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THE NEED OF THE HOUR – JUDICIAL ENCROACHMENT

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Abstract
Supreme Court favoured to introduce All India Common Test for selection of the judges for lower judiciary, stating that centralised mechanism would ensure appointment of the competent judges without any delay and would pave way for an effective judiciary. Apex court Bench comprising of CJI JS Kehar, Justice AK Goel expounded that it would be beneficial for country if there is centralised examination for the appointment of judges and tried to allay apprehension of some High courts that it was against federal structure as their role in the appointment of the judges would be taken away by a central agency. Former Justice S H Kapadia said Parliament and Executive had well defined powers under the constitution and these needed to be respected by the Judiciary. "Legality and legitimacy are important concepts and go hand in hand. If there is excess of judicial overreach, then the legitimacy of judgements will be obliterated", he warned.In relation to this issue, one needs to ascertain as to

(a) What status the judiciary has been accorded in the Indian constitution. Is it supreme as compared to the other organs or is subordinate thereto? Whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so?
(b) Whether the creation of AIJS would lead to the further erosion of the powers of the States whose powers under the present dispensation are not many. By virtue of several entries in the Union List and as a result of the 42nd Amendment to the Constitution, the powers of the States have already been adversely affected. Is it advisable to diminish them further by taking away the power of selection from the High Courts and by vesting in a central body?
(c) Would it be advisable to amend Article 312 again by removing clause (3)?

This paper attempts to undertake the task of analysing these questions by constitutional provisions and related case laws.

Introduction

Dr.Ambedkar in Constituent Assembly Debate stated that "Our judiciary should be both independent of the other organs and must also be competent in itself. And the question is how these two objects could be secured". [1] The recent debates on the

[1]Dr. B.R. Ambedkar, Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (24-5-2949), in *Constitutent Assembly Debates*, Vol. VIII, 258.

judicial appointments however state the contrary. The coming of the National Judicial Appointment Committee, which was later struck down and stated unconstitutional and now the favoured judgement of Supreme Court over the All India Judicial Services has brought to light a difficult question of the need of the hour. The proposal for an All India Judicial Service (AIJS) in lines of All India Services was proposed as early as 1950. The idea was first mooted by the Law Commission in the 1950s to have an All India Judicial Services. The Constitution of India was amended in 1977 to provide for an All India Judicial Services under Art 312. The Chief Justices Conferences in 1961, 1963, and 1965 favoured creation of All India Judicial Services and even the Law Commissions (1st, 8th and 11th, 16th) had suggested the creation of the service. However, each time it was faced with opposition. The proposal was again floated by the ruling UPA government in 2012 but the draft bill was done away with after opposition from High Court Chief Justices who labelled this an infringement of their rights.[2] Most recently, the Central Government after holding a meeting presided over by the Law Minister Ravi Shankar Prasad had sought the advice of its two top law officers – Attorney General MukulRohtagi and Solicitor General Ranjit Kumar – on the question of constituting All India Judicial Services just on the lines of All India Civil Services.[3] There lies a very thin line between the judicial overreach and judicial activism. It was also commented that judiciary must draw its own 'Lakshmanrekha (invioble boundary)' and not take decisions that fall in the domain of other organs. Just as independence of the judiciary is part of the basic structure, [4] the primacy of the legislature in certain subjects is also a part of basic structure and interference by the courts into their domain is not justified. Judiciary should not become a super parliament that frames laws and a super executive that seeks to implement them. When the thin line between the judicial activism and judicial overreach is crossed, judicial activism is considered an encroachment on legislature. Complete separation of powers is not possible – neither in theory nor in practice. Some overlapping is unavoidable; but it should not mean anencroachment. This article will elaborately analyse this issue.

Separation of Powers

The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, legislative, executive and judiciary. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance:

(a) Legislative authority – is the power to, amend and repeal rules of law.
(b) Executive authority – is the power to execute and enforce rules of law.
(c) Judicial authority – is the power; if there is a dispute, to determine what the law is and how it should be applied in the disputes.[5]

[2]See Indira Jaising, National Judicial Appointments Commission – A Critique, 49 EPW 6(2014).
[3]https://economictimes.indiatimes.com/topic/All-India-Judicial-Service?from=mdr

[4]Art 50 of the Constitution of India.
[5] IM Rautenbach& EFJ Malherbe *Constitutional Law* 4 ed (2003) at p 78.

The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said for the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.

