Chapter – VI

CONCLUSION & SUGGESTIONS

The functions of government are often divided into three broad classes—legislative, executive (or administrative) and judicial. It is not always easy, or indeed possible, to determine under which head a particular task of government falls, but the organs which mainly perform these functions are distinguishable. To give an example from one of the oldest tasks of government, that of taxation: to enact a law authorising a new tax is a legislative function; to operate machinery for assessing and collecting the tax payable by each taxpayer is an executive (or administrative) function; to determine disputes between the taxpayer and the tax-collector as to the tax due in a particular case is a judicial function, involving interpretation of the law and applying it to the facts. So too in criminal law: creation of a new offence is a matter for legislation, enforcement of the law is an executive function and the trial of alleged offenders is a judicial function. But the tasks of government today are complex. The simple model afforded by taxation and criminal law is not easily applicable to many of the more elaborate processes of government.

In this research, it is intended to examine the two questions:

(a) to what extent are the three functions (legislative, executive and judicial) distinguishable today?
(b) to what extent are these three functions exercisable separately by the institutions of Parliament, the executive and the courts to which they are often attributed?

Conferment of powers in a single body leads to absolutism. But, even after distinguishing the functions, when an authority wields public powers, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such powers. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely.

The status of modern state is a lot more different than what it used to be. It has evolved a great deal from a minimal, non-interventionist state to an welfare state, wherein it has multifarious roles to play, like that of a protector, arbiter, controller, provider. This omnipresence of the state has rendered its functions becoming diverse.
and problems, interdependent and any serious attempt to define and separate those functions would cause inefficiency in government. Hence, a distinction is made between 'essential and 'incidental' powers of an organ. According to this differentiation one organ can't claim the powers essentially belonging to other organ because that would be a violation of the principle of separation of powers. But, it can claim the exercise of the incidental functions of another organ. This distinction prevents encroachment of an organ into the essential sphere of activity of the other.

It is the exercise of incidental powers only which has made executive grow everywhere in this social welfare state. It has assumed a vital role but, it has not usurped any role from any other wing. It just happened that the other two organs, namely, judiciary and legislature, became unsuitable for undertaking the functions of this welfare state and as a consequence the functions of the executive increased. As controller and provider, the judicial processes were very time consuming and the legislature was overburdened with work. Therefore, it was in natural scheme of things which made the administrators end up performing a variety of roles in the modern state including those of legislature and judiciary too, to an extent.

Further, the check of the adjudicators over functioning's of the other two has been regarded as an 'essential' feature of the basic structure theory. The judicial review power is a preventive measure in a democratic country which prevents administrators and law-makers to exercise their whims and caprices on the lay man and turn it into a despotie regime. There have been cases where the judiciary has dictated the ambit of their powers to the implementers and the mode to exercise it. Not even the representatives of people are immune to the powers of the courts. Two recent Supreme Court judgments- on the cash-for-query case and on the Ninth Schedule - have once again brought the powers and roles of the legislature and the judiciary into focus. In the case of the former, the court upheld the Lok Sabha's decision to expel members of Parliament, who were caught on camera taking bribes, but clearly rejected the contention that it cannot review parliament's powers to expel MPs and claimed for itself the role of final arbiter on decisions taken by the legislature. The judgment on the Ninth Schedule has curtailed Parliament's powers to keep certain progressive laws outside judicial review.
In the Second case, i.e., *I.R. Coelho v. State of Tamil Nadu*,\(^{674}\) S.C. took the help of doctrine of basic structure as propounded in Kesavananda Bharati case and said that Ninth Schedule is violative of this doctrine and hence from now on the Ninth Schedule will be amenable to judicial review which also forms part of the basic feature theory. The basic structure theory and the Golden triangle comprising of A. 14, 19, and 21, will now be the criterion in scrutiny of the Ninth Schedule.

In a democratic country goals are enshrined in the constitution and the state machinery is then setup accordingly. And here it can be seen that constitutional provisions are made as such to support a parliamentary form of government where the principle can't be followed rigidly. The S.C. rulings also justify that the alternative system of checks and balances is the requirement, not the strict doctrine. Constitutionalism, the philosophical concept of the constitution also insists on limitations being placed upon governmental powers to secure basic freedoms of the individual. Hence, the conclusion drawn out of the study is that there is no strict separation of powers but the functions of the different branches of the government have been sufficiently differentiated.

It is a tribute to the sagacity and farsightedness of the framers of our Constitution that today, as we look back, India has not only survived as a Democracy but, despite some areas of concern, it has won worldwide admiration as one of the fastest growing developing countries with strong social, cultural and economic bonds across regions. The issue of separation of Powers was also the principal item on the agenda of the Emergent Conference of Presiding Officers of Legislative Bodies in March 2005.

As is well-known, the debate about the doctrine of separation of powers, and exactly what it involves, is as old as the Constitution itself. It was extensively debated in the Constituent Assembly. It also figured in various judgments handed down by the Supreme Court after the Constitution was adopted. Although the controversy on defining the precise boundaries of powers of different institutions has recurred from time to time, there is nonetheless a broad agreement among all concerned on some fundamental points.

Thus, the doctrine of "separation of powers" is acknowledged as an integral part of the basic features of our Constitution. It is also commonly agreed that all the

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\(^{674}\) AIR 2007 SC 8617
three organs of the State, i.e., the Legislature, the Judiciary, and the Executive are bound by and subject to the provisions of the Constitution, which demarcates their respective powers, jurisdictions, responsibilities and relationship with one another. It is assumed that none of the organs of the State, including the judiciary, would exceed its powers as laid down in the Constitution. It is also expected that in the overall interest of the country, even though their jurisdictions are separated and demarcated, all the institutions would work in harmony and in tandem to maximize the public good. While there is a broad agreement on the above principles, in practice, from time to time, a dispute arises whether one organ of the State has exceeded the boundaries assigned to it under the Constitution. This was the case in 1973 in Kesavananda case, which I mentioned earlier, when the powers of the legislature to amend the Constitution was considered by the Supreme Court. The Court confirmed that the "basic structure" of the Constitution was an unalterable feature of our Constitution which could not be amended even by an Act of Parliament.. In 1975, however, this view was challenged by the then government before a special bench of the Supreme Court. It was argued that Parliament was "supreme" and represented the sovereign will of the people. As such, if the people's representatives in Parliament decided to change a particular law to curb individual freedom or limit the scope of judicial scrutiny, the judiciary had no right to question whether it was constitutional or not. Then after the then Chief Justice of India decided to dissolve the Bench, and the "basic structure doctrine was re-affirmed as an unalienable feature of our Constitution.

