

Re-Viewing The Reviewers: Incorporating The Idea Of A Constitutional Council To Safeguard Rule Of Law In India

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Abstract

“We, the People of India” have witnessed several face offs apropos supremacy between the two of the three pillars of Indian Democracy viz. Legislature and Judiciary. Despite a written constitution, the ambits of powers of the abovenamed pertaining to concluding the law of the land are unclear and vague due to a tussle of supremacy through unjustified and excessive exercise of their respective constitutional powers. History entails evidence of such instances wherein the two constitutional institutions viz. Parliament and Supreme Court, time and again, have attempted to attain their institutional supremacy under the garb of constitutional supremacy henceforth eclipsing the principles of the rule of law in India. Hence, in the light of the aforesaid, the present time calls for a dire need to revamp the existing constitutional framework to safeguard rule of law in India.

In order to avoid such face offs apropos supremacy, this paper explains the idea of incorporating a new constitutional body viz. Constitutional Council of the People of India in order to provide with effective solutions to certain underlying issues appertaining to the scope of powers of constitutional review of the legislature and the judiciary. This paper attempts to answer the pertinent question of what constitutional framework is best suited for India in order to bring the Legislature and the Judiciary on an intermediate position in order to restrict them from exercising unjustified and excessive use of their constitutional powers.

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Research Methodology

The paper is based on doctrinal method of research which includes primary as well as secondary data such as judgments, articles, books and journals. Analytical, critical and comparative methods are also used in support of the arguments.

Objective

The objective of this research is to understand and analyze some pertinent questions arising out of the working of the existing constitutional provisions which has led to ambiguity as to the nature, scope and extent of the legislative and judicial powers of the Parliament and the Hon'ble Supreme Court of India respectively.

Background

A written constitution in any country, entailing the essentials of constitutionalism, is considered to be an epitome of rule of law and it is fairly expected that the institutions created by such constitution, whether it be legislature, executive or judiciary, will function within the prescribed ambits of the written provisions of such constitution. Such was the case with the Constitution of India ("Constitution") at the time of its commencement. However, through experience gained by the working of constitutional provisions by the abovementioned constitutional institutions, developed a concept of supremacy in the affairs of the state which has distorted the whole constitutional framework through exploitation of loophole provisions which was neither intended nor expected by our constitutional makers. Whether it be unjustified exercise of its legislative power by the Parliament or unwarranted assumption of certain judicial powers by the Supreme Court of India, the Constitution makers did not expect any of the above due to an unblemished trust they had in these institutions.

In support of the above views, let us consider an instance from the time when our Constitution was in the process of making and the same pertains to the constitutional practice intended by the Constitution makers and subsequently adopted by the Parliament and the Supreme Court of India with respect to the power of Judicial Review of the 'right to life and personal liberty' under the Constitution. Sir B.N. Rau, who was the Constitutional Advisor to the Constituent Assembly, on one of his visits to the United States, met U.S. Supreme Court Justice Felix Frankfurter, who told Sir B.N. Rau that he considered *the power of judicial*

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review implied in the due process both undemocratic - because a few judges could veto legislation enacted by the representatives of the nation -and burdensome to the Judiciary and the same was conveyed by Sir B.N. Rau to the President of the Constituent Assembly, Dr. Rajendra Prasad in an airmail letter dated 11 November, 1947.² This game changing incident marked the initiation of the process of inculcating in Article 21 of the concept of ‘procedure established by law’, hence amending the previously adopted draft article founded on the doctrine of ‘due process’. Conclusively, in consonance with the abovementioned views of Justice Frankfurter, the makers of the Constitution did keep above the elected representatives of the people sitting in the Parliament by entrusting upon them a great responsibility that no such law would be enacted by the legislature that would undermine their trust. However, there have been several instances in the post-constitutional history of India whereby the legislature has attempted to misuse its powers by enacting certain laws which are considered to be glaring examples breaching the trust of the constitutional makers. One such legislation comes during the reign of the then Prime Minister Smt. Indira Gandhi, where in the year 1971, Maintenance of Internal Security Act was passed by the Parliament and placed in the Ninth Schedule of the constitution in order to keep the same out of the purview of judicial review.³ However, in the year 1977, the same was repealed by the Janata Party led Government and through forty-fourth constitutional amendment, the same was removed from the Ninth Schedule of the Constitution henceforth retaining the trust of the constitutional makers in the legislature. It is to be noted here that due to unjustified exercise of power by the Parliament, the Supreme Court of India, in order to safeguard constitutionalism in India, seemed to be compelled to interpret law by reading beyond the provisions of the Constitution and had to come up with certain practices in order to maintain the system of checks and balances in the constitutional framework. One such example in furtherance of the above instance pertains to an interpretation by the Supreme Court wherein it considered the concept of ‘procedure established by law’ as synonymous to the doctrine of ‘due process’ henceforth safeguarding the fundamental right of life and personal liberty under Article 21 against the arbitrary actions of the state howbeit contrary the intention of the Constitution makers.⁴

² Granville Austin, *The Indian Constitution* 128-129 (2014).