Lord Mustill in R v. Home Secretary, Ex p Fine Brigades Union[6] defined the doctrine of separation of powers in England as: 'it is a feature of the peculiary British conception of the separation of powers that parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.'The meaning of separation of powers in United States of America and France shows a variety of meanings. The concept may mean at least three different things:

(a) That the same person should not form part of more than one of the three organs of government, for example, that ministers should not sit in parliament;
(b) That one organ of government should not control or interfere with the work of another, for example, that the executive should not interfere in judicial decisions;
(c) That one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.[7]

The modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke (1632-1704). He wrote in his second treaties of civil government as follows: "it may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage".[8]

It is clear that he was advocating the division of government functions into legislative, executive and judicial. However it is the French philosopher (jurist) Montesquieu (1689-1755) who is usually credited with the first formulation of the doctrine of separation of powers. He based his exposition on the British constitution. In the pertinent chapter of his well celebrated work, L' Esprit des Lois (1748), [9] he purported to describe the British constitutional system of the 18th century[10] so that it might serve as an example to France of a political dispensation founded on liberty, which according to him, was the supreme objective of a political society. JD van Der Vyer observed that Montesquieu was a poor observer, since the British constitutional system did not comply then, neither does it today, with the basic norms

[6] [1995]2 at 567.

[7] AW Bradley and KD Ewing *Constitutional and administrative Law* 13 ed p 84.
[8] Ch X (1), Para 143, Quoted in 'vile Constitutionalism and the separation of powers' p 62.
[9] Edition published in Parid in 1877, 11.6. The tile of the chapter is 'De la constitution d' Angleterre'.
[10] Visited England in 1732.

of the idea of separation of powers.[11] Even if it were so, Montesquieu's analysis of the British system, is generally accepted as political ideal which is worth pursuing.

Montesquieu recognised the three basic pillars of state authority, which includes the executive, legislative and the judicial functions; and he added that these functions ought to vest in three distinct governmental organs with, in each instance, different office bearers. He supported his argument by saying:[12] 'all would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals'.

His idea eventually developed into a norm consisting of basic principles:[13]

(a) The principle of triaspolitica, which simply requires a formal distinction to be made between the legislative, executive and judiciary components of the state authority.
(b) The principle of separation of personnel, which requires that the power of legislation, administration and adjudication be vested in three distinct organs of state authority and that each one of those organs be staffed with different officials and employees, that is to say, a person serving in the one organ of state authority is disqualified from serving in any of the others.
(c) The principle of the separation of functions which demands that every organ of state authority be entrusted with its appropriate functions only, that is to say, the legislature ought to legislate, the executive to confine its activities to administering the affairs of the state, and the judiciary to restrict itself to the function of adjudication.

The main objective of the doctrine is to prevent the abuse of power within the different spheres of government. In our constitutional democracy public power is subject to constitutional control. Different spheres of government should act within their boundaries. The courts are the ultimate guardian of our constitution, they are duly bound to protect it whenever it is violated. Moseneke CJ also stated that the courts are more likely to confront the question of whether to venture into the domain of other branches of government while performing their functions as entrusted by the constitution.[14] Within the context of the doctrine of separation of powers the courts are duty bound to ensure that the exercise of power by other branches of government occurs within the constitutional context. But the thing here is the courts must also observe the limit of their own power.

Different scholars also echo their views on the purpose of the doctrine. Montesquieu said in this regard:[15] 'when the legislative and executive powers are united in the same person, or in the same body of magistrates there can be no liberty; because

[11] JD Van Der Vyer 'The Separation of Powers' 1993 (8) *South African public law* 177 at p 178.
[12] Supra n 5, 11.6.
[13] See Ville *Constitutionalism and separation of powers* (1967) p 13.
[14] 'Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function' 2008 SAJHR 341 at p 349.
[15] Supra n 5, 11.6.

apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the lie and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were joined to the executive power, the judge might behave with violence and oppression'.

According to Dicey, the doctrine rests on the 'necessity… of preventing the government, the legislature and the courts from encroaching upon one another's province.[16] The United States constitutional system comes close to the theory of Montesquieuan theory.

