

Striking a balance between the Judicial Review and Parliamentary Sovereignty-A comparative analysis of UK and India

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ABSTRACT

The Judiciary, Legislature and Executive are the three pillars on which the effective functioning of the Government rests. A balance as opposed to conflicts is very necessary to achieve the ultimate public welfare and smooth functioning of constitutional machinery. The article deals with the Parliamentary sovereignty and Judicial Review, its evolution in U.K. and India, functioning thereby differentiating the two economies and at the same time deals with joining of U.K. with EU or introduction of Human rights Act did not violate the Parliamentary Sovereignty in U.K. rather it strengthened the Parliamentary powers as opposed to causing restrictions on it. India on the contrary bears the supremacy of the constitution where the powers of the Parliament are circumscribed within the four walls set by the constitution and yet provides for striking a balance between the various pillars without any encroachment on each other's area and providing effective governance. The various heads covered under the article are

1. An acquaintance with Judicial Review
2. Understanding Parliamentary Sovereignty
3. Meaning of Parliamentary Sovereignty
4. Parliamentary Sovereignty in U.K
5. Human rights Act
6. Parliamentary sovereignty in INDIA

1. An Acquaintance with Judicial Review

1.1 Introduction

Parliament, Executive and Judiciary are the three pillars that form a strong base for running the constitutional machinery in an effective manner maintaining their independence and at the same time working under the principles of mutual co-operation

and harmony. Judicial review encompasses the power of judiciary to review actions of legislative and judiciary thus enshrining the principle of rule of law and maintaining separation of power principle at the grassroots level. Thus, the main frame within which the judiciary limits are circumscribed consist of judicial review of administrative and legislative actions and scrutinizing several constitutional amendments in the light of constitutional provisions thereby protecting the sanctity of the constitution and protecting the fundamental rights of the citizens.

Judicial review is a strong tool to keep a check on public bodies and rendering their accountability if their decisions or policies go outside the powers that have been specified in the constitution. It maintains an effective check and balance whereby it controls unriddled, arbitrary or unjust acts taken on behalf of executive and legislature.

1.2 Origin

The concept of judicial review traces its roots in the U.S. landmark case Marbury v Madison (1803) whereby the concept gained its full-fledged acknowledgement. Article III of US constitution provides that “Judicial power of US include original, appellate jurisdiction and matters arising under law and equity jurisdiction incorporates judicial powers of the court. Article VI provides “Constitution of US is the supreme law of the land”. In UK there is no written constitution, so the concept of Judicial Review could not get into great limelight and was constrained only to secondary legislation and not to Primary Legislation except giving weightage to certain Human Rights or respecting the individuality of the person. The Canadian Judicial Review came into being by Canadian federal constitution where the imperial Parliament enacted the British North America Act. Then the Canadian Charter of rights and freedoms in 1982 encompassed several issues pertaining to academics, politicians and media.

Edmund Burke said, “all persons in possession of powers ought to be strongly and lawfully impressed with an idea that “they act in trust and must account for their conduct to one great master to those in whom political sovereignty rests, the people”¹. India

¹Anupa v Thapiyal “Central Administrative Tribunals and their power to issue directions, orders or writs under Article 226 and 227 of the constitution”, (1992)4 SCC (Jour) 18

resorted to Parliamentary form of government as opposed to Presidential form of government whereby each head of the government must render its accountability. Being under the clutches of British Government in the initial years judiciary adopted a pro-legislative approach in its various decisions but later between 1970-1975 more than 100 laws were made by the state which were held unconstitutional by the Parliament and ultimately in *Keshvananda Bharati Case*², the Judicial review was held to be the basic structure of Indian constitution. Same view was reiterated in *S.P. Sampath Kumar v Union of India*³. Justice P.N Bhagwati relying on *Minerva Mills Ltd (1980) 3 SCC 625* declared that it was well settled that Judicial review forms the basic structure of our Indian Constitution. The *KihotoHollohanv Zachillur 1992Supp(2) SCC 651, 715, para 120* held invalid para 7 of 10th schedule regarding non-review of the decision of speaker/ Chairman on the question of disqualification of judicial review of MLA and MP's. In *L.Chandra Kumar v UOI (1997) 3 SCC 261*, the Supreme Court held that power of judicial review under Article 32 and 226 is an integral and essential feature of basic structure of our Constitution. Judicial review thus formed a specific and special tool in the hands of the judges whereby theunlawful actions of the legislative and executive could be quashed, and we are under the shade of rule of law as opposed to an authoritative or even totalitarian state. Rule of law has been very well explained by Lord Hoffman-