³ Before the judgement passed by the Hon’ble Supreme Court on 11 Jan. 1977, any law placed in the Ninth Schedule was out of the purview of judicial review. See *I.R. Coelho v. State of Tamil Nadu &Ors.* [(2007) 2 SCC 1].

⁴ See *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248].

Such instances of tussle, among many others, between the Parliament and the Supreme Court ultimately led to the struggle of supremacy over the Constitution, a landmark example of which one can find in the case of *Kesavananda Bharati*⁵. The judgement by the Hon'ble Supreme Court in the said case is not only considered to be a saviour of Indian democracy by propounding the doctrine of basic structure, but on the other side of the coin, this landmark doctrine owing to its ambiguity and uncertainty, has facilitated the Supreme Court to pronounce certain judgements which seem to be a misemployment of the basic structure doctrine. One such instance comes from the *Three Judges' Cases*⁶ which established the collegium system in India that has been criticized by many eminent legal scholars and jurists such as Fali S. Nariman⁷ and H.M. Seervai⁸ on the ground that it is rewriting of Article 124 of the Constitution and a blatant example of judicial overreach through an constitutionally unfounded act of judicial legislation by the Supreme Court. Moreover, an attempt by the Parliament to change the said collegium system through the ninety-ninth constitutional amendment also failed on the ground of violation of basic structure doctrine.⁹ Also, after the introduction of the basic structure doctrine, the judiciary has assumed unfettered power of reviewing the constitutional provisions and the danger which was contemplated by Sir B.N. Rau on the advice of Justice Frankfurter in incorporating the 'due process' doctrine in the Constitution came to be true after two decades of Constitution's commencement. Even the National Commission on Review of Working of the Constitution, while recommending for the reforms in the judicial functioning of the higher judiciary in India related the situation of judicial review in India to that of the United States in the light of Bill of Rights and considered the following in its basic approach and perspective to review the Constitution:

⁵ See *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* [(1973) 4 SCC 225].

⁶ The three Judges' Cases include the following cases: (i) *S.P. Gupta v. President of India and Ors.* [1981 (Supp) SCC 87] (First Judges' Case); (ii) *Supreme Court Advocates-on-Record Association v. Union of India* [(1993) 4 SCC 441] (Second Judges' Case); and (iii) *In re. Special reference 1 of 1998* [(1998) 7 SCC 739] (Third Judges' Case). These cases led to the formulation of collegium system in India and in the Third Judges' case, it was established that for the purposes of judicial appointments in higher judiciary, the recommendations of a collegium consisting of Chief Justice of India along with four other judges of Supreme Court shall be binding on the Government of India.

⁷ With respect to the collegium system, Fali S. Nariman expressed his disappointment in a chapter named 'A Case I Won — But Which I would Prefer To Have Lost' in his autobiography *Before Memory Fades* by quoting, "Today, I can only express my extreme anguish at the current state of ground realities in the matter of appointment of judges." See *Fali S. Nariman, Before Memory Fades: An Autobiography 404-405 (2010)*.

⁸ Seervai while condemning the judgement in the Second Judges' Case which laid and strengthened the very foundation of the collegium system has quoted in his book *Constitutional Law of India* that, "The majority judgement of 5 Sup. Ct. Judges in the Second Judges' Case bristle with almost every fault which can be committed in a judgement." See *3 H.M. Seervai, Constitutional Law of India 2904 (2017)*.

⁹ See *Supreme Court Advocates-on-Record Association v. Union of India* [(2016) 5 SCC 1].

“2.22.2 Another recurrent theme of debate relates to constitutional adjudications, judicial review and judicial activism. Even the incorporation of an entrenched justiciable Bill of Rights was attacked on democratic theory that the consequential shift of power to the judiciary, and away from the elected legislature, would place power in the hands of ‘unelected, unaccountable and elite group of people, viz., the judges’ who can over-turn the acts of Parliament. The power to identify and determine the inconsistency between an impugned law or an administrative policy on the one hand and the provisions of the Bill of Rights on the other hand, would itself, it is said, violate three most fundamental elements of democracy viz.- participation, representativeness and accountability and that judges exercise such powers without being accountable to the community. It is argued that ‘judicial activism’ is a slippery word which could mean a thin justification to interfere in the governing process.

