The Supremacy of the Constitution

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Our system of government is based upon a secular democratic faith which, in the words of Abraham Lincoln, is "that government of the people, by the people, and for the people shall not perish from this earth." The basic tenets of that faith are embodied in a Constitution to which all dignitaries of State, ministers, judges, legislators, and others down to members of the *nyaya panchayats* in villages, swear allegiance. Thus, in place of a living monarch, we have enthroned a set of principles contained in the Constitution. In such a system, loyalty to principles which, viewed as a whole, are legally sovereign or supreme, must rise above all other ties such as those of kinship, class, creed,or community. The Supreme Court of India, in *Virendra Singh* v. *State of U.P.*[1] described the effects of the promulgation and the basis of our republican Constitution as follows:

> [A]t one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.

Constitutional theory and precept to be effective must both reflect and mould national sentiment and practices.

Montesquieu in his work on the *Spirit of the Laws* wrote long ago that a healthy democracy depends for its sustenance upon the prevalence of a spirit of "virtue" among the people by which he meant patriotism and love of equality. It implies a strong attachment to elementary principles of fairness and justice, an absence of a desire to exploit others, and a scrupulous effort to give every one his due. Habits of thought, feeling and action which can make unprincipled or unjust action by either the people or their leaders impossible must depend, ultimately, on a sound system of education and great, inspiring and honest leadership. It is the firmness with which such a system, visualised by our Constitution, is planted in the lives, thoughts, feelings and institutions of the people that will determine whether democracy will survive or perish amongst them. A widespread knowledge and understanding of our Constitution and its meaning must necessarily play a vital role in sustaining it.

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1. 1955 S.C.R. 415 at 436.

Although the law presumes that every citizen knows the law, and, therefore, the Constitution of the Republic, which shapes the lives and destinies of all of us, yet, this presumption is, we find, sometimes rudely shaken by the speech or action of those who are entrusted with wide governmental powers and who ought to know how to use them wisely, properly, justly, and honestly, and, sometimes also of those who, though professional lawyers, show gross want of either understanding of it or respect for it. Hence, the need and function of the courts to explain and expound the meaning of the Constitution in all cases of dispute and difficulty on the subject, and of enforcing it when violated. The Supreme Court and the High Courts are the especially constituted organs of the Republic for elucidating the meaning of the Constitution and for enforcing it for the Nation against its transgressors whoever they may be.

In *Kesavananda Bharati's* case[2] a Bench of 13 Judges, the largest Bench constituted since the inception of the Constitution to hear a case, declared that the supremacy of the Constitution was one of its cardinal features, or, a part of "the basic structure of the Constitution."

What does this mean? The writer has, in an election case decided not long ago, in *Indira Nehru Gandhi* v. *Raj Narain*[3] examined and explained at some length the meaning of the "supremacy of the Constitution." In the course of a discussion of this principle, which is perhaps more elaborate than any which could be found in the judgment of any court given anywhere at any time, he gave its essence as follows:

> Neither of the three constitutionally separate organs of State [i.e. the Executive, the Legislature, and the Judiciary] can, according to the basic scheme of our Constitution today, leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical and natural meaning of the principle of Supremacy of the Constitution.[4]

This means that the legality of any action of each organ or authority in the State must be capable of being tested in a Court with reference to the Constitution. The principle of supremacy of the Constitution may, however, not suffice to safeguard the fundamental rights of citizens, because, woven into that Constitution, are emergency provisions which can suspend the jurisdiction of superior courts to enforce fundamental rights of citizens against the State or its agents or officers during an emergency, when, in

2. 1973 Suppl. S.C.R. 1.
3. (1976) 2 S.C.R 347.
4. *Id.* at 539.

order to protect the safety of the Nation or to ward off the risk of some imminent danger of national disintegration, action may have to be taken on bare suspicion which may not be able to withstand a judicial examination. If courts' powers are suspended they can only caution against the danger of abuse of excessive executive authority and concentration of powers. Here, the writer had referred to an often misunderstood judgment of his in the *Habeas Corpus* case[5] where, while finding that High Courts were unable to interfere when their powers were suspended, he had warned executive authorities against misuse of executive powers. He had pointed out the pathetic condition of suffering subjects when, owing to the somewhat exaggerated fears evoked by the French Revolution, the powers of courts to issue writs of *Habeas Corpus* were suspended in England. The result, in the words of Erskine May, quoted there by him, was:

> [A]ny subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt, his accusers were unknown; and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however, circumstantial in their narratives to Secretaries of state and law officers, shrank from the witness-box; and their victims rotted in gaol. Whatever the judgment, temper and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused. Whatever the danger by which it was justified, never did the subject so much need the protection of the laws, as when Government and society were filled with suspicions and alarm.[6]

According to a learned English author, a thousand years of British history demonstrate that "no liberty is safe without a Court to protect it." Let us hope that we, in this country, have learnt this lesson in a lesser period so that excessive and unquestionable powers are not easily conferred upon executive officers or authorities in a way which invites their lawless abuse against citizens.

