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SEPARATION OF POWERS: INDIAN PERSPECTIVE

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ABSTRACT

The doctrine of Separation of Powers was originally started in the writings of Montesquieu in the spirit of the Laws where Montesquieu refers to the division of govt. responsibilities into three separate branches of government to make sure that none of the branch intrude into the domain of another. The true objective of introducing there principles was to prevent the concentration of power and provide for check and balances. American Constitution, Australian constitution is very rigid as compared to Indian constitution and it does not apply to India or even England. Separation of Powers is practiced in India but not that rigidly. The tree main areas of government in some or the other way perform the task of other. The present research paper assess the separation of powers as envisioned by the Indian Constitution and the difficulties faced in practice by the government's three wings, while implementing the constitutional provisions in letter and spirit. The writer also draws a comparative analysis to the separation of Powers American Constitution scheme of Separation of Powers..

1. Introduction

In the contemporary world constitutional systems all over world might not follow a strict separation of powers because that is undesirable and at times impracticable, however, the diluted form of this concept can been seen implemented in almost all the countries. It is widely accepted fact that for the political system to be stable, the holder of the power need to be balanced off against each other. The principle of separation of powers deals with the interrelation between the three major organ of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of powers is the aim sought to be achieved by this principle. The basic aim of this

principle signifies the fact that one person or body of persons should not exercise all the three powers of the government. Montesquieu, a French scholar, found that concentration of power in person or a group of persons results in tyranny. And therefore for decentralization of power in three different organs, the legislature, the executives, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to each other.

Separation of powers means distribution of powers for specified functions of the government. All the powers of the government have been conceived as falling within one or another of three great classes, as – (1) the enactment of making laws, (2) the interpretation of that laws and (3) their enforcement; namely- legislative, judicial and executive. Government has been deemed to be made up of three branches having for their functions and such classification is recognized as classical division.

The framers of the Indian Constitution did not perceive in an inflexible way the assumption of the division of forces. Nevertheless, it cannot be seen clearly through the distinction rendered in the constitution by the various branches of the legislature in the release of capacities. This congress is not an exception to constitution itself. As it is reviewed, important ideal law like *Ram Jawaya v. Condition of Punjab plainly illustrates this rule.* **Justice Mukherjea** in the moment case said: "*It can in all likelihood be said that Constitution does not consider supposition, by one organ or a piece of the State, of capacities that basically fit in with another. The official for sure can practice the forces of departmental or subordinate enactment when such powers are designated to t by the governing body. It can likewise, when so enabled, exercise legal capacities in a restricted manner"*

2. Discussion

1. Meaning and origin of "separation of powers"*:*

Through centuries of political and philosophical evolution the principle of separation of powers evolved. The history can be traced back to the 4th century B.C., when Aristotle identified the three government agencies viz, in his treatise entitled politics. The General Assembly, the Police and the Judiciary. A somewhat similar system existed in Republican Rome, consisting of public assemblies, senates and officials, all operating on the principle of checks and balances. Following the fall of the Roman Empire, Europe became fragmented into nation-states, and from the end of the end of the Middle Ages until the 18th century the dominant governmental structure consisted of a concentrated power residing in the hereditary ruler, the only exception being the development of the English parliament in the 17th century. With doctrine of the three branches of government reappeared with the birth of the parliament, this time in John Locke's two government Treatise (1689), where these powers were described as legislative, administrative, and federative. Nevertheless, Locke did not consider the three divisions to be co-equal, nor did he consider them equipped for autonomous action.

He considered the legislative branch to be supreme, while the executive federative functions respectively as internal and external affairs that were left

under the control of the monarch, a scheme that obviously corresponded to the dual form of government that prevailed in England at the time, that is, the Parliament and The king. The word executive had a much wider connotation in England during those days, as opposed to how it is perceived today. Everything called now executive judicial roles were then simply referred to as executive power. The king was considered the repository of all executive and judicial powers, and was considered the sole protector of nature's laws. The need for the independence of the judiciary from the hands of the king and his other servants, however, was long-felt demand since early times that was further influenced by Fortescue's writings, a political thinker of that time. Chief Justice Coke went a step further on similar lines in 1607, saying that judicial matters should not be decided by natural reason, but by artificial reason and law judgment, which law is an act that requires long study and experience before a man can come to know it. Nevertheless, it was very clear in people's minds that the only role the king played in administering justice was that of appointing judges. Having felt that the judiciary should be separate and independent from the king's clutches, another theory aimed at separating legislative and executive (including judicial) functions grew autonomously through the influence of several other political writers' writings of that time. During the 17th and 18th centuries, English authors attempted to explain a separation theory.

