Dear Readers of *The Parliamentarian,*

As I write this article and as I continue to share with you on the different global aspects of our time, I am engulfed with huge emotion and reflection. This is so because of the timing of this particular issue of *The Parliamentarian.*

At a personal level, the emotion comes with the realisation that the end of my current term as CWP Chairperson is fast approaching. As we prepare for the 62nd Commonwealth Parliamentary Conference (CPC) this year, this article presents me the opportunity not only to engage with you on the theme of this issue of *The Parliamentarian* which is ‘Separation of Powers and the relationship between Parliament and the Judiciary’, but also to reflect on my time of my stewardship of CWP and the massive, massive inroads we have made together.

During the past three or so years of my term as Chairperson of the Commonwealth Women Parliamentarians (CWP), it has been a whirlwind experience and this has been so because of the enormous task that we undertook and we continue to execute. At the 1989 plenary CPA conference, our founders resolved to continue to discuss ways to increase female representation in Parliament and work towards the mainstreaming of gender considerations in all CPA activities and programmes. This is the core of our task and it is this undertaking that has guided our activities during the last three years. We have intensified advocacy for women rights and empowerment throughout all the branches of the CPA. In some areas like Seychelles, new branches of the CWP have been opened during my term and we are proud of this unique achievement. We were also able to formulate a strategic plan which is a crucial cog for guiding our activities. In so doing we have traversed most of the CPA regions organising workshops, seminars, conferences and high level dialogues all in the quest of inspiring women’s political emancipation. Obviously we would not have achieved so much without the invaluable support of the CPA Secretariat and the Executive Committee. I am grateful to Rt Hon. Sir Alan Haselhurst MP and the current Chairperson, Hon. Dr Shirin Sharmin Chaudhury MP.

I cannot give a full narrative of what has transpired during my term of office in this article. At an opportune time later in the year, I shall surely produce a detailed report of the same. Our dear readers, all I can say is that during my term so far, I have met some wonderful people from all the regions of the CPA, some wonderful women and women leaders; as well as some truly wonderful colleagues. I am happy to report that the CWP family is expanding by the day and that our work continues to assist hundreds of women within the Commonwealth.

We have also continued to advocate for increased women representation in Parliaments, the Judiciary, and in Cabinet and local governments within the Commonwealth. However, I must concede that we are still grappling with some really low percentages particularly in the Pacific and Caribbean regions. Fortunately, there are strategies in place to reverse this trend. Lest I deviate too much, let me delve into the theme of the Journal.

I would like to thank the Editorial team of *The Parliamentarian* who coined the theme; ‘Separation of powers and the relationship between Parliament and the Judiciary’ because as a Parliamentarian myself, this is a subject matter I find pertinent in true democratic governance.

The term ‘*trias politica*’ or ‘*separation of powers*’ which was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th century French social and political philosopher has become one of the major pillars and doctrines of modern democratic governance so much so that it should even be considered sacred in my opinion. Quite simply, separation of powers entails the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances. These checks and balances are so vital in building our democracies and must therefore be observed.

The traditional characterizations of the powers of the branches of government are:

- The legislative branch is responsible for enacting the laws of the state and appropriating the money necessary to operate the government.
- The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.
- The judicial branch is responsible for interpreting the constitution and laws and applying their interpretations to controversies brought before it.

Today’s theme concentrates on the relationship between
Parliament and the Judiciary and I intend to keep it within those limits. We must give due credence to this special relationship because one branch makes the laws and the other is responsible for interpreting them and passing judgments. There is therefore critical need for symbiosis and mutual respect between the Parliament and the Judiciary. Ultimately, this makes for a very delicate and volatile relationship.

Constructive relationships between the two arms of government - the legislature and the judiciary - is essential to the effective maintenance of the constitution and the rule of law. In recent years, the character of this relationship has changed significantly, both because of changes in governance and because of wider societal change.

The other constitutional principle of central importance in governing the relationship between the Judiciary and Parliament is that of the ‘independence of the Judiciary’ and the ‘independence of Parliament’. This does not and should not mean that the Judiciary and Parliament have to be isolated from each other or the other branches of the State. Nor does it mean that both organs - individually and collectively - need to be insulated from scrutiny, general accountability for their role or properly made public criticisms of conduct inside or outside the courtroom and the plenary. In my long experience as a Parliamentarian, the accountability of MPs is to those who elected them i.e the citizenry. The Judiciary on the other hand must bear accountability for decisions reached and judgments made.

In my opinion, the key to harmonious relations between the Parliament and the Judiciary is ensuring that both organs do not violate the independence of either organ in the first place. To achieve this, there is apparent need for either organ to fully understand the parameters of its own mandate while at the same time recognizing the interdependence nature of their work.

In the same vein, it is imperative that just as MPs ought to demonstrate restraint in commenting on the Judiciary, so judges should avoid becoming inappropriately involved in public debates about legislative procedure, government policy, matters of political controversy or individual politicians.

I believe that it is possible to put in place measures of ensuring a permanent harmonious relationship between these two organs of the state. Effective channels of communication between the Parliament and the Judiciary are vital to ensure that the impact of legislation or legislative proposals upon the administration of justice is fully understood at an early stage to avoid contradiction at a later stage. Furthermore, concerns amongst the Judiciary about particular legislative proposals can be conveyed through formal responses to consultation between the two organs for purposes of achieving consensus. It is also important; especially for the countries within the Commonwealth; to assign responsibility to a parliamentary committee to verify that bills are in conformity with the constitution, to reduce the risk of legislation being struck down by the courts at a later stage. In my Parliament (Uganda), we have one such committee – the committee on Legal and Parliamentary Affairs whose cardinal mandate among others is to oversee the activities and programmes of some judicial institutions. In addition, there is need to provide support to build the capacity of parliamentary committees to carry out this function.

I have always argued that it is imperative to establish an independent office of the Attorney-General who can give an opinion on issues of conflict and play an intermediary role between parliament and the courts. This is something I tried to initiate in my Parliament although it didn’t come to fruition. Suffice to say that the Attorney-General is not trusted as an independent player in all countries.

It is also vital that we avoid political interference in the appointment of judges, including from the executive branch of government. This would require therefore that we consider the creation of Judicial Councils or Judicial Service Commissions, whose members would be nominated by Parliament, the Judiciary and the Executive, to oversee the administration and effective working of the justice system while respecting the independence of judges. There is also a need develop a code or principles governing relations between Parliament and the courts as well as establishing a mediation body to monitor and advise on the application of these principles.

Dear Readers, let me stop here and wish you a happy reading.
SEPARATION OF POWERS

View from the 7th CPA Secretary-General

Commonwealth Charter 2013: Separation of Powers – “We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.”


The Commonwealth Latimer House Principles have proved to be an effective framework for upholding the Commonwealth’s fundamental values on the Separation of Powers, as set out in the 2013 Commonwealth Charter above.

The application of the Commonwealth Latimer House Principles has helped to uphold the rule of law, democracy and good governance globally across the Commonwealth and beyond.

For Parliamentarians, one of the key tenets of the Commonwealth Latimer House Principles is on the Independence of Parliamentarians (Objective III):

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful influence.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

The rights of Parliamentarians to be independent, which has evolved into the modern day parliamentary privilege, derives from the UK Parliament’s Article 9 of the Bill of Rights 1688 which provides "That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Outside of Parliament, Parliamentarians are bound by the same laws that restrict certain speech that all citizens are bound by such as certain hate speech, or speech that is defamatory. However, parliamentary privilege in some Commonwealth jurisdictions protects Parliamentarians from what is said in Parliament. The overarching reason for the creation of the Bill of Rights 1688 was to allow politicians and the institution of Parliament to operate without interference from outside forces, and to uphold the notion that parliament is the only body able to create laws, rather than another entity. That is not to say that parliamentary privilege has not been challenged in some arenas.

The Clerk of the Queensland Parliament, Mr Neil Laurie recently gave a defence of the principle of parliamentary privilege in the Brisbane Times newspaper (01/06/2016): "Freedom of speech only protects members’ statements and documents against places ‘outside of parliament’. That is, courts, tribunals, etc. Members are subject to regulation under parliamentary law by the Speaker and accountable to the Parliament itself for the content of speeches. There are a vast array of impediments within parliamentary law and practice to statements made by members: sub judice, that is the prohibition on mentioning matters before the criminal courts (mentioned by Harrison); the rule prohibiting un-parliamentary language; the prohibition on reflections upon the judiciary and the Governor; and the rule allowing members who feel (subjective test) that another member has personally reflected upon them to seek a withdrawal of the remarks.

Furthermore, members who make statements or table documents that are deliberately misleading run the risk of a complaint by another member and being referred to the Ethics Committee. A member found to at fault of such a charge risks a range of penalties. In practice, this process often leads to members making withdrawals and apologies for inaccuracies or clarifying or qualifying previously made statements well before an Ethics investigation."

The Latimer House Principles also provide distinct guidelines on several areas including Parliament and the Judiciary; preserving judicial independence through judicial autonomy and funding; Women in parliament; Judicial and parliamentary ethics; Executive accountability; and the law-making process.

Judge Pierre Olivier, Supreme Court of Appeal: Bloemfontein (Advocate, 2000) said: "The successful implementation of these Principles calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular, the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met. Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines. It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election."
The ‘separation of powers’ is a principle of constitutional law under which the three branches of government, the executive, legislative and judiciary, are kept separate to prevent abuse of power. The concept is also known, more colloquially, as the system of “checks and balances”, whereby each branch of government is invested with certain powers and responsibilities which define not only the work of each branch, but circumscribe and limit the authority of other branches. Pursuant to the doctrine of the separation of powers, each branch of government is functionally independent from the other and no individual should possess powers that span more than one branch of government.

As this article will show, however, the practice is not as clear cut as some theorists would contend. The necessities of good government have resulted in certain lines being blurred and certain flexibility engineered into certain constitutional models. This is not to eviscerate the principle of the separation of powers - which is a central tenet of good governance - it is simply an acknowledgement that the spirit of the rule is more important than form alone.

Montesquieu, heralded by some as the first theorist to urge a tripartite division of power, surmised that in order to safeguard political liberty, the same person or the same body or institution should not exercise the following three powers: “that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

Montesquieu warns that “there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”

The purpose of the notion is that the several constituent parts of the government may “by their mutual relations, be the means of keeping each other in their proper places” thus, operating as a system of ‘checks and balances’.

The reality is that the United Kingdom’s system of government does not conform strictly to a formal notion of separation of powers. According to Walter Bagehot, there is a close union and nearly complete fusion of the executive and legislative powers. Indeed, he famously applauded that system as the “efficient secret” of the British constitution.

The members of the executive are drawn from the legislature. Until recent years, there has also been a fusion of sorts between the judicial and the legislative branches of government. Historically, judges could be elected as MPs and in certain circumstances, serve as members of the Cabinet.

Furthermore, the highest court in the United Kingdom was a committee of the House of Lords, the second chamber of the UK Parliament.

In other countries such as the United States of America, where, unlike the United Kingdom, there is a single written constitutional document, a more formal doctrine of separation of powers is adhered to. The legislature, i.e. the Senate and House of Representatives, is separate from the executive, i.e. the President and members of the Cabinet.

There have, however, been two significant reforms in the United Kingdom in recent years which have moved towards cementing a more formal separation of powers.

First, the Supreme Court was established, which separates the House of Lords hitherto judicial function from Parliament. Second, there has been a modification of the powers of the Lord Chancellor; he has been removed from his triple-hatted function as head of the judiciary, member of the executive and, as speaker of the House of Lords and ‘Law Lord’, as a member of the legislature.

