CONSTITUTIONAL CONSTRAINTS VERSUS CONSTITUTIONAL CANONS: A JUDICIAL *PERESTROIKA* IN INDIA

Prof. Dr. Dilip Ukay*

Introduction

The Constitution of India, 1950 contains aspirations, demands, needs and wants of its millions of people, and promises them justice, liberty, equality and fraternity since its inception. It being an organic document, it not only tries to set up the governance machinery but also seeks to reorganize and restructure the social, political, economic fabric and life of the whole society. The makers of the Constitution were well equipped to draft a document for establishment of an egalitarian, liberal democratic social-legal order. They were aware about the nature of politico-legal system to be set up, and the nature and character of the government and its machinery to be established in India. The democracy being the nascent one and the parliamentary form of governance, a novice to Indian society, they took an abundant care to balance the rights of people and the powers of the executive and the legislatures.

The Constitution of India in its Part III guarantees basic fundamental rights to its citizens as well as other people/persons. These rights are nothing but the limitations or stipulations imposed upon the conferment and exercise of legislative and executive powers by the state. Fundamental rights operate as a check upon the abuse or misuse of these powers by these two organs of the government. The Constitution also confers a power of judicial review upon the judiciary in India.[1] However, there appears to be the changing phases of the exercise of this power by the judiciary over the period of times. The judicial paradigms hinges upon political, social and other such relevant factors in India, as they have been elsewhere too. The power of judicial review itself has witnessed a dynamic change in the Indian judicial history and particularly in post emergency period. The constitutional interpretations resorted to by the higher judiciary in last few decades underlie the core value of constitutional canons, being substituted with constitutional constraints. This has acquired a brand name in the form of judicial activism or judicial creativity in

* Head, Department of Law, University of Pune, Pune; Former Vice Chancellor, SRTM University Nanded.

[1] INDIA CONST. art. 13(2).

Indian judicial system. Hence in view of this, the paper aims at analyzing the constraints imposed by the Constitution upon the exercise of judicial review power and its interface with constitutional canons and judicial activism adopted by the judiciary in India. The first part would deal with the power of judicial review in India and other countries; the second part shall contain the emergence of public interest litigation (PIL) and right to compensation in India; and in its third part the doctrine of political question and its relevance in today's scenario would be conceptualized.

Doctrine of Judicial Review and its Nature

The basic fundamental and natural rights are meant for individual's growth, development and his welfare. Since most of the time these rights are provided to individuals and to be exercised against the state, it became imperative to confer the power upon the judiciary to secure the guarantee and protection/enforcement of these rights. The power of judicial review is the product of natural law and natural rights theory. The Constitution of United Kingdom (U.K.) being an unwritten one and more importantly the presence of parliamentary sovereignty inter alia, as one of the basic principle of the Constitution of U.K., the House of Lords as a highest court of the country was constrained to exercise the power of judicial review to safeguard the rights of individuals. In the year 1610, Chief Justice Coke in Dr. Bonham's case held that, any Act enacted by the British Parliament, if found to be violative to basic fundamental rights of people; then despite of the doctrine of parliamentary sovereignty, it could be declared as an unconstitutional.

Similarly the Constitution of United States of America (U.S.A./U.S.) is erected upon the doctrine of separation of powers along with fundamental rights contained there under. Separation of powers imposes a limitation upon the judiciary to review and declare law as an invalid. Nevertheless, Chief Justice Marshall of the Supreme Court of U.S. in *Marubary v. Madison* in 1803 held that any congressional legislation, which abridges or takes away fundamental rights of people, would be declared as an unconstitutional. Chief Justice Marshall said that this court has a power and authority to review such a legislation despite of a separation of powers theory and if found violative to the basic rights of people then could be declared as an invalid also. This judgment delivered by the Supreme Court of U.S. was criticized then as bad due to the exercise of a power not vested in it by the Constitution. Though the constitutional constraints were imposed upon the judicial power, yet Chief Justice Marshall found the power of judicial review in constitutional canons, which prevailed

upon the constraints. In view of this it was acclaimed as a victory of natural law and the beginning of the judicial activism.

In India as well, judicial constraints were prevailed in the initial phase of the judicial history of the Indian Supreme Court. In *A.K. Gopalan v. State of Madras*[2] the Supreme Court interpreted Article 21 in a literal manner and had refused to read "due process clause" of Fifth Amendment of the U.S. Constitution under Article 21 of the Constitution of India. Article 21 guarantees right to life and personal liberty to all persons.[3] The majority judges held that when the word "due" is missing from the text of Article 21 and which was deleted from the draft of Article 19 of the Constitution, how come it would be proper and possible for them to read the same there. This textual interpretation had occurred due to the constraints of the words used in the said provision.

