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Supremacy of Organ in a Body: A Constitutional Myth in a Democratic Republic

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ABSTRACT

The concept of independence of the Judiciary has baffled many. The present research paper is a genuine effort to simplify the philosophy of organic independence in a meaningful manner. To make it more palpable, an analogous explanation has been resorted to. It travels through the analogy to enter into the complex analysis of the constitutional philosophy, so that the concepts are made more clear and vivid.

The instant research paper further explains in details, the difference between the conceptual understanding of the independence of organ and the separation of powers. In the backdrop of the sovereign functions and the delegated powers, the separation of powers is explained to meet the constitutional mandate. Many confusing questions which baffled the minds of the legal fraternity has been answered in the simplest manner through the above research paper. It is an established truth that, in a constitutional democracy, not only the Judiciary but every functionary is independent and autonomous in its own sphere of authority. But every such exercise of powers shall be accountable to the people through a proper constitutional mechanism. In case that accountability is lost and the organic independence becomes absolute, there is always a threat of tyranny, and that could jeopardise the rule of law in a constitutional democracy.

As the people of the nation is the sovereign, they have the absolute right to determine, what are the depth, extent and ambit of such powers and independence an organ of the nation shall exercise. Hence, though the functional independence is not watertight compartments, they are neither absolute nor unaccountable. Every organ is subject to democratic controls, and without which there is a strong possibility of injustice perpetuating.

Keywords: Judiciary, Supremacy, Independence, Constitution, Democracy.

Some writers and constitutional philosophers claim that the parliament is supreme in a democratic republic. The rationale behind such argument is augmented by the fact that the parliament is the collective body, elected directly by the people, who are the sovereign in a democratically governed nation. Hence, the elected representatives hold the right to represent 'we the people' and reflect their aspirations and hope. Further, the said parliament is answerable

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to the people through the ballot, periodically. There is an alternative general concept that the Judiciary is supreme, as the law is finally interpreted by the Judiciary. Even though the parliament is the law-making body, the said law is interpreted by the Judiciary, and the final world lies with the Judiciary. The power of judicial review makes the parliament and its Acts subject to judicial verdicts. Hence, the said school of thought claims that the Judiciary is supreme, not the parliament, even though the nation is a parliamentary democracy. The basic premise, as conceptualised by the Constitution, was the separation of power. It travelled to the concept of judicial independence and then even entered into judicial supremacy. We need to understand these concepts to the core, without which there is a possibility of entering into fallacies of legal propositions. An analogy will be easier, akin to the bodily sovereignty. Organic supremacy cannot be above bodily interest and existence. It needs to be subservient to the sovereign.

For example, our body is sovereign in its functions. It can grow on its own, repair itself and control itself without any external interference. So as a person, or living organism, our body is sovereign. But this body cannot exist, without the organs, of which it is made off. Now the question comes of organic functional independence. Are the organs capable of functional independence? In another way, will the organs be able to discharge its functions without organic independence?

The duty of the heart, being an organ is to pump blood to all the other organs, including itself. The function of the kidney is to separate urine and other predetermined impurities from the blood. The function of the Brain is to have supervisory and executive control over all the other organs and the entire body. So, the basic structure is the separation of functions. Functional independence is the core of organic function. Each organ has its own predetermined functions, which are separated so that no organ encroaches into the functions of other organs. When all these organs function within its predetermined roles, without encroaching into the functions of other organs, it is in the superior interest of the body in general, which is sovereign. In this context, there is no doubt in the fact that the body major is the sovereign, not its organs, though the organs can claim functional independence or domain independence.