The previous position was a quirk of British constitutional history. Viewed as quaint and harmless to some, it was anathema to others. The symbolism of the change represented by updating the constitutional position was perhaps as important and the substantive changes the reforms ushered in. At the very least, it
can hardly be argued that the previous system headed by great Lord Chancellors of the recent past - like Lord Hailsham of Marylebone and Lord Mackay of Clashfern – and many others, resulted in significant iniquities or was devoid of certain advantages either.10

Similarly, the new Supreme Court seems “neater”, but one would hard pushed to argue that the Judicial Committee of the House of Lords had ever felt circumscribed in its deliberations or determinations because they were members of the House of Lords and could take part in debates and help inform discourse on important matters of legislation or during special committee deliberations.

Be that as it may, change came in the form of the Constitutional Reform Act 2005. The Lord Chancellor’s office has been modified to the extent that he is no longer a judge and neither does he exercise any judicial functions.11 For example, the following previous functions of the Lord Chancellor have now been transferred to the Lord Chief Justice: ‘the authorisation and assignment of judges, allocation of work and the distribution of business within the same level of the court system’ and ‘the nomination of judges to deal with specific areas of business and to fill judicial leadership posts such as the Presiding Judges’.12 The 2005 Act ultimately imposes a duty on Ministers of the Crown and the Lord Chancellor to uphold the independence of the judiciary.13

The 2005 Act also created the Supreme Court of the United Kingdom and made provisions for the transfer of the appellate jurisdiction of the House of Lords to the Supreme Court and the devolution jurisdiction of the Judicial Committee of the Privy Council.14 The 2005 Act also restricted the right of the House of Lords to sit and vote for so long as they hold full time judicial office.15 Thus, Justices of the Supreme Court are not permitted to sit in the House of Lords.

The United Kingdom system has nonetheless historically placed value upon the core motivation behind the separation of powers doctrine. As stated by Lord Diplock in Duport v Sirs, “it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them.”16

Despite the recent reforms in the UK and, as is evident from the select case law explored in relation to certain Commonwealth countries below, the separation of powers is often not ‘strict’ in nature. There remains a divergence of approaches to how the doctrine is applied in practice. Often, various overlaps and interactions between the judicial and
Supreme Court held that the 119(2) of the Constitution. The independence of the judiciary was subject to legally enacted and other laws. Thus did not mandate a system of checks and balances envisaged by this same principle to function. According to the Supreme Court, most political systems applied a ‘diluted form’ of this doctrine rather than a strict interpretation. The Seychelles Constitution thus did not mandate a system of absolute non-interference by the legislature in the affairs of the judiciary. Article 119(2) of the Constitution provided for the independence of the judiciary with the caveat that the judiciary was subject to the Constitution and other laws. The judiciary were thus subject to legally enacted laws except where the laws in question were themselves unconstitutional and void.

Simeon v Attorney General was another case dealing with mandatory minimum sentences. The court relied upon the South African jurisprudence to hold that the nature of a checks and balances system mandated that there was an intrusion of one branch of government into the domain of another in order to prevent the branches of government from usurping power from one another. It is thus a ‘partial’ rather than a complete separation of powers. The court cited cases from Mauritius, the United Kingdom and Ireland to hold that the separation of powers under the Seychelles constitution just like other liberal democratic societies and balances designed to prevent an overconcentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest. The court endorsed jurisprudence from Mauritius which stated that mandatory sentencing is a ‘twilight zone’ within which the sovereignty of both the legislature and judiciary to act within their respective domain must be acknowledged and respected.

**Case study: Kenya**

When it comes to Kenya, of particular interest is the apparent power of the Kenyan Courts to bring about a dissolution of the Kenyan parliament in cases of a failure by parliament to enact certain specified legislation. Section 261 of chapter 18 of the 2010 Kenyan Constitution provides that the Kenyan Parliament must enact the legislation listed in the schedule thereto within certain time periods specified therein. Subsection 2 and 3 permit the National Assembly by two-thirds majority to delay enactment by a maximum of one year in ‘exceptional circumstances’. If Parliament does not act within such time limits, subsection 5 permits ‘any person’ to petition the High Court, and the Court has the power under subsection 7 to ‘advise the President to dissolve Parliament’ and consequently, ‘the President shall dissolve parliament’.

The Kenyan Parliament has invoked Article 261(2) and (3) on a number of occasions and in relation to a variety of different legislative issues. Recently, on 18 August 2015, Parliament invoked Article 261(2) for a period of 12 months from 27 August 2015 for a number of legislative issues. The Kenyan courts have not been reticent in relation to Chapter 18. The Kenyan High Court has held that Article 261(5) and (6) permit Parliament, as a State organ, to be sued in its own name. Recently, the High Court held that the Attorney General (AG) in consultation with the Commission on the Implementation of the Constitution (CIC) were under a constitutional duty to prepare legislation to effect the gender equity rule and ordered that they must do so within 40 days of the judgment. The Court further held that should Parliament fail to act, a citizen of Kenya could invoke the provisions of Article 261(5)-(7).

**Case study: South Africa**

In South Africa, the Courts have shown themselves willing to review government policy, in particular, with regards to budgetary matters. The Constitution of South Africa is particularly innovative, in that it explicitly enumerates judicially enforceable socio-economic rights.

The case of Minister of Health and Others v Treatment Action Campaign and Others (No 2) concerned a petition by Treatment Action Campaign that, contrary to a government policy, an anti-retro viral drug ‘nevirapine’ be made available at all state hospitals and clinics under the right to ‘health care’ in article 27 and 28 of the Constitution. The South African Constitutional Court held that ‘when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation’. These powers included ‘mandatory and structural interdicts.’ The court stressed that policy should be flexible and “court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making…legitimate choices.” The court considered the budgetary implications of making the drug available on a wider basis and held that ‘with the additional funds that are now to be available, it should be possible to address any problems of financial incapacity that might previously have existed.” Thus, the court held that the government policy on the provision of the drug in question was inconsistent with the Constitution. The Court made a detailed order on the steps the government was to take henceforth in order to reverse the government policy.

**Conclusion**

As is evident from the few cases referenced above, the separation of powers is often not applied rigidly in Commonwealth countries. Rather, courts in various Commonwealth countries often permit interactions between the different branches of government in order to ensure a full functioning of the checks and balances system. Indeed, ‘intrusions’ between the branches often serve to buttress accountability among the various pillars of government and uphold
constitutionally protected rights, as demonstrated by a growing trend of heightened judicial scrutiny of legislative and executive actions or inactions.

As noted by James Madison, an effective notion of the separation of powers does not necessitate that the branches of government “ought to have no partial agency in, or no control over, the acts of each other.” Rather, the fundamental principles of a free constitution are subverted “where the whole power of one department is exercised by the same hands which possess the whole power of another department.”

From this vantage point, the system of checks and balances is preserved where the branches of government are ultimately obedient to a higher constitutional law. The spirit underlying this latter objective is, perhaps, more elusive than the formalities of structure chosen under various national constitutional models.

References
3 http://press-pubs.uchicago.edu/founders/documents/v1ch17s9htm.html
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6 Walter Bagehot, The English Constitution, 2nd Ed. 1873, at 48.
7 , accessed on 4 May 2016.
10 Lord Woolf, as Master of the Rolls (and shortly before his appointment as Lord Chief Justice) was categorical in the advantages that he perceived as flowing from the prevailing position: “As a member of the cabinet, he (the Lord Chancellor) can act as an advocate on behalf of the courts and the justice system. He can explain to his colleagues in the cabinet the proper significance of a decision which they regard as being distasteful in consequence of an application for judicial review. He can, as a member of the Government, ensure that the courts are properly resourced. On the other hand, on behalf of the Government he can explain to the judiciary the realities of the political situation and the constraints on the resources which they must inevitably accept. As long as the Lord Chancellor is punctilious in keeping his separate roles distinct, the separation of powers is not undermined and the justice system benefits immeasurably. The justice system is better served by having the head of the judiciary at the centre of government than it would be by having its interests represented by a minister of justice who would lack these other roles.” (H. Woolf, “Judicial Review – the tensions between the executive an the judiciary” (1998) 114 Law Quarterly Review 579)
12 Constitutional Reform Act 2005, Explanatory Notes, para 37.
14 Constitutional Reform Act 2005, Explanatory Notes, para 58.
20 For instance the National Land Commission Bill 2011 and the Land Bill 2012, Commission for the Implementation of the Constitution, Quarterly Report for the period January to March 2012. Both acts were subsequently enacted into law in 2012. On 19 August 2014, the Kenyan Parliament invoked Article 261(3)(b) in relation to a variety of legislative issues for a period of 9 months.
23 Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR, Petition No. 182 of 2015, 26 June 2015, at para 113(c).
25 Ibid, para 113.

The views expressed in this article are the personal views of the author.
DOCTRINE OF THE SEPARATION OF POWERS: RELATIONSHIP BETWEEN PARLIAMENT AND THE JUDICIARY IN INDIA

I. Introduction
In contemporary times the idea of the democratic nation state has evolved into one based upon three main institutions - the legislative or law-making arm, the Executive or Government and the Judiciary, with a fourth being the media and press. These institutions interact in the processes of national vision setting, direction, implementation and growth. While their interrelatedness is seen as different in each nation, as a matter of practice or depending upon the level of development and depth of democracy, the lack of a vibrant arm of any of them makes evident the failure of the nation as a whole in serving its people.

In a democratic set up, the legitimacy of every constitutional institution, be it the Legislature, the Executive or the Judiciary, must be traced to the will and consent of the people, directly or indirectly. This holds for all tiers of the nation, be it at the Federal Level, the State Level or at the level of the local, urban and other authorities. The bearers to public offices in all other institutions in the country are appointed either by an executive authority that is accountable to the people or by a mechanism involving the Executive and Legislature by law. No institution in a democracy is entitled under the constitutional provisions nor should be allowed to abrogate to itself any power or appoint its own office bearers save as stated in the nation’s Constitution which governs them and the laws thereto.

II. Separation of Powers – Origin and Meaning
India is not only the largest working parliamentary democracy in the world but also has the distinction of having the longest written Constitution that not only lays down the structure and functions of various organs but clearly demarcates the role and functions of every organ of the state thereby establishing the norms for their inter-relationship and smooth functioning within the democratic edifice.

While the Constitution of India does not explicitly denote the theory of separation of powers in its text, there has been created a manner wherein the theory in itself holds without requiring its annotation. The debates in the Constituent Assembly that deliberated the post-independence setup for India and the framers of the Constitution hence ensured that the spirit of separation of powers was inherent in India, whereas the theory need not be written.

This is seen at the Federal level and mirrored at the State levels through an independent judiciary, a bicameral or unicameral legislature consisting of the people’s direct and/or indirect representatives and an executive formed out of such representatives and answerable to the legislature. Hence, creating a holistic and cohesive system of checks and balances for a functioning, effective and impartial democracy that has stood the tests of time for close to 70 years now.

This is enshrined in the Preamble which in turn ensures the achievement of the objectives of justice, liberty and equality to the citizens of India and promotes fraternity, unity and integrity of the nation. The Preamble also highlights the kind of polity and society as envisaged by the Constitutional framers of India. Profound analysis of parliamentary democracy underpins the fact that the powers of the different arms of democracy must be balanced in a way that none should get credence over the other. On the same principle, none of the organs can derelict any of the essential functions endowed upon and to them under the Constitution. The difficulties resulting from the divided powers are great but the consequences of concentrating power are disastrous as singular power corrupts and leads to authoritarianism. Therefore, it seems of paramount importance that an effective system on the basis of doctrine of ‘Separation of Powers’ should continue to operate so as to meet the needs of democratic society in the best possible manner, and at the same time evolving with...
the times as the nation and its democratic construct changes.

Hence achieving the ideals of Aristotle as elucidated in his book ‘Politics’ and as furthered by the writings of Baron de Montesquieu, that, "There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitution are bound to correspond to the differences between each of these three elements." (Aristotle).

This is further elaborated upon by Montesquieu wherein he states that, the ‘valour’ resides not in concentrating but in renouncing and abandoning the absolute dominance and creating an unhindered and balanced flow of power bestowed by the supreme authority. It is an act of striking the balance between power and responsibility and ruling out the possibility of abuse. Montesquieu envisioned this ‘valour’ in the scheme of separation of powers amongst the Legislature, Executive and Judiciary when he first enshrined the doctrine in his book De L’Espirit des Lois (The Spirit of Laws). He emphasized that when the power of these three organs is integrated in one single body, it would amount to disorder and chaos and seize all liberties that may be exercised by them in their own right.