However the same Supreme Court in *Maneka Gandhi v. Union of India*[4] has refashioned itself and accorded the dynamic interpretation to Article 21. The judges held that "procedure established by law" under Article 21 would essentially meant a due procedure including principles of natural justice. This decision of the Supreme Court of India has opened the gates of constitutional canons to be read and invoked in judicial decision-making process. It is not the text but the context in which the due process clause is to be resorted to, have become imperative and significant. *Maneka* has paved the way for judicial *perestroika* in India vis-à-vis interpretation of constitutional law matters.

It is pertinent to note that, in India it is not *Maneka* wherein constitutional canon had outplayed the constitutional constraint, but prior to it, in *India v. J.P. Mitter*[5] the Supreme Court of India displayed the wisdom laying down the foundation of futuristic activist zeal and zest holding that, though according to Article 217(3) of the Constitution President's decision is final on the question of the age of a High Court judge; but notwithstanding such finality of the order of the President, the court has a jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed by the President. It further said that, or the President's judgment was coloured by the advice or representation made by the executive or was founded on no evidence, then also despite of such finality

---

[2] A.I.R. 1950 S.C. 27.

[3] INDIA CONST. art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

[4] A.I.R. 1978 S.C. 597.

[5] A.I.R. 1971 S.C. 1093.

accorded by the Constitution, such order could be declared as an unconstitutional.

This decision of the Supreme Court signifies the overcoming of constitutional constraints and substitution of constitutional canons with them, by the higher judiciary in India. The judicial acumen and pragmatic understanding in interpretation of the constitutional provisions, shown by the Supreme Court represents not only the power of judicial review but also the concern of the governance in accordance with rule of law. It assumes more value, since it was decided earlier than *Kesavananda Bharati v. State of Kerala*[6] where in judicial review was held as a basic feature of the Constitution. Finality Clause under Article 217(3) did not accord a finality to President's decision and judiciary was constrained to overcome the constraint of judicial review imposed by the Constitution and substituted it, with that of the constitutional canon.

Kesavananda itself has displayed a keenness of judiciary to exercise its review power in constitutional interpretations and validity of amendments. The evolution of the basic features doctrine by the Supreme Court of India was an attempt on its part to reassert its power and authority in the area of judicial review. The apex court said that though the parliament has a power to amend the Constitution and fundamental rights, yet its basic features ought not to be destroyed. Any constitutional amendment found to be violative of any of the basic feature; the court in exercise of its review power could strike it down as an unconstitutional. Moreover, since the text of the constitution is silent about the basic features, it was left to the discretion of the Supreme Court and constitutional canons, to lay down which features could be considered as basic.

The basic features doctrine has become a touchstone to determine the scope and ambit of judicial review despite of a constitutional constraint placed by the constitutional provision. In *Wamanrao v. Union of India*[7], the Supreme Court held that all amendments to the Constitution made before April 24, 1973, and by which the Ninth Schedule was amended from time to time by the inclusion of various laws and regulations therein were valid and constitutional. But amendments made on or after the *Kesavanda*'s decision delivered on the aforesaid date, and were amended the Ninth Schedule by including various acts or regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the

---

[6] A.I.R. 1973 S.C. 1461.
[7] A.I.R. 1981 S.C. 271.

constituent power of the parliament since they damage the basic and essential features of the Constitution or its basic structure.

This view and principle again was strengthened by the Supreme Court of India overcoming the constitutional constraint on the basis of constitutional canons in *I.R. Coelho v. State of Tamilnadu*[8]. It was held that:

> "The power to grant absolute immunity at will, is not compatible with the basic structure doctrine and thus laws included in the Ninth Schedule [Article 31B] in the post period of April 1973 [after *Kesavananda*'s decision] do not have an absolute immunity. The prime object of Article 31B is to remove difficulties and not to obliterate Part III in its entirety. Amenability in the period stipulated is to be tested in the backdrop of basic or essential features of the Constitution in view of Article 21 along with Articles 14 and 19. Legislatures cannot grant fictional immunity upon amendments and laws, and exclude them from the judicial review simply placing them in the Ninth Schedule after the enunciation of basic structure doctrine."[9]