“There is however another relevant principle that must exist in a democratic society. That is rule of law.....The principles of judicial review give effect to the rule of law. They ensure that the administrative decisions should be taken rationally, in accordance with a fair procedure and within powers conferred by the parliament.”⁴

2. Understanding Parliamentary Sovereignty

2.1 Introduction

² (1973) 4 SCC 225

³ (1987)1 SCC 124

⁴ *Regina (Alconbury Development limited and others v Secretary of state for the environment Transport and the Regions (2003) 2 AC 295*

In USA the Justice Marshall declared-“the legislature has no authority to make laws repugnant to constitution and in the case of constitutional violation the court has absolute and inherent rights to invent the system of judicial review which was already in process of evolution. Again, in *Mc Culloch v Maryland*⁵ Justice Marshall expanded the powers of Federal government by Doctrine of Implied powers and declared the statute of Maryland as unconstitutional.

2.2 Constitutional provisions

The extent of judicial review occupies a vital place deeply rooted in Indian Constitution and is enshrined in articles 13, 32, 131-136, 143, 226 and 246

- a. Art 13(2)- The state shall not make any law that takes away or abridges fundamental rights or rights conferred under Part III of the constitution and any law made in contravention of this clause shall to the extent of contravention shall be void.
- b. Art 32- 32(1) provides right to move to the Supreme Court by appropriate proceedings for the enforcement of Fundamental rights and as per 32(2) the Supreme Court shall have the power to issue directions or orders or writs for the enforcement.
- c. Art 136- Provides Special leave to appeal from any judgement, decree, determination against any court or tribunal in the territory of India.
- d. Art 143- Provides power to the president to consult Supreme court on any question of law and fact which of such a nature so as to obtain public opinion.
- e. Art 226- Provides Writ jurisdiction to High Courts for the enforcement of fundamental rights and for any other purpose against any government, authority or person.

The US constitution does not expressly mention judicial review but in 1787 powers were given to the judges to render any ultravires provisions to constitution as unconstitutional; it was acted in case of *Hilton v Virginia* (1796) and later it was exercised in *Marbury v Madison* (1803). Art VI of section 2 “This Constitution and the law of US which shall be made in pursuance thereof and all

⁵ 4 Wheaton 316 (1819)

treaties or which shall be made under the authority of US shall be supreme law of land and judges in every state shall be bound thereby, anything in the constitution or law of any state to the contrary notwithstanding”. The Vth amendment further strengthened the judicial review under the umbrella of due process law that means life, liberty or property cannot be taken or deprived without due process of law and cannot be subjected to unfair, arbitrary means of legislature, executive and judiciary. In Canada the Judicial Review provides that a court has the power to set aside a decision for an error of law, absence of evidence and unauthorized exercise of power.

3. Meaning of Parliamentary sovereignty

3.1 Introduction

Sovereignty encompasses a capacity enjoyed in certain area. It includes political autonomy though the sovereign state actions are under public scrutiny. The sovereignty explained in terms of Parliament is called as Parliament Sovereignty. There can be two-fold approach to this supremacy, one may provide absolute supremacy keeping the Parliamentary view or decision to the final say in matters of removing dark shadows arising out of difficulty in constitutional interpretation and another view keeping or upholding the parliamentary sovereignty in one area while in other areas the role of parliament may be restricted or limited. Parliamentary sovereignty has been very well interpreted by AV Dicey-

“The Principle of Parliamentary Sovereignty means neither more or less than this: namely that Parliament thus defined has under the English Constitution, the right to make or unmake any law whatever and further no person or body is recognized by the law of England having a right to override or set aside the legislation of Parliament...”⁶

Thus, Dicey’s view provide the supreme power to the Parliament enacting law on any subject matter and not bound by any predecessor or authority. The role of judges is

⁶ Le Suer Andrew and etal (2010,75) Public law text cases and materials, Oxford University Press

only confine to interpretation of statute will and cannot reapply their precedents or earlier statutes. Thus, Dicey has rightly said- “True is what the Parliament doth no authority on earth can undo”.