Parliamentary democracy underpins the fact that the powers of the three pillars of a democracy must be balanced in a way that none should get credence over the other and each should act within the pre-determined framework under the Constitution. Thus, while examining the doctrine of Separation of Powers it is important to deduce that there are three branches of the state machinery, namely legislative, executive and judicial and that each branch must be limited to its own sphere strictly and should not be allowed to trespass upon the sphere allotted to any other branch. As neatly stated in the doctrine found in the Massachusetts Declaration of Rights, 1780: “In the Government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. The Executive shall never exercise the legislative and judicial powers, or either of them. The Judiciary shall never exercise the legislative and executive powers, or either of them. To the end, it may be a Government of Laws and not of man.”

Thus, drawing from the doctrine, it is rational to infer that determination of disputes and adjudication of questions of fact or law is beyond the sphere of legislature. Similarly, law making is out of the purview of the judiciary. If the judiciary assumes legislative or executive functions, such an assumption would be void, not on any theoretical basis but on the general principle that a court cannot exercise powers not conferred on it by law.

III. Three Organs of the State in India

Adopting the federal structure with strong centralizing tendency, the Constitution of India distinctly provides the broad framework of the three organs of the state, namely, the legislature, the executive and the judiciary both at the union level as well as the state level. Thus, the main task of the legislature is to make laws, that of the executive is to implement the laws so made and lastly,
the judiciary as the watchdog of the fundamental rights of the people, is vested with the task of interpretation of the laws that has been extended to the role of safeguarding the constitution as well. The role of the judiciary also extends to seeing as to whether the Parliament has legislative competence and whether due procedure as laid down by the Constitution has been followed while making the law.

IV. Relationship between Parliament and the Judiciary in India

There are two contentious positions on this relation: the first upholds the primacy of the Judiciary and the other, that of Parliament, charting a long drawn debate on the issue of Separation of Powers and supremacy between the two.

The period between 1950 (the year that the Constitution of India came into effect) and 1973 marks the period of the Parliament being the apex institution in India. In the Supreme Court case of A.K. Gopalan v. State of Madras, it was held that the constitution does not recognize the absolute supremacy of the judiciary over the legislative authority in all respects. Further, in the case of ‘Shankari Prasad v. Union of India’, the Supreme Court set aside the appeal against the First Amendment that amended Fundamental Rights of the Citizens and abolished certain landholdings such as the Zamindar’s and held that there was a clear distinction between ordinary law made in the exercise of legislative power and constitutional law made in the exercise of constituent power, as specified in Article 368 (Power of Parliament to amend any provision of the Constitution and procedure therefor). In Golak Nath’s case, the issues that had been smoldering in this relation came to be heard for the first time and the court held that Article 368 could not override the specific provisions of Article 13(2) and that the Parliament could not take away or abridge the fundamental rights mentioned therein through an ordinary law; hence necessitating a constitutional amendment to alter or void the fundamental rights that the citizenry of India are endowed with save under a state of emergency provisions.

Eventually the Keshwanand Bharati case serves as a watershed in the relationship between the Parliament and the Judiciary wherein the Supreme Court upheld the power of the Parliament to amend the Constitution while announcing the doctrine of ‘Basic Structure of the Constitution’ and saving its power to review those amendments at the same time. The Court adjudicated that while Parliament has ‘wide’ legislative and Constitutional powers, it did not have the power to destroy or emasculate the basic elements, structure or fundamental features of the constitution.

The judgment enunciated that: 1) The supremacy of the constitution; 2) A republican and democratic form of government; 3) The secular character of the Constitution; 4) Maintenance of separation of powers; 5) The federal character of the Constitution; 6) The mandate to build a welfare state contained in the Directive Principles of State Policy of the Constitution; 7) Maintenance of unity and integrity of India; and that 8) The sovereignty of the country, were beyond parliamentary amendment through the constitutional mechanism as they constituted the basic structure and the essence of the Indian Constitution and the nation as envisioned by the framers of the Constitution.

This principle was used even recently to hold unconstitutional the 100th amendment to the constitution that would have changed the manner of judicial appointments through the ‘National Judicial Appointments Commission’ in the nation by using it to ensure that the principle of separation of powers between parliament, executive and judiciary was maintained, safeguarding against a loaded judiciary appointed by the executive as was attempted during the period of emergency in India in the 1970s. Similarly, in ‘Indira Gandhi v. Raj Narain’, the Supreme Court set aside the 39th amendment (placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of Indian courts) to the Constitution of India as it violated the basic structure of the constitution, as all citizens even those elected to govern and head government are equal before the law.

Thus, it is to be noted that the period from 1977-2007 is the period of judicial activism triggered in part by attempts to weaken the judiciary during the period of emergency prior to 1977 by the Executive and through Constitutional amendments by the Legislature to tilt it in their favor. Hence, from the primacy of the Parliament, the pendulum swung towards the judiciary. The court reassessed the limits of authority of the Parliament as formulated in the Keshwanand Bharati and Minerva Mills cases and it upheld the limitations on the Parliament’s power to amend the constitution subject to the Basic Structure Doctrine. Moreover in Waman Rao’s case, the Court declared that any amendment to the Constitution after Keshwanand Bharati, which included laws placed in the Ninth schedule (making them beyond judicial scrutiny), would have to be tested by reference to the doctrine of Basic Structure necessarily. Thereafter, in ‘I.R. Coelho v. State of Tamil Nadu’, the court reiterated its stand and at present, the trend suggests the re-articulation of the relationship between the two with all three arms attempting to rework and re-establish a working relationship between the judiciary on one hand and the legislative and executive branches on the other, through the instruments of judgments, laws, constitutional amendments and executive acts and policies endowed upon each of them respectively.

V. Conclusion

Thus, the Indian Constitution while not recognizing the doctrine of separation of powers in its absolute rigidity but in its functions in the different branches of India’s democracy has demarcated and differentiated the organs of state in the spirit of separation of powers, essential in a democracy.”
Constitutional scheme and as the conscience keeper of the framers of the Constitution. Therefore, India’s three democratic arms and specifically the Parliament and Judiciary possess an excellent working relationship which has in turn, worked for the institutionalization of social, economic as well as political democracy and parity.

While the Judiciary advanced the doctrine of basic structure of the constitution, it also rallied to protect the amending powers of the Parliament. Thus, the current position with respect to the relationship between the Parliament and the Judiciary in India is crystal clear that the Parliament has the power to amend “any provision” of the Constitution but while doing so the basic structure of the Constitution should remain unaffected. Hence, in India the judiciary assists the Parliament to pursue the social, economic and political goals as surmised in the Preamble of the Constitution thereby making it vibrant and ever responsive to the needs of the individuals and society at large.

A living and breathing text that fosters the shouldering of different responsibilities as well as allows for the separation of powers, allowing for democratic values to continuously evolve. It is this uniqueness that allows for the Legislative, Executive and Judicial arms of the nation to work independently, in coordination and to constantly develop and evolve their relationships. Hence being seen as a role model for Constitutional framers and writers the world over, setting high benchmarks of quality, equality, responsiveness, foresightedness and flexibility to follow and incorporate in their existing texts or in new ones that follow.
The idea that the major institutions of the state should be functionally independent and that no individual should have powers that span these offices, although conceived in the interests of good governance and constitutional tranquillity has been a potent force for tension within parliaments and legislatures ever since Montesquieu first crystallised its principles in *De l’Espirits des Loix*.

As far back as the American War of Independence, one of the chief complaints of the American revolutionaries was that the United Kingdom’s Act of Settlement of 1701 did not extend its attempts at the separation of powers to the colonies and that while in the United Kingdom a judge held office under the Crown during good behaviour and could only be removed by joint address to the Lords and Commons, judges in the thirteen colonies were appointed for limited terms by Colonial Governors acting on behalf of the Crown and could be dismissed if they made decisions of which the Governor disapproved.

The secession of the thirteen Colonies had a profound effect on how people since then have thought about constitutional arrangements not least because the American colonists, in attempting to explain the decision to rebel against British rule, were among the first to ask in a technical sense “What is a constitution for?”

If a time-travelling delegation from almost any of the Thirteen Colonies were to attend a modern Commonwealth Parliamentary Conference then it would be as sub-sovereign attendees of the Small Branches’ part of the conference. It is often a feature of Commonwealth and pre-Commonwealth constitutional development that important moments begin at the fringes and work their way towards the centre.

The Channel Islands, in particular the Crown Dependency of Guernsey, was sixteen years ago at the heart of one of these moments which had important consequences for the development of the separation of powers in the United Kingdom and beyond. The Channel Islands have a history of legislating for themselves and developing their own customary law that stretches back to the early middle ages. Until 2000, the Islands would, in legal terms, have been best known beyond their shores for their connection to the pre-revolutionary customary laws of Normandy and their development of Trust Law. Since that date Guernsey is, in legal and parliamentary terms, likely to be best known for the European Court of Human Rights Ruling in *McGonnell v the United Kingdom*.1

Mr McGonnell had wanted to convert a flower packing shed into residential accommodation but was refused permission to do so under Guernsey’s development plans. In 1995 Mr McGonnell, who had taken up residence in the shed, appealed to the Guernsey courts where his appeal was dismissed. The presiding judge was the Bailiff of Guernsey who five years previously as Deputy Bailiff and Deputy Presiding Officer, had presided over the Island’s parliament when the development plans had been debated. In Guernsey, as in Jersey, the Chief Justice, called the Bailiff, is also the Presiding Officer of the Assembly.

Mr McGonnell took his case to Strasbourg. On 8 February 2000, the European Court of Human Rights gave judgment and found there to be a breach of Article 6 of the European Convention on Human Rights, the article that protects the right to a fair trial. Bias was not alleged but the Court felt that Mr McGonnell had been given legitimate grounds for fearing that the Chief Justice may have been influenced by his earlier participation as Presiding Officer in the Assembly’s adoption of the planning provisions. The Court did not point to anything wrong with the dual roles vested in the single office of Bailiff but did require that when sitting in a judicial capacity, the Bailiff should remind litigants where

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1. *McGonnell v the United Kingdom*
appropriate of the dual role. It would be too much to say that the case of McGonnell from the small jurisdiction of Guernsey was exclusively responsible for bringing to an end the 1400 year old great office of state that was the position of the United Kingdom’s Lord Chancellor but it was certainly powerfully influential and Lord Irvine of Lairg’s reply to a parliamentary question shortly after the decision that “The position of the Lord Chancellor is unaffected by this case” was somewhat wide of the mark. Lord Irvine’s subsequent clarification in the light of McGonnell that “the Lord Chancellor would never sit (as a judge) in any case concerning legislation in the passage of which he has been concerned” was more prophetic. It is certainly the case that McGonnell acted as one of the spurs to the Blair government’s reforms of the UK constitution in the early 2000s. Until 2005 the office of Lord Chancellor rose far above the principles of separation of powers. As head of the judiciary in England and Wales, Speaker of the House of Lords, Cabinet Minister and Law Lord, the Lord Chancellor’s responsibilities branched into functions of the executive, judiciary and parliament. After 2005 and the coming onto the statute books of the Constitutional Reform Act 2005, the Lord Chief Justice took on the role as Head of the Judiciary and the House of Lords elected its own Speaker.

In 2009, as a development arising naturally out of the post McGonnell landscape the legal function of the House of Lords was separated from the legislative function and the Supreme Court was created but not before Lord McCluskey QC had commented “a good deal of nonsense is spoken about the separation of powers….for a 135 years or so serving judges have always played an important part in the deliberations of this House. They seldom vote.”

It is one of the interesting features of the McGonnell case that whilst the Channel Islands can have been said to be instrumental through it in reshaping the British Constitution, the Islands themselves were less affected.

