A BRIEF ANALYSIS ABOUT INDIAN SOVEIERINITY

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ABSTRACT

Sovereignty is a term of political theory which has a number of meanings changing in accordance with different times and different places.According to a famous french jurist, Jean Bodin, sovereignty is something very personal which is restricted to the monarch only, it cannot be divided and is absoluteBut how sovereignty can be personal in a republic? How it can be indivisible in a federation? And how it can be absolute in a country with a written constitution like that of ours? These are some questions I would be answering in this article. A.V Dicey, a very famous constitutional jurist from Britain later tried to make the term 'sovereignty' less complex and more relatable in context with the modern world. He divided sovereignty between the people and the parliament. He said that political sovereignty resides in the people and legal sovereignty in the parliament. In **L. Chandra Kumar v UOI** (1997), the Supreme Court held that power of judicial review under Article 32 and 226 is an integral and essential feature of the basic structure of our Constitution. Recently, the judicial censorship of the policy and expediency of law is seen at its peak perhaps in two decisions: **Bhau Ram v. Baijnath Singh** and **Sard Ram v. Labh Singh**. In the first case the Supreme Court, by a majority of one, declared void a law of pre-emption based on vicinage as being inconsistent with article I9(l)(f) of the Constitution and In the second case the Court, following the first case, declared the custom of pre-emption based on vicinage to be void for the same reason.

KEYWORDS-SOVERINITY, CONSTITUTION, RIGHTS, FUNDAMENATAL

INTRODUCTION

Parliamentary Sovereignty under Constitution of India

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Dicey's Parliamentary Sovereignty has three Connotations:

(a) There is no law which the Parliament cannot make.
(b) There is no law which the Parliament cannot repeal or modify.
(c) There is no distinction between laws which are fundamental or constitutional and laws which are not.

In simpler terms, parliamentary sovereignty under the English constitution is the right to make and unmake any law whatsoever and further that no person or body recognized by the law of England is having a right to override and set aside the legislation of the parliament.

Other political theorists like HLA Hart and Hans Kelsen are also of the same views.

HLA Hart described the principle of parliamentary sovereignty as 'the ultimate rule of recognition' and Hans Kelsen called it the 'grundnorm' (the fundamental rule upon which all the other rules of the constitution are based).

But the thing to be noted here is that all these political theorists used the term 'sovereignty' in its legal sense and not in a political sense. For them, the term sovereignty means the power of law-making unrestricted by any legal limit. Now it's clear that even in Britain where the principle of Parliamentary Sovereignty evolved through the struggles between Parliament and the crown in the 17th century, parliament only has legal sovereignty and not political sovereignty.

Coming to the question of the validity of the doctrine of parliamentary sovereignty with respect to the constitution of India, well, our democratic arrangement is more similar to that of US than that of Britain. At the heart of the debate surrounding parliamentary sovereignty in India, we have a relationship between the parliament and the supreme court, which is shifting and stirring in accordance with the changing environment to protect the holy book of the land, The Constitution.

Our constitution empowers the Parliament to make laws but at the same time, give equal powers to the Supreme Court to declare any law made by the parliament invalid if it unreasonably abridges fundamental rights of the citizens or does not go in consonance with the basic structure of the constitution.

A quick glance at the development of the basic structure doctrine through some important Supreme Court judgments:

The concept of basic structure is not defined anywhere in the constitution and developed gradually with the active interference of the judiciary to protect the fundamentals of democracy.

Say for example, the First Constitution Amendment Act, 1951 was challenged in the **Shankari**

Prasad vs. Union of India on the ground that it violates the Part III of the constitution but it was held that the Parliament, under Article 368, has the power to amend any part of the constitution including fundamental rights. The same ruling was followed in **Sajjan Singh Vs State of Rajasthan** in 1965 too.

The first major rift from the doctrine of parliamentary sovereignty in India took place in **Golak Nath vs State of Punjab** in 1967 where the Supreme Court overruled its earlier decision. It said that the Parliament has no power to amend Part III of the constitution as the fundamental rights are transcendental and immutable.

The Parliament, in retaliation, in 1971, passed the 24th Constitution Amendment Act which gave absolute power to the parliament to make any changes in the constitution including the fundamental rights as it added to clause 4 to Article 13 providing nothing in this article shall apply to the amendment of the Constitution made under Article 368.

In response to this, the apex court in **Kesavananda Bharti Vs. State of Kerala 1973**, held that the parliament can amend any provision, but cannot dilute the basic structure. It later reaffirmed the concept of the basic structure. In **Minerva Mills Vs. Union of India 1980**, the concept was further developed by adding 'judicial review' and the 'balance between Fundamental Rights and Directive Principles' to the basic features of the basic structure doctrine.

In **Kihoto hollohan Vs. Zachillhu** and **Indira Sawhney Vs. Union of India**, the concept of free and fair elections and the rule of law was added to the basic structure. S.R Bommai vs Union of India in 1994 further added federal structure, unity and integrity of India, secularism, socialism, social justice and judicial review as the basic features of the basic structure doctrine of the constitution. Other major checks on parliamentary sovereignty under the Constitution of India.