It is true that the rule of law which Dicey contemplated was an attempt to formulate certain principles of the British Constitution which, in Dicey's opinion, though they did not legally limit the legislative powers of Parliament (the extent of which in England he explained under the principle of "parliamentary sovereignty"), yet, they actually governed the decisions of common law courts and the British Parliament would not think of abrogating them. That type of rule of law, based solely on what courts declared

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5. *A.D.M. Jabalpur* v. *S. Shukla*, A.I.R. 1976 S.C. 1207.
6. *Id.* at 1304.

as "common law" rights conferred by an imaginary "ideal Constitution" in the minds of judges and the conventional respect of Parliament for such declarations, could not be said to exist, in the same form, in a country with an elaborate written Constitution although we too have imbibed its spirit. Dicey was attempting rather desparately to dispel "the dark saying" of a French jurist, De Tocqueville, who said that the British Constitution did not exist. We, on the other hand, have a very comprehensive written Constitution which makes it unnecessary for us to find our Rule of Law outside the Constitution. Whatever principles of natural or common law our courts can enforce are, under our system, the necessary consequences of constitutional provisions when their operations are not suspended. Hence, our Supreme Court has laid down repeatedly that our rule of law is found in the Constitution and not outside it. This has been explained at some length by the writer in the *Habeas Corpus* case mentioned above.

According to the majority view which he had shared in those cases, the Indian Constitution is not just a convenient wrapping or a coat or label put on to a body of basic natural or common law rights which could be enforced by the courts even when their constitutional powers were suspended. It constitutes the written substance into which all the basic natural or common law rights of citizens and powers of courts had become incorporated so as to leave nothing outside or apart from it in the eye of law which the courts could enforce as fundamental rights. For this conclusion reliance was placed by him, *inter alia*, on the views expressed by Chief Justice Subba Rao on behalf of himself and four other judges of the Supreme Court, in the famous *Golak Nath* case, when he held that the fundamental rights of our Constitution are "the modern name for what are traditionally known as natural rights." He had also cited the view of a famous American Judge, Benjamin Cardozo, who said that the modern philosophy of law weaves natural law into positive law, and, instead of trying to find "natural law" outside the positive law, seeks to discover it in the ideal side of positive law itself. This can be done by understanding the theory or the purposes underlying our Constitutional provisions and keeping powers true to their purposes.

The highest norms of our positive law are found embodied in our Constitution in the sense that they test the validity of all laws made under the Constitution. The courts function under the Constitution and by reasons of powers conferred by it. They do not operate in any sphere above or outside it. They cannot, when the Constitution says that some of their constitutional powers must remain asleep for the time being, order the dormant parts of the Constitution, as though the court had some miraculous overriding powers, to wake up and function as they normally should.

The courts, like Parliament itself, are creatures of the Constitution and have to keep within the limits of their constitutional powers. They can only decide cases as they come before them on the questions raised before them. They have no roving commissions to inquire *suo motu* into anything simply because unconstitutional action may exist somewhere. They can only declare the law as it is but not make it or change it. The citizens in general, organised into political parties, their representatives assembled in Parliament, and the press, have, in some respects, wider and more immediate or direct responsibilities for maintaining the health and vigour of the Constitution which comes up before Courts for interpretation only when there is a complaint about its violation or a dispute about its meaning. Questions relating to what the Constitution could be or should be but is not have also greater relevance and interest for them than they have for courts.

A question which arises, not only for the constitutional and political theorist but also before the judge or the lawyer, who is more concerned with the application of law, is the relationship between "parliamentary sovereignty" and the "supremacy of the Constitution." The writer had here referred to a passage from the election case mentioned above to show that the theory of the supremcy of the Constitution is not a new one. He said there:

> A.V. Dicey, the celebrated propounder of the doctrine of the sovereigenty of Parliament, had criticized Austin for frequently mixing up legal sovereignty and political sovereignty (see: Law of the Constitution by A.V. Dicey—10th Edn. p. 72). He contrasted the British principle of "Parliamentary Sovereignty" with what was described by him as the "Supremacy of the Constitution" in America. He observed (at p. 165):
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> 'But, if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be "the law of the land", and in so doing created modern federalism. For the essential characteristics of federalism—the Supremacy of the Constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal state.'