Parliamentarians from small jurisdictions will be familiar with the flexibility and degree of ‘multi-tasking’ that are required of officials in a mini state. “Parliamentarians from small jurisdictions will be familiar with the flexibility and degree of ‘multi-tasking’ that are required of officials in a mini state.”

Above: The Royal Court in Guernsey has existed on its present site in St Peter Port since the early 1800s and today caters for a very wide range of activity, including criminal and civil court proceedings, meetings of Guernsey’s parliament, civic receptions and ceremonial occasions, marriage ceremonies, archiving and research and the registration of births, deaths, marriages and property conveyances.
The separation of powers is an evolving, interlinked constitutional issue. Decisions in one small jurisdiction on the separation of powers can affect the entrenched constitutional arrangements of another much larger one.

In ancient customary law, jurisdictions such as those found in the Channel Islands, the executive, judiciary and legislature are closely entwined, so closely entwined that in Guernsey the legislature is also the executive. In the United Kingdom ninety five salaried ministers sit in the House of Commons. It might appear at first glance that both these systems are a long way from the separation of powers envisioned by the principles of Latimer House but in both Guernsey and the UK the presence of the executive within the legislature can also allow for rigorous scrutiny of that executive. Integration of the executive and legislature in this way can provide stability and efficiency in the operation of government, balancing abstract concerns about an over mighty executive with a pragmatic desire to make the constitution work. Similarly the advent of the Human Rights Act, which has changed the relationship between the judiciary and the legislature, has brought about a situation which at first glance does not sit comfortably with a pure interpretation of the separation of powers. Since the advent of the Act, judges can declare a statute to be incompatible with the Convention on Human Rights and the Government is required to rectify the situation. However the system works and it works in much the same way as the system of judges in the Channel Islands both sitting and presiding does, by the exercise of partnership and restraint on the part of the parties.

Does the Separation of Powers work in practice and are the Latimer House Principles still relevant today? The separation of powers is an evolving, interlinked constitutional issue. Decisions in one small jurisdiction on the separation of powers can affect the entrenched constitutional arrangements of another much larger one as McGonnell demonstrates. In fact, it demonstrates the assemblies of the Commonwealth, in spite of their diversity and different origins are constituent parts of a single living organism. Used properly the Latimer House Principles can operate as a frame work accommodating that diversity, allowing for the flourishing of the separation of powers and at the same time enabling assemblies, both small sub sovereign ones and large national and federal ones, to develop in sometimes subtle and complex ways, the practical arrangements needed to keep judiciary, legislature and executive distinct but also fair, efficient and accountable.

References
1 McGonnell v The United Kingdom; ECHR 8 Feb 2000.
2 Lords Hansard; Written Answers 23rd February 2000: Column WA31.
4 HL Deb col 1030 8 March 2004
5 Commonwealth(Latimer House) Principles; Commonwealth Secretariat; Foreward, Kamalesh Sharma, July 2008.
THE SEPARATION OF POWERS IN THE FALKLAND ISLANDS

The doctrine of the separation of powers is observed in the Falkland Islands along the lines of the Westminster model but with a number of augmentations, exceptions and with additional safeguards resulting from the constitutional settlement inherent to British Overseas Territory status.

The doctrine is a constitutive feature of most democracies and provides, along Montesquieu's model, that government is divided into three branches: the executive, the legislature and the judicature. Each, notionally separate from the other, must carry out its functions free from interference.

In the Falkland Islands Constitution resides the detail that supports the doctrine and emulates the UK's settlement. The main offices in which the distinct authorities are vested and the powers which may be exercised (and not exercised) by the office holders are prescribed by the Constitution.

Context

In general one must bear in mind the societal context in which role fusion is more prevalent in micro polities than larger systems. Hairdresser may be travel agents; legal secretaries may be customs officers; planning officers as soldiers; housing officers, auxiliary policemen and dance masters. Within the public service the range of officers’ responsibilities rests upon the broad shoulders of the pioneer. In this environment of function and role-sharing one might expect to find constitutional separation of powers compromised through resource shortage. In fact, and especially given this context, the strength of the doctrine is arguably more in evidence in the Falkland Islands than in many larger countries.

The Legislature

An authority, the Legislative Assembly, is established under the Constitution. The power to make the laws, commonly conferred on the legislature in other jurisdictions is, however, conferred on the Governor. Further powers are reserved to the Westminster Parliament to make law for the peace, order and good government of the Falkland Islands on behalf of Her Majesty The Queen. There are practical limitations on the power of the Legislative Assembly and in this sense the assembly is not supreme. Parliamentary supremacy is displaced by 7,000 miles. The Westminster Parliament may, but seldom does, impose legislation directly to the Falkland Islands. Legislation passed by the Legislative Assembly may be blocked by the executive, by the British Government or by the courts of either jurisdiction if deemed to be contrary to good governance or ‘repugnant’ to any Westminster statute. Similarly, the Governor may propose legislation and enact it with or without the approval of the Legislative Assembly (subject to reporting obligations).

In practice the Legislative Assembly make the laws of the Overseas Territory subject to the following checks:

- the Governor has reserved power to assent or refrain from assenting to the laws - in addition to his power under section 55 to propose that any Bill be deemed to have been passed by the Legislative Assembly; and,
- the Secretary of State having the power of disallowance.

To accept the strength of the criticism of the efficacy of these legacy colonial powers is to mistake the venom of the shaft for the vigour of the bow for these powers have been deliberately retained by the UK and have been exercised in other Overseas Territories in recent memory. From a governance perspective, far from disturbing traditional separation...
The Separation of Powers in the Falkland Islands

The Constitution also perpetuated an Executive Council with whom the Governor is obliged to consult. The Executive Council under the Constitution is an advisory body to the Governor whose executive authority is limited de jure only by the Westminster Parliament. The Governor may, if he or she chooses, dispense with or ignore the advice of Executive Council in accordance with the Constitution. De facto, Governors appear to have accepted significant constraints by the Executive Council in the exercise of executive power. This convention is, however, just that. It is presumed by the authors that the democratically elected members of the Westminster Parliament having, as a body, fought for control of executive government are opposed to allowing even themselves to exercise untrammelled executive control over the Falkland Islands. It would be understandable for them to feel that, in the face of the democratic mandate of the Falkland Islanders’ elected representatives, such control is a bill of rights, a civil war, a European Convention Human Rights and a Constitutional Order too late. This de facto acceptance of the role to be played by Executive Council in the exercise of executive power upsets the operation of the doctrine of the separation of powers and in practice leads to a fusion of the legislature (from whom Executive Council membership is comprised) with the notionally discrete executive control vested in the Governor.

It is beyond the scope of this article to consider the broader relationship of Overseas Territories and their (qualified) constitutional autonomy from the British State. Any powers which are reserved to Britain are effectively the result of the choice of the people of the Falkland Islands to consent to this continuing relationship with Britain. From the Statute of Westminster onwards successive British Governments have been reluctant to legislate for Overseas Territories or to exercise direct control over territories with local Assemblies and appear to regard doing so as a nuclear option to be used only as a last resort. It is sufficient in the context of an analysis of the Constitution to state that the reserved federative powers of the British state are benign and more than compensate for a lack of a stricter practical separation of the executive and legislature in the Falkland Islands. Thus, the legislature and executive are legally and constitutionally separate but in convention and practice are fused.

The Independent Judicial Arm and the Transnational Approach

The defining characteristic of the Constitution, like that of the British model, is the rule of law. The separation of powers doctrine requires an accountable relationship between the judiciary and the legislature. Relations between these limbs should be governed by respect for the legislature’s primacy in law-making and for the judiciary’s responsibility for the interpretation and application of legislature-made laws. Both limbs should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

Micro-polities sometimes struggle to find an effective balance between these limbs. Attempts to ensure laws are accessible to citizens often generate codes and administrative tests, sentencing guidelines and cross-limb committees aimed at interpreting, democratising and applying law in a way which threatens an erosion of the judicial function. Similarly, delegation to the Courts to set their own fees and prescribe rules (in the absence of legislation) are outside the traditional role of the judicial limb.

Leaving aside some administrative minutiae, it has to be recognised that in the Falkland Islands, the judicial power is not (as elsewhere) the weakest of the three limbs of government power. Whereas the UK courts accept the superiority of the Westminster parliament and the supremacy of the legislative limb, in the Falkland...
Islands the balance is inverted.

There is an apparent conflict to this in Chapter VIII of the Constitution which prescribes that all judicial appointments are made by the Governor and in the reliance on the local courts on funding from an appropriation vote from the legislature administered by the public servants of the Falkland Islands Government. However, on account of the federative reserved powers of the UK, any action by the legislature or executive to interfere with the administration of justice or oust the power of the courts, if not blocked by the Governor, would almost certainly lead to censure from the UK and the imposition of corrective measures as necessary.

The authors refrain from examining the question of whether the Falkland Island’s judicial branch is in this way subject to the Westminster executive or legislature in a manner inimitable to the doctrine of the separation of powers. Certainly, directly implemented Westminster legislation cannot be challenged in the local or UK courts although Orders in Council can be reviewed judicially (Bancoult (No1) [2000] EWHC.

At present the Falkland Islands judiciary enjoys those constituent parts of full judicial independence: secure tenure and secure remuneration, both issues being reserved to the Governor’s discretion (free from the control of the Legislative Assembly). There are numerous uncomfortable instances where local legislation prescribes judicial functions to the executive or public officers but all of these (even where the Ordinance suggests otherwise) are justiciable under the Constitution. Even an independence constitution would be unlikely to alter the status enjoyed at present by the Judicial Committee of the Privy Council as the ultimate appellate court. British Overseas Territories and many independent countries formerly of colony or dominion status electing so to be are subject to the jurisdiction of the Privy Council and all lower courts are subject to its jurisprudence. Privy Council case law (Hinds v R (1977), Liyange v R (1967)) shows an absolute faith in the certainties of the separation of judicial power from legislative or executive control. So the doctrine is entrenched in the Falkland Islands.

The product of having a truly independent uppermost court (the Privy Council not being subject to the supremacy of the Westminster Parliament in the same way as the Supreme Court of England and Wales) is that there are simply no mechanisms available to the Falkland Islands Government (short of acceded UDI) to enable it to over-reach the jurisdiction of the Privy Council.

Conclusion: A partially fused Executive and Legislature and an independent Judiciary

For all the manifest practical difficulties facing domestic lawyers on the Islands - lack of legal certainty being the most obvious and unsettling with references in certain statutes purporting to give judicial powers to the executive to the exclusion of the courts being another - the practical and theoretical state is happily one of absolute judicial independence both under the Constitution and in the political realm beyond.

References

1. Falkland Islands Constitution Order, UKSI (SI 2008/2846)
2. section 37 provides for the Legislature to advise on and consent to the laws made by the Governor.
3. article 11 of the Constitution Order.
4. Section 55
5. Alternative constructions of this relationship are advanced by the Foreign Office and the Privy Council which though practically effective in application secure their foundation on a carousel of feathery hats.
PREVENTING POLITICAL INTERFERENCE WITH JUDICIAL APPOINTMENTS: THE TASMANIA EXPERIENCE

Hon. Elise Archer MP is the Speaker of the House of Assembly at the Parliament of Tasmania, Australia. She was elected to the Tasmanian House of Assembly in March 2010. After the March 2014 State election, Hon. Elise Archer was named as the Government Nominee for the Speaker of the House of Assembly, and was formally elected by the House on 6 May 2014.

In many Commonwealth countries there has been concern regarding the independence of judicial appointments and the impact on perceptions (or actuality) of political interference on the separation of powers central to our system of government. Three models for judicial appointments that are commonly used in such jurisdictions are generally agreed.

**Models for judicial selection**

In most major common law countries, judges are appointed by the Executive. However, the selection process varies across jurisdictions, and even within jurisdictions. In broad terms, the models include:

- Executive makes a selection after conducting a consultation process, which may be formal or informal;
- Executive makes a selection after receiving advice from an advisory panel convened by the Executive;
- Executive makes a selection after receiving recommendations from an independent appointments commission.

