1. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Illustrate.

Introduction

Separation of power is a doctrine where the power is diffused into different organs of the state to avoid concentration of power/conflict of interest. Unlike in USA/Australia where a rigid separation of powers is followed, in India, separation of functions is followed and hence less rigidity.

Body

Background:

The doctrine of separation of power in a rigid sense means that when there is a proper distinction between three organs and their functions and also there should be a system of check and balance.

Not a rigid separation of powers:

- Though the executive power in India is defined as in American constitution is vested in President under Article 53(1) and in Governor under Article 154(1) but there is no provision which talks about the vesting of legislative and judiciary power in any organ. Thus, SOP is not rigid.
- Westminster form of government: where the minister is from among the legislators. In USA/ Australia, a legislative member cannot hold any executive post until he/she resign from legislature.
- There is no voting power to the president USA/Australian president in laws passed by the legislature. However, in India, head of the government (PM) and council of ministers forms major part of legislature voting.
- House of common people and senate is least influenced by US president compared with Indian PM who acts as leader of the house.
- Judicial members: post retirement, many judges are appointed for executive posts. Also, some posts like NHRC Chairman and so on is exclusively judicial members.
- Judicial activism: special powers conferred on supreme court under Article 136 and 142 dilute the rigidity in separation of powers. E.g. supreme court's judgement on highway liquor ban.
- Tribunals with some of them having the effect of supreme/High court. Tribunals being appointed by executive dilutes the SOP with executive encroaching upon judicial area with conflict of interest.
- Extra- ordinary situations and instruments: like the emergency provisions and ordinance route is not as a rigid to use as in USA or Australia.
- Legislature punitive powers: parliamentary privileges give the judicial power to them and thus diluting rigid SOP. USA strictly adhere to SOP and there is no punitive powers to legislature.

Conclusion

In the case-Indira Gandhi vs Raj Narain, the court held that In our Constitution the doctrine of separation of power has been accepted in a broader sense(not too rigid). Though not as rigid as in USA, the doctrine is broad enough to protect the liberty of the individual from the arbitrary rule and prevents the organs from usurping the essential functions of other organs.

2. How does lack of adequate number of forums for dispute resolution affect ease of doing business in India? Analyse. What measures can be taken to address this problem? Suggest.

Introduction

Economic survey 2016-17 gave a report on economic costs due to delays in dispute resolution which accounts as much as 5-6% of GDP. The delay, as world bank suggest is as much as 4-5 yrs causing serious lapses in ease of doing business. Pending commercial disputes in Indian courts have multiplied 123% between 2015 and 2017.

Body

Lack of forums:

Business involves several parameters which decides the ease of running it and inadequate forums for dispute resolutions in these would affect the business.

- A recent survey by FICCI enlisted bureaucratic delays, corruption, tax terrorism (e.g. angel tax) act as major hurdle for start-ups. However, there is still no dedicated dispute resolution forum for start-ups. Because of this, venture and angel investors are reluctant to invest in India and take to countries like Singapore, USA where there is a separate start up dispute resolution forum.
- Construction permit: a multiplicity of forums can be seen and there is a lack of coordination among them. A single dispute resolution forum to look into the applications of permits is missing. This causes delays in starting business making India unattractive for investors.
- Property registration: due to inadequate property record details in digital form brings dispute and a pan India land dispute resolution forum is absent. This causes cost and time overrun for business and hence causes constraint in ease of doing business.
- Paying taxes: up until recently, there were multiple indirect taxes causing litigations with very few tax dispute resolution forums to adjudicate the same. This caused judicial delays and caused a form of tax terrorism.
- Trade across borders: A mutually consensual trade dispute resolution forum is absent with many of our neighbors. This let trade dispute in international

forums like WTO and affects Indian credibility in international markets. This affects business investment and rising public shares (domestic and foreign).

- Enforcing contracts: Instead of a separate dispute resolution forum, most of the cases is pending with High court or supreme court. This creates uncertainty in Indian economy and adversely affects investors.
- Insolvency resolution: only recently IBC was passed. Before that, the successful arbitration was less. Also, the teething problems of industries seen as failure and stopping credit is de-motivating for any investors.