The constitution of the United States is premised on the doctrine of separation of powers, according to which there is an institutional separation between the legislature and the executive, giving rise to a presidential form of government with checks and balances. This is evident by the fact that when the American constitution was ratified, the modern understanding of the doctrine of separation of powers was established. This version may be divided into two elements of division encompassed by the principles of triaspolitica, namely, the separation of functions and the separation of personnel. The element of independence, on the other hand, encompasses the principle of checks and balances.[17] It is arguably strictest when it comes to separation of powers between the different branches of government.[18] The drafters of the American constitution also adopted the principle of checks and balances to the doctrine of separation of powers. It requires different branches of the state to keep a check on one another in order to maintain a balance of power amongst them.[19] In order to prevent anyone of the branches accumulating power at the expenses of the others the drafters of the American constitution argued that it was necessary to write a constitution, in which the powers of government should be so divided and balanced amongst several bodies of magistracy, so that no one could transcend their legal limit, without being effectively checked and restrained by others.[20]

Indian view on Separation of Powers

Indian supreme court in Ram JawayaKapur vr. State of Punjab, the court through Mukherjee J. held that [21] the Indian constitution has indeed not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can very

[16] *Introduction to the study of the constitution* (1959) p 337.

[17] See Seedirf and Sibanda in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed p 12-9.

[18] IM Rautenbach& EFJ Malherbe *Constitutional Law* 4 ed (2004) 79.

[19] See Seedirf and Sibanda in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed.

[20] Jefferson *Notes on the State of Virginia* (1781) Query 13.4, as quoted in Seedorf and Sibanda in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (05;05-08) 12-08.

[21] AIR 1955 SC 549.

well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another. A more refined and clarified view taken in Ram Jawaya's case can be found in Kartar Singh v. State of Punjab, where Ramaswamy J. stated[22] it is the basic postulate under the indian constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the constitution. The functional classification and sufficient demarcation, as is held by the Supreme Court, indeed does not suggest the application of the doctrine in its absolute terms. Rather it just gives a slight glimpse as to the character of the Indian constitution which it shares with the 'pure doctrine' discussed above, that is, inter-alia the acceptance of the philosophy behind the doctrine pertaining to rigors of concentration of power and the avoidance of tyranny, of having a rule of law and not rule of men. Agreeing on this premise, it has also been accorded the status of basic structure by the Supreme Court.[23]

Another point of concern which requires clarification is whether the three organs, though not rigidly separate, can usurp their powers or are they required by the constitution to work only within the respective area earmarked in a narrow-sense. To put it differently, whether the constitution mandates encroachment by one organ into the domain of another on the pretext of failure or inaction of the other organ is the next question that needs to be addressed in its context. Though theoretically, this issue has been addressed by the Supreme Court, however, in has failed to cater an effective basis in practice which is evident from the growing amount of judicial encroachment in the domain of other organs. In Asif Hameed v. State of J&K, it has been held that[24] "although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislative, Executive, Judiciary have to function within their respective spheres demarcated under the constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people's will, have all the powers including that of finance. Judiciary has no power over sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits. It is the sentinel of democracy".

Basic constitutional provisions relating to subordinate judiciary and All India Judicial Service

Chapter VI of Part VI of the constitution of India deals with subordinate courts.
Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the governor of the state in consultation with the high court exercising jurisdiction in relation to such state[25]. Appointments of persons other than

[22] AIR 1967 SC 1643(1967)2 SCR 762.
[23] Indira Gandhi v. Raj Narain (1975) SCC Supp.1.
[24] AIR 1989 SC 1899.
[25] See Art. 233(1) of the Constitution of India.

district judges to the judicial service of a state shall be made by the governor of the state in accordance with the rules made by him in that behalf after consultation with the state public service commission and with the high court exercising jurisdiction in relation to such state [26]. The control over the subordinate courts is vested in the high court. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a state and holding any posts inferior to the post of district judges shall be vested in the high court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the high court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law[27]. There is an interpretation clause which defines the expression "district judge". It includes "judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge"[28].

All-India services[29]. Prior to the constitution (forty-second amendment) Act, 1976, it does not specifically refer to an All-India Judicial Service. It was however brought in along with clauses (3) and (4) by the constitution Amendment Act. As it stands today, article 312 reads as thus: 312. All-India services- (1) notwithstanding anything in [chapter VI of part VI or part XI], if the council of states has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, parliament made by law provide for the creation of one or more all-India services [(including an all-India judicial service)] common to the union and the states, and, subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service. And the clause (3) of article 312 says that: The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

A reading of the afore-mentioned provision of the constitution yields the following features:

The subordinate courts/subordinate judiciary is a state subject. The appointment of the members of the subordinate judiciary is to be made by the governor. However such appointment is to made in the case of district judge, in consultation with the high court and in the case of other posts, in consultation with the public service commission and the high court. As a matter of practice, selection of district judges is made by the high court on the basis of which, formal order of appointment is issued by the governor. In case of Munsiff/magistrates, the selection is made by the state public service commission and the concerned high court acting together and

[26] See Art. 234 of the Constitution of India.
[27] See Art. 235 of the Constitution of India.
[28] See Art. 236 of the Constitution of India.
[29] See Art. 312 of the Constitution of India.

orders of appointment are issued by the governor on the basis of such selection.