The issue of the relative jurisdictional boundaries of the organs of the State has acquired a new momentum in the recent period in the context of coalition politics at the center and in states. Thus, during state elections in early 2005 in some states, particularly Jharkhand, Goa and Bihar, no party or a coalition of parties had a clear majority. The situation was further complicated by the fact that neither the Governors of these states nor the presiding officers of the legislatures (who had the powers to conduct the proceedings of the House where the majority claimed by the new government was to be tested) were considered to be impartial in their decisions. Irrespective of the intrinsic merits of the decisions taken by any of these constitutional authorities, an appeal to the Courts by aggrieved parties, therefore, became unavoidable.

Thus, in Jharkhand, after the elections in March 2005, the Governor was pleased to swear-in a government headed by a member of the Union Cabinet, who did
not seem to have a clear majority. He was also given a number of days to prove his majority on the floor of the House. The opposition parties, who claimed to have a majority, were extremely upset by this decision of the Governor and filed a writ petition in the Supreme Court challenging the decision of the Governor. On March 9, 2005 the Court passed an order, which *inter alia* gave directions to the Speaker to extend the Assembly session by a day and conduct a floor test between the contending political alliances. In the light of Court's decision, the earlier government headed by the Union minister decided to tender his resignation on the advice of the central government. An alternative government was then formed by a combination of other parties which was able to prove its majority on the floor of the House.

The directions of the Supreme Court to the Speaker of Jharkhand Assembly raised a legal storm, as these were interpreted by several experts as intruding into an area which was within the jurisdiction of the legislature.

On 23rd May 2005, the controversy relating to the Supreme Court directions in the Jharkhand case acquired a new dimension. This time, it related to the action taken by the President of India to dissolve the Bihar assembly on the recommendation of the Governor of the state, and the advice of the Union Cabinet. Over the previous few months, the state was under President's rule, and the Assembly was in suspended animation as no party or combination of parties had emerged with a clear majority in the earlier elections in February 2005. The legislators belonging to some minority parties had become restive, and there were strong rumours that some of them were likely to join a coalition of parties which were opposed to the previous ruling party (the Rashtriya Janata Dal) in the state, which was a member of the ruling coalition at the center. On grounds of alleged "horse-trading" among legislators, the Governor suddenly decided to recommend dissolution of the assembly to the Union Cabinet, and through it, to the President, who was then on state visit to Moscow. The recommendation was duly accepted late at night in Moscow and the assembly was dissolved. Some of the affected legislators filed a case against the action taken by the executive branch.

The centre's legal position in this case, as filed in an affidavit before the Supreme Court was that "the Court is not to inquire - it is not concerned with - whether any advice was tendered by any minister or council of Ministers to the President, and if so, what was that advice. That is a matter between the President and his council of Ministers". In other words, according to the government's view, the
Council of Ministers could advise the President to pass any order (irrespective of its merits); the President had no option but to accept that advice under the Constitution; and the Court had no right to examine whether the action of the executive was legal or not.

After hearing the arguments, in October 2005, the Supreme Court gave a summary verdict declaring the action of the government to dissolve the Bihar assembly as being "unconstitutional" and unreasonable. The Court, however, did not order the revival of the old assembly as fresh elections had already been announced by the Election Commission and were scheduled to take place after a few days, The Court's verdict caused considerable public embarrassment to the government since the decision to dissolve the Assembly was taken by the President at a very short notice on the advice of the Union Cabinet.

Even before the hearings in the Bihar case were completed, in August 2005, another controversy arose on the Court's judgment regarding reservation quotas in unaided private engineering colleges. The court ruled that if quotas were necessary, the government should make the appropriate amendment in the relevant Acts. Otherwise, mandatory reservation quotas in unaided colleges were not legal. This judgment of the Court raised vociferous objections from all sections in Parliament, cutting across party lines. No party was willing to offend the beneficiaries of such quotas pending the passage of relevant legislative amendments. Recently in the case of university of Kerela decided in 2009 which I mentioned earlier that the judiciary should not seek to perform legislative or executive functions.

I have briefly mentioned these recent cases, as I believe that a closer examination of the reasons for the differences of views on separation of powers would help us in considering where the boundaries should be drawn on the judiciary's powers to determine the legality of actions taken by the Legislature and/or the executive branch.

In theory, and in principle, both sides of the argument on the doctrine of separation of powers have some validity. Thus, it can be rightly argued that Parliament is the supreme law-making body, and the courts should not pass verdicts which have the effect of changing the legal position as approved by Parliament. It can also be pointed out, with some justification, that some court rulings in the past were wrong in law and had to be over-turned by subsequent rulings by a higher court or a
larger bench of the Supreme Court. The Supreme Court, therefore, cannot be considered to be infallible.

Similarly, it is true that, prima facie, some of the past Constitutional judgments were indeed protective of private interests. For example, soon after independence, in 1951, several court rulings overturned land reform measures as being violative of the fundamental rights of landowners. The government had to amend the Constitution to implement land reforms, which were considered vital for country's economic and social progress. Similarly, in 1970, the Supreme Court had also ruled against nationalization of banks, undertaken by then government. Special legislation was passed by Parliament to make nationalization possible.

While all these arguments have some validity, keeping in view the recent political developments at the center and in the states, I am firmly of the view that, on balance, the long term interests of the public and the ordinary citizen are safer if the Supreme Court continues to be the watchdog of India's democratic conventions and final arbiter of the constitutional validity of any law or action approved by the legislature or the government of the day. It is no accident that the political pressure to limit the powers of the judiciary and declare Parliament as being "supreme" and representative of the will of the "People of India" is the strongest when a coalition government of parties with varying agenda is in powers or when the political survival of the undisputed leader of the majority party is threatened. In these circumstances, political survival becomes more important than the legal merits or demerits of a case.675

The other advantage of judiciary being the arbiter of legality or otherwise of an executive or legislative decision is that, even if a particular verdict is wrong or socially unacceptable, it is subject to review and reversal. This not usually the case with legislative or executive decisions unless the government of the day so decides. A citizen has no legal right to ask for a review of decisions taken by the legislature or the executive, even if they are not in the public interest. The recent Right to Information Act is an important step forward in making the executive accountable to the people directly. However, in case of any unjust or partisan decisions taken by the government, the remedy would still lie with the Judiciary.