He said (at p. 144):

> 'A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belongs to the nation or to the individual States, is subordinate to and controlled by the Constitution.'

He wrote about the American Supreme Court (at p. 159):

> 'Of the nature and position of the Supreme Court itself this much alone need for our present purpose be noted. The court derives its existence from the Constitution, and stands therefore on an equality with the President and with Congress; the members thereof (in common with every Judge of the Federal Judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a Judge's tenure of office.'[7]

If the first set of the writer's observations relate to the misuse of powers by executive officers armed with excessive powers, which were made immune from scrutiny by courts, the second set were made in the context of an assumption by our Parliament itself of a judicial power it did not possess under the Constitution. It had, in effect, taken upon itself to decide the election petition of Raj Narain against Indira Nehru Gandhi, invalidated the judgment of the Allahabad High Court upon it, and enacted that the Supreme Court must decide the case in the appeals pending before it, in accordance with what Parliament had purported to do in exercise of its legislative powers. The Supreme Court held, in no uncertain language, that this was an unconstitutional usurpation of judicial power which the Parliament did not possess. The Parliament had acted in a manner amounting to the decision of an election case without any power given to it by the Constitution to do so and without even hearing the two sides. The Constitution, whose supremacy over Parliament was vindicated by the Supreme Court, conferred only legislative power upon Parliament. Even when the Parliament exercises its "constituent" power, it has to act in accordance with the constitutionally prescribed legislative procedure. It was not a judicial power at all which can only be exercised in accordance with a judicial procedure not found in article 368 where the whole power and procedure for amending our Constitution is contained.

In the course of the judgment in the above-mentioned case, the writer gave an instance of an unjustifiable assumption of judicial power by the British Parliament itself to punish two judges in a case in which, on a bare suspicion of partiality, the Parliament had summoned the judges of the King's Bench Division before it and punished them. He quoted Lord Denman, C.J., who, in *Stockdale* v. *Hansard*[8] in a subsequent period and age when such a thing had become legally impossible in England after the Act of Settlement of 1701, described the punishment of the judges as a "foul indignity" heaped

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7. *Indira Nehru Gandhi* case, *supra* note 3 at 618-19.
8. 112 English Rep. 1112, 1163.

upon them and said:

> Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown.[9]

Thus, the principle of supremacy of the Constitution requires for its maintenance in full force and vigour: firstly, an executive which respects the judiciary and its verdicts and does not take away, by the exercise of its constitutional powers, judicial powers to deal with the rights of citizens even against executive actions of the State; and, secondly, the absence of any legislative interference with judicial functions in a manner characterised by Dean Roscoe Pound as "legislative lynching" or threats of any kind held out for reaching particular conclusions however unpalatable they may be to any one. Articles 121 and 211 of our Constitution, prohibiting discussion of the conduct of a Supreme Court or a High Court judge in the discharge of his duties even by Parliament or a state legislature, except upon a motion for his removal by the constitutionally prescribed procedure of addresses presented by each House of Parliament after proved misconduct or incapacity of a judge and resolutions by 2/3 majorities of each House present and voting, are there in our Constitution to ensure this. Can ordinary citizens do elsewhere, with impunity, what members of Parliament cannot do in Parliament and legislators cannot do in a state legislature, and, if so, to what extent? Such questions will have to be answered by courts with reference to the facts of particular cases if and when brought to their notice.

It would be a sad day for the supremacy of the Constitution and for the rule of law, which it implies, if malicious or ill-informed persons, filled with the irrationality involved in the spirit of what Dean Pound called "lynching" or misguided zest or vindictiveness, acting in a manner freed from the restraints of law or reason, were allowed to take upon themselves the task of passing judgments on actions of others particularly of judges performing judicial functions. That would certainly sound the death knell of what Dean Pound calls "judicial justice" and the rule of law. The supremacy of the Constitution can only be maintained when there is a spirit of law abidingness and discipline amongst citizens so that principles of law can be applied scientifically to facts by courts of justice, which are the custodians of what has been described by political philosophers as the abiding or continuing "real will" of the whole Nation embodied in the Constitution contrasted with the will or wishes of some or majority of citizens for the time being expressed in legislatures or elsewhere. Judges,

9. *Supra* note 3 at 604.

who have taken oaths of allegiance to the Constitution, are bound to uphold it conscientiously "without fear or favour, affection or illwill." They have to give their honest judgments without caring for popular approval or disapproval.