The majority of Australian jurisdictions use one of the first two models. Generally there is little focus on the process used for judicial appointment in a jurisdiction until something goes wrong. This was certainly true in Tasmania, where although there have been disagreements over the person appointed, the process was not usually a matter of controversy.

Tasmania used the first model for many years but, following a discussion paper released in 1999, guidelines for judicial appointments were released in 2002. However, as will be illustrated in the case study to follow, either these guidelines were ineffective or were not adequately implemented.

The Commonwealth has also focussed on the issue of judicial appointments with the Latimer House Principles having a section dedicated to the best practice in the appointment of judges.

1. Judicial appointments
Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission… The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.4

The preferred approach espoused in this document is the third model of appointment outlined above.

Events that occurred in Tasmania in 2007-08 provide a useful case study of the consequences of interfering with a proper process for judicial appointment.

On 22 August 2007, it was announced that Glenn Hay would be appointed as a magistrate to the Tasmanian Magistrates Court to replace Magistrate Roger Willee.5

“...The Commonwealth has also focussed on the issue of judicial appointments with the Latimer House Principles having a section dedicated to the best practice in the appointment of judges.”
surrounding this appointment that resulted eventually in the resignation of the Attorney-General and Deputy Premier Steven Kons MP and played a part in the later resignation of the then Premier Paul Lennon. These events clearly chronicle an example of inappropriate political interference in the process of a judicial appointment.

Key to these events was a whistleblower in Mr Kons office providing shredded documents from that office to a Member of Parliament. These showed that the appointment of Mr Simon Cooper had been agreed and appointment documents prepared but these were shredded and another person was appointed as a magistrate.

Initially Mr Kons denied the existence of an appointment document, but when the shredded document was produced in Parliament by Kim Booth MP, who had reassembled it, Mr Kons suggested the change was entirely his choice:

"On examining the relevant qualifications, I concluded that Mr Hay’s experience of serving as a temporary magistrate, along with his significant experience as a legal practitioner, made him the best person to become the next magistrate. Having made this decision, I communicated it to the Secretary of the Department of Justice."  

There is not sufficient space in this paper to cover all the events that followed the disclosure that there had been political interference in the judicial appointment, so only the most relevant events are included.

The political imperatives driving the change have never been completely teased out, however Mr Kons gave the following commentary in his evidence to a Parliamentary Committee:

"Although I cannot confirm the reason why he [Mr Cooper] was preferred as the nominee, I can only speculate on the matter. My belief is that Mr Cooper made some comments in his capacity as Acting Executive Commissioner of the RPDC that placed the government in a potentially difficult position. For example, I was aware that he sent a letter to the Premier over concerns about the deficiencies in the Gunns Pulp Mill application."  

Mr Kons then shredded the original document appointing
Mr Cooper as described in his evidence:

“After the phone conversation was terminated, I took the Cabinet Minute relating to Mr Cooper to the office shredder and shredded it. The reason I did this was because I was told to and I knew a new one would be prepared.” p. 47, (Kons, Statutory Declaration 2008, 5)

The events above so shocked the Tasmanian community that trust in the government evaporated. When Paul Lennon resigned as Premier, his replacement, David Bartlett, felt compelled to act in an attempt to re-earn the trust of the Tasmanian people. He quickly released his ‘Ten Point Plan to Strengthen Trust’ which laid out a series of reforms designed to strengthen democratic institutions and trust in our democracy. The third point in the plan was a promise to develop an independent and effective protocol for judicial appointments.

3. Approved Protocols and Rules for Judicial Appointments to be released soon by the Attorney-General. The new protocols have been subject to scrutiny by the profession and other stakeholders, including the opposition parties. The outcome of this process was the ‘Protocol for Judicial Appointments’ released in 2009.

• Supreme Court Vacancy
• A representative of a professional legal body chosen by the Attorney General.
• Secretary of the Department of Justice or their nominee.
• Attorney-General’s nominee.

Chief Magistrate or their nominee.

Secretary of the Department of Justice or their nominee.

Attorney-General’s nominee

In addition, expressions of interest are called for and the vacancy must be advertised.

In 2015, the protocol was reviewed and a few minor alterations made. The 2015 protocol are the current arrangements governing judicial appointments in Tasmania. There has not yet been any indication that the current protocols are not working or lack general support but a model more closely resembling that recommended in the Latimer House Principles is worth using as a benchmark for judicial appointments in Tasmania.

Independent Commissions are part of the UK and Canadian judicial appointment process. They are often proposed as a solution to political interference in the process. However, they are also viewed as providing potential different biases to the appointment process that can lead to other issues in relation to the objectives of providing a judiciary that reflects the diversity of the State or Country.”
been some opposition to this proposal on grounds, including: the costs involved; the argument that well-informed politicians are much more likely to make better decisions than a group of lawyers; and also on the basis of criticisms of the performance of UK Judicial Appointments Commission.”

Since 2009 and the political fall-out from ‘shredder gate’, there have been appointments to the Supreme Court and the Magistrates Courts without any controversy. Whether this is due to the presence of the protocol or fear of the political consequences of interfering with judicial appointment engendered by the fallout from ‘shredder gate’ is difficult to establish. However, the presence of a clear and open protocol does provide a degree of comfort in the process of judicial appointments.

Whether the current protocol would be enhanced or the establishment of an independent commission as envisaged in the Latimer House Principles would enhance the process of judicial appointment in Tasmania is unclear. These concerns are particularly relevant in a smaller jurisdiction such as Tasmania where resourcing of such a body may be problematic in the light of other demands on limited resources.

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2 Department of Justice and Industrial Relations, 1999, Discussion paper on judicial appointments in Tasmania
3 Patmore, Peter, 2002, House of Assembly Hansard, Thursday 18 April 2002 - Part 1 - Pages 1 - 40
5 The Examiner, 22 August 2007, p. 16
6 Legislative Council Select Committee Public Sector Executive Appointments, Interim Report 14 of 2009
7 House of Assembly Hansard, Tuesday 8 April 2008 – Part 2 Pages 26-96
8 Legislative Council Select Committee Public Sector Executive Appointments, Interim Report 14 of 2009
9 Legislative Council Select Committee Public Sector Executive Appointments, Interim Report 14 of 2009
10 Legislative Council Select Committee Public Sector Executive Appointments, Interim Report 14 of 2009
12 Protocol for Judicial Appointments, April 2009

The Commonwealth Parliamentary Association (CPA) produces a number of toolkits and booklets for Parliamentarians and Parliamentary staff including the Recommended Benchmarks for Codes of Conduct for Members of Parliament and the Handbook on Constituency Development Funds (CDFs): Principles and Tools for Parliamentarians.

Please contact hq.sec@cpahq.org to request a copy or visit www.cpahq.org/cpahq/resources to download an e-version.
The impeachment of a judge of a High Court of India is in the news. According to a Bulletin issued by the Rajya Sabha Secretariat on 17 March 2015, the Chairman of Rajya Sabha admitted the following motion received from Ms. Wansuk Syiem and 57 other MPs of the Rajya Sabha relating to a judge of the High Court of the State of Madhya Pradesh State, India: “This House resolves that an address be presented to the President for removal from office of Justice S.K. Gangele of the High Court of Madhya Pradesh on the following three grounds of misconduct:

(i). Sexual harassment of a woman Additional District and Sessions Judge of Gwalior while being a sitting judge of the Gwalior bench of the High Court of Madhya Pradesh;

(ii). Victimisation of the said Additional District and Sessions Judge for not submitting to his illegal and immoral demands, including, but not limited to, transferring her from Gwalior to Sidhi; and

(iii). Misusing his position as the Administrative Judge of the High Court of Madhya Pradesh to use the subordinate judiciary to victimize the said Additional District and Sessions Judge.”

Thereafter, on 15 April 2015, another Bulletin was put out informing that a notification had been issued regarding the constitution of a Committee by the Chairman, Rajya Sabha for the purpose of making an investigation into the grounds on which the removal of Shri Justice S.K. Gangele had been sought. The Committee consists of three Members – all of them senior judges in India. The Report of the Inquiry Committee is awaited.

Impeachment of a judge is not a singularity, but is still a rarity in India. However, in recent times, it has happened three times in fairly quick succession (2009, 2010 and 2015). Justice V. Ramaswami, Justice of the Supreme Court of India was the first judge, since coming into force of the Constitution of independent India, against whom impeachment proceedings were initiated in 1991. In the case of Justice V. Ramaswami, the motion moved in the Lok Sabha (Lower House of Indian Parliament) failed in 1993, since it did not get the requisite majority of two-thirds of a majority of members of that House present and voting. In the case of Justice Soumitra Sen, the judge submitted his resignation to the President on 1 September 2011, after the motion for his removal had been adopted by the Rajya Sabha but before it could be taken up for consideration in the Lok Sabha. As far as Justice P. D. Dinakaran is concerned, he resigned in July 2011, before the Inquiry Committee constituted to look into the allegations levelled against him could complete its work.

What then is the procedure for the removal of a judge of the Supreme Court or a High Court in India?

Article 124 of the Constitution of India inter alia provides as follows:

Clause (4): “A Judge of the..."
Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."

Clause (5): "Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4)."

As regards the Judges of the High Courts, Article 217 (1) (b) provides:

"A Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court."

Further, in pursuance of clause (5) of article 124, the Parliament passed the Judges (Inquiry) Act, 1968, which was followed up with the Judges (Inquiry) Rules, 1969 by the Government.

In consonance with the statutory provisions mentioned above, in simple terms, the procedure for removal of a judge, either of the Supreme Court or the High Court, normally comprises the following steps:

(1) A notice of motion for removal the judge is given by Members of Parliament (at least 50 in case of the Rajya Sabha and 100 in case of the Lok Sabha).

(2) If the Motion is admitted by the Presiding Officer (Chairman / Speaker) of the concerned House, a three member Inquiry Committee is constituted in consultation with the Chief Justice of India (in respect of the serving members of the Higher Judiciary), comprising a judge of the Supreme Court and a Chief Justice of High Court and an eminent jurist nominated by the Presiding Officer (the Chairman of Rajya Sabha or the Speaker of the Lok Sabha, as the case may be).

(3) The Committee prepares the draft charges, a draft statement of grounds (imputations) and communicates them to the impugned judge.

(4) The Committee issues a statutory notice to the impugned judge to appear before it either in person or through an advocate.

(5) After giving the impugned judge an opportunity to present his / her case, the Committee prepares and presents its Inquiry Report, along with copies of the evidence tendered before it, to the concerned Presiding Officer.

(6) Copy of the Report is laid on the table of the two Houses, simultaneously.

(7) A copy of the Report, along with all other documents, is forwarded to the impugned judge seeking his reply thereon.

(8) A reply is received from the impugned judge.

(9) The impugned judge is invited to appear first before the House, the Members of which had given the motion for his removal.

(10) With the approval of the concerned Presiding Officer, a Bulletin is issued by the secretariat regarding admittance of motion for consideration of the Report of the Enquiry Committee.

(11) The motion is included in the List of Business of the House.

(12) The House considers the motion and the Address to the President prepared in pursuance of Clause (4) of Article 124 of the Constitution of India.

(13) The motion and the Address is either adopted or rejected by the House.

(14) If the motion and the Address are carried in the first House, they are mutatis mutandis considered for adoption by the other House.

(15) The removal of the judge, in the form of the Address, is recommended to the President of India, if it is adopted by both the Houses with the requisite majority of the total membership of the House and by a majority of not less than two thirds of the members of the House.
that House present and voting. The procedure is similar to the adoption of an amendment to the Constitution of India.