2.22.3 It was also argued that such a power in the judiciary would shift the power from the legislatures to the judges; a process bristling with the possibilities of politicization of the judiciary.”¹⁰

The report duly observed certain matters in the constitutional provisions which needed reforms and recommended the same therefor but it did not touch upon the crux of the issue i.e. the struggle for supremacy by the Parliament and the Supreme Court whereby the system of checks and balances failed many a times.

The Core Problem

The most remarkable but disputed feature of governance provided by the Constitution of India is the system of checks and balances whereby no space is left for any arbitrariness and any *ultra vires* action of any of the organs of the state is balanced by the other through a system of checks and restraints. However, in recent times, again this system seems to be failing with the shift of unfettered power in the hands of the Supreme Court. Let us observe and understand stage wise in brief that how this shift occurred:

Stage 1: Commencement of the Constitution

The Constitution makers entrusted to the Parliament a great responsibility of making laws for good governance of the nation and regarding making of laws, kept the authority of these

¹⁰ Report of the National Commission to Review the Constitution, 31 Mar. 2002.

elected representatives above the unelected judges. At the time of commencement of the Constitution, the elected representatives in the Parliament understood their responsibility of governing the country strictly within the ambits of the constitutional provisions, maybe because of the fact that the Constituent Assembly itself worked as the first parliament of the nation. Slowly and gradually, with the need to introduce new reforms and development, the Parliament felt certain needs to amend the Constitution whereby it decreased the scope of the fundamental rights through certain amendments in the constitution such as amendment of Article 19 (2) and insertion of Articles 31A and 31B by the first amendment.¹¹ However, with the practice of working of the Constitution, the process of amendments which was once used for public welfare, development and to provide socio-economic justice to the people, was being exploited by the ruling party for its political purposes and the same led to hardships to the common man. Some well-known glaring examples of such abuse of constitutional power are twenty-fourth, thirty-ninth and forty-second constitutional amendments.

Stage 2: Twenty-Fourth Constitutional Amendment

Miffed by the judicial restraints and in its quest to attain supremacy over the affairs of the state, in the year 1971, the Parliament with the then ruling Indian National Congress party, by incorporating twenty-fourth amendment in the Constitution provided to the Parliament an unfettered power to amend any part of the Constitution. This purpose of attaining supremacy by the Parliament was further advanced through twenty-fifth, thirty-ninth and forty-second constitutional amendments through which the Parliament attempted to exclude Judiciary from reviewing the actions of the executive.

Stage 3: Basic Structure Doctrine

In order to curb the unfettered power of the Parliament over the Constitution, the Supreme Court came up with some measures to ensure the framework of checks and balances and hence through its landmark judgement in the *Kesavananda Bharati case*¹² propounded the doctrine of basic structure and held that Parliament does not have the power to amend certain features of the Constitution which constituted its founding stones. The judgement in the aforesaid case widened the scope of judicial review to a very large extent and further, vide

¹¹ See *First Amendment, Constitution of India*.

¹²*Supra* note 5.

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Supreme Court's judgement in the *I.R. Coelho case*¹³, even the Ninth Schedule of the Constitution, which was outside the scope of judicial review, came within its purview by virtue of the basic structure doctrine. Henceforth, the Supreme Court has the ultimate say in declaring what the law is and the supremacy over the Constitution shifted from the Parliament to the Supreme Court. However, this shift of power has led to many instances whereby the Supreme Court has assumed such powers under the garb of basic structure doctrine though the same were unwarranted by the express constitutional provisions.

An analysis of this shift in power conveniently lead us to three conclusions viz. (i) any space left for any form of accumulation of authority in one organ of the state, whether it be conferred or self-assumed, is destined towards the failure of the system of checks and balances; (ii) the system of checks and balances itself seems to be flawed when practiced by two independent organs as in order to work this system, it is inevitable that one organ would need a higher authority over the other to check other's actions and the same ultimately leads to abuse of such higher authority; and (iii) there is a dire need to replace the existing system of checks and balances through a new system of harmonious and cooperative governance prescribing necessary restraints on the power and authority of each organ through a process of negotiations and discussions.