2. Separation of powers: the true precept*:*

The theory, euphemistically speaking, being universal in nature, can be understood as being explicitly committed to the achievement of political freedom, an essential part of which is the restriction of governmental power, and that this can best be done by creating divisions. In this way, however, it must be recognized that acknowledging the need for government action to provide the appropriate climate for individual growth is complementary to, and not inconsistent with, the view that firmly reiterates that government restraints are an essential part of a theory. One of the major problem with an approach to literature on the concept of the separation of powers is that a few authors describe exactly what they mean by it, what its basic treats are, and how it applies to the other concepts. One such attempt; is nevertheless made in his book constitutionalism and separation of Powers by Professor Vile. Dividing the government into three branches or division, the legislature, the executive and judiciary is necessary for the establishment and preservation of democratic liberty. There is a corresponding recognizable role for each of these branches of government, legislative, administrative, or judicial. Every government branch must be limited to performing its own role and not permitted to encroach upon the functions of the other branches. In addition, the individuals that make up these three government agencies must be kept separate and distinct, and no entity should be allowed to be a member of more than one branch at the same time. Accordingly, branches will be a check to the others and no single group of people will be able to control the machinery of the state. From Professor Vile's study of this "alien-ideal type" or "alien-benchmark" concept, one can infer that the first item of pure doctrine is the declaration of a

division of government agencies into three categories: the Legislative, the Executive, and the Judiciary. Unlike earlier systems, it can be said that although they were actually based on double division of governmental powers, since the mid-eighteenth century, the three fold divisions have usually been recognized as the basic necessity for a constitutional government.

Another element of the doctrine suggests that there are three specific functions of the government. In comparison to first element, which suggests for 3 branches of government, this element of the doctrine suggests a sociological truth that there are, in all governmental situations, three necessary functions to be performed, whether or not they are in fact all performed by one person or group, or whether there is a division of their functions among two or more agencies of government.

The third element in the doctrine, and the one that generally separates the separation of powers from those who adhere to the general themes mentioned above, is what can be called the separation of persons for want of a better phrase.

On the guiding light of the creation of this ideal type, it is worth recalling the statements of scholars and eminent jurists who have, from time to time, commented on the utility and desirability of holding the doctrine in its rigid or flexible form while giving effect to it in its true letter and spirit. According to Friedman, "Srtict separation is a theoretical absurdity and a practical impossibility. However there is no liberty if the judicial power be not separated from the legislative and executive". For Jaffe and Nathan, "Separation of Power is undesirable in strict sense nevertheless; its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous power of the executive. The object of the doctrine is to have a government of law rather than of official will or whim."

3. Separation of powers in USA & Uk*:*

Given the protection it offers against dictatorship, it is very difficult for modern day societies to rigidly implement it. Theory aiming for mutual separation of powers and dilution of powers.

USA

Doctrine of power-separation in America forms the foundation upon which the entire constitutional structure is based. Article 1, section 17 wests all Congressional legislative powers. Article 2, section 118, confers on the President of the United States all the executive power. Article 3, section 1, 19 confers upon the Supreme Court all the judicial powers. An Apex court in the USA has not been given the powers to decide on political questions, so that the court can not interfere with the exercise of the power of the government's executive branch. The Constitution of America did not confer upon the Apex Court the overriding power of judicial review. And all this functioning is based on the theory of Separation of powers. Although, American constitutional changes have shown that, given the nature of modern government, a simple hierarchical definition of the powers of government is not feasible. The President of the United States, by exercising his veto power, interferes with the exercise of powers by the congress. President's treaty-making power also

include legislative powers. President can also impedes with his powers to appoint the judges. The separation of powers in the United States is often been criticized as promoting inefficiency; when different parties hold congress and the Presidency, a lack of co-operation may deadlock the legislative process. English author Walter Bagehot famously criticized the U.S. system on these grounds in his 1867 book *The English Constitution*, specifically noting the events during the administration of Andrew Johnson. Srveral individuals have proposed that a parliamentary systems- in which the same party or coalition of parties controls both the executive and the legislature- would function more efficiently. Advocates of a parliamentary systems have included President Woodrow Wilson. In comparing the English parliamentary system with the American systems, Bagehot wrote:

"The English Constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good: the American, upon the principle of having many sovereign authorities, and hoping that the multitude may atone for their inferiority."