At present, there is no specific law to govern investigation of complaints of misconduct and incapacity against the judges of the Supreme Court and the High Courts, except for the Constitutional provisions aforementioned as well as the Act and the Rules framed thereunder. Complaints received by the government against the higher judiciary are simply forwarded to the Chief Justice of the Supreme Court for appropriate action. In 2010, however, the previous government had proposed a Judicial Standards and Accountability Bill, which was passed by the Lok Sabha in 2012. In the Rajya Sabha some amendments to it were proposed; but the Bill lapsed on dissolution of the Lok Sabha on completion of its term in 2014. The salient features of the Bill were:

- It required the judges to declare their assets, prescribed judicial standards, and attempted to establish processes for removal of judges of the Supreme Court and High Courts.
- Judges were required to declare their assets and liabilities, and also that of their spouse and children.
- The Bill sought to establish the National Judicial Oversight Committee, the Complaints Scrutiny Panel and an Investigation Committee. Any person could make a complaint against a judge to the Oversight Committee on grounds of ‘misbehaviour’.
- A motion for removal of a judge on grounds of misbehaviour could also be moved in Parliament. Such a motion would have been referred for further inquiry to the Oversight Committee.

- Complaints and inquiries against judges would have been confidential and frivolous complaints were to be penalised.
- The Oversight Committee could issue advisories or warnings to the impugned judges, and also recommend their removal to the President.

The new government that has assumed office in 2014 proposes to revive the Bill, but is treading cautiously in view of the controversy created in respect of the National Judicial Appointments Commission (NJAC for short) Act, 2014.

A spate of cases of so-called impeachment of judges in recent times has led to doubts being raised against the robustness of the existing system of selection and appointment of justices of the High Court and the Supreme Court, popularly known as the ‘Collegium System’, which appoints judges to the nation’s constitutional courts, under which the Chief Justice of India and a forum of four senior-most judges of the Supreme Court recommend appointments and transfers of judges.

This System had its genesis in three judgments of the Supreme Court which are collectively known as the ‘Three Judges Cases’, viz. (1) S. P. Gupta versus Union of India – 1981 (also known as the Judges’ Transfer case); (2) Supreme Court Advocates-on Record Association versus Union of India, 1993; and (3) In re Special Reference 1 of 1998. The Third Judges Case of 1998 was not actually a case but an opinion rendered by the Supreme Court of India responding to a question of law regarding the Collegium System, raised by the then President of India K. R. Narayanan, in July 1998 under his constitutional power to consult the Supreme Court (Article 143). The Collegium System has been in use since the judgment in the Second Judges Case was delivered in 1993. Over the course of the three cases, the court evolved and further refined the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges. Further, in January 2013, the court dismissed as without locus standi, public interest litigation filed by an NGO (Suraz India Trust) that sought to challenge the Collegium System of appointment of superior judiciary. In July 2013, the then Chief Justice of India spoke against any attempts to change the Collegium System.

However, it must be noted that there is no mention of the Collegium either in the original Constitution of India or in its subsequent amendments. Although the creation of the Collegium System was viewed as controversial by legal scholars and jurists outside India, her citizens, the Parliament and the Executive did little to replace it. The Union Government has since criticised it saying that it has created an imperium in imperio (empire within an empire) within the Supreme Court.

Several considerations, buttressed no doubt by a succession of cases of misdemeanor on the part of certain judges perhaps, led to amendment of the Constitution of India through the ninety-ninth constitutional amendment, namely the Constitution (Ninety-Ninth Amendment) Act, 2014 and passage of the National Judicial Appointments Commission (NJAC) Act, 2014 to regulate the functions of the National Judicial Appointments Commission, and on their ratification by 16 of the state legislatures in India, and subsequent assent by the President of India on 31 December 2014. The NJAC
Act and the Constitutional Amendment Act came into force with effect from 13 April 2015. The NJAC consists of six members — the Chief Justice of India, the two senior most judges of the Supreme Court, the Law Minister, and two ‘eminence personae’. These eminent persons are to be nominated for a three-year term by a committee consisting of the Chief Justice, the Prime Minister, and the Leader of the Opposition in the Lok Sabha, and are not eligible for re-nomination. The judiciary representatives in the NJAC - the Chief Justice and two senior-most judges – can veto any name proposed for appointment to a judicial post if they do not approve of it. Once a proposal is vetoed, it cannot be revived. At the same time, the judges require the support of other members of the Commission to get a name through. The NJAC would have replaced the Collegium System for the appointment of judges. However, on 16 October 2015 the Supreme Court upheld the Collegium System and struck down the NJAC as unconstitutional after hearing the petitions filed by several persons and bodies, with Supreme Court Advocates on Record Association being the first and lead petitioner. By a majority opinion of 4:1, the Supreme Court of India struck down the constitutional amendment and the NJAC Act, thereby restoring the two-decade old Collegium System of ‘judges appointing judges’ to higher judiciary. The Supreme Court declared that NJAC is tantamount to encroachment on the autonomy of the judiciary by the executive, which amounts to tampering with the Constitution of India under which the Parliament of India is not empowered to change its Basic Structure. However, the Supreme Court acknowledged that the Collegium System of judges appointing judges is lacking in transparency and credibility, which requires rectification / improvement by the Judiciary.

On 3 November, 2015 the Supreme Court pronounced that it is open to bringing greater transparency in the Collegium System within the following existing four parameters:

- How the Collegium can be made more transparent?
- The fixing of the eligibility criteria for a person to be considered suitable for appointment as a judge.
- A process to receive and deal with complaints against judges without compromising on judicial independence.
- Debate on whether a separate secretariat is required, and if so, it’s functioning, composition and powers.

Following an invitation from the Supreme Court of India to the general public to send proposals to improve the ‘opaque’ Collegium System, a large number of suggestions were received for reforming the system. Taking note of the suggestions received from various quarters, a five Judge Bench of the Supreme Court directed the Government of India, through the Attorney General, to prepare the draft of a revised Memorandum of Procedure (MoP), which would prescribe the guidelines for the Supreme Court Collegium in appointment of judges to the High Courts and the Supreme Court. The Government has prepared the draft MoP which under consideration of the judiciary.

The Constitution of India upholds the independence of the judiciary by ensuring a security of tenure. That is why, as mentioned above, a judge of the Supreme Court or the High Court cannot be removed from office except through an elaborate procedures prescribed by the Constitution, the Judges (Inquiry) Act, 1968 and the Rules framed thereunder. Moreover, the Parliament is not empowered to discuss the conduct of any judge of the Supreme Court or the High Court in the discharge of his duties except in terms of the procedure prescribed for his removal. The higher judiciary has adequately protected not only against the vagaries of Parliament but also of the executive through a system of appointment of the judges by a committee of their own brethren. But it does not provide for their accountability as is the case in several Western democracies. There is no mechanism at present to make judges accountable or to evaluate their performance. While judicial independence is indeed a part of the basic structure of the Constitution, it cannot be the ultimate goal of the judicial system per se.

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Articles

THE SEPARATION OF POWERS AND THE RELATIONSHIP BETWEEN PARLIAMENT AND THE JUDICIARY: AN EXPERT’S VIEW

Introduction

Commonwealth Heads of Government have committed their countries to the protection and promotion of democracy, democratic processes and institutions which reflect national circumstances, the rule of law, judicial independence and just and honest government.1 These commitments refined in the Commonwealth (Latimer House) Principles (“CLHP”)2 were re-iterated in the Commonwealth Charter of 2013 which recognises the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary as the guarantors in their respective spheres of the rule of law. This is a pre-requisite for the effective separation of powers. Thus Parliament is expected to make laws, the Executive to enforce the laws and the Judiciary to adjudicate on conflicts that might arise when the laws are deemed to have been transgressed.

The shared legacy of the common law emphasises the rule of law and procedural safeguards secured through an independent judiciary3 and an Executive accountable to Parliament.

The CLHP provide that:

- when the Judiciary seems to engage in areas which are seen to come under parliamentary sovereignty or privilege,
- when Parliamentarians try to impose authority over the Judiciary and compromise judicial independence.

Parliamentary Sovereignty and Parliamentary Privilege

The Legislature is the democratically elected forum for political debate and formulation of political policies which are then converted into legislation. The judiciary is responsible for impartial reasoned findings in relation to specific facts and taking into account constitutional provisions and the common law. However, both parliament and the judiciary share a common responsibility to ensure the accountability of the executive.

Parliamentary sovereignty means that “Parliament has, under the English constitution, the right to make any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside legislation of Parliament.”4

This principle, put forward in the 18th century, was exported across the Commonwealth. However, the principle has come under some scrutiny when it is powerless to protect the people if Parliaments are used to rubber stamp unjust laws put forward by an oppressive Executive. Parliaments have also come under criticism recently for passing legislation in reaction to popular or social pressure.

Written constitutions in the Commonwealth generally confer on judges the power to strike down legislation which is deemed incompatible with the constitution as the supreme law and to ensure that Parliaments do not abuse their rights. This has led to criticism of judges becoming law-makers and the rise of judicial activism has been blamed for impacting too much on the delicate balance of powers. Critics say that courts do not have the right to alter public policy as judges are not representatives of the will of the people but parliamentary sovereignty is not an absolute, especially with written constitutions setting out the
duties and limits on the role of parliament.

Some Parliamentarians have called for judges to appear before them to be held in contempt of parliament. The Speaker of the Bahamas recently reminded the House of Assembly that judges of the Supreme Court enjoyed immunity in the execution of their duties as well: “I believe this would be a gross violation of the doctrine of separation of powers for a judge to be called before Parliament to explain their actions in the execution of their duties.”

The CLHP states that “Criminal and Defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.”

The concept of parliamentary privilege grants Parliamentarians certain immunities so that they can exercise their duties and responsibilities without interference from outside the Legislature. It includes the right to freedom of speech and the right of Parliament to regulate its own affairs and that of its Members without interference, especially from the Courts. It was enshrined in England in the Bill of Rights of 1689 and the right has been exported to other Commonwealth jurisdictions. It does not however include the right to unduly criticize a judge in the exercise of his/her judicial functions. The judiciary has however, been called on increasingly to deal with issues which relate to procedures in Parliament. Commonwealth politicians often seize the courts through election petitions when they are unhappy with election results or when they have been excluded from Parliament for floor-crossing and the judiciary have had to deal with such issues. Some Parliamentarians have also been arrested for corruption, bribery or abuse of expenses, criminal charges which do not fall under parliamentary privilege and the judiciary has had to deal with such cases.

The CPA’s Benchmarks for Democratic Legislatures state in Article 10 that:

“10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.
10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.
10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.”

The implementation of such principles in the Commonwealth is paramount to ensuring that the rule of law prevails.

Maintaining Judicial Independence and Integrity

“The rule of law is the bedrock of a democratic society….. And if the rule of law is to be upheld it is essential that there should be an independent judiciary.”

The rule of law requires judicial officers to decide matters before them in accordance with their assessment of the facts and their understanding of the law, free from any improper influences, inducements or pressures, direct or indirect, from any quarter or for whatever reason.

Lord Phillips deplored the increasing tendency to challenge the mandate of the judge. “Some say that our decisions are not legitimate, because we have not been elected. It is claimed that judges are not accountable for their decisions. Such comments are not helpful and stem from a misunderstanding of the role of judges.”

As Sir Jack Beatson QC, FBA pointed out: “The judges are not free to do what they wish. They are subject to the laws as enacted by Parliament.….. The independence of the judiciary is thus… not a privilege of the judges themselves….It is necessary for the public in a democratic state. It is necessary to ensure that people are able to live securely, and that their liberty is safeguarded and only interfered with when the law permits it. It is necessary for all of us, but perhaps particularly so for those who espouse unpopular causes or upset the powerful.”

Accountability

In her report to the UN Human Rights Council of April 2014, the former Special Rapporteur on the Independence of Judges and Lawyers, Mrs Gabriella Knaul, states that “Judges must… be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.”