Measures that can be taken:

- Arbitration mechanism promotion: like the recent passage of New Delhi International Arbitration Centre Bil etc.,
- Real estate Regulation authority: as adjudication authority in construction permit, property registration within a municipal area etc.,
- Judiciary must only look into the political philosophy and constitutionality without entertaining appeals involving technical nature.
- Bilateral and multilateral investment treaties to prevent or handle the cross-border trade disputes. A multilateral dispute resolution body can be established.
- Digitisation: use of IT brings in efficiency, speedy permit grants, avoids physical contact of authorities avoiding corruption and thus bringing down the number of disputes.
- Penalise litigation culture: government must try to discourage parties wanting to opt for the litigation process by making the litigation process more expensive than ADR. This would prompt parties to approach ADR institutes as the first mode or step of conflict resolution.

Conclusion

Thus, a healthy environment for ease of doing business involve an optimal number of dispute resolution forums. A well-established Alternative Dispute Resolution is a prerequisite as well. Even the Urjit patel committee suggested to rationalize the number of forums and bring reforms in National litigation policy. With above measure, the aim of ease of doing business ranking can be achieved.

3. What advantages do administrative tribunals bring into the legal ecosystem of the country? Is there a need to rationalise the administrative tribunals in India? Critically examine.

Introduction

Tribunal is an administrative body established on the recommendation of The Swaran Singh Committee under Part XIV-A of the Indian Constitution for the purpose of discharging quasi-judicial duties. Tribunals relieve the burden of judiciary and provide quick and speedy justice.

Body

Tribunals are not Courts because Courts are governed by strict procedure defined in Code of Criminal Procedure CrPC, Indian Penal Code IPC and the Indian Evidence Act whereas tribunals are driven by the principles of natural justice. The Administrative Tribunals have been established to overcome the major lacuna present in the Justice delivery system in the light of the legal maxim *Lex dilationes semper exhorret* which means 'The law always abhors delays'.

Advantages of Administrative tribunals:

- **Accessibility**
  - Administrative adjudication is more convenient and accessible to individuals compared to ordinary courts.
  - Administrative justice ensures cheap and quick justice.
  - Its procedures are simple and can be easily understood by a layman.
- **Flexibility**
  - The process of adjudication in administrative agencies is flexible and informal compared to the rigid, stringent and much elaborated ordinary court procedures, as it follows principles of natural justice.
- **Expediency**
  - administrative agencies are better than ordinary courts in disposing cases timely.
- **Expertise**
  - Administrative tribunals are filled by a panel of persons vested with special skill and expertise related to the complicated dispute they adjudicate.
  - Whereas ordinary court judges are generalists in law and lack such expertise knowledge on the needs of the administration in this technologically advanced world.
- **Relief to Courts**
  - The system also gives the much-needed relief to ordinary courts of law, which are already overburdened with numerous suits
- **Adequate Justice**
  - In the fast changing world of today, administrative tribunals are the most appropriated means of administrative action, and also the most effective means of giving fair justice to the individuals.
  - Lawyers, who are more concerned about aspects of law, find it difficult to adequately assess the needs of the modern welfare society.

Need to rationalize Administrative Tribunals

Limitations

- Government interference in appointing the heads and members of tribunal.

- Administrative adjudication is a negation of Rule of Law.
- Lack of power to enforce the decree.
- Lack of infrastructure and man power.
- A person can again appeal in the court against the decision of the Quasi-Judicial body. This fades away the advantage of cost and time provided by the Quasi-Judicial body.
- Most of the tribunals do not enjoy the same amount of independence of the Executive as do the Courts and the judges.
- The civil and criminal courts have a uniform pattern of administering justice. A uniform code of procedure in administrative adjudication is not there.
- At times they adopt summary procedures to deal with cases coming before them.

Way Forward and solutions

- Qualifications: In Union of India vs. R. Gandhi (2010), the Supreme Court looked said that when the existing jurisdiction of a court is transferred to a tribunal, its members should be persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court. Establishing a uniform procedure to elect the heads of tribunal eg the way the chairman of NHRC is appointed by President, the same can be implemented over here.
- Independence: The administrative support for all Tribunals should be from the Ministry of Law & Justice. Neither the Tribunals nor its members shall seek or be provided with facilities from the respective sponsoring or parent Ministries or concerned Department.
- Finance: Providing administrative and financial autonomy in order to dispense justice fairly.
- Structure: Rationalizing of tribunal by merger which helps in removing structural complexities.
- Penalty for non-compliance: Establishing a uniform code of punishment, if the orders of tribunal are not implemented by any agency.
- Power-Tribunals themselves are better positioned to gauge their own administrative requirements. Therefore providing power to tribunals to create or sanction posts.