675. The Third Nani A. Palkhivala Memorial Lecture by Bimal Jalan
Against the above background, let us briefly consider the merits of three recent cases which I mentioned earlier regarding the alleged incursion of the judiciary in areas belonging to the legislature or the executive. Thus, in respect of the directions given by the Supreme Court to the Speaker of the Jharkhand assembly in March 2005, it is certainly possible to take the view that the court went a bit too far in telling the Speaker exactly what to do (including, for example, asking for a video recording of the proceedings). However, there is very little doubt that the partisan action to swear in a government which did not have a majority, followed by efforts to prevent an alternative government from being formed by another combination of parties was against all canons of fair play and long-standing legislative conventions. Let us suppose, for the sake of argument, that the Supreme Court had dismissed the case on the ground that it could not intervene in a case involving the Speaker's action in the Legislature. Would the refusal of the court to hear the case helped the country or the average citizen in upholding their fundamental democratic rights?

In this connection, I should mention that the Hon'ble Speaker of the Lok Sabha in his Nani Palkhivala Memorial Lecture on 12th May 2005 before the Bar Association of India has raised an important and legitimate issue. He has rightly asked the question: what would have happened if the Supreme Court order could not be implemented by the Speaker because of the disturbances and disruption by the members of the Legislature in the House? Would the judiciary have been able to deal with the situation or file a case of contempt against the Speaker and members of the House? In case the Court's directions could not be implemented and the Court was unable to secure the enforcement of its order, the country would have been faced with a most difficult situation and a Constitutional deadlock.

Ultimately, Courts themselves have no direct means of enforcing their orders - whether these orders relate to individuals, organizations, government or any other entity. If the executive, with or without approval of the legislature, decides to exceed its constitutional authority and ignore Supreme Court's orders, there is nothing that the Court itself can do, except re-iterate or revise its orders. If because of the inaction of
the executive, there is a constitutional breakdown, the ultimate remedy lies only with the people.

In the Bihar case, one related issue which has caused some legal controversy is the timing of the initial summary verdict of the Supreme Court in October 2005 without explaining the full rationale. It has been argued that, even without the Court's summary judgment, state elections would have gone ahead anyway. The Court's incomplete summary verdict did not change the course of events, and gave rise to an avoidable controversy about the decision taken by the Head of State on recommendations of the Union Cabinet. This is a reasonable observation and it would have certainly been better if the Court had given its decision in full. However, it does not deflect from the main point that an important decision taken by the Union Cabinet in a hurry on the Governor's recommendation was not adequately supported by available facts on the ground.

Finally, in the case involving quotas in unaided engineering colleges, it is legitimate to take the view that, subject to certain conditions, such quotas are socially desirable and justified. However, the question that deserves an answer is: what is the harm done to society if the courts rule that imposition of quotas is not permissible under prevailing laws? In that case, the legislature is free to pass the necessary law. This is precisely what was done in the last session of the Parliament. In case the earlier view was that those who had already been admitted under quotas could be adversely affected, the Courts could have been requested to allow for time for the necessary legislation to be enacted without affecting the present beneficiaries.

The position in the United States in respect of separation of powers, enshrined in its Constitution for well over two centuries, is also of some relevance to us. In the United States, the head of the executive branch, the President, and his Cabinet are not members of the Congress. The justices of the Supreme Court are appointed for life after being nominated by the President and approved by the Congress. However, once appointed, they are accountable to no other branch of the State. Their job is to uphold the Constitution, which empowers them to overrule other branches of the government. The Supreme Court is the final arbiter of the Constitutional limits of the powers of the legislature and the President.

As is the case in India, all the judges of the Supreme Court are entitled to take their own separate views on the intent of the Constitution and vote accordingly.
However, in the U.S., each judge is appointed for life, and the President and the Congress have only limited flexibility in influencing the Court's composition during their tenures. Whenever a vacancy occurs, there is, therefore, considerable public excitement and scrutiny of the ideology and legal credentials of the Presidential nominees. Some of the famous decisions of the Court, for example in the Roe vs. Wade\textsuperscript{677} verdict in 1973, which legalized abortions under certain circumstances, or the recent 2005 \textit{Kelo v. New London}\textsuperscript{678} decision which expanded the government's powers of "eminent domain" (by a narrow 5-4 majority) and allowed state governments to erase private waterfront houses, have aroused considerable public controversy among different ideological groups. The Roe decision expanded private rights, and the Kelo decision severely restricted it under certain circumstances. However, while the arguments about the merits of these and other decisions have been intense, and review petitions have also been filed, no one has questioned the unfettered right of courts to review whether decisions taken by Congress and State Legislatures are in conformity with the Constitutional provisions.

Keeping in view our own experience as well as the experience of other democracies, it is clear that a rigid demarcation of legal powers among different branches, irrespective of the specific circumstances, is neither feasible nor desirable. By and large, under normal circumstances, there is no doubt that it is appropriate for different branches of the State to work in harmony and confine themselves to their primary tasks as enshrined in the Constitution. Parliament as the highest representative body should also have the unquestioned authority to pass laws which it considers appropriate. The executive branch should be accountable to Parliament, and should have full administrative powers to implement laws and programmes as approved by Parliament. And, the judiciary should give verdicts and settle legal disputes as per the laws of the land. Most of the time, in all mature democracies, there should also be no cause for jurisdictional conflict among different organs of the State.