3.2 Parliamentary Sovereignty in U.K.

The UK has remained a milestone in promoting Parliamentary Supremacy whereby the parliament comprising of King, House of Lord and House of Commons is given supreme powers having no superior authority over it. It has an autonomous discretion having the power to amend, modify or repeal or pass any law.

Lord Hoffman points out that Parliament has the power to make the primary legislation contrary to rights in legal area, the aspects of UK courts even though acknowledging the sovereignty of Parliament, they could consider that those rights cannot be restricted by any power.

Dicey’s definition of Parliamentary power provides a clear view of the Parliamentary Supremacy- “The right to make or unmake any law whatever, and further no person or body is recognized by the law of England as right to override or set aside the legislation of parliament.”

Thus, Dicey’s definition disregarded distinctive features between fundamental or ordinary laws. It also portrays that Parliament is supreme and no law made by the Parliament can be declared void because it is unconstitutional, and the Parliament does not have the power to bind itself or its successor U.K. constitution and it does not provide for any restrictions on Parliamentary powers. Everything that happens is constitutional and if nothing happened that will be also constitutional.⁷

3.3 History of Parliamentary sovereignty in U.K.

The first Parliament was assembled by Simonde Monte in 1265 to give counsel to Henry III. Henry VIII and Elizabeth I gave supremacy to the royal crown delimiting

⁷J.A.G. Griffith, The Political Constitution, 42 M.L.R., 19 (1979)

the Parliamentary authority. But the conflicts of 17th century leading to civil war, Charles I execution, Cornwell's Protectorate and the restoration of monarchy in 1660 raised the question whether king can use its prerogative powers to govern without parliament. The Judiciary acted subservient to the king as it was demonstrated in *Godden v Hales* but the Act of settlement 1700 provided that they should hold office *quamdiusebenegeerint* (during good behavior) but subject to power of removal upon an address from both the houses of parliament.⁸

Thus, the bill of rights and Act of Settlement marked the milestone for Parliamentary supremacy preserving the crown's prerogatives. The situation was reversed from monarchy to Parliamentary sovereignty. The position of affairs has been reversed since 1714. Then the kings and queens governed through ministers, now Ministers govern through the instrumentality of the crown.⁹ In *Mazimbamuto v Larden Burke*, Lord Reid said—"It is often said though it would be unconstitutional for the U.K. Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament is to do such things. If Parliament choose to do any of them, the courts could not hold the act of Parliament as invalid."¹⁰

3.4 Entry of U.K. in European Commonwealth in 1973

Before United Kingdom entered European Community in 1973, the principle of EU legal order which enabled the EU to have supreme authority over all member states had already been established¹¹. The international law binded the state with regards to international treaties but the essential requirement into the act of Parliament remained an unanswered question. To fill this gap, the European Communities Act, 1972 was made by the Parliament. Article 2(1) of the act completely dispensed with the need of further enactment to be given effect by Parliament. This article stated-

⁸ Supreme Court Act 1981, S 11(3), Constitutional reform Act, 2005

⁹ Anson, Law and customs of constitution Vol II, P41

¹⁰ In Public law and democracy Ch 2, Craig's arguments on Dicey's nothing of sovereignty

¹¹ Turpin, Colin, Tomkins, Adam (2011); 79

“all such rights, powers and liabilities, obligations and restrictions from time to time arising by or under the treaties are without further enactment to be given effect.....in the United Kingdom”