Now let us look into the organic independence, which emerges out of the separation of functions. The kidney is independent in its functions. As the separation of functions do not allow any other organ to encroach upon its functions of filtering out urine from the blood. The heart is prevented from encroaching into the functions of the kidney. All are vital organs, without which the body cannot sustain. If the body doesn't sustain itself, none of its organs can sustain independently. Hence, the basic feature of the separation of functions results in the

independence of each organ. The kidney is independent of filtering urine out of the blood is true. Nobody has any doubt about it. No other organ shall ever encroach into its functional independence. No organ shall even think of doing so. Many years, when we repeatedly say and propagate this preposition, can lead us into another catchphrase that '*kidney is supreme*' in its functions. All these premises are absolutely true and form the basic feature of the body sovereign. Even when we express it in different languages, the foundation is upon the concept of separation of functions. Now, maybe for years together- maybe even hundreds of or even thousands of years, we can repeatedly say that '*kidney is supreme*', and organically it's true as well. Nothing wrong with it. '*kidney is supreme*' in filtering urine out of the blood. But, when all the people together hailing for many years that the '*kidney is supreme*', the kidney may enter into hallucination and activism, forgetting the entire basic premise, that the kidney is supreme over and above the other organs!

If under that misconceived notion, the kidney over a period of time starts pumping the blood or taking over the executive control of all other organs from the brain, then one can imagine the disaster awaited for the body and to the kidney itself!!!!

The independence and supremacy of the kidney are only to the extent of filtering urine out of blood, and nothing beyond it. If the kidney declares itself to be independent and supreme and refuses to be accountable to the brain, it can eventually destroy the kidney itself. It will certainly be suicidal, wittingly or unwittingly. The greater interest of the body is to keep the basic features of separation of functions intact. That is in the interest of each of the organs itself. The very existence of the organs depends upon the existence of the sovereign body and the functional independence of each of its organs. If that fine-tuned balance is jeopardised, the organs will find their way to their own destruction.

Hence, the organic independence cannot be above the interest of the body itself and cannot encroach into the functions of other organs. The organic independence of the Judiciary is to function within the framework of the Constitution, and not to function without a framework.

Who is the master and provider of judicial independence? Wherefrom judiciary derives its independence? It's not bestowed from divine gods like religious priesthood or gathered from wild, like that of the powers of farming. It's not a natural power inherent upon the institution, neither like the powers of a mammoth nor like the powers of a wild cat. It's the people who created this institution and provided independence to the Judiciary. It's the people of this nation, who are the provider of the powers to the Judiciary through the Constitution and it's the people who utilise the benefits of such independence. Rather the people of the nation are the creators,

guardians, providers and consumers of the powers bestowed upon the Judiciary². This truth to the core cannot be ignored at any cost. Hence the people have the very absolute right to determine, what are the depth, extent and ambit of such powers and independence also. Where those rights of people are limited, the existence of democracy is jeopardised.

The parliamentary form of democracy upon which our constitutional mechanism is built up is supported by four pillars, three being expressly construed by the Constitution itself and the fourth one, not being built up by it, but assured its existence through freedom of speech and expression³.

In a form of monarchy, all the powers are vested in the monarch, who is supreme in all aspects. In a monarchy, the Monarch is the sovereign. The concept of power is divided broadly into three parts, namely, law-making, law implementation and law interpreting. As the modern democracy developed, which is broadly based upon the famous definition of Abraham Lincoln, 'by the people, for the people, of the people'⁴, the said powers are considered to be distributed among the three organs, called parliament, executive and Judiciary, none encroaching or usurping to the authority of the other. This organic distribution of powers is known under constitutional philosophy in terms of '*separation of powers*'.

If in any case any of these powers happen to be concentrated in one organ, it amounts to tyranny, causing serious impairment to the concept of parliamentary democracy itself. Even though watertight compartments of the functions are not practical, the doctrine of restraint is the greatest virtue, by which each organ can protect its dignity by not encroaching into the other organ's realm and develop mutual respect in the greater interest of the nation.