Our Constitution contains an inspiring Preamble reflecting the hopes and aspirations of the Indian People, a chapter on Directive Principles of State Policy, indicating the manner in which the people's objectives can be attained by legislative action, with due respect for the fundamental rights of the citizens, the enforcement of which should only be suspended under compelling necessities. A democratic system, such as ours, depends for its success upon a government under the Constitution, in accordance with the letter and spirit of the Constitution, and, as expressed in the laws which must prevail amongst a law abiding people and be enforced, in cases of their infringement, by courts armed with adequate powers and authority and given the respect due to those through whom the Constitution and the laws speak. This, in practice, is the meaning of the "supremacy of the Constitution."

The doctrine is essentially a legal device adopted by the people of our country by setting up, through the Constitution they gave unto themselves, independent courts to act as guardians of their constitutional rights and liberties against unjustifiable invasions of these either by the executive or by the legislature. It is inherent in the very idea of a written Constitution. It is the hub of a mechanism of checks and balances which prevents either abuse or excess of power by any organ or authority in the Republic. It is a part of a system for the "taming of power" as Bertrand Russel, in his social and political analysis of "Power", considers democracy itself to be. It is an answer to the problem, which has troubled political philosophers and jurists like Aristotle and Kautilya since ancient times, of keeping those who wield governmental power over the lives and fortunes of their fellow citizens within the bounds of justice and reason as laid down in the law. For "power", as Lord Acton once said, "corrupts" and, "absolute power," he added, "corrupts absolutely." Power is apt to act like a Frankenstein's monster which turns against those who create it. Hence, people must have a "supreme" Constitution containing basic norms, to be protected and enforced against all, however strong and mighty, and, if necessary, finally, by the Supreme Court, so that a "government of the people", even if it cannot be one directly "by the people" does not cease to be one "for the people" in so far as its obligations towards citizens have been legally defined and can be enforced by courts.

The doctrine is thus a part of that discipline, decreed by the people themselves in their Constitution, to be observed by the people as well as by

all the instrumentalities of their Republic. Both individual freedoms as well as governmental powers, if undisciplined, tend to run riot. Without proper control and balance and direction, they are, at their best, negative removals of restraints, and, at their worst, degenerate into paralysing and anarchic license, confusion, and tyrannies of the worst kind which are destructive of the freedoms of all. Constitutionally regulated and disciplined powers and freedoms expand the total areas of freedoms of all citizens without undue discrimination.

As the Indian Constitution, rightly described by Granville Austin, writing on it, as the "Cornerstone of a Nation", is meant for the benefit of the masses of our people, it is incumbent on them to try and grasp its full significance. It is a precious heritage—the product of a prolonged national struggle, filled with great sacrifices and sufferings, against a powerfully entrenched foreign imperialism. It is meant to secure for all our citizens a present and a future free from degrading and irrational discriminations and inequalities, free from fear, insecurity, and want, and full of hope and promise. Hence, it prescribes, even though by one of the recent amendments of the Constitution, what was always the duty of every patriotic Indian citizen since the inception of the Constitution: "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem."[10]

In the preamble of this Constitution "justice, social, economic and political" is given the first place amongst the objects of our Republic because that is the primary concern of all progressive people throughout the world. The other values and objectives—liberty, equality, and fraternity—mentioned there, are only aspects or facets of justice. All these values, set out in the preamble to our Constitution, which has been described as the "soul of the Constitution," constitute the binding force or the civil religion—from "religio" or to bind together—of our secular democratic State. Our faith in them should sustain the whole variegated social structure of our people. Our pursuit of these should unite citizen and citizen, the citizen and the State, and various organs of the State. They should animate them with a sense of purpose and instil in them a spirit of dedication which transcends all differences—social, economic, political, religious, racial, regional and cultural. That, apart from its uses in our courts of justice, is the function of the supremacy of the Constitution as a part of a living and active faith of a people on the march. If it performs that function well ours will be a great Nation worthy of the values the Constitution holds aloft.

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10. See article 51A (*a*), The Constitution of India inserted by the Forty-second Amendment.