Such an enactment was a direct attack on Parliamentary sovereignty of U.K. On the other side, the European Communities Act, 1972 came into force in United Kingdom there had not been any dispute before the Factortame case in 1988 since then the Parliament has struggled to avoid making a legislation which conflicts with the European Law and in the same vein, the judges zealously had interpreted domestic provisions in accordance with the norms of EU law.¹²

Thus the entry of U.K. into the European Community marked the lending and rotation of powers from the hands of U.K. to European Community. Namely while there is a former veneer of Parliamentary Sovereignty in the U.K. law for all practical purposes, ascribing priority to the law of European Law.¹³ The traditional concept of Dicean Parliamentary Sovereignty lost its absolute authoritarian nature. The case *Costa v ENEL* reaffirmed the said proposition by saying “member states have limited their sovereign rights and albeit within limited fields, have created a body of law which binds both nationals and themselves. One of the 20th century British lawyers, Sir William Wade said that UK entry into EU has lead to tremendous revolution in the constitution that has lead to the extinguishment of parliamentary democracy rather than its suspension.

But as there are two sides of the coin these fears or detriments to Parliamentary sovereignty is the cornerstone of the British system and a codified constitution may impose a restriction, but an uncodified system does not impose many restrictions. Thus the only check on the power of Parliament is the sovereignty of future Parliament legislation can always be overturned, treaties can always be broken and participation in the EU is never truly binding¹⁴. Furthermore, despite the growing number of legislative powers voluntarily delegated by the sovereign crown to the European Union, the United Kingdom parliament is often described as an extremely

¹² Barber, N.W (2011;149) *The Afterlife of Parliamentary Sovereignty*, Oxford, Oxford University Press

¹³ Elliot, Mark (Undated;551) *United Kingdom: Parliamentary Sovereignty Under Pressure*, Cambridge Press

¹⁴ Jowell, Jeffery L and Dawn Oliver “The judicial response prior to Factortame” *The Changing constitution*, Oxford: Oxford UP, 2007,92

strong parliament in the sense that it has put in place a number of institutions both within the House of Commons and House of Lords for scrutinizing EU legislation.¹⁵

In European Monetary Union- The Kingdom Inquiry, EU academic M.Pani addresses-

[The introduction of Euro] will not change this position [Parliamentary sovereignty] radically a single currency is to be managed by a single Central Bank is bound to remove what little vestige of national autonomy is left in the monetary policy. But on its own will not affect national sovereignty and thus the ability of the country to leave EU it will of course increase the cost of doing so.....¹⁶

4. Human Rights Act 1998

The Human rights Act is to get enhancement of rights and the freedoms provided under European Convention on Human Rights. UK has accepted the Human Rights Act with a warm welcome into its unwritten democracy and became the first state to sign the convention though the binding nature of the convention was as per the court's discretion as judges are given power to make law.

In *S and Marper v United Kingdom*¹⁷ the European court of Human rights held that the retention of biometric samples of individuals who were apprehended and then acquitted resulted in violation of Art 8 of the rights. But this decision was reversed in *R (Marper) v Chief Constable of South Yorkshire Police*¹⁸ did not cast any entrenchment of Art 8 holding that retained fingerprints and samples did not attract Art 8(1). In *Ghaidan v Godin- Mendoza*¹⁹ it was held under section 3(14) all legislation must be befitting with the convention rights and courts may then be empowered to interpret legislation and Parliamentary intention.

The Human Rights Act section 3 requires the interpretation of legislation to be consistent with convention rights as far as possible. If no consistent interpretation is required, then higher courts u/s 4 may issue any declaratory convention as incompatible. The

¹⁵ Cygan, Adam "Scrutiny of EU Legislation in the UK Parliament" National Parliament within the enlarged European Union. Ed. John O' Brennan and Tapio Raunio New York. NY: Routledge, 2007.164

¹⁶ United Kingdom. House of Commons Library. EMU: The Constitutional Implications. By Richard Ware