Many people think that the independence of the Judiciary is a basic structure as it is. Whereas no organ can function independent of other organs. The concept of independence itself is a myth, not so provided by the constitutional philosophy or mechanism. The organic independence per-se is against the democratic principle itself. Our Constitution never envisages the independence of the Judiciary and the development of such a myth over a period of time, has only benefited some vested interests. The constitutional philosophy always propagates and perpetuates the philosophy of separation of powers. Directive Principles of State Policy reads as follows:

"50. Separation of Judiciary from the executive.-The State shall take steps to separate the

² INDIA CONST., Preamble

³ INDIA CONST., Art.19, cl.(1), sub cl.(a)

⁴ President Abraham Lincoln, Gettysburg address in November 1863, Wikipedia (May. 13, 2021, 15:47 PM), https://en.wikipedia.org/wiki/Gettysburg_Address

Judiciary from the executive in the public services of the State."⁵

Hence the Constitutional mechanism is envisaging the separation of power and not the independence of the Judiciary as such. Independence of the Judiciary is the term developed by the Judiciary itself by reiterating it time and again. To a great extent, it has formed into a cult in the public mind, with the media finding it a tool to discredit political leadership. This is the abuse of the freedom of speech in the name of democratic criticism. Political leadership is always subject to criticism at the hands of the media. That is the essence of democracy. But, that shall not lead to the discrediting of the democratic institutions like parliament and legislatures themselves. Especially the Judiciary should have shown the greatest of reticence in criticising and discrediting an important organ of the nation. The Preamble of the Constitution declares that: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a sovereign....."⁶

It is the constitutional mechanism that envisages that the people of India declare themselves to be sovereign and all other powers are exercising powers as delegates of the people. None of the said pillars is indeed having its own power, apart from the powers so delegated by the people of India to it. Hence none of these powers can exist independently, being unanswerable to the people. Only the people of India are not answerable to anybody in their collective decision making, through the ballot, based upon the adult franchise.

Rex=The King (England)= The People of India (India)=Sovereign

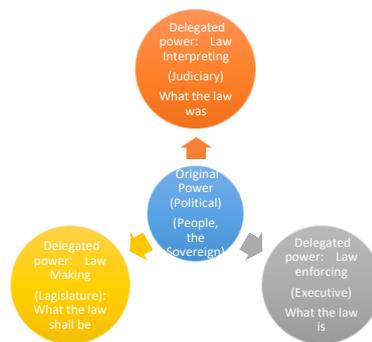


Figure 1

The concept of separation of powers and judicial restraint is discussed in detail by the Supreme Court of India⁷ in the judgment of Municipal Committee, Patiala vs Model Town Residents Asson. & Ors on 1 August 2007. To quote from the judgment is as follows:

⁵ INDIA CONST., Art.50, in part IV

⁶ Ibid

⁷ Municipal Committee, Patiala vs Model Town Residents Asson. & Ors, 2007 Latest Caselaw 584 SC, (INDIA).

"Any law made by the Legislature, which it is not competent to pass, which is violated of the provisions in Part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question of whether a statute is constitutional or not is always a question of the power of the Legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motive of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts."

Further, which functionary is not enjoying independence in a constitutional democracy? Look into the functioning of the police, which is subordinate to the executive. Have the police got independence? Yes, indeed. The police are independent to do, what is supposed to be done by the police, under the law. Even if the home secretary, or the judge, or the Home Minister, or even the Prime Minister commits a murder or rape in front of the police inspector, shall the police inspector lose the independence to arrest him, under the law is a moot question. The police shall not lose its independence to enforce the law. The police can execute the law, independently, to prevent such commission, or to bring him before the law. So, even after being placed under the executive authority, the Police is not losing its functional independence, even against their superiors. But that independence is governed by the rule of law. The person exercising such powers shall be legally accountable.

Only police can register an FIR. Not even a minister or the government secretary is empowered to register an FIR. Even the judge is not empowered to register an FIR and conduct the inquiry. They can only direct the police to register it. That is functional independence. So, if the police inspector enjoys functional independence, does it mean that the same police officer can take over the appointments of all his subordinates, to fulfil the said independence in callousness amounting to an imprudent act? That is too much of stretching of the concept of independence. Further, shall nobody question the propriety of such appointments, even if the said selection is vitiated by blatant nepotism and favouritism? Shall this nepotism and favouritism be protected for judicial independence? Such elasticity is detrimental to the Constitution, the democracy and eventually to the nation itself.