Judges are, in fact, accountable in a number of
Above: The Royal Courts of Justice, London, United Kingdom.

ways. Parties or litigants have a right of appeal of decisions made by judicial officers if they are unhappy with a judgement. They can even appeal now, in some instances to regional courts or, for some still, to the Judicial Committee of the Privy Council. In addition, judges in most Commonwealth countries which follow the common law have to produce reasoned arguments for any decisions. Sir John Beaton argues that “the duty to give reasons for decisions is a clear example of “explanatory” accountability which assists transparency and scrutiny by the other branches of the state and the public.”

Judicial officers have to comply with ethical guidelines/codes for their conduct within and outside of court. Since 1998, the CMJA has been the repository of these guidelines/codes which are refined and amended on a regular basis. Judicial officers are also are guided by the principles of independence and impartiality of their Oaths of Office they swear to on appointment. Finally, if Parliaments are really unhappy with decisions in court, they are free to legislate and reverse the effect of decisions. However, this has led to calls in some countries for parliaments to be more involved in the appointment and removal of judges.

Appointments and Removals
The CLHP calls for an independent and transparent appointments process. The Commonwealth has seen an increase in the establishment of independence judicial appointments mechanisms in the last 16 years. Many Commonwealth constitutions contain clauses relating to the establishment of such commissions, however, constitutional provisions are not always sufficiently detailed to ensure the independence of such commissions. In 2013, the CLA, CLEA and CMJA published a report entitled ‘Judicial Appointments Commissions: A Clause for Constitutions’. This report put forward suggestions as to good practice in the establishment, composition and running of a Judicial Appointments Commission. The report provides a guide as to the composition of such a body which would ensure that there was no judicial or political majority to avoid the politicization of judicial officers or criticism of nepotism. If the rule of law is really to prevail, the individual citizen must be confident that the judge will apply the law to them without fear or favour, affection or ill-will.

Parliament does however have a role in ensuring that any legislation that implements the constitutional provisions relating to the judiciary is clear and concise and does not lead to confusion as to who has the authority to appoint or remove judicial officers and to ensure that the security of tenure of judicial officers is guaranteed so that they can fulfil their functions with integrity and independence.

Whilst constitutional provisions provide that the Legislature in many Commonwealth countries has the right to remove judicial officers, especially those at the higher level, judicial officers should only be removed from office for gross misconduct or incapacity to fulfil their functions, and this only against a set of detailed criteria. The historic role of parliament in this process has been a source of tension between the two branches of government. It is unfortunate that there are increasingly too many examples in the Commonwealth where a compliant Legislature, or a ruling-party majority in Parliament, has led to undue pressure being exerted on the judiciary and to the removal of judicial officers without due process being followed. Legislatures have amended constitutional or legislative instruments which remove the right of the Head of the Judiciary to investigate (or appoint a tribunal to investigate) cases of misconduct or incapacity, though such provisions are still subject to judicial scrutiny. There have been examples too of impeachment processes against judicial officers which were deemed to be in the interest of the ruling party and in which the judge being impeached has been deprived of his/her right to a fair trial through the denial of legal representation, the introduction of trumped up charges or the denial of a right of appeal against the findings of the investigative tribunal. Judicial officers are human beings and have the same rights as every citizen to a fair hearing.

Resources
Like any other institution, the judiciary must be accountable for its spending. The allocation of resources however, has traditionally been undertaken through ministerial departments (Ministries of Justice or Finance). Thus the judiciary has not had control of its own budgets and in many instances this has led to a power play between the three organs of state and the misconception that the judiciary is just a ministerial department subject to the government’s direction or the will of parliament.
rather than the equal third pillar of democracy.

The CLHP - as well as the subsequent Plans of Action [12] - call on Commonwealth governments and parliaments to ensure that the judiciary has adequate resources and set out a number of practical steps to be taken by government. “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” [13]

Suitable and sustainable funding has to be provided to enable the judiciary to perform it functions to the highest of standards. Chronic underfunding can lead to delays and inefficiencies and in some cases strikes. Access to justice has suffered in a number of countries as a direct result. In 2000, the Chief Justices of the Commonwealth meeting at the CMJA’s Triennial Conference in Edinburgh called for the Judiciaries to be given control of their own budgets. 16 years on, only a few Commonwealth jurisdictions have allowed the judiciary to take responsibility for their own budget and even then, access to justice can still be compromised if the other organs of power limit the allocation of structural (use of court houses), operational (use of IT or even basic provision of materials) or human resources (for example in not providing a living wage for the lower judiciary and judicial administrative staff).

However, in most, control over finances remains in the hands of the Executive and this can severely impact on the good administration of justice. In addition, unless there is an independent mechanism for the establishment of public sector salaries and benefits (including those of judges and magistrates), there is a continued risk that the control of the judiciary over its budget may be curtailed and open it up to corruption from outside influences.

At its Triennial Conference in Wellington, the CMJA General Assembly noted with concern, the continued lack of sufficient resources provided to the courts in many Commonwealth countries and recorded its disappointment pointing out that the provision of sufficient resources to the courts is a fundamental constitutional obligation of the Executive branch of government.

Conclusion

The Commonwealth (Latimer House) Principles called for judiciaries and parliaments to “fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.” [14]

The Edinburgh Plan of Action noted that “each new generation of government officers, parliamentarians, lawyers, judicial officers and members of civil society has to be alert to the imperatives of, and balance between, the independence and accountability of the judiciary, parliament and the executive…” [15]

Most problems which arise in the Commonwealth derive from a continued lack of understanding of each institution’s role in the governance process. The Edinburgh Plan of Action called for more regular awareness training, on appointment or election, of Parliamentarians, judicial officers and public servants on basic constitutional principles and the primary roles of each pillar of democracy in the constitutional process.

In 2013, the Commonwealth Secretariat commissioned the CLA, CLEA, CMJA and CPA to develop a Latimer House Toolkit to enhance the dialogue between the three pillars of democracy whilst not compromising their independence. Published in 2015, the four associations hope to assist the Commonwealth Secretariat to roll out this toolkit in order to promote better respect between the three organs of the state in order to ensure that “Each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.”

References

1 Harare Declaration of 1991
2 Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the three Branches of Government - 2003
3 Judiciary means any judicial officer at any level (including judicial officers with limited jurisdiction).
4 “Introduction to the Study of Law and the Constitution”, Prof A. V Dicey
6 Chapter III (b) – Independence of Parliamentarians.
8 i.e.: judges and magistrates
9 Speech given to Nottingham Trent University in September 2008 on “Judicial Independence and Accountability, Pressures and Opportunities”
10 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. A/HRC/26/32.
13 Article 7 UN Basic Principles on the Independence of Judges, 1985
14 Principle II (b)

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THE RELATIONSHIP BETWEEN PARLIAMENT AND THE JUDICIARY: VIEW FROM UTTAR PRADESH

Pradeep Kumar Dubey is Principal Secretary at the Uttar Pradesh Legislative Assembly in India. Mr Dubey was educated at Allahabad and Delhi Universities before joining the Judicial Service and working as a Judicial Magistrate and Munsi Magistrate/Civil Judge at Lucknow, Civil Courts. He was Legal Advisor to the Governor of Uttar Pradesh and Principal Secretary, Parliamentary Affairs before taking up his current position. Mr Dubey has organised many CPA and Presiding Officers and Secretaries Conferences in India.

The Parliament, the Executive and the Judiciary are the three main pillars of our democratic edifice. The Constitution of India defines powers, delimits jurisdictions and demarcates responsibilities of each organ. As regards the relationship between the Parliament and the Judiciary, both are under constitutional obligation not to encroach upon each other’s jurisdiction.

Under the scheme of our Constitution, Parliament being the Supreme legislative body has been accorded the pre-eminent position in our polity. Several constitutional provisions amply demonstrate this. Reflecting the hopes and aspirations of the people, the Parliament, over the years, has truly become a people’s institution par excellence. Being the supreme law-making body in the country, Parliament discusses, scrutinizes and amends the drafts of various legislations if necessary, and thereafter it puts the seal of approval, thereby legitimizing the legislative proposals formulated by the Executive.

The Constitution also accords an important place to the Judiciary, with the Supreme Court at the apex of the judicial system. The Supreme Court, in addition to being the final court of appeals - civil and criminal - has exclusive original jurisdiction in disputes between the Union and the States and between two or more States and is the ultimate arbiter in all matters involving the interpretation of the Constitution.

Thus, as per the Constitutional scheme, both Parliament and Judiciary are supreme in their respective spheres. Various constitutional provisions do not leave any scope for confrontation between the two organs of State. Indeed, the harmonization of the principles of Parliamentary Sovereignty and Judicial Review is a unique feature of India’s Constitution.

While the Constitution has not recognised the doctrine of separation of powers in its absolute rigidity, the functions of the three organs of State - viz a viz the Legislature, the Judiciary and the Executive - have been sufficiently demarcated.

As observed by Raghava Rao J.: "The powers of each one of the three organs have to be exercised as fundamentally subject to the provisions of the Constitution relating to that organ individually as well as to the provisions relating to other organs. It is the respect that is accorded by one organ of the State to the others that ensures that healthy working of the Constitution which is the acid test of its merits whatever the paper value of its provisions."

Both Parliament and State Legislatures are sovereign within the limits assigned to them by the Constitution. The supremacy of the Legislature under a written Constitution, as observed by the Supreme Court, is only within what is in its power but what is within its power and what is not, when any specific Act is challenged, it is for the Courts to say.

All legislations, whether Union, State or delegated, are subject to the doctrine of ultra vires and liable to judicial review. The scope of review is limited to see whether the legislation impugned falls within the periphery of the power conferred and whether it is in contravention of the Fundamental Rights guaranteed by the Constitution or of any other mandatory provision of the Constitution. The Courts are concerned only with interpreting the law and are not to enter upon a discussion as to what the law should be. The Legislature can amend laws to meet the lacunae or defects pointed out therein by the Courts, or legislate afresh to give effect to their original intentions and such amendments are accepted by the Court as valid law.

Some of the related articles in the Constitution of India are as follows:-

**Article 121 - Restriction on discussion in Parliament:**
No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.
Article 122 - Courts not to inquire into proceedings of Parliament:
(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
(2) No officer or Member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

Article 211 - Restriction on discussion in the Legislature:
No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

Article 212 - Court not to inquire into proceedings of the Legislature:
(1) The validity of any proceedings in the Legislature of a State shall not be called into question on the grounds of any alleged irregularity of procedure.
(2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

Pt. Nehru, the first Prime Minister of India, intended that the Parliament of India should serve as a vehicle of social change and expected that the Judiciary would not create obstacles in this task. During the course of his speech in the Constituent Assembly on 10 September 1949, he said: "We will honour our pledge within limits. No Judge, no Supreme Court can make itself a third chamber. No Supreme Court and no Judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point out."

However, it goes to the credit of Pt. Nehru that he firmly believed in the independence of the Judiciary. Intervening in the debates of the Constituent Assembly on the appointment of Judges, he said: "It is important that these judges should not only be first rate, but should be acknowledged to be first in the country and of the highest integrity, if necessary, people who can stand up against the Executive and whoever may come in their way."

It is vitally important in a democracy that individual judges and the Judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the Executive or the Legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

It is vital that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law. Only relevant facts and law should from the basis of a judge’s decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice. Judicial independence does,
however, mean that judges must be free to exercise their judicial powers without interference from litigants, the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. For example, it is clearly inappropriate for the judge in charge of a criminal trial against an individual citizen to be influenced by the state. It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, how to direct the jury or to pass a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone.

Judicial independence is important whether the judge is dealing with a civil or a criminal case. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge’s own personal interests, such as a fear of being sued for defamation by litigants about whom the judge is required in the course of proceedings or judgment to make adverse comment. This requirement that judges be free from any improper influence also underpins the duty placed on them to declare personal interests in any case before it starts, to ensure that there is neither any bias or partiality, or any appearance of such.