However, there are times when sectional interests and "compulsions of coalition polities" can become the primary drivers of the laws passed by Parliament and/or administrative actions taken by the executive. Some of these laws and executive decisions may run counter to the intent of the Constitution and adversely affect the fundamental rights of the public. If the political majority in Parliament is

\textsuperscript{677} (1973)

\textsuperscript{678} (2005)
fragmented, and there is a serious conflict, ideological or otherwise, among coalition partners, some Parliamentary decisions may reflect sectional electoral interests rather than the long-term interests of the people as a whole. There may also be times when the political or private interests of a supreme leader or a group of leaders may be under public scrutiny because of certain exogenous or endogenous developments. In such exceptional and hopefully infrequent circumstances, it is necessary to have a court of last resort to decide on the constitutional validity of specific laws or actions initiated by the legislature or the executive. The final legal arbiter in such cases can only be the judiciary, which is directly accessible to the public, and whose verdicts are in any case subject to review and appeal.

All Indians are justifiably proud of their Parliamentary democracy and their multiple freedoms. The preservation of these freedoms is also a primary goal of the Indian Constitution. There can be no compromise on this score, whatever be the short-term interests of political parties and governments, which are temporarily in powers as agents of the State. It is the responsibility of the judicial system, as a separate agent of the State, to provide a measure of protection to the people against excesses committed by other public institutions.

It is, of course, true that the judiciary can also make mistakes. Thus, thirty years ago, at the time of Emergency, the highest Court in the land had endorsed several extra-constitutional Acts passed by the legislature at the instance of the executive. In view of the enormous delays and multiple levels of appeals, it can also be argued that judicial system itself is in urgent need of reforms in order to provide speedy justice. However, even after taking all these imperfections into account, I have no doubt that, on balance, the country is better off with judiciary as an additional check-point on legality of action taken (or, for the matter, not taken) by the legislature and the executive. It should be free to issue appropriate directions to any agency of the State if its actions are considered arbitrary, partisan and violative of the intent of the Constitution to give India a government of the people, by the people and for the people.

Traditionally federalism has been conceived as a system under which powers and functions of the government are divided between the Centre and the States, which operate independently of each other. Modern developments have changed this concept and have given rise to a new phenomenon called the ‘cooperative federalism’ which in essence, is a system under which the Central and State governments supplement
each other and jointly or collaboratively perform a variety of functions. Much of the subject-matter concerning the cooperative federalism in India in found in the Constitution itself, in the principles and institutions established under it. However, in recent years many extra-constitutional means and methods of cooperation have also been evolved which are also of a year great importance.

The Indian Constitution contains an elaborate scheme of distribution of powers. But from the scheme of the distribution of powers between the Centre and the State it appears that the framers have opted for a stronger Centre.

The scheme of division of legislative powers between the Union and the States in the Indian Constitution has been examined in this study Chapter IV In the examination, it is revealed that there is an obvious constitutional tilt in favour of making the centre strong over the States. But, in spite of long enumeration of powers between the Union Parliament and State legislatures, it may be asserted that the scheme of distribution of powers lays stress more on powers sharing to bring about a large amount of interaction and interdependence between the Centre and the States. Some critics allege that the scheme of division of legislative powers under the Indian Constitution show a sign of over-centralization.

Administrative relation between the Union and States reveals that the constitution of India lays down a flexible scheme of allocation of responsibilities for administration between the Centre and the States. The scheme is such as to permit all kinds of cooperative arrangements between the Union and the States as may be thought desirable to deal with the situations at hand. The Centre has been empowered to administer any matter falling within its exclusive legislative domain, but it is not bound to administer all these matters itself and can if it so desires, entrust the responsibility of administering any of these matters to the states or their instrumentalities by legislation. Thus, from the survey of the administrative relations between the Union and the States it appears that Constitution of India has assigned very wide administrative powers to the Union. It has been revealed that on the whole cooperative solutions have been found for problems as they have arisen in the field of financial relations. The scope for cooperative action is found to be wide and it assumes several forms. Certain duties are levied by the Centre but collected and appropriated by the States. There are several taxes levied and collected by the Centre but whose proceeds are assigned either wholly or partially to the States. There are also
provisions relating to the making of grants by the Centre to the units and they cover unconditional as well as conditional grants. All details regarding the sharing of tax-proceeds and the making of grants are worked out by an independent finance commission.

From the survey of the cooperative trends in Indian federalism, too, it may be asserted that the cooperative trends have become active and more stronger over competitive trends in recent years and they have succeeded to a great extent in counteracting several of the undesirable consequences arising out of the competitive struggle for powers. There is, therefore, no need to think of unitary system as the only remedy for overcoming the defects of federalism. The Indian federal system of government has shown its capacity to adjust itself to changing needs and circumstances and this process of adjustment in Indian federalisms as in other federations of the U.S.A., Australia and Canada has been facilitated by the cooperative devices. If these cooperative trends are strengthened further federalism will continue to be an ideal system of government for country like India which is vast in size and consequently develops geographical, economic, social and cultural diversity.

There can neither be any finality in conclusion nor can there be any final solution to the problem of conflict of union and state relations under the federal structure of polity. Yet its proposed to conclude the present study with a brief resume of inference drawn from the forgoing chapters along with few suggestions emerging out of the these inferences, however tentative these inferences and suggestions may be.

As discussed in the preceding chapters an inference can be drawn that strong union has been woven into the wrap and woof of the constitution. Need for strong centre is aptly observed by eminent jurist M.C. Setalvad679:

"The founding fathers were painfully conscious that the feeling of Indian nationhood was still in the making and required to be carefully nurtured. They therefore built a constitutional

9. Setalvad M.C., Union State Relations under the Indian Constitution (Tagore Law Lectures) at 31."
States allege that there is a large degree of over-centralization and autonomy of states has been encroached by the union Sarkaria Commission’s recommended on the issue of residuary powers of legislation which vests with the union that:

Residuary powers of legislation in regard to taxation matters should remain exclusively in the competence of Parliament, while the residuary field other than of taxation, should be placed on the concurrent list. The constitution may be suitably amended to give effect to this recommendation.

The demand of the states of deletion of Art. 248 which confides residuary powers of legislation to Union Parliament need to be analysed critically. The founding fathers decided in favour of federation with a strong centre as they were aware of the diversity in the culture, language, religion and geography of the country and had foreseen that and under peculiar Indian situation where separatist and secessionist tendencies are in abundance, there was a need to make centre strong.

