Constitutional Supremacy:

Different Experiences in the United States, India, and Malta

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This article reproduces as a matter of public record the lecture delivered by **Professor Tonio Borg** at the Institute of Advanced Legal Studies (IALS) on the 21st of March 2024 in Russell Square, London. In it, Professor Borg explores the supremacy of the constitution of select countries.

TAGS: Constitutional Law

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1. United States

The idea of a written Constitution being supreme is a relatively recent one. It was only with the birth of the Constitution of the United States of America in 1787 that the idea was born that a written constitution should be regarded as the apex or the supreme law; and then such supremacy was not enshrined in the Constitution itself but was only the result of the landmark judgment in 1803 of *Marbury v Madison*. Indeed, the United States Constitution does not have a supremacy clause except one which proclaims the supremacy of the Federal Constitution *vis-à-vis* the State constitutions; but it is silent on whether the Constitution prevails over the measures and actions of the federal institutions such as Congress or the President of the United States.

It is for this reason that the case of *Marbury v Madison* is the flag bearer of those who believe that the supremacy of the Constitution is something enmeshed in the DNA of all written constitutions, and that it does not need to be expressly written down in the constitution itself; it is carried wherever a written constitution applies. I remember visiting the Chambers of the US Supreme Court Justice Antonin Scalia a decade ago to find a huge oil portrait of William Marbury, the plaintiff in the *Marbury v Madison* case. Scalia told me when he saw me staring at the portrait: 'I hung it there because I owe my job to that man'.

In this respect, therefore, it is interesting to examine the factual background of this ground-breaking judgment. President John Adams, a founding father of the Constitution had campaigned on behalf of the Federalist Party. On the eve of the end of his term in office, namely on the 3rd of March 1801, as the second President of the United States, he appointed William Marbury as Justice of the Peace in the district of Washington DC. The official seal was attached to the appointment, but it was not delivered to him before Thomas Jefferson, who won the Presidential election against Adams in 1800, an arch-rival, took office in 1801. Marbury petitioned the Supreme Court to compel the new Secretary of State, James Madison, to deliver the documents. Marbury, joined by three other similarly situated appointees, petitioned for a writ of *mandamus* compelling the delivery of the commissions under the newly enacted Judiciary Act of 1789. It is pertinent to point out that Marshall, before his appointment as Chief Justice, had been Secretary of State (1800-01) in President Adams's Cabinet.

The Court ruled that by signing the commission of Mr Marbury, the President of the United States had appointed him as Justice of the Peace, the seal being conclusive evidence of such fact. This gave him the legal right to the office for the space of five years. He, therefore, had a right to request delivery of the commission and a refusal to deliver it was a plain violation of

that right for which the laws of the country afforded him a remedy.

> *The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to derive this high appellation, if the law furnish no remedy for the violation of a vested legal right.*

There is no doubt that the Court was here paving the way to an enunciation of the principle of the supremacy of the Constitution, for if the government of the United States is a government of laws and not of men, *multo magis* it is bound by the provisions of a Constitution which is necessarily supreme even because it was enacted through a more laborious process than enacting ordinary laws.

However, when it came to the *procedural* question of whether the action had been regularly filed directly before the Supreme Court, the latter ruled that the Judiciary Act of 1789 was in breach of the Constitution since the merits of the case did not fall under one of the subjects for which the Supreme Court enjoyed original jurisdiction as a court of first and last instance. Therefore, in doing so Chief Justice Marshall, an avowed Federalist, decided the matter whether the judiciary could declare a federal law passed by the federal legislature as being unconstitutional.

The case has remained famous because Marshall laid down the legal philosophy and thinking behind the supremacy of a written Constitution. Marshall stated eloquently:

> *To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not a law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.*

Logically, Marshall should have decided the issue of whether Marbury had correctly filed an action before the Supreme Court first for, if as later ruled by the Court, the action was inadmissible because the federal law on which it was based was unconstitutional, the case would have stopped there. Instead,

Marshall first ruled that Marbury's legal stand and position was correct, chastising the Jefferson Administration in the process, and then decided that the Supreme Court had the power to review legislation passed by Congress or, for that matter, any action of any federal organ authority or officer, to decide whether such entity or officer abided by the supreme US Constitution. Indeed, therefore, though Marbury lost the case and no *mandamus* was issued against Jefferson, a broader, wider principle of judicial review was established and affirmed, making the defendants' victory only a pyrrhic one.

2. India

In India, two issues which have arisen illustrate the Indian stance on constitutional supremacy. The first one is the extent to which the Constitution of India is supreme; the second, the development of the judicial doctrine of 'basic structures'.