Though clause (1) of article 233 does not expressly say that the appointment of district judges can be regulated by the rules made under the proviso to Article 309[30], a conjoint reading of both the provisions would show that rules can be made under the proviso to Article 309 with respect to method of appointment of district judges also subject of course to the provisions to the constitution including Articles 233 and 160[31]. As a matter of fact, such rules have been made in several states.

If the council of states (RajyaSabha) declares by resolution supported by not less than two-third of members present and voting that it is necessary of expedient in the national interest to do so, parliament may by law provide for creation of an All-India Judicial Service (AIJS) common to the union and the states and also to regulate the recruitment and conditions of service of persons appointed to such All-India service. This proviso is made notwithstanding the provisions contained in chapter VI of part VI of the constitution. However, the All-India judicial service cannot include any post inferior to that of district judge (as defined in article 236). The law made by parliament providing for creation of AIJS as contemplated by clause (1) of article 312 may contain such provisions for the amendment of chapter VI of Part VI, as may be necessary to give effect to the provisions of that clause but no such law shall be deemed to be an amendment of the constitution within the meaning of article 368.

How far Judiciary can interfere

The prime point of our concern here is whether the judicial organ of the state is conferred with a constitutional mandate so as to overstep its limits while discharging its main functions. That is to say whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so, or it cannot do simply by virtue of the fact that the concept of separation of powers puts fetters on it. To answer these points, we needs to ascertain as to what status the judiciary has been accorded in the Indian constitution. Is it supreme as compared to the other organs or is subordinate thereto?

Judiciary under Indian constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and functions within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the constitution, had observed that[32] "the doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislative or super-executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned".

[30] Recruitment and conditions of service of persons serving the Union or a State.

[31] Discharge of functions of the governor in certain contingencies.

[32] Cited in Glanville Austin, The Indian Constitution-Cornerstone of a Nation 174(1966).

It can thus very aptly be said that creation of judicial organ in India was not at all meant to give to it a supreme status as compared to the other co-ordinate organs. Rather, with powers and functions sufficiently distinguished and demarcated, what is expected out of judiciary is to act as a watchdog to oversee and prods to keep the other organs within the constitutional bounds.

Also on the question that where the amending power of the parliament does lies and whether art.368 confers and unlimited amending power of parliament, the S.C. in Keshavnand Bharti [33] held that amending power was now subject to the basic features of the constitution. And hence, any amendment tapering these essential features will be struck down as unconstitutional. Beg. J. added that separation of powers is a part of the basic structure of constitution. None of the three separate organs of the republic can take over the functions assigned to the other. This scheme cannot be changed even by resorting to art. 368 of the constitution. There are attempts made to dilute the principle, the level of usurpation by judicial power is increased. In a subsequent case law, S.C. had occasion to apply the Keshavanand ruling regarding the non-amendability of the basic features of the constitution and strict adherence to doctrine of separation of powers can be seen. In Indira Gandhi v. Raj Narain, [34] where the dispute regarding P.M. election was pending before the supreme court, it was held that adjudication of a specific dispute is a judicial function which parliament, even under constitutional amending power, cannot exercise. So the main ground on which the amendment was held ultravires was that when the constituent body declared that the election of P.M won't be void, it discharged a judicial function which according to the principle of separation it shouldn't have done. The place of this doctrine in indian context was made a bit clearer after this judgement.

In a democratic country goals are enshrined in the constitution and the state machinery is then setup accordingly. And the Supreme Court rulings also justify that the alternative system of checks and balances is the requirement, but not the strict doctrine.[35]

Federal structure

Federalism constitutes a complex Governmental mechanism for governance of a country. It seeks to draw a balance between the forces working in favour of concentration of powers – in the Centre of it inunder units. A federal Constitution establishes a dual polity as it comprises of two levels of Government. The two levels of the Government divide and share the totality of a Governmental functions and powers between themselves. The distribution of legislative powers between the Centre and the States is the most important characteristic of any federal system. Thus a federal Constitution envisages a demarcation or division of Governmental – function and powers between the Centre and the regions by the sanction of the Constitution itself which is usually a written document and also a rigid one i.e. which is not capable of amendment easily. The Constitution of India establishes a dual polity in the country, consisting of

[33] AIR 1973 SC 1461.
[34] AIR 1975 SC 2299.
[35] Justice Katju.blogspot.com

Union Government and State Governments. The States are regionally administrative units into which the country has been divided and thus India has been characterized as "Union of States"[36].