Conclusion

Tribunals are very important for maintaining a healthy justice delivery ecosystem in the country. Tribunals created for various fields have met with some amount of success, but in order to make them receptive to dynamic world functional & financial autonomy needed to imparted to them. This will help them dispensing justice in a timely and effective manner.

4. There needs to be a change in the perspective with which arbitration is viewed in India. It has to be viewed as the priority rather than playing second fiddle to Indian court litigation work. Elaborate.

Introduction

Prior to the amendment of the Indian Arbitration and Conciliation Act 1996, India's journey towards becoming an international commercial hub was hampered by a largely ineffective Act and an arbitration regime that was afflicted with various problems including those of high costs and delays. To address these issues, the Indian Government promulgated the Arbitration and Conciliation (Amendment) Bill 2019, to make arbitration a preferred mode for settlement of commercial disputes by making arbitration more user-friendly and cost effective.

Body

There needs to be a change in the perspective with which arbitration is viewed in India

Although, most of the amendments to the Act have been welcomed by the arbitration community for their potential in increasing the fairness, speed and economy with which disputes are resolved by arbitration in India, two amendments in particular may end up being counterproductive.

Reducing Delays

- One of the main amendments to the Act was the introduction of Section 29A, which was intended to reduce delays and the protracted timelines in Indian arbitrations through the imposition of strict timelines on the arbitral proceedings and the minimisation of court interference.

- Section 29A provides that the arbitral tribunal must enter the award within 12 months from the date the tribunal entered reference with the option to extend the time period by a further 6 months with the mutual consent of all parties. However, after the expiry of that 18-month period, parties seeking a further extension would have to apply to the Indian courts, which may grant such an extension on such terms and conditions as it may impose if it finds that there is sufficient cause.

- However, although this amendment appears to, on its face, address the issue of protracted timelines in Indian arbitrations, further analysis shows that the process may be intrinsically flawed.

    - First, the arbitration cases come in a wide array of all shapes and sizes and setting a common timelines for all arbitrations ignores the vast range of variance in issues that may arise in arbitration. Further, given the intention to minimise court interference, requiring court approval for a further extension of time represents a step backwards in promoting the efficient disposal of arbitration cases by increasing, rather than

decreasing, court involvement in on-going arbitrations and considering the already overburdened Indian court schedules, this amendment may end up prolonging protracted Indian arbitration timelines.

Appointment of Arbitrators by the Courts

- The Bill permits parties to appoint arbitrators. If they are unable to appoint arbitrators within 30 days, the matter is referred to the court to make such appointments. The Bill states that, at this stage, the Court must confine itself to the examination of the existence of a valid arbitration agreement. Section 11(14) provides that "for the purpose of determination of fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame rules as may be necessary, after taking into consideration the rates specified in the fourth schedule

- However, the flaws and ambiguities of Section 11(14) and the Fourth Schedule are worth noting.

  - First, the model fees in the Fourth Schedule only vary according to the sum in dispute. Often, in practice, it can be very difficult to quantify the 'sum in dispute'. Further, even if the amounts claimed can be quantified, the question of whether the 'sum in dispute' relates only to the amount claimed by the Claimant or whether it will also include the amount counter-claimed by the Respondent is left open.

  - Second, the extent of the application of the Fourth Schedule is ambiguous. It is unclear whether the Fourth Schedule applies to (i) all arbitrations in India, (ii) all arbitrations initiated under Section 11, or (iii) all arbitrations initiated under Section 11 except fast-track arbitrations by a sole arbitrator under Section 29B.

  - Finally, there is potential for the new Section 11(14) to be misused in ad hoc arbitrations. A party or parties to an arbitration agreement may intentionally fail to follow the relevant appointment procedure or to agree to on an arbitrator in order to take advantage of the Fourth Schedule fee structure, which may be significantly lower than the fee quotes by ad hoc arbitrators. Unfortunately, this also has the unintended effect of increasing judicial interference.

A change in the very culture of Indian arbitration is required.

- For one, there needs to be a change in the perspective with which arbitration is viewed. The pool of Indian legal practitioners who specialize in the practice of arbitration has to grow, with arbitration viewed as the priority rather than playing second fiddle to Indian court litigation work.