¹⁷ [2008] ECHR 1581

¹⁸ [2004] UKHL 39

¹⁹ [2002] EWCA Civ 1533; [2004] UKHL 30

introduction of human rights can still enact a statute that is inconsistent with convention and courts must uphold such ECHR incompatible statute if it does not find an interpretation compatible to section 3. Hence Human Rights do not cast a ban on Parliamentary Sovereignty. Prior to bringing the HRA Act into force, the white proceeding the Act provided for creating a Parliamentary Committee on Human rights casting a vigilance and inquiring about the issues pertaining to human rights and making reports after due scrutiny and analysis for Government and Parliament assistance. The committee in pursuance of the above-mentioned objective and taking care of other human rights to which U.K. is signatory was formed in 2001 comprising of 12 members 6 from each house and eight other Parliamentary staff rendering a supportive assistance. Thus, the joint committee on human rights provided for legislative scrutiny, analyzing the conflicts between the Parliamentary Sovereignty and Human rights and also analyzing the UK prospective and treatment to European Court of Human rights and finding incompatibility if any. Thus, the Joint Committee appointed by house of Lords and House of commons is appointed to consider the matters pertaining to Human rights, proposals for remedial orders and their drafting. The committee has the power to require written evidence submission and documents, to examine witness, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisors and to make reports to both the Houses²⁰

Recently as per the report of the Committee in 2016-17 the validity of collection of bulk individual data incompatibility to Human rights Act, 1998, thereby keeping the political legislative powers of the Government under scrutiny in light of justification of Human Rights. Article 46.1 of European convention on Human rights states-

Art 46- Binding force and execution of Judgements

1. The High Contracting Parties must abide by the final judgement of the court in any case to which they are parties.

But the Joint Committee on Human Rights preserving the Parliamentary Sovereignty said

²⁰ Joint Committee on Human Rights- Legislative Scrutiny: Investigatory Power Bill (First Report of Session 2016-17. Pg 5)

“Parliament remains sovereign, but the Sovereignty resides in Parliament’s power to withdraw from the convention system; while we are part of that system we incur obligations that cannot be subject of cherry picking. A refusal to implement the court’s judgement would not only undermine the national standard of the U.K.; it would also give the Succor to those states in the council of Europe who have a poor record of protecting human rights and who may draw on such actions as setting of precedents that they may wish to follow”²¹

The Brighton Convention was also adopted in 2012 to grant and guarantee human rights and regulation of pendency of cases, appreciation of Convention’s preamble and seeking advisory opinion by U.K. courts from European courts if any problem arises as to interpretation of the convention.

The Legislative intention was given priority in *Ghaidan v Godin Mendoza*²² (“Ghaidan”) saying:

“In the ordinary course of interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question”²³

Thus, the introduction of HRA does not violate or diminishes parliamentary sovereignty as courts reserve their powers to declare a legislation incompatible and under section 3(1) of HRA they are not forced to give effect to the rights under ECHR if they are incompatible. As the white paper report has also affirmed-

“The government has reached the conclusion that courts should not have the powers to set aside primary legislation, past or future on the grounds of incompatibility with the convention. This conclusion arises from the importance which the Government attaches to Parliamentary Sovereignty”²⁴

5. Parliamentary sovereignty in India

²¹ Parliamentary Sovereignty and the European Convention on Human Rights-by Alexander Horne, Vaughne Miller Nov 6, 2014

²² [2004] UKHL 30

²³ Ibid 30

²⁴ Rights brought home: The Human Rights Bill (1997) Cm 3782

The Indian Parliament is not supreme as the British Parliament as Indian Parliament works within the boundaries or peripherals set by the constitution and there is American policy of judicial review in India though it is not as wide as the American constitution which follows due process of law as opposed to procedure established by the law as per article 21 of the constitution. In U.K. Parliament is given immense power to amend, repeal or modify the constitution but in India there is difference between statutory law and constitutional law and special provisions are incorporated in the constitution to make amendments as per article 368. Thus, the power of the Indian Parliament is not unfettered as the British Power because it is circumscribed within the four walls of constitution.