Pointing out the fundamental aspect of Indian federalism, B.P.Jeevan Reddy, J. in S.R. Bommai v. UOI [37], observed that "within the sphere allotted to them, the states are supreme. The centre cannot tamper with their powers. More particularly the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the states. Let it be said that Indian federalism in the Indian constitution is not a matter of administrative convenience, but one of principle-the outcome of our historical process and a recognition of the ground realities. It is equally necessary to emphasise that courts should be careful not upset the delicately-crafted constitutional scheme by a process of interpretation."

Article 142 of the constitution provides that the Supreme Court may pass such order as is necessary for doing complete justice in any cause or matter pending before it. However, a five-judge bench of the supreme court in Supreme Court Bar Association v. UOI[38] ruled that "article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly." The union government argued that in a federal structure it was the duty of the courts to uphold the constitutional values and enforce constitutional limitations, as the ultimate interpreter of the constitution. There is no dispute over the particular argument that judicial review acts as the final arbiter to give effect to the distribution of legislative powers between the parliament and the state legislatures and when the case did not evolve any dispute between the centre and the states over the distribution of legislative powers, nor was there any allegation that either of them transgressed those powers.[39]

Conclusion

By taking suomoto cognisance of the letter by the union department of justice suggesting recruitment of district-level judges on the basis of all-India examination, the apex court is trying to indirectly amend the constitution. While the procedure can be changed through a constitutional amendment, the same can be done only by the parliament. Parliament, however, cannot carry out amendments which destroy the basic structure of the constitution. When the Supreme Court undertakes the task of establishing a new procedure for the appointment of district judges, it tramples upon the cherished principle of separation of powers. What is strange is that there is no complaint that the existing system in place for appointments to the subordinate

[36] Article 1(1) of the Constitution – Also see M.P. Jain, "Indian Constitutional Law" (Nagpur :Wadhwa 2003) at pp. 553-54.

[37]([1994] 2 SCR 644: AIR 1994 SC 1918: (1994) 3 SCC 1)

[38] AIR 1998 SC 1895 The Bench comprising of S.C. Agarwala, G.N. Ray, Dr. A.S. Anand, S.P. Bharucha and S. RajendraBabu, J.J. and the judgement of the court was delivered by Justice A.S. Anand (as he then was).

[39] Frontline, 26 March 2010, at 43.

judiciary is a failure. Without any serious grievances about the existing procedure, attempts to amend the constitution are highly capricious. It has to be understood that the large number of pendency of cases are due to a variety of factors and cannot be attributed only to delay in appointment of judicial officers.

Anything which has a centralising tendency is highly discriminatory in nature as it shows no concern for the marginalised. NEET exams are as classic example of that. It is an irony that the letter suggests the examinations to be based on the NEET model. NEET is a model opposed to social justice and anathema to the concept of state autonomy. Hence by attempting to take away the powers which already exist with the state government, the Supreme Court will be doing a great disservice to the constitutionally protected rights of the states and the concept of federalism.

The objections that are generally put forward against the AIJS proposal, namely:

(a) Inadequate knowledge of regional language would corrode judicial efficiency both with regard to understanding and appreciating parole evidence pronouncing judgements;
(b) Promotional avenues of the members of the State judiciary would be severely curtailed causing heart burning to those who have already entered the service and manning of the State judicial service would be adversely effected; and
(c) Erosion of control of the High court over subordinate judiciary would impair independence of the judiciary;
(d) The conflict between centre and state would start.[40]

Thus in simple words, the "Doctrine of Separation of Powers" or the "Federalism" in today's context of Liberalisation, Privatization and Globalization cannot be interpreted to mean either 'separation of powers' or 'checks and balance' or 'principle of restraint' or 'division of powers between Centre and the State' but 'COMMUNITY POWERS' exercised in the spirit of cooperation for the best interest of the PEOPLE.

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[40] 116th Law Commission Report (submitted in November, 1986).