Coelho's decision displays the re-augmentation of review power by the Supreme Court despite the constitutional provision of Article 31B, which confers immunity to laws from judicial review if placed under the Ninth Schedule.[10] The Bench headed by Sabharwal, CJ. (as he then was) fashioned itself to overcome the constitutional constraint stipulated by the said provision and replaced the same with that of constitutional canon. Since the Supreme Court held judicial review as one of the basic feature, it was imperative for it to reassert its authority and power invested in it by the constitutional philosophy. The dialectical dichotomy, which I may call, is a new constitutional *mantra* and became a constitutional *dharma* (not in a literal sense) of the higher judiciary and the judge "priest". Assumption of this constituent power by the Supreme Court, heralds a new era of

---

[8] A.I.R. 2007 S.C. 861.

[9] *Id.*

[10] INDIA CONST. art. 31B.Validation of certain Acts and Regulations.—
Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

constitutionalism in India.[11] Though the text of the Constitution remains the same, impeding even the power of judiciary to review constitutional amendments, laws, rules etc., and thus judiciary otherwise becomes constrained, yet it devises (as it did) the means and ways and mechanisms invoking canons of the Constitution or rather evolving the canons to re-establish itself as a final arbiter and custodian of the Constitution. These canons are not otherwise expressly provided in the text of the Constitution, but they are the creation of the apex court of India in its attempt to safeguard the rule of law, the Constitution and justice contained in it. These instances are multiple, however, the sagacity and creativity of the highest court has transformed the notion and nature of doctrine of judicial review in India, which could be seen from different perspective in the following part.

Judicial Activism and Public Interest Litigations

The doctrine of fundamental rights has a value and significance due to the constitutional remedies provided under Articles 32 and 226 of the Constitution of India[12]. Mere incorporation of rights and guaranteeing them is not enough unless they are coupled with certain remedies required for their enforcement. Right to approach to the court is conferred upon an individual to enforce his right or rights whenever it/they are violated. Right to go to the court for enforcement of fundamental rights is itself a fundamental right under Article 32 of the Constitution. The locus is accorded to an individual by the said provision. However, in a unique manner the Supreme Court of India in Asiad Worker's case[13] conferred the right to approach to the Supreme Court, upon an organization for the enforcement of rights of workers. Article 32(1) though confers a right upon a person to go to the court, whose right is violated, yet the judges held that due to the poverty, illiteracy and their oppression they are unable to approach the court, and hence that right was conferred upon a public spirited person or organizations. The constraint imposed by the constitutional provision was substituted with that of the constitutional canons ingrained in the Preamble of the Constitution. The dilution of locus standi has marked the beginning of the emergence of public interest litigations (PILs) in India.[14]

---

[11] It is worth to note that Prof. Upendra Baxi had observed earlier that the Supreme Court shares a constituent power along with the parliament.

[12] INDIA CONST. art. 32: Remedies for enforcement of rights conferred by this Part; INDIA CONST. art. 226: Power of High courts to issue certain writs.

[13] Peoples' Union of Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1479.

[14] *See* Bandhua Mukti Morcha, M.C. Mehata, Neeraja Choudhari, and several other cases.

The emergence of PIL has paved the way to take recourse to judicial process for restoration and enforcement of collective rights in India. Collective rights, wherein public interest or benefit contains, is sought to be safeguarded and furthered by the judicial process. The impediment in the form of locus was removed by the Court and has opened the doors of the judiciary to poor, indigent illiterate etc. The phenomenon of PIL has crossed a millions of miles in India covering a territory of water, heath, education, environment, prisoners' rights, personal liberty etc. M.C. Mehta[15] has become a brand ambassador of the cause of public interests in the area of environment/water pollution. In plethora of cases/decisions the Court has applied the canons of the Constitution to do justice. Those constraints did not remain constraints due to judicial activism displayed by the higher judiciary.

This has also heralded the era of emerging trends of the judicial activism and creativity in India. The higher judiciary (the Supreme Court and the High Courts) have a power to restore the right if found to be abridged illegally or without due procedure. The Constitution has fore walled the judiciary and has confined its role as an interpreter of the constitutional and other legal provisions. Nevertheless, the Supreme Court of India overcame this constitutional constraint and went on to award the compensation to victims for a violation of their fundamental rights in the writ petition itself.[16] This activism or creativity demonstrated by the Supreme Court of India is unique in its nature, and has restructured the human rights jurisprudence in India. The constitutional canons like justice in reality, freedom and liberty etc., were given a human value by the judiciary. Right to compensation for deprivation of right to life and the Supreme Court viewed personal liberty as a fundamental right.[17] The Court has held that right to life guaranteed under Article 21 is not confined to the citizens alone or the right to compensation, but would be available even to foreign nationals under similar circumstances.[18] These and other decisions depict the nature of constitutional constraints imposed upon the exercise of power by the judiciary and the dynamism shown by the higher judiciary resorting to constitutional canons and philosophy.