UK

In United Kingdom, there is no formal separation of powers in the absence of a written constitution and therefore no parliamentary act can be considered unconstitutional if any power is conferred in contravention of the doctrine. Parliament's absolute is retained, whereby the Crown rules by ministers who are Parliament's representatives and are accountable to it. The independence of the judiciary is set firmly by the settlement Act, 1700. Many disputes that arise from the government process are dealt with by the administrative tribunals rather than by the ordinary courts. Nevertheless, the tribunals' impartiality is maintained by preserving essential features of 'fair judicial procedure'.

4. Indian perspective*:*

Many conflicts that arise from the government process are dealt with by the administrative tribunals rather than by the ordinary courts. Nevertheless, the tribunals' impartiality is maintained by preserving essential features of 'fair judicial procedure'. It is found, on analysis, that under the various provisions of the Constitution, such as Article 53(1) and 154(1), the executive powers of the union and the states are vested respectively in the president and the governors. According to this scheme, the president is the chief executive of the Indian union who exercises his powers constitutionally in accordance with Article 74(1) on the assistance and advice of the Ministerial Council. The threefold division of powers is partially recognized and the parliament and the state legislatures and judicial powers in the Supreme Court and other courts have been given no unbridled "legislative powers. India's constitution has taken a midway route on this issue Article 50 of the Constitution provides that the state shall take measures to separate the judiciary from the executive within the State's public services. The constitution also empowers the President to issue ordinances in the exercise of his legislative powers which extend to all matters falling within Parliament's legislative competence. Under Article 123, the President shall have the power to promulgate an ordinance when it deemed necessary during the recess of both houses of Parliament.

The President also performs the judicial duties, and in this manner he is empowered to determine a contested question concerning the age of the High Court and judges of the Supreme Court for the purpose of removal from the judiciary. In this respect, as the Supreme Court has held, the President will consult only the Chief Justice.

In the event of the President's impeachment, one of the houses acts as the prosecutor, and the other Houses investigates the charges and declares whether or not such charges have been upheld. With regard to the Council of Ministers, Article 75(5) provides that no person may be a member of the Council of Ministers for more than six months unless he is a member of either House of Parliament.

In the case of *Minerva Mill's case*, the Apex Court by deleting section 4 and 5 of the 42nd Amendment Act to be *ultra vires* maintained its supremacy and its role as the watchdog of the Constitution. About Section 4 of the said amendment, which sought to oust the jurisdiction of the Court, Mr. N.A. Palikhivala has observed that provision was clearly *ultra vires* the amending power of the parliament. That destroyed the balance of power between the legislatures and sought to deprive the citizens of the modes of redress which are guaranteed by Article 32.

3. Conclusion

Constitution is the terrestrial supreme law. No organ should go beyond the role which the constitution assigns to it. It is the duty of the judiciary, executive and legislature to adhere strictly to one of the most fundamental features of the Separation of Powers' Constitution. There is no doubt that a more robust interpretation is needed and enough room to accommodate the same. It is necessary to protect the lofty ideal of the constitutional system which can only be preserved when put into practice. There is a considerable gap between the Constitutional plan and the separation of Powers practice. The constitution's founding fathers had also defined the position and the powers of the state's three organs. They had realized that being an organic entity, government could never achieve complete separation of powers. To aim for a complete separation of powers is therefore tantamount to speaking in vacuum. However, that does not mean that each branch has exclusive powers, but that they have to adhere to their constitutional limits. In recent times, the Executive has grown very powerful which has certainly led to a wide abuse of powers. In addition to the Judiciary and Legislature check on them, media and NGOs have played a major role in exposing government officials' misdeeds. In the end, the three organs aim to protect people's right. In a democracy, people's proactive attitude will help to ensure proper functioning and discourage excessive of power. For our prosperity the three organs must be in peace. They observe a division of duties in India and not separation of powers. And so, in its rigidity, we don't abide by the theory. Although strict separation of powers in India, as in the American sense, is not followed, but as part of this doctrine there is the principle of 'checks and balances'. Therefore, none of the three organs can usurp the essential functions of the bodies, which constitute so much a part of the doctrine of the 'basic structure' that, not even by amending the

Constitution, and if any such alteration is made, the court must strike it as unconstitutional.

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