Sarkaria commission in its report as suggested that our constitution is basically sound, and its fundamental scheme and provisions have withstood reasonably well in the inevitable stresses and strains of the movement of heterogeneous society towards its development goal. Amendment to the constitution is not the real solution rather such an amendment may destroy to basic structure of the constitution.

The enforcement of Union laws particularly those relating to the concurrent sphere, is secured through the machinery of the states. Co-ordination of policy and action in all areas concurrent or overlapping jurisdiction through a process of mutual consultation and cooperation is, therefore, a pre-requisite of smooth and harmonious working of the dual system.

To secure above mentioned ends, recommendation has been made by Administrative Reforms Commission Study Team on Centre-State become ‘bigger, broader and deeper’, covering a wide range of governmental functions in new fields which had hitherto been the exclusive or predominant preserve of the State or their local subdivisions. 681
Moreover, Supreme Court of India through judicial pronouncements has observed that although Constitution attributed residuary powers to the centre but the centre can use it only for unforeseen circumstances and not according to its sweet will.

Keeping in view the intention of the founding fathers of the Constitution and the trend in United States, Australia, West Germany and Switzerland, the provision conferring residuary powers on the Central Government vide Art. 248 appears reasonable and as such the demand to amend it made by some regional parties does not appear to be sound.

Article 249 of the Constitution authorizes the Union to enact law of the subject enlisted in state list, whenever it is required in the national interest. States allege that there are chances that centre can use it for suppressing the states. Article 249 does not limit the subject matter that may come within the preview of the Parliament, as the term ‘national interest’ is such a wider term that any matter can be dragged under it. Conflicts can arise between Center Government and State Government when there in case that different parties are ruling in center and state. In Indian Constitution, the parliament has authority to decide what are ‘National Interests’, in contrast, in Canadian system is that its for the judiciary to determine what provincial subjects may assume ‘national importance’. The argument that the resolution is to be passed by the Rajya Sabha (Council of States), which is the representative of the States, does not hold good, as in the case in Indian scenario states are not equally represented in Council of States, as is the case in other federal countries.

Despite the criticism, it can be asserted that the Indian Constitution by providing this novel scheme has gone a long way in breaking a new ground in the division of powers between the center and states. It is unique and novel because no such provision for making temporary adjustment in the scheme of division of powers has to be found in the classical federations except Canada. The absence of this provision has been keenly felt by the federal legislature of the U.S.A. and Australia when pressing socioeconomic problems has called for uniform legislation and solutions. The main aim of assuming state legislative powers by parliament under this provision is to make the legislative powers concurrent because the powers of state legislature on those subjects are not restricted but only in case of repugnancy with the union laws.
Article 249 may also be availed in a situation in which speed is the essence of the matter and invocation of Art 352 and Art 356 is not considered necessary or expedient. Art 254 provides a mechanism to resolve the conflict, if any, arises when central laws and state laws clash with each other,, under the concurrent list in which both the centre and state government have equally been empowered to legislate.

In such a situation the Central laws shall prevail and not the state laws. Co-operation of Art 252 is another provision in our constitution which makes centre strong, as it makes central laws to prevail in case of repugnancy between Union and state laws.

The primary lesson of India’s history is that, in this vast country, only that polity or system can endure and protect its unity, integrity and sovereignty against external aggression and internal disruption, which ensures a strong centre with paramount powers, accommodating, at the same time, its traditional diversities. This lesson of history did not go unnoticed by the farmers of the constitution. Being aware that, notwithstanding the common Cultural heritage, without political cohesion, the country would disintegrate under the pressure of fissiparous forces, they accord the highest priority to the assurance of the unity and integrity of the country.

Federalism is not a static paradigm, it is changing notion. The classical concept of federalism which envisaged to parallel governments of co-ordinate jurisdiction, operating in isolation, from each other in water-tight compartments, is nowhere a functional reality now. With the Relations as well as by the Administrative Reforms Commission\(^\text{682}\) for the establishment of an Inter-State- Council. Similar recommendation has been made by Sarkaria Commission.

Language of Article 263 makes it amply clear that such an Inter-State-Council was mainly to look into disputes among the states themselves and advise the Central Cabinet in them although some matters in which the Central Government and a few states might be interested.

After the recommendation of Sarkaria Commission, in year 1990, the Govt. took the decision to set up the Inter State-Council. It consists of the Prime Minister, the Chief Minister of all the states and six other members.

Moreover in field of concurrent subject on which uniformity of policy and action is essential in the larger interest of the nation, leaving the rest and the details

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for state action within the broad framework of the policy laid down in the Union Law. Further, whenever the Union proposes to undertake legislation with respect to a matter in the concurrent list, these should be prior consultation not only with the State Governments; individually, but also, collectively.

It is submitted that the constitution framers in opting for a constitution which blends the imperatives of a strong centre with the need for adequate local initiative. In a country two large and diverse for a unitary form of government, they envisaged a system which would be worked in co-operation by the two levels of government national and regional as a common endeavour to serve the people. Such a system, it was conceived, would be most suited to Indian conditions as it would at once have the advantages of a strong unified central powers and the essential values of federalism.

The Union Government by virtue of the overriding position is called upon to co-ordinate the activities of various state government in the field of legislative relation with a view to bringing about uniformity without which there is a grave risk of separation and secessionism growing unchecked leading to balkanization of the states.

The main reason for providing a strong centre is the experience of other federations. Centralization of powers in the hands of Central Government is a universal phenomenon and virtually all the great driving forces in modern society combine in a centralist direction. This centralizing tendency is mainly due to need for adjusting governmental machinery to the shifting exigencies of a dynamic society. Planning, financial assistance from federal government to the states and judicial interpretations, have promoted the increase of federal powers in the U.S.A., Canada, Australia and Switzerland. Sarkaria commission has observed on the ‘working of the constitution’ that its fundamental scheme to provisions have withstood reasonably will excepting some fields no major amendment is called for. However, when the state legislature intends to make a law in a concurrent sphere, it consults the Central Government but this procedure is not followed vice-versa.

