiciary.
5. **Promoting Alternative Dispute Resolution:** Encouraging the use of alternative dispute resolution mechanisms, such as mediation and arbitration, can reduce the burden on the

judiciary and provide timely resolution to conflicts. This can help alleviate some of the pressure on the courts and foster a more cooperative environment.

6. **Promoting Judicial Restraint:** The judiciary can exercise self-restraint while dealing with matters that fall within the domain of the Parliament. It is important for the judiciary to respect the principle of separation of powers and intervene only when there are clear violations of constitutional provisions.
7. **Continuing Judicial Education:** Regular training and education programs for judges and parliamentarians on constitutional principles, legislative processes, and the role of each institution can foster a better understanding and appreciation of each other's functions. This can contribute to a more harmonious relationship between the Parliament and the judiciary.
8. **Public Awareness and Engagement:** Encouraging public awareness about the roles, powers, and importance of both the Parliament and the judiciary can generate public support for their respective functions. Engaging citizens through public debates and discussions can help build consensus and understanding of the complexities involved.

It is important to note that tussles between the Parliament and the judiciary are inherent to the democratic process, and a certain level of tension is healthy. However, adopting these suggestions can help manage conflicts and ensure that both institutions work in tandem to uphold the rule of law and protect the rights and interests of the citizens.

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