The independence of the Judiciary is the requirement of rule of law, to prevent the accumulation

of power. The very purpose is that the law-making authority, the law implementing authority and the law interpreting authority are not vested in one forum, but separated. So, the very concept of independence of Judiciary can be lost in both ways, if the Executive encroaches on the authority of Judiciary or if the Judiciary encroaches on the authority of parliament or executive. In either case, the independence of the Judiciary is at stake, as the result will be the accumulation of power. As far as the nation and its people are concerned, both are equally dangerous. Hence the very foundation of independence of Judiciary can be lost even when the Judiciary encroaches upon the realm of other organs of law-making and law enforcement.

Judicial independence is the concept that the Judiciary needs to be kept away from the other branches of government. That is to say, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests in deciding the inter-party disputes. Judicial independence is vital and important to the idea of separation of powers.

The human nature of functioning is forward-looking, not backwards-looking. If the functional independence of a judge to be made independent, the requirement is to protect him from present and future temptations or assaults. The independence of the Union Public Service Commission⁸, Comptroller and Auditor General of India⁹ and Election Commission¹⁰ are protected by protecting the current terms of engagement, tenure, and protected from the temptations of post-retirement appointments. The independence of the Judiciary also needs to be protected in such a way, by protecting from the temptations of post-retirement appointments. Even the CAGs, CECs, UPSC members and Judges who were appointed by the Executive were most independent in their discharge of constitutional duties.

Past is not a consideration for the independence of the Judiciary.

The present is protected constitutionally by fixed tenure, protecting the conditions of service, protection of pay and allowances etc.

The future interest of the judges is not protected as done in the case of CAG¹¹ or UPSC Chairman¹². Either the retirement age can be raised, or the post-retirement appointments can be avoided. In the United States of America, the appointment to the Highest Court is for life¹³.

⁸ INDIA CONST.Art.317.

⁹ INDIA CONST.Art.148, cl. (3).

¹⁰ INDIA CONST.Art.324, cl. (5).

¹¹ INDIA CONST.Art.148 cl.(4) "The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office."

¹² INDIA CONST.Art.319, cl. (a). "the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;"

¹³ U.S. CONST. Art 3, Sec. 1 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during Good Behavior,."

Independence without accountability is tyranny. Hence the Judicial independence cannot be total without judicial accountability. Otherwise, it is not independence, but tyranny alone. Hence, to protect Judicial Independence, accountability is also an essential feature. Both are the two sides of the same coin. Neither can travel nor exist, void of the other. “Power tends to corrupt, and absolute power corrupts absolutely”¹⁴ as Lord Acton predicted, the matters of our Judiciary are reaching.

As the Judiciary has entered into the executive and parliamentary functions, it has violated the basic structure of the Constitution, namely separation of powers and judicial review. Now the executive, as well as the parliamentary authorities, are concentrated to the Judiciary, and hence the separation of powers is lost. Further, when the executive authorities are exercised by the Judiciary, there is no scope for the judicial review of the said executive action, and hence is in violation of the ratio laid down by the Supreme Court in "Kesavananda Bharati case¹⁵", where it was held that the judicial review is the basic structure of the Constitution. The concept that the parliament cannot amend the basic structure does not imply that the Judiciary has the authority to amend or destroy the Basic Structure of the Constitution.

¹⁴ John Emerich Edward Dalberg Acton, Letter to Archbishop Mandell Creighton, dated Apr. 5, 1887, Wikipedia, (May. 13, 2021, 16:17 PM), <https://history.hanover.edu/courses/excerpts/165acton.html>

¹⁵ His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 SCC 225, (1973) Supp SCR 1, (INDIA).