Some time back, a media correspondent in Delhi compiled a list of issues and matters in which the Courts have apparently, if not clearly, strayed into executive domain or in matters of policy. He noted that the orders passed by one High Court had dealt with subjects ranging from age ant! other criteria for nursery admissions, unauthorised schools, criteria for free seats in schools, supply of drinking water in schools, type of conveyance to be used to reach the schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing
a world class burns ward in the hospital, the kind of air Delhi breath, begging in public, the use of sub-ways, the nature of buses we board, the legality of constructions in a major city, identifying the buildings to be demolished, the size of speed breakers on roads, auto-rickshaw over-charging, growing frequency of road accidents and enhancing of road fines. And I am sure, there are umpteen such instances in the records of other High Courts as well. Recently, some Court has decided what should be the dress of lady teachers of a school and whether women should be given commissions in the Army or not. And the glaring instance is that by appointing its own committees, the Apex Court has almost taken over the sole jurisdiction and authority over forests with neither any accountability nor any legal provision whatsoever. And now of course, the decision that every Government asset should be dealt with only by public auction has created immense problems to all public authorities. ‘The Jagadambilca Pal case of 1998, involving the UttarPradesh Legislative Assembly and the Jharkhand Assembly case of 2005, to my mind, were two glaring examples of deviations from the clearly provided constitutional scheme of separation of powers. The interim order of the Supreme Court in these two cases, to my mind, clearly upset the delicate constitutional balance between the judiciary and the legislature. I feel that these were instances of palpable intrusion by the Supreme Court into well demarcated areas of powers of the legislatures, contrary to the provisions of Arts. 122 and 212 of the Constitution. Chief Justice Verma has recently described the orders in the U.P. and Jbarkhand cases as judicial aberrations and has expressed his hope that the Supreme Court would soon correct them.

There is considerable cynicism among our people about the way our institutions function, particularly the Parliament, the Legislative Assemblies and the Executive. Many a time the judiciary is applauded for its interventions in forcing the arm of the executive to do certain things or in restraining it from doing certain things. People appreciate it, at least, that is what the media reports. Criticisms of the executive and legislatures, from time to time, have been made from the Bench in very strong words while hearing what are described as Public Interest Litigations (PIL).

The contention that the judiciary should take on itself the onerous responsibility of the governance of the country, in a Parliamentary Democracy with a written Constitution in matters, which the Constitution has imposed on either the executive or legislature, has serious implications.
Administration of justice derives its strength only from the confidence of the people in the system. The most important way in which the judiciary can maintain the people’s confidence is by providing speedy and effective justice to them.

People’s rights can be effectively protected if they are able to approach the Court and have their matters taken up by competent lawyers at affordable costs and have their cases disposed of within a reasonable time. Delay in trial by itself constitutes denial of justice. The right to speedy disposal of cases is an essential right of the people in a democracy. The slow movement of the judicial system, the mounting arrears of cases and the lack of easy affordability and accessibility to the legal process are some of the major concerns our people have vis-a-vis the judiciary today. It is understood that there are over three crores of pending cases with various Courts in the country, some of them for periods ranging from 5, 10 or 20 years.

There is a clear perception in our society and as it seems to be the fact that the best legal services are available only to the affluent and due access to the doors of justice is denied to the poor and the socially disadvantaged. The biggest challenge before the judicial system in the country today is that of ensuring that everybody has affordable access to justice and an assurance that everyone gets equal treatment before the law. The delay in our criminal justice system is particularly of gravest concern and there is a growing feeling among the people that dispensation of justice can be affected or frustrated by people of means and of questionable integrity.

To my mind, what is required for any institution to perform most effectively is, to start with, a realistic role-perception within the broader systemic framework. Once the judiciary gets involved with an issue, which falls within the executive domain, it precludes the possibility of the legislature exercising its assigned role of ensuring executive accountability through effective legislative scrutiny. It is important for the judiciary to remind itself, if I may humbly submit, that its “task does not include an amorphous supervision of the Government.”

It is often seen that the judiciary is applauded for its “activism.” The issue involved, however, is more serious than the perception of a section of the people, who have access to the media. It is about the very basis of our constitutional scheme of powers-relationship. Self-restraint is the primary balancing element in the exercise of judicial powers. Justice Frankfurter of the US Supreme Court reiterated this in the case of Trope v. Dulles (1958), when he said:
"It is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitation on its own powers, and this precludes the Court’s giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observation of the judicial oath, for the Constitution has not authorised the justices to sit in judgment on the wisdom of what Congress and the executive branch do."

The same principle would apply in our country too. It is submit that for any organ or authority under the Constitution, to enjoy any powers, not specifically or by clear implication conferred by the Constitution, the source of powers is or can be only the Parliament and no other authority. As has been held, the Supreme Court can declare the law and cannot enact law.

Almost all votaries of judicial activism, including the Hon’ble Judges themselves, while exercising powers in such assumed jurisdiction justify it on the supposed failure of the legislature or the executive authorities in taking proper action to mitigate the people’s grievances or to find solutions to people’s problems.

But with regard to dispensation of justice, how many ordinary citizens of the country, who are oppressed and subjected to various forms of discrimination and denial of rights, particularly women who are victims of torture and exploitation, can have access to the Courts, specially the highest Court of our country, if he or she needs to approach the Courts or contest effectively proceedings initiated against them? How many dismissed employees, how many victimised teachers, how many peasants dispossessed of their lands, how many senior citizens, how many disadvantaged people staying in far flung areas of the country, who would need to seek justice, can approach the Apex Court of our country? The geographical distance, prohibitive cost of litigation, inordinately long time taken for disposal of matters, discourage or otherwise make it impossible for ordinary litigants to approach the Court. The situation should disturb the nation’s conscience, and if I may say so, it is for the judiciary to find ways and means to make the temples of justice easily accessible to the common people.

The large number of arrears pending in almost all the Courts is affecting the people’s faith in our justice delivery system. These issues require to be given very serious attention not only by the Legislature or the Executive but also by the judiciary. One has to admit that in many instances the judiciary (without attributing any fault to
it) is not able to cater to the needs of the common people of the country in adequate measure. Now, in such a case, can any other organ of the State take up on itself the right to exercise judicial powers on the plea that judiciary has not adequately been able to do so? Obviously neither the legislature nor the executive can do so, because it has no such powers under the Constitution. We can assess that validity of some contentions by extreme examples. So, in my submission, no organ under the Constitution can take upon itself the function of any other organ on the ground that there is supposed malfunctioning or non-functioning or inadequate functioning of that particular organ.