- And the pool of arbitrators needs to grow as well. Unfortunately, the tendency to appoint retired Indian judges as arbitrators is also stifling the growth of

arbitration as a dispute resolution mechanism in India. What is needed is the growth of a community of arbitrators unfettered by the traditions of the Indian courts and focused on growing arbitration in its own right.

- The final, and most important, change needed is the minimization of judicial interference. ONGC v Saw Pipes has demonstrated how judicial interference in the arbitration process can take root when there is even the slightest ambiguity in arbitration law, with the interference being of such magnitude that legislative change is necessary to remedy it. Unfortunately, as shown above, even the recent amendments to the Act are riddled with many such ambiguities thereby providing the opportunity for further judicial interference.

Conclusion

The amendments to the Act, though laudable, are only a first step towards making arbitration the preferred mode of dispute resolution in India. It must be acknowledged that increased efficiency in arbitration is unlikely to come solely from the imposition of top-down legislative change, especially one that is as inherently flawed. It is only when the Indian arbitration culture has changed and these persisting problems have been addressed that arbitration will finally become the preferred mode of dispute resolution in India.

5. Compare and contrast the evolution and broad features of the Indian and the South African constitutions.

Introduction

A constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organization or other type of entity, and commonly determine how that entity is to be governed. In this context Indian and South African constitutions have some contrasts and similarities in their evolution and features.

Body

Evolution of Indian and South African constitution
Comparison

1. Both Indian and South African constitution evolved through a long struggle against colonialism and imperialism.
2. While drafting constitution both countries closely observed constitutions of other countries and made their own constitutions as the best in the world. In both Constitution, every citizen has got equal rights and equal opportunities.

Contrasts

1. **The South Africa Act of 1909 and Government of India act of 1935:** The period 1909 to 1910 covers the independence period and is essentially the genesis of the constitutional development of South Africa. This period was

characterized by the enactment of the South Africa Act by the British Parliament, establishing an independent Union of South Africa comprising the territories of Cape Colony, Orange Free State, Natal and Transvaal. In reality, this was South Africa's Independence constitution. On the other hand, Government of India act 1935, stressed on Establishment of a Federation of India (which never came into force though)

2. **Voting rights:** India gave voting rights to limited number of people before Independence by Government of India act 1919, on the other hand South African constitution gave voting rights to its citizens after its independence.
3. **The establishment of a Federal Court:** India Established Its Federal Court by Government of India Act, 1935. On the other hand South African Federal court is established by Interim constitution of 1993.

Features of Indian and South African Constitutions

Indian Constitution was framed in 1949 and we borrowed the feature of Constitutional Amendment from South Africa. Though South African Constitution, framed in 1996 against backdrop of Apartheid and civil war like conditions, does NOT have any exclusive Fundamental Rights like Indian, but there are many similarities and differences between the two.

Comparison

1. Both Countries Constitution's "Preamble" starts with wordings "We the People", meaning People are Sovereign and constitution draws its authority from the People of the nation.
2. Both Fundamental Rights and Bill of Rights form the bedrock of the constitution and democracy under the Indian and SA Constitutions respectively. Just as the Fundamental Rights under Indian Constitution, the Bill of Rights under the SA Constitution are available against the State. In fact some limited rights under both Constitutions are available against private citizens also. Neither the Fundamental Rights nor Bill of Rights are absolute both are subject to reasonable restrictions and limitations.
3. Both allow certain degree of freedom to the State to work for upliftment of the marginalized and downtrodden.
4. Like the constitution of South Africa certain articles of Indian constitution are amended by two-thirds majority of parliament.

Contrasts

1. Right to vote which finds a place in the Bill of Rights is only a statutory/legal right in India i.e., it does not have the status of a Fundamental Rights.
2. Right to property, which finds a place in the Bill of Rights was removed from Part III of the Constitution by the 44nd Constitutional Amendment and has been placed under Art 300A thereby reducing its status to that of a legal right.
3. Right to information, which is included in Bill of Rights is only a statutory right in India.

Conclusion

While making the Constitution, the South African Constitutional Experts forgot about their past where there were clashes between Whites and Blacks. They only thought about the situation where both the Whites and the Blacks lived together with harmony. Whereas while making the Indian Constitution, Indian leaders thoroughly studied Constitutions of various countries of the world and then drafted the Indian Constitution. Our Constitution is truly based on the Principles of Secularism and equality between all religions.