The Proposed Solution

After analyzing the above problem with the existing system of checks and balances followed by the two independent organs of the state viz. the Parliament and the Supreme Court of India, the solution to the same seems to lie in revamping the said practice by establishment of a forum where these two supreme organs of the state get an opportunity to resolve their disputes in an amicable manner with the purpose and objective of good governance and welfare of the public and the same should not be directed towards any quest for supremacy over the constitution. It is a sad state of affairs that the need of such forum has arisen due to the fact that the Constitution has been worked neither by the Parliament nor by the Judiciary in the manner it was intended to be worked upon by the Constitution makers.

In the light of the aforesaid, the author in the present paper suggests for constitutional establishment of such forum viz. Constitutional Council of the People of India. This Council shall provide for a platform of negotiations and discussions to the two independent organs of the state for such matters of dispute wherein any pertinent constitutional question

¹³ See *I.R. Coelho v. State of Tamil Nadu &Ors. [(2007) 2 SCC 1]*.

appertaining to the governance of the country or the welfare of the state arises. For example, the ambiguity lying in the present basic structure doctrine has led to unfettered power of the judiciary over the legislature and the same is against the constitutional principles as it has ultimately led to the 'Rule of Judges' rather than ensuring 'Rule of Law'. One such glaring example of the same can be seen as introduction of the collegium system in the matter of appointment of the judges in the higher judiciary and upholding of the same under the basic structure doctrine. Now due emphasis is laid on the fact that after the introduction of the doctrine of basic structure, the Supreme Court has assumed the final authority over the Constitution and hence, the system of checks and balances which prevailed earlier came to an end. Even if we assume a situation where the shift of power takes place from the Supreme Court to the Parliament at any time in future, then it is highly probable that history may repeat itself as was the case at the time of Indira Gandhi led government. Similarly, even if any other constitutional body is kept supreme and as a final authority in the constitutional matters, then it is highly probable that such body may abuse such power and authority conferred upon it by the Constitution. Hence the author proposes the establishment of a Constitutional Council of the People of India with its *broad outlines* as follows:

Proposed Structure Of The Council

The nature of the Council shall be permanent and the members of the Council shall consist of three sets of representatives from the Parliament and the Supreme Court in the following manner:

1. Six members representing the Parliament wherein one set of three members shall be from the Council of Ministers and other set of three shall be from the Opposition. The three members to be appointed from the Council of Ministers shall be appointed by the Prime Minister in consultation with the Council of Ministers and the other three members from the opposition shall be appointed by the Leader of Opposition in consultation with the other members of opposition.
2. Three members representing the Supreme Court of India who shall be appointed by the Chief Justice of India. The selection of members of the Council shall be made through a process of single transferable vote and the Chief Justice of India shall be bound to appoint the first three Judges gaining the highest votes as the members of the Council.

3. The President of India shall be an *ex officio* observer member of the Council and shall have the function as provided below. It is to be noted that the President shall not have any right to vote in the matters of the Council.

How The Council Should Function?

Keeping in view all the aspects of the problem concerning supremacy, the Council shall not be constituted like any other body, but its functions shall be limited to provide a platform for the Parliament and the Supreme Court to come together to a discussion table where discussions may take place between the representatives of the Parliament and the Supreme Court over only such constitutional questions which seems to lead to excessive exercise of constitutional powers by any of the said organ. However, it should be mandatory that such discussions shall be directed towards achieving the objective of good governance and welfare of the public and any conclusion arrived thereon by the representatives of the Parliament and the Supreme Court shall be mandatorily considered by both the organs while discharging their functions. Due emphasis is laid on the fact that any breach of such conclusion arrived shall be supported by a well-founded reason by the breaching organ and on that particular reason(s), the problem shall be reconsidered by the Council till further conclusion as to its solution. A limited time period shall also be prescribed to arrive at the conclusion to the problem. However, if the Council fails to arrive at a definite conclusion even after a number of prescribed consecutive sittings, the President of India shall put the problem to vote of the people wherein the people had to choose whether the alleged breach by any organ of the state is justified or not and henceforth, the Council shall be bound to come to a conclusion of the problem on the lines of the mandate of the People of India.

How The Council Should Arrive At A Solution?

The Council in total consists of nine members and the President of India as its observer member. Each problem before the Council shall be put to vote by the observer member i.e. the President of India and a solution as to such problem shall be final only on attaining a minimum of seven votes in its support.

How Council Should Take Up Problems For Its Consideration?

Any member of the Council, the Parliament through a resolution passed by simple 1/2 majority or any judge of the Supreme Court may refer to the Council a problem regarding any existing issue appertaining to excessive and unjustified exercise of the constitutional power

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by any organ of the state and such problem shall be considered by the Council for the purposes of discussions to be held over the problems and solutions thereof.