In conclusion, it may be stated that in a democratic society, the Parliament is the supreme law making body of the country. The Parliament of India is the nerve centre of our polity. During the last sixty years, it has been witness to many ups and downs in the nation’s life, but as an institution, it has sustained democracy in its purest form. Parliament is the master of its own functions and enjoys certain privileges so that it can discharge its parliamentary functions independently and without fear. It has powers to punish for its own contempt. No judicial proceedings exist for any speech made or vote given in the Parliament or any of its Committees.”

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Committees, Justices of the Court are not the architects of policy. They can nullify policies of the Executive if they are arbitrary and contrary to public interest. In a nation’s life, vital domestic issues arise which need adjudication, which is the exclusive domain of the courts. No other limb of the State can surpass or usurp this power of the Judiciary. In order to maintain the independence of the Judiciary, the Parliament does not discuss the conduct of judges during its proceedings. In the final analysis, it may be said that the Parliament and the Judiciary both have followed the principle that neither of the three constitutionally separate organs of State can, according to the basic scheme of our Constitution today, leap outside the boundaries assigned, sphere or orbit of authority into that of others. This is the logical and natural meaning of the principle of supremacy of the Constitution.
PARLIAMENT AND THE EXECUTIVE

Challenges in the India Parliament: Rajya Sabha takes historical decision to amend the Motion of Thanks on President’s Address for the fifth time

Yet again history was created in the Rajya Sabha (Council of States), the Upper House of Indian Parliament, on 9 March 2016 when an amendment of the Leader of Opposition, Mr. Ghulam Nabi Azad to the Motion of Thanks on President’s Address was adopted by the House. It is unusual in that for two consecutive years the Motion of Thanks for President’s Address has been amended. In 2015, the Motion of Thanks was amended on the issue of ‘black money’. It is not a usual happening in the annals of parliamentary democracy of our country. If the Motion of Thanks on President’s Address is amended in the Lok Sabha (House of the People), the Lower House of the Indian Parliament, the Government would fall.

One may recall that the Prime Minister, Mr. Chandrashekar resigned from office in March 1991 when he apprehended that the Motion of Thanks on President’s Address would be amended in the Lok Sabha. The late Mr. R. Venkataraman, former President of India, in his memoirs “My Presidential Years” wrote that Prime Minister Chandrasekhar met him on 6 March 1991 when the Motion of Thanks on the President’s address was being discussed in the Lok Sabha (House of the People) and was told that he did not want his Government to be defeated in the House following the failure of the adoption of the said motion. Therefore, the adoption of the amendment to the Motion of Thanks on President’s Address is of vital importance for the credibility of the Government.

Constitutional Provisions on the President’s Address

It is well known that Article 87 of the Constitution of India deals with the Special Address by the President to both the Houses of Parliament assembled together for the purpose of informing Parliament of the causes of its summons at the commencement of the first session after each General Election to the Lok Sabha (House of the People) and at the commencement of the first session of each year. Such an Address of the President constitutes the policies and programmes of the Government and, therefore, it can be described as the manifesto of the Government.

This provision concerning the Address by the President to Parliament, as per Article 87 and informing Parliament of the causes of its summons, was incorporated into the Constitution of India following the Campion’s book on the rules of the House of Commons. A peep into the debates of the Constituent Assembly reveals that Dr B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly of India, while replying to the debate concerning the President’s Address to Parliament on 18 May 1949, stated that the adequate research on it led him to Campion’s book which provided the vital information and procedure for the President’s Address to Parliament.

While clause (1) of article 87 deals with the Special Address by the President, clause (2) prescribes that “Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address.” Article 71 of the draft Constitution, corresponds to article 87 of the original Constitution. While Article 71 was being debated in the Constituent Assembly on 18 May 1949, one distinguished member Dr. P.S. Deshmukh participated in the discussion and stated that “There is no necessity for a provision in the Constitution by which time for discussion of the matters referred to in such address must be allotted.”

The intent of the framers of the Constitution of India was that the matter concerning the span of time required to discuss the President’s Address in Parliament should not be explicitly mentioned in the Constitution itself. Therefore, the Constitution does not allot time for the discussion on President’s Address in both the Houses of Parliament and it allows both the Houses to make rules for this purpose.

The views expressed are personal views of author and are not of the Rajya Sabha Secretariat.
CHALLENGES IN THE INDIA PARLIAMENT

**Rules concerning Discussion on the Motion of Thanks on the President’s Address**
Accordingly, Rules 14 to 19 of the Rules of Procedure and Conduct of Business of Rajya Sabha deal with, among others, the President’s Address, the scope of discussion on the Motion of Thanks on the President’s Address and the amendments to be moved to such a motion. Once the President delivers such an Address, it is discussed in both Houses of Parliament and, as per Rule 18 of the Rules of Procedure and Conduct of Business in the Council of States, the Prime Minister or any other Minister of the Government replies to the discussion of the Motion of Thanks on the President’s Address in the Rajya Sabha.

**First Amendment to the Motion of Thanks on the President’s Address**
The Parliament of India started functioning on 13 May 1952. From that year till 1979, the Motion of Thanks on the President’s Address was never amended in the Council of States (Rajya Sabha). It happened for the first time in 1980 when Mr. Bhupesh Gupta’s amendment concerning attempts to engineer defections in some State Assemblies and the arbitrary dissolutions of such Assemblies was adopted on 30 January 1980.

**Other Amendments to the Motion of Thanks on the President’s Address**
In the history of parliamentary democracy, the Motion of Thanks on the President’s Address was amended for the second time in 1989 when six amendments were adopted by the House. The first amendment referred to the failure on the part of the Union Government to mention Ram Janam Bhumi-Babri Masjid dispute in the President’s Address and the measures proposed by the Government to resolve it. The second amendment was about the failure of the Union Government to avert destabilisation of State Governments. The third amendment was about the failure of the Union Government to amend the Constitution to ensure the right to work as a fundamental right. The fourth amendment was dealing with the failure of the Union Government not to mention Indo-Sri Lanka accord and take measures for the safety and securities of Tamils in Sri Lanka and the devolution of powers to the North-Eastern provinces. The fifth amendment was about the failure of the Union Government to outline its stand on the Anandpur Sahib Resolution which threatened the unity and integrity of the country. And the sixth amendment was about the abject surrender of the Union Government to the demands of the anti-national secessionist forces in Jammu and Kashmir by releasing some terrorists in December 1989.

The Motion of Thanks on the President’s Address was...
amended by Rajya Sabha for the third time on 12 March 2001 when the House adopted the amendment on the issue of the decision of the Government to sell a profit making public sector undertaking BALCO (Bharat Aluminum Company) to a private sector company whose track record of managing and running an aluminum manufacturing company was doubtful.

It is significant that almost 14 years later on 3 March 2015, the Motion of Thanks on the President’s Address was amended by the Rajya Sabha when it adopted two amendments concerning ‘black money’. It signified the importance and relevance of Rajya Sabha in our body polity and its meaningful role in holding the Government to account.

Amendment of the Motion of Thanks on the President’s Address in 2016

Exactly a year and six days later, on 9 March 2016, the Rajya Sabha amended the Motion of Thanks on the President’s Address by regretting that the address did not contain issues concerning the elections to the Panchayatraj (Grassroots representative institutions) bodies. It may be mentioned that the governments in the States of Haryana and Rajasthan of the Indian Union are run by the same party, Bharatiya Janata Party (BJP) which also runs the ruling party, Bharatiya Janata Party (BJP) in the States in the evolving democratic tradition of India. It also clearly brings out the dynamics of our parliamentary democracy which is dependent on the balance of strength of political parties and the composition of the House. It unambiguously testifies to the importance of the Rajya Sabha in our body polity and democracy. ‘The Hindu’ a leading English daily newspaper of India commented on the adoption of the amendment by the Rajya Sabha under the caption ‘Heeding the Spirit of the Amendment’ on 12 March 2016 and stated:

“The President’s Address sets out a government’s policies and programmes, and is first approved by the Union Cabinet. Should an amendment to the Address be carried through in the Lok Sabha, the government would have to resign. There is, of course, no such obligation in the Rajya Sabha, but it is still seen to undermine the government’s ability at consensus-building. For the members of the Rajya Sabha, it is a way to give notice that they cannot be taken for granted. It is therefore not just an embarrassment for the BJP-led National Democratic Alliance government to have faced this situation twice less than halfway through its five-year term. It also hints at the ruling party’s failure to reach out to the Opposition and forge a working consensus on the legislative agenda... The BJP could plead helplessness over its lack of numbers in the Rajya Sabha, and instead cite the passage in the House of the Real Estate Bill this week as proof that it is getting on with its legislative workload. Or it could heed the spirit of the institutional mechanism of the amendment to a Motion of Thanks, and take up the subject highlighted for a follow-up debate in Parliament.”

Conclusion

All such developments testify to the importance of the Council of States, the Upper House of Indian Parliament particularly in the context of multi-party democracy which often creates a situation wherein one or more groups of political parties obtain the majority in the Lower House (House of the People) and in the Upper House, the Opposition has a dominant position on account of its better numerical strength.

“It signified the importance and relevance of Rajya Sabha in our body polity and its meaningful role in holding the Government to account.”

Those two State Governments had passed legislation requiring that their citizens would be eligible to contest elections in Panchayat bodies who would fulfill prescribed educational qualifications and have toilet facilities in their homes. Such kind of legislations were considered by many as measures which effectively made the underprivileged sections of society ineligible to contest or stand for elections. Therefore, the Leader of the Opposition Mr. Ghulam Nabi Azad moved the following amendment to the President’s Address:

“That at the end of the motion, the following may be added: ‘But regret that the Address does not mention that the Government is committed to securing the fundamental right of all citizens to contest elections at all levels, including to Panchayats, to further strengthen the foundations of democracy which also forms part of the basic structure of the Constitution and is consistent with the spirit of the 73rd Amendment to the Constitution, intended to expand and encourage democratic participation of the poor and marginalized without imposing educational or any other limitation on the right to contest election.”

The Leader of the House Mr. Arun Jaitley, who is also Minister for Finance, raised a point of order saying that the amendment could not be taken up in the House as it referred to a matter concerning State Legislatures and as per the rules for such matters dealing with State Subjects cannot be discussed in Parliament. Therefore, he argued that the Council of States (Rajya Sabha) has no jurisdiction on the subject matter of the States which is covered under the scope of the said amendment. However, the Deputy Chairman disallowed the objections by giving the following ruling.

“Now, prima facie, there is no mention of any State or any State Legislature in the amendment. It is only the concern of the Member who has moved the Motion. If there was a direct mention of any Legislature in the amendment, then, we could have considered it in a different way. It is a concern of a Member that certain things are not there in the President’s Address. Of course, there is a valid explanation for why those things have not been included and why those things should not be there. There is a valid explanation. But that would be relevant when that issue is considered. It does not however prevent the Member, who moved the amendment, from expressing his views or putting it to vote. That is what my common sense tells me. Therefore, there is no harm in putting it to vote.”

Effectively the Deputy Chairman stated that in the amendment moved by the Leader of the Opposition there was no reference to a particular State and, therefore, no objections against it could be sustained. Eventually the motion of amendment was put to vote and it received 94 votes in its favour and 61 votes against. The adoption of the said amendment constituted a landmark event in the annals of India’s parliamentary democracy. It was undertaken in two successive years (2015 and 2016) and, therefore, underlined the significance of the Council of States in the evolving democratic tradition of India. It also means that no such obligation in the Rajya Sabha, but it is still seen to undermine the government’s ability at consensus-building. For the members of the Rajya Sabha, it is a way to give notice that they cannot be taken for granted. It is therefore not just an embarrassment for the BJP-led National Democratic Alliance government to have faced this situation twice less than halfway through its five-year term. It also hints at the ruling party’s failure to reach out to the Opposition and forge a working consensus on the legislative agenda... The BJP could plead helplessness over its lack of numbers in the Rajya Sabha, and instead cite the passage in the House of the Real Estate Bill this week as proof that it is getting on with its legislative workload. Or it could heed the spirit of the institutional mechanism of the amendment to a Motion of Thanks, and take up the subject highlighted for a follow-up debate in Parliament.”

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