The principle of separation of powers, clearly provided for in our Constitution, to my mind, is not an optional feature to be selectively recognised by the organs of the State, but is one of the most essential directives of our Constitution, which has to inform every aspect of administration in the country.

In a democratic set up, the space and role of every institution is expected to be clearly earmarked in the Constitution that creates it. It is in the effective discharge of those functions, that it serves the people for whom the institutions are meant. This can be accomplished without intruding into or trivializing the role of the co-ordinate institutions or without undermining the importance of fundamental democratic processes. To my mind, when institutions succeed in functioning strictly within the domain assigned to each, not only do they grow in public esteem, but they also create the ideal conditions for the effective functioning of the entire system.

To my mind, there is definitely sufficient space in our system for all the institutions to co-exist and work together for the common benefit. Undoubtedly, the people look up to the Courts, which are temples of justice, with great expectation, hope and confidence. Similarly, people look up to the Parliament and State Legislatives, of which the Executive is a part, also with expectation and hope, because under the Constitution, the Parliament is the supreme legislative institution of the country, the people’s institution par excellence, through which laws for the people are made and executive accountability is enforced. We must recognise that Constitution is the supreme law and no organ of the State should go beyond the role assigned to it by the Constitution. It is the duty of all concerned, including the legislature, the Executive and the judiciary, to ensure that this balance is scrupulously adhered to. No organ can be the substitute of another. Visionary leaders of our country strove all through their life to preserve and protect this lofty ideal of our constitutional system,
an ideal which needs repeated reiteration, as it has an eternal bearing on our parliamentary polity and constitutional and democratic framework.

Most unfortunately and rather alarmingly, issues like intolerance, divisiveness, corruption, confrontations and disrespect for dissent are increasingly vitiating our socio-political system. The cynicism that is creeping into the minds of the people, specially the youth, about the functioning of our democratic structure is undoubtedly a matter of grave concern. The greatest challenge of good governance it to bridge the gap between the expectations of the people and the effectiveness of the delivery mechanisms. To my mind, we have to create a culture of commitment to democracy as our Constitution delineates and to democratic values such as equality, justice, freedom, concern for other’s well being, secularism, respect for human dignity and rights and in this respect, our judiciary indeed has a positive role to play; along with other constitutional organs as an independent arbiter, dispensing speedy and inexpensive justice to every section of the people. We need to take effective steps to facilitate access to the higher judiciary for the common people.

And that is why I have always been of the view that the concept of Public interest Litigation is a most welcome development in our legal procedure, but my appeal to the well meaning learned Judges that it should be exercised with proper care and in due regard to our constitutional provisions, and based on pronounced judicial doctrines and not on the basis of one’s personal predilections.

All our citizens have to get to feel that the constitutional authorities exist to serve them and that they are ultimately accountable to them. We must recognise that there is a symbiotic relationship between institutions of the State if we do anything that could weaken one, its adverse consequences would be felt by the entire system.

Sixty three years have rolled by since the Constitution of India came into force. These years have seen many crises, phases of turbulence; uncertainty and even confrontation. But the Constitution has, on the whole, served the nation very well. It has not failed the people. It is not without its shortcomings. But the failures have been due more to lapses of those who operated the Constitution rather than to any shortcomings in the Constitution itself. It is my earnest hope that, both in spirit and in letter, the constitutional scheme of separation of powers and, with it, the checks and balances, that are indispensable to democratic governance, will be respected, and the spirit of moderation and mutual respect, animated by a common commitment to the
Constitution are followed in all cases and our efforts are fully directed towards improving the social and economic conditions of our people, which they have a right to expect that of us.

And finally, on the sanctity of the Constitution, he reminded us and the generations yet to come:

"The Constitution is not a structure of fossils like a coral reef and is not intended merely to enable politicians to play their unending game of powers. It is meant to hold the country together when the raucous and fractious voices of today are lost in the silence of the centuries."

Our Constitution Framers vision of a fast growing, free and empowered India is now closer to reality than ever before. I hope that all our people and all our institutions, public and private, will continue to work together, in harmony, to fully realize our national goals."

Suggestions

In the light of these conclusions it is suggested that:-

In theory, the doctrine of separation of powers was very sound. However, in practice many defects surfaced when it was sought to be applied in real life situations. Suggestions which were found on the basis of this research work are mainly the following:-

- Some conventions need to be followed by both central and state governments such as there must be effective consultation by centre government with state government before legislating in the concurrent field. It is suggested that Inter-State-Council should always be consulted before Bill in the concurrent field is introduced in Parliament, as this forum would be best forum for this purpose. Need of the hour is that there must be cooperation and co-ordination between the Centre and the States, it shall definitely cement harmonious relationship between the two layers of the government. Several features and provisions of the constitution appear to have been deliberately designed to institutionalise the concepts of cooperative federalism.

- It is suggested that the residuary powers of legislation in regard to taxation matters should remain exclusively in the competence of parliament while the
residuary field other than that of taxation should be placed on the concurrent list.