The Indian Constitution does not contain a general supremacy clause. It does have a supremacy clause *as to the human rights chapter* found in the Constitution; any law or action which runs counter to human rights is null and void; but what about the other non-human rights provisions of the Constitution? In *Gopalan v State of Madras* in 1950 the Supreme Court ruled that:

> *The inclusion of article 13(1) and (2), in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid.*

The Indian Supreme Court has, however, boldly gone further. It developed the so-called **basic structures rule or doctrine** which is not found anywhere in the written Constitution but which evolved as a judicial doctrine. In *Kesavananda Bharati v State of Kerala* the Court stated that Parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution. The judges did not provide what constitutes the basic structure but provided an illustrative list of what may constitute the basic structure. As per Sikri, C.J., the basic structure constitutes the following elements:

- The supremacy of the Constitution
- Republican and Democratic forms of Government
- Secular character of the Constitution
- Separation of Powers between the Legislature, the Executive, and the Judiciary
- Federal Character of the Constitution

This extraordinary form of judicial creativity may be criticised by positivists. However, if one takes a constructive approach, one can state that courts of constitutional jurisdiction are not just ordinary courts. They interpret and apply a *living* legal instrument. Not one which is static and rigid. Protecting the basic features of a written constitution against populist take over or intrusions, is a laudable legal motive. The Indian Supreme Court, faced with several such intrusions in the early seventies, including spurious declarations of national emergency and the forced sterilisation of human beings, took the extreme measure of bestowing upon itself the power to block certain changes in the Constitution which would neutralize and undermine the very nature of a constitution of a democratic State governed by the rule of law. This was not done through legislative intervention, but as a result of a bold decision of the apex court of India.

3. Malta

In Malta, the supremacy issue came to the fore in the interesting even if turbulent month of December of 1974. The Mintoff government which had been elected in 1971 had on several occasions stated that the Independence Constitution, given by the British Government in September 1964, constituting a monarchy within the Commonwealth with the British sovereign represented by a Governor General as its head of state, was not appropriate for Malta. Now the Constitution had been approved by an ordinary majority by the then Legislative Assembly before Malta became independent and had also been approved by a majority in a referendum in May 1964. The argument to undermine the supremacy of the Constitution, and therefore introduce certain changes without the need of getting a two-thirds majority of the members of the legislature and a referendum as stipulated in the Constitution, was the following: The Constitution provides for most of its important provisions to be entrenched by a two-thirds majority; a list was contained in Article 66 of the Constitution listing the articles which needed such a qualified majority to be changed. The supremacy clause, which by the way was not in the original draft submitted to the Independence Conference in 1963 at Marlborough House, was not included in the list. According to the Constitution, articles not contained in the list required only an absolute majority to be amended, namely 50% plus one of all those eligible to vote in legislature, the Maltese House of Representatives. Government threatened that if no agreement was reached with the Opposition to affect the changes it desired, it would use the unentrenched Article 6, the supremacy clause to push forward its amendments, particularly the changeover from a monarchy to a republic. The Opposition decided to negotiate, and 20 out of 26 of its members were in favour of the amendments. The problem, however, was that some amendments such as the shift from monarchy to republic required a referendum apart from two-thirds majority of MPs. The Opposition acquiesced in supporting Government in using Article 6,

change it for 48 hours by declaring that Parliament was supreme not the Constitution if a statute expressly so provided, introducing the agreed amendment without a referendum, and then entrenching Article 6, this time with a two-thirds requirement for the future.

The drafter of the 1964 Constitution Prof. J.J. Cremona, who later on became Chief Justice in 1971, in an article written after he retired in 1981,[1] stated that this was a bizarre and probably unconstitutional way of amending Article 6; the supremacy of the Constitution was enshrined in Article 6 of a written Constitution. The argument put forward even today is that those countries which do not have a supremacy clause contained in their written constitution, have declared through their supreme courts that a constitution is supreme of its every nature; and here in Malta, where we have a supremacy clause, a way was found to bypass such provision. He described what happened as a 'break in legal continuity' alleging a 'misconceived manipulation of article 6' and that the agreed compromise – amounting to a break in legal continuity which was however cured by general acquiescence. In 1988, in an address he made Cremona stated:

> The hierarchical superiority of the Constitution is in fact expressed in section 6 of the Constitution itself which provides that if any law is inconsistent with the Constitution, the Constitution prevails. But in truth in the Maltese legal system where the Constitution is a written one and imposes limitations on the powers of the Legislature, which it itself created the hierarchical superiority of the Constitution exists and operates independently of this formal affirmation, which as was stated in respect of a kindred provision in another Commonwealth Constitution, was only inserted *ex abundanti cautela*.[2]

Four years after the 1974 constitutional amendments, Cremona sitting as President of the Constitutional Court in *Luis Vassallo*,[3] quoting de Smith's *The New Commonwealth and its Constitutions*, stated *obiter* that the principle of supremacy strictly speaking, did not need to be proclaimed. It was part of the DNA of a written constitution. Later on, in 1988, Cremona after his retirement, referring to the *Vassallo* judgment in 1978, stated: 'that such judgment was indicative of how the issue would have been decided had it been brought before the courts.'[4]

The Maltese experience goes to show that sometimes constitutional supremacy is sacrificed at the altar of political convenience, succumbing to political acquiescence irrespective of any scruples about breaking legal