Article 13 declares that the states must not make any laws inconsistent with part III of the constitution violating Fundamental rights or that take away or abridge Fundamental Rights. Thus, the article provides a judicial review of the pre-constitutional and post constitutional laws providing a synchronizing approach to the provisions of the constitution. Article 368 provides for amendment of constitution which requires introduction of such bill in either house of the Parliament by a majority of total members and presentation to president who shall give his assent and in some matters like Article 54,55,73, 162 or 241 any list of 7th Schedule, representation of states in the Parliament requires ratification by not less than one half of the states. In *Shankari Prasad v UOI* (AIR 1951 SC 458) where the validity of 1st Constitutional amendment adding Article 31A and 31B was challenged. The Supreme court held that amendment power under article 368 includes constitutional law also Article 368 is general and empowers the Parliament to amend the constitution without any exception and it is the exercise of sovereign constituent power.

The same view was reiterated in *Sajjan Singh v State of Rajasthan* (1965) 1 SCR 933 whereby the amendment power under Art 368 included the power to amend Fundamental rights. In *Golaknath v State of Punjab* (1967) 2SCR 762 it was provided that amending power of the Parliament does not include the power to amend Fundamental rights. Because of this decision 24th amendment was introduced that added clause 4 to Article 13 providing nothing in this article shall apply to the amendment of the constitution made under article 368. The *Keshvananda Bharati v State of Kerala* AIR 1973 SC 1461 provide that the basic structure of the constitution cannot be amended. In *Indira Nehru Gandhi v*

Raj Narayan (AIR 1975) SCC 2299, the theory of basic structure was applied and reaffirmed. In *Minerva Mills v UOI* the clauses 4 and 5 of Article 368 were inserted by 42nd amendment and they were struck down as violation of basic structure.