- The enforcement of Union laws, particularly those relating to the concurrent sphere, is secured through the machinery of the States.
- To ensure uniformity on the basic issue of national policy, with respect to the subject of a proposed legislation, consultations may be carried out with the State governments individually and collectively at the forum of the proposed Inter-Governmental council.
- Certain provisions of our federalism based on the govt. of India Act, 1935 with the changing circumstances require scrutiny.
- Subject matter of the state list may be increased.
- It must be made obligatory for centre to consult states before enacting laws on subjects of concurrent list it did not feel desirable for complete centralization of powers.
- A strong centre is necessary to preserve the unity and integrity of the country because a weak Centre is likely to result in weakening the nation. A weak nation either becomes a target of foreign attack or invites chaos in the country. This is evident from its past history as well as from present secessionist tendencies.
- Powers of organs of state, if concentrated it will yield despotism. Conversely, if they are separated it will stop overlapping and confusion among the organs.
- The executive is to be separated from legislatures. Separate legislature can effectively control executive. Every legislator makes every efforts for ministerial berth or some other lucrative offices in legislative form of Government. It executive is separated from legislature then there will be no rat race for ministerial births and other lucrative jobs among legislators.
- In modern times strict separation of powers not possible because without cooperation of the organs of the states developments of the nation is not possible. So, in modern practice the theory of separation of powers means an organic separation and the distinction must be drawn between 'essential' and 'incidental' powers and that one organ of government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function thereof. Concept of justice is dynamic and liberty
which the judiciary is expected in a democratic set up to safeguard and protects through exercise of powers and judicial review, and therefore, it is absolutely, essential that the judiciary be free from executive pressure and influence. An independent judiciary is an indispensable requisite of a free society under the principle of rule of law. The challengeable origins of the great powers of judicial review a powers not specifically, conferred by the constitution. An independent judiciary emanated from the doctrine of separation of powers is the prime necessity and the heart of our democratic structure. If you destroy the corner stone, the structure will come down, it will collapse and the country will be plunged in to darkness and chaos of and totalitarian regime. So, the suggestion is that judiciary must be independent of and separate from the remaining two organs of the government viz. legislative and executive.

- Cooperative Federalism is the answer to today’s complex problem. Hence to make cooperative federalism successful and to check the unnecessary growth of powers to the Centre, in the light of above appraisal, we may make here certain suggestions.

- The Seventh Schedule lays down the legislative jurisdiction of the Parliament and the State Legislatures. The both Parliament and State Legislatures have concurrent jurisdiction on the subjects in the Concurrent list which makes Centre — State Cooperation imperative. As the Union Government in India Calls on the individual States for implementation of its legislation relating to any subject in the Concurrent List. Thus, there is a strong case for suggesting for the better implementation of the law that before any law is introduced in Parliament in relation to any entry in the Concurrent List, the State should first be consulted and their views taken into Consideration.

- To make the co-operative federalism successful and to check the unnecessary growth of powers of the Centre through the predominance of finance over the State, it is submitted here that Finance Commission should be entrusted with determining both plan and non-plan grants for each five-year period and the Union Government should treat its recommendations as an award so that there will be no opportunity for the Centre to discriminate among the States on political considerations.
- We must also adopt theory of separation of powers in our constitution in order to avoid instability of the executive and untimely death of the legislature. Stability of government and tenure of legislature must constitutionally be ensured through incorporation, of constitutional provisions. They are necessary for us because we are suffering most from frequent changes of government and agony of frequent elections.
- A suitable executive system may be designed and be incorporated in the constitution.
- The life of the legislature may also be fixed.
- The theory of separation of powers may be adopted in our constitution in context of our political life.
- This is an open fact that the present British-based parliamentary executive is not suitable to us. Britain is a very small country, very small in size, lesser in population, two political parties system, and higher public awaking than India.
- We must design our own system of executive that would suit to us the most. Developing our own genus executive is always better than copying any foreign executive. We must design our own system of executive that would suit to our own genus. Executive developed upon our own genus is always better than copying any foreign executive form.
- Provisions relating to legislature are to be put up at one place in order to avoid unnecessary repetitions.
- Our constitution does not prescribe duration of executive but it prescribe duration of legislature. They should complete their periods through governments may be changed during the period of legislature.
- For Independence of judiciary, booth smooth functioning of a judge independent of vicious circle and also independents for a judge without fear and favours of executive there must be rational and uniform policy of transfer of judges is to be formulated by a parliamentary status. The present policy of pick and shoot is against the spirit of the constitution and independent of the judiciary.
- Hence, the experiment of territorial division of powers has worked well in India and we need to further work on the territorial division of powers.
• For independence and self respect of judiciary sitting or retired judges of Supreme Court or High Court should not be appointed on inquiry commission.

• As pious obligation state should stop to sell justice in any form. For this purpose entry 82A tax for administration of justice in Union list of 7th schedule of the constitution on may be inserted.

• State has monopoly of imparting justice to citizens. Indian people are not by nature litigious but they are forced by complexities of law to knock the doors of judiciary. Indian people are by nature of conciliatory character, generally avoid conflicts rather adopt for compromise. No other private agency is recognised for imparting justice managing conciliation outside or before reaching the courts. For this purpose a law may be enacted by Parliament and state legislatures. Entry 5A private arbitration be inserted in list III Concurrent List of 7th Schedule of the Constitution.

• Number of courts are to be increased in proportion population and number of cases.

• We must develop our own legal and justice delivery system. English justice delivery system should be replaced by India’s own justicing system.

• Distinguished jurists should also be appointed as Judge of the Supreme Court. Article 124(3) of the Constitution provides for three categories of persons who are eligible to be appointed as a Judge of the Supreme Court—a High Court Judge with five years experience, an advocate of the High Court with ten year experience and a distinguished jurist. Right from commencement of the Constitution till now, the Judges of the Supreme Court has been appointed mostly from first category. The third category has been consistently ignored. It was supposed that the persons from first and second categories work in Courts and are involved in litigation either as a Judge or as a lawyer. Therefore, they are conversant with the judicial process. But, it is also important to understand that the Supreme Court is basically a Court of appellate jurisdiction that has to decide cases on substantial question of law as to interpretation of the Constitution under Article 132 and of general importance under Article 133. The expression “jurist” refers to law experts especially academic lawyers who expanded the frontiers of legal knowledge through research and teaching. Consequently, the jurist can develop the legal principles more efficiently
through interpretation of statutes while deciding cases. There have been cases in U.S.A. of appointment of non-practicing lawyer as Judge of the Supreme Court. Felix Franfurter is a living example. He was a teacher of law at Harvard Law School before he was appointed Judge of the Supreme Court. His ability and deep knowledge of law can be seen in his judgments.

- These suggestions should be incorporated in the Constitution through constitutional amendment so that the objective can be secured from any breach. After all, the effectiveness of any law or system entirely depends on its effective implementation. Howsoever excellent a law or system may be, it cannot serve its purpose unless and until it is implemented in its true spirit and with the same vigour an enthusiasm as existed at the time of its enactment or evolution.

Let me, now, conclude recalling the injunction of a wise American judge, who said if we are to keep our democracy there must be one commandment. "Thou shall not ration justice"