[1] JJ Cremona, 'Birth Pangs of a Republic: Section 6 of the Maltese Constitution' in *Selected Papers* Vol II (1990-2000) (PEG 2002) 129.
[2] JJ Cremona, 'The European Convention on Human Rights as Part of Maltese Law' in *Selected Papers* Vol I (1946-89) (PEG 1990) 228.
[3] *Luis Vassallo et vs Prime Minister*, Constitutional Court 27 February 1978.
[4] JJ Cremona (n 2) 232.

continuity. The new entrenched Section 6 is not without its flaws, such as that it was not entrenched by a requirement of two-thirds majority of the legislature and a referendum to change; but only by a two-thirds which means that in the future, by using the same stratagem of 1974, one can remove or amend the provisions in the Constitution requiring a referendum by the two-thirds only!

4. The United Kingdom

Technically, my address should stop here, having reviewed the constitutional supremacy in the United States, India, and Malta. However, I could not resist the strong temptation to delve into the recent pronouncements of the UK Supreme Court which seems to have assumed the role of a constitutional court in a country which does not have a codified supreme constitution.

I shall be analysing very briefly the so-called Second *Miller* case,[5] namely the one where plaintiff Gina Miller sought a review of the Johnson Government's decision to use its prerogative power to prorogue Parliament for an unusual period of 5 weeks allegedly to avoid debating Brexit in Parliament towards the end of 2019. In that case, a unanimous decision of the Supreme Court ruled that such decision was unlawful.

The Supreme Court, presided over by Baroness Hale, stated the following on the 24th of September 2019:

> *Although the United Kingdom does not have a single document entitled 'The Constitution' it nevertheless possesses a Constitution established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as the legal principles. In giving them effect, the courts have the responsibility of upholding values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government and to decide whether any exercise of powers has transgressed those limits.*

It then added:

> *The legal principles of the Constitution are not confined to statutory rules but include constitutional principles developed by the common law.* […] *such principles are not confined to the protection of individual rights but include principles concerning the conduct of public bodies*

[5] [2019] UKSC 41.

and the relationship between them […] *the fundamental principles of our constitutional law are relevant to the present case: the first is the principle of parliamentary sovereignty* [...] *time and again sovereignty from threats posed to it by the use of prerogative powers has been protected* [...] *the sovereignty of parliament would however be undermined as the fundamental principles of our constitution, if the executive could through the use of the prerogative prevent Parliament from exercising its legislative authority for as long as it pleased.*

The same question arises in relation to a second constitutional principle that of parliamentary accountability which lies at the heart of Westminster democracy [...] *a decision to prorogue will be unlawful if the prorogation has the effect of frustrating or preventing without reasonable justification the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the Executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course.*

It annulled the prorogation as having no effect. Incidentally, Parliament has since then through statute blocked any future judicial review of such prerogative power of prorogation through an ouster clause introduced in the Dissolution and Calling of Parliament Act 2022 which in Article 3 provides that:

A court or tribunal may not question—(a) the exercise or purported exercise of the powers referred to in section 2, (b) any decision or purported decision relating to those powers, or(c)the limits or extent of those powers.

5. Conclusion

I have quoted extensively from the *Miller* decision because there are two approaches to an analysis of this judgment. Was this case a constitutional one and was the judgment one of constitutional review? Or one based on the more traditional ground of judicial review of administrative action based on accepted grounds of review such as abuse of power? I must admit that the more I read the judgment, the more I come closer to the conclusion that this was mainly a constitutional review case with a flavour of administrative law issues added to it. The way the Supreme Court explains the nature of the British Constitution and enunciates the two fundamental principles of the British Constitution relevant to the case, namely parliamentary sovereignty and accountability of the Executive to Parliament, indicate that here, the Supreme Court was reviewing an executive decision from a constitutional angle. This means that the Supreme Court has assumed the role of reviewing administrative action,

even if highly loaded politically, on a constitutional basis; for though there is no supreme constitution, there is a constitution in the UK and there are constitutional principles. The novelty of the judgment is that it is not based on an interpretation of a statute of a constitutional nature but on conventions and traditions. Since conventions are classically defined as ‘rules of political practice considered to be binding by those whom they are intended to apply but which are not enforceable in a court of law’, the *Miller* judgment could have changed such definition. It would seem that there are practices and traditions, apart from any statute, which are so essential to a Westminster democracy, that even if unwritten, they will be enforced.

Another explanation would be that this was a pre-eminently administrative law review case, whereby under common law the courts of law can strike down as unlawful an exercise of discretion. Once the prerogative was subject to judicial review, and therefore justiciable, the improper use of such power was unlawful. This minimalist approach, however, in my view, considering the reasoning and the references in the judgment, although possible, is not probable and I am certain in the view that the judgment in the *Miller* case has opened the door to constitutional review in severe and serious cases of constitutional misconduct, introducing the role of the supreme court of safeguarding the supreme and fundamental norms of the British Constitution.

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