---

[15] Mahesh Chandra Mehta is a public interest attorney from India. He was awarded the Goldman Environmental Prize in 1996 for his continuous fights in Indian courts against pollution-causing industries. He received the Ramon Magsaysay Award for Asia for Public Service in 1997.

[16] Bhagalpur Blinding Care, (1981) 1 S.C.C. 627, Rudul Shah v. State of Bihar, A.I.R.1983 S.C. 1086 *etc.*

[17] Nilabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1960.

[18] Chandrima Das v. Chairman Railway Board, A.I.R. 2000 S.C. 403.

Doctrine of Political Question and Judicial Review

India, though a federal country, yet it has certain unitary features and hence being branded as a quasi-federal state. Even the notion of competitive federalism was substituted with that of co-operative federalism. The Constitution casts a duty upon the center to protect a state from external aggression, internal rebellion and also to ensure that the administration is to be carried on in accordance with the provisions of the Constitution.[19] If it is found that the state administration cannot be carried on in accordance with the Constitution then it empowers the President to impose a state emergency and acquire legislative/executive powers to be exercised by the center.[20] The exercise of this power by the President was immune from judicial review on the ground of the question is a political in nature.[21] The doctrine of political question was an exception to the doctrine of judicial review in India, which has limited the review power of the judiciary. The Supreme Court held that it could not interfere with the center's exercise of power under Article 356 merely on the ground that it embraced political and executive policy and expediency unless some constitutional provision was being infringed. Article 74(2) disables the court from inquiring into the very existence or nature or contents of ministerial advice to the President. Article 356 makes it impossible for the court to question the President's satisfaction on any ground unless and until resort to Article 356 in specific circumstances is shown to be so grossly perverse and unreasonable as to constitute parent misuse of this provision or as excess of power on admitted facts.

However, the judicial review in this area was reactivated the Supreme Court of India in *S.R. Bommai v. Union of India*[22] and rejected the doctrine of political question. The instant case had negated the power of the President to impose the state emergency even without the report of the Governor. The apex court said that the exercise of the power by the President if found to be irrational, arbitrary, or with malafide intentions, then the court has power to declare it as an invalid and unconstitutional. The judicial paradigms in the area has strengthened the power of judicial review overcoming the constitutional constraints and substituting them with that of constitutional canons and principles or features which are to be basic for the governance of the country and the society.

---

[19] INDIA CONST. art. 355.
[20] INDIA CONST. art. 356.
[21] Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361.
[22] A.I.R. 1994 S.C. 1918.

Conclusion

The judicial paradigms in India have refashioned the doctrine of judicial review and restructured the whole gamut of the constitutional mechanism of the governance. Albeit it may be true to some extent and in some cases that the judicial activism/creativity displayed and adhered by the Indian higher judiciary has made it stronger than the parliament/legislatures. However there is no denial of the fact that the democracy is not only survived but is strengthened in India because of the strong and independent judiciary.

The emergence of the Supreme Court of India as a custodian of people's rights and a democratic, functional institution is the most significant and important development in the judicial history of independent India. It is being envisaged not as a redressal forum of elite class in the society or pre-occupied with rendering merely lip services to people. Instead, it is seen and perceived as a forum for raising, redressing and articulating the problems of the have-nots/deprived, oppressed, downtrodden women, children, environmental groups and abuse of powers and positions by persons holding high public offices. It has become a forum for the representation, articulation and protection of the basic human rights of the people vis-à-vis society.[23]

The evolution of basic structure doctrine by the Supreme Court of India[24] has played a very significant role in the field of constitutionalism in India. An abject surrender by the judiciary to the legislature/executive is an alien to the Constitution of India, its philosophy and canons. These values have prevailed and upheld higher/superior to the provisions of the Constitution by the judiciary. It is indeed a judicial *perestroika*, which has enabled the rule of law, democracy, freedoms to rule over/upon the constraints of the Constitution in India.

[23] Dilip Ukey, *Human Rights and Judicial Activism in India,* 12 CULR, 432, 455 (1997).
[24] Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1469.