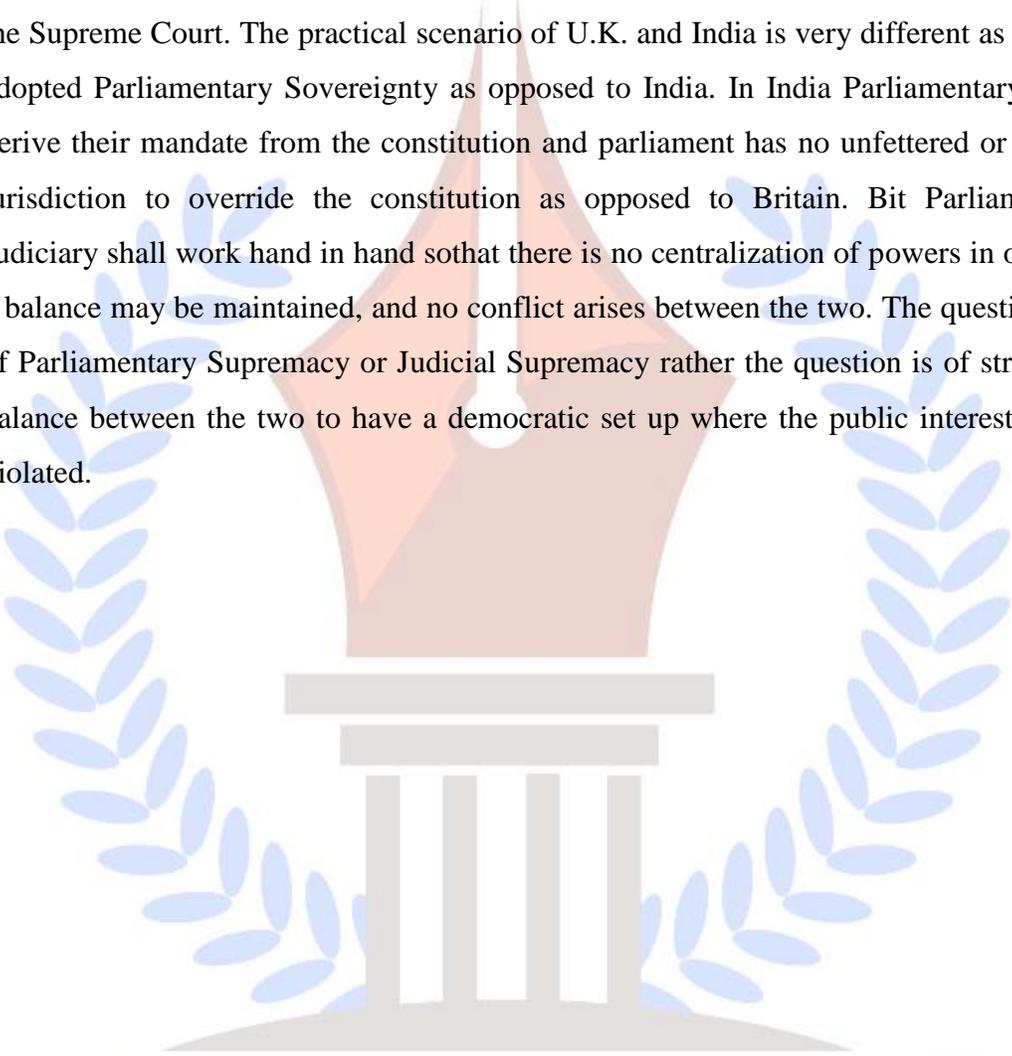
Sovereignty means the power to acquire and cede territory, but Parliament is not empowered to make a law in permitting cessation of a part or whole of the territory of the state as held in *In Re: Berubari Union and Exchange of Enclaves*, (1960) 3 SCR 250. The doctrine of separation of powers and supremacy of the constitution is the basic structure of our constitution. Parliament does not have any say in matters pertaining to the elections as the powers regarding such matters is vested with the election commission of India as per Article 324. The expenses and salary of the Comptroller and Attorney General, Supreme Court Judges, members of UPSC etc. are charged out of consolidated fund of India and Parliament does not have the power to diminish such allowances except during financial emergency. Parliament has limited sovereignty over union servants as they are elected as the pleasure of the President under Article 310. Art 213 and Article 123 provides the legislative power of making ordinance to the Governor and the President. Article 370 impose restrictions on the Parliament for exercising its jurisdiction in Jammu and Kashmir awarding it a special status. In *State of West Bengal v Subodh Gopal* (1954) SCR 5e7, 626 it was held that courts can strike down a retrospective legislation if it unreasonably abridges fundamental rights of the citizens. In *A.K. Gopalan V State* (1950) S.C.R. 88, 198 (Patanjali Shastri) J said-

“There can be no doubt that the people of India have, in exercise of the sovereign will as expressed in the preamble, adopted the democratic ideal ...and in delegating to the legislature, executive and judiciary their respective powers in the constitution, reserved to themselves certain fundamental rights, so called, I apprehend, because they have been retained by the people and made paramount to the delegated powers.....”

Conclusion

Thus, it can be inferred from the above mentioned constitutional provisions of India that Indian Parliament does not enjoy a supremacy over Indian Constitution and India strikes a balance of Judicial review of the Legislative enactments. But the three pillars the executive, Judiciary and Legislature must work hand in hand and shall not encroach upon

the rights of another person but on the other hand Parliament reserves the right to extend its jurisdiction to List I and List III and it also provides to act on behalf of two or more states as per Article 252. It also maintains its right to act during the period of emergency as per Article 250 and solves water disputes among the states as per Article 262. Article 253 provides for implementation of International Treaties as held in Vishaka's case by the Supreme Court. The practical scenario of U.K. and India is very different as U.K. has adopted Parliamentary Sovereignty as opposed to India. In India Parliamentary Powers derive their mandate from the constitution and parliament has no unfettered or arbitrary jurisdiction to override the constitution as opposed to Britain. But Parliament and Judiciary shall work hand in hand so that there is no centralization of powers in one hand, a balance may be maintained, and no conflict arises between the two. The question is not of Parliamentary Supremacy or Judicial Supremacy rather the question is of striking the balance between the two to have a democratic set up where the public interests are not violated.



JUS IMPERATOR