Written Constitution:

In India, unlike the UK, we have written constitution which put necessary limitations on all organs of the state. Though parliament can obviously amend some parts of the constitution but only to the degree bestowed upon it by the constitution.

Independent judiciary and Judicial review:

The concept of judicial review traces its roots in the US landmark case **Marbury v Madison** (1803) where it was held that the constitution of the US is the supreme law of the land. In India also, the judiciary is independent, it's the role in interpreting the constitution approximates that of an oracle unto itself.

In India, it was in Keshvananda Bharati case that Judicial review held to be the basic structure of the Indian Constitution. The same view was reiterated in **S.P. Sampath Kumar v Union of India**.

In **L. Chandra Kumar v UOI** (1997), the Supreme Court held that power of judicial review under Article 32 and 226 is an integral and essential feature of the basic structure of our Constitution.

Recently, the judicial censorship of the policy and expediency of law is seen at its peak perhaps in two decisions: **Bhau Ram v. Baijnath Singh** and **Sard Ram v. Labh Singh**. In the first case the Supreme Court, by a majority of one, declared void a law of pre-emption based on vicinage as being inconsistent with article I9(l)(f) of the Constitution and In the second case the Court, following the first case, declared the custom of pre-emption based on vicinage to be void for the same reason.

So now it is clear that the judiciary can declare any law or ordinance passed by the legislature void if any of its provisions violate one or more of the constitutional provisions.

The verdict of the Supreme Court on the 99th Constitution Amendment Act and the National Judicial Appointments Commission (NJAC), declaring them to be ultra vires the Constitution is another glaring example when any parliamentary act is overturned as unconstitutional on the principle of judicial review.

So now it is well established that the judiciary can declare any law or ordinance passed by the legislature void if any of its provisions violate one or more of the constitutional provisions and the parliamentary provisions should be reasonable both as to substance and as to the procedure which means that both the end and means of the law should receive judicial approval in order to get implemented.

Federal polity and the division of powers:

Although the constitution says India as a union of states, India is a federal polity and the subjects of legislation are apportioned between parliament and the state legislatures. Parliament's choice as to legislation is ordinarily confined to the subjects enumerated in lists I and III of the seventh schedule.

The doctrine of separation of power:

The doctrine of separation of power is part of basic structure doctrine, it implies that each pillar of democracy – the executive, legislature and the judiciary – perform separate functions and act as separate entities. It imposes checks and balances upon all three pillars of democracy. Thus, the judiciary exercises judicial review over executive and legislative action, and the legislature reviews the functioning of the executive. The Vishakha case where guidelines on sexual harassment were issued by the Supreme Court, the order of the Court directing the Centre to distribute food grains (2010) and the appointment of the Special Investigation team to replace the High-Level Committee established by the Centre for investigating black money deposits in Swiss Banks are some ace examples of judicial activism in India.

From all the above-mentioned points, it is clear that in our country, absolute sovereignty doesn't lie with the parliament but with the people. Parliament can be said to be sovereign but in a much narrow sense as the reasonableness of a parliamentary law affecting the basic structure can undoubtedly be challenged and can be declared void by the court. Here, all the three pillars of democracy work together to protect the holy book of the land because ultimately, all of them derive their power from the people.

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CONCLUSION

Enumerated in list II of the seventh schedule :

- When the Council of States declares by a resolution supported by not less Than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to them.
- While a proclamation of emergency issued under article 352 is in force.
- If the legislatures of two or more states adopt a resolution that it is desirable That Parliament should legislate for them.

- When by virtue of article 356 the President has assumed to himself the functions of the government of a state.
- When it is necessary so to do for implementing any treaty, agreement or convention with any other country or any decision made at any international conference.

- **The parliamentary system of government in India though largely based on the British parliamentary system has following differences**

1. India has a republican system in place of British monarchical system.
2. The Head of the State in India (that is, President) is elected, while the Head of the State in Britain (that is, King or Queen) enjoys a hereditary position.
3. The British system is based on the doctrine of the sovereignty of Parliament. The Parliament is not supreme in India and enjoys limited and restricted powers due to a written Constitution, federal system, judicial review and fundamental rights.
4. In Britain, the prime minister should be a member of the Lower House (House of Commons)of the Parliament.
5. In India, the prime minister may be a member of any of the two Houses of Parliament. (Indira Gandhi (1966), Deve Gowda (1996), and Manmohan Singh (2004), were members of the Rajya Sabha).
6. Usually, the members of Parliament alone are appointed as ministers in Britain. In India, a person who is not a member of Parliament can also be appointed as minister, but for a maximum period of 6 months.
7. Britain has the system of legal responsibility of the minister. India has no such system.
8. Unlike in Britain, the ministers in India are not required to countersign the official acts of the Head of the State.
9. 'Shadow cabinet' is an unique institution of the British cabinet system. It is formed by the opposition party to balance the ruling cabinet and to prepare its members for future ministerial office. India doesn't have such institution.

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