Page 1345 - 1354

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Separation of Powers; Comparative Analysis of the Doctrine an International Perspective

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ABSTRACT

The Doctrine of Separation of Powers deals with the mutual relations among the three organs of the government, viz., legislative, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. But the rule of separation of powers was propounded for the first time by the French Jurist, Montesquieu. He formulates this theory in his famous book 'L Esprit deploys' (The Spirit of the Laws) published in 1748.

According to this theory, powers are of three kinds; Legislative, executive and judicial and that each of these powers should be vested in a separate and distinct organ, for if all these powers, or any two of them, are united in the same organ or individual, there can be no freedom. If for instance, legislative and executive powers unite, there is an apprehension that the organ concerned may enact tyrannical laws and execute them in tyrannical manner. Again, there can be no liberty if the judicial power be not separated from the legislative and the executive. Where it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator where it joined with the executive power, the judge might behave with violence and oppression. The Doctrine of Separation of Powers has been accepted and adopted by the constitution of the United States of America, moreover in India and England this doctrine has not been strictly applied. This paper compares the doctrine of separation of powers in the United States of America, India and England and the reiteration of this demarcation in the three nations by the judiciary.

Keywords: *Separation of powers, Constitution, Democracy, Government, Legislative, Executive and Judiciary.*

I. INTRODUCTION

The theory (doctrine) of Separation of Powers has engaged in several forms at different periods. It was organized by Aristotle and it was developed by Locke in the 16th and 17th centuries, French Philosopher John Boding and British Politician Locke respectively had

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 [ISSN 2581-5369]

expressed their opinions about the theory of separation of powers. But the rule of separation of powers was expounded for the first time by the French Jurist, Montesquieu.[2] According to this theory there are three main organs of the government in a state namely i) the Legislature; ii)the Executive; and iii) the Judiciary. The three organs should be separate, distinct and sovereign in its own sphere so that one does not trespass the territory of the other. According to some scholars like Wade and Phillips the doctrine of Separation of Powers means that the same person cannot compose more than one of the three departments of the government. One department should not control and interfere with acts of the other two departments, and one department should not discharge the functions of the other two departments.

The Doctrine of Separation of powers had a very good impact on the development of Administrative Law and in the functioning of the government. It is well appreciated and accepted by the Jurists and Politicians in England and America. In India, the doctrine of Separation of Powers has not been accorded a constitutional status. Apart from the directive principles laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.[3]

The doctrine of separation of powers is an inseparable part of the evolution of democracy. Democracy dictates a system in which every citizen, can without fear of retribution, breath, express and pursue his or her interests. It enables him to live a life of his choice to the extent he does not encroach upon the rights of the other people. It is in this context that it can be presupposed that a system of balances and counter balances exists among the three organs of the government to ensure a strong nurtured democratic system.

II. SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

The Doctrine of Separation of Powers has been accepted and strictly adopted by the constitution of United States of America. As Davis points out "probably the principal doctrinal barrier to the development of the administrative process has been the theory of separation of powers'. The truth is that while the theory of separation has affected the character of the American Administrative Law, the doctrine itself has been affected by the newly emerging trend in favor of Administrative Law.

The legislative department shall never exercise the executive or judicial powers, or either of them, the executive shall never exercise the legislative and judicial powers, or either of them, the judicial shall never exercise the legislative or executive powers, or either of them, the

[2] Regasurya Rao "Lectures on Administrative Law", Asia Law House, 2011, P.15.
[3] Massey, I.P."Administrative Law", Eastern Book Company", Luck now, 2012, P.40

 [ISSN 2581-5369]

judicial shall never exercise the legislative or executive powers, or either them, to the end it may be a government of law and not of men.[4]

(A) Presidential Form of Government:

The form of government characterized as presidential is based on the theory of separation between the executive and the legislature. The President is both the head of the state as its chief executive. He appoints and dismisses other executive officers and thus controls the policies and actions of government departments. The persons in charge of the various departments, designated as the Secretaries of State, hold office at his pleasure, are responsible to him and are more like his personal advisors. The President is not bound to accept the advice of a Secretary and the ultimate decision rests with the President. Neither the President nor any member of the executive is a member of the Congress and a separation is maintained between the legislative and executive organs. This system of government is fundamentally different from the parliamentary system prevailing in India.[5]

In the United States of America the President is not in theory responsible to the Congress unlike India where the cabinet is collectively responsible to the Parliament. The President has a fixed tenure of office and does not depend on majority support in the Congress. Before the expiry of term, he can be removed only by the extremely cumbersome process of impeachment. Nor can the President dissolve the Congress whereas in India, Prime Minister has the power to seek dissolution of the Parliament. The executive therefore is not in a position to provide effective leadership to the legislature and it is not always that the Congress accepts the program and the policy proposed by the executive.[6]

(B) Principles of Checks and Balances:

As per the constitution of America the legislature powers are vested in the Congress (Article 1), the Executive powers are vested in the President (Article 2) and the Judicial powers in the Supreme Court and its subordinate Courts (Article 3). In America there is a system of 'Checks and Balances' to see that one organ should not encroach upon the powers of other organ. However In view of the development of Administrative Law and expansion of the government machinery, strict compliance to this doctrine is impracticable. Therefore the doctrine of separation of powers has been relaxed in certain cases. For instance a bill passed by the Congress may be vetoed by the President and, to this extent the President may be said to be exercising a legislative function. Similarly, the Congress being the legislative organ

[4] Upadhya J.J.R, "Administrative Law", Central Law Agency, Allahabad, 2006, P.31
[5] Supra note, P.39
[6] ibid

 [ISSN 2581-5369]

controls the executive by the power of impeachment of President.

It also controls the judiciary in appointment and impeachment of the judges. Likewise the Judiciary, by exercising the power of Judicial Review over legislation, controls the legislature.

The United States of America Constitution however incorporate some exceptions to the doctrine of separation with a view to introduce the system of checks and balances. For instances, a bill passed by the Congress may be Vetoed by the President and to this extent the President may be said to be exercising a legislative function, Again appointment of certain high officials is subject to the approval of the Senate. The treaties made by the President are not effective until approved by the Senate; to this extent, therefore, the Senate may be deemed exercising executive functions. The Congress continuously probes into executive functioning through its various committees, and also has the power to tax and sanction money for governmental operations. The Supreme Court has the power to declare the acts passed by the Congress unconstitutional. But the Judges of the Supreme Court are appointed by the President with the consent of the Senate. This exercise of some part of the function of one type by an organ of the other type is justified on the basis of the theory of checks and balances. It means that the functioning of one organ is checked in some measure by the other organ so that no organ mat run amok with its powers and misuse the same.

In the case of Panama Refining Company Vs Ryan commenting on the practicality of the doctrine J.Cardozo said;

The doctrine of separation of powers is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation; there must be elasticity of adjustment in response the practical necessities of government which cannot foresee today the development of tomorrow in their nearly infinite variety.[7]

Administrative law and separation doctrine are somewhat incompatible, for modern administrative process envisages mingling of various types of functions at the administrative level. Had the doctrine of separation been applied strictly in the United State of America the growth of administrative process would have been extremely difficult and modern government might have become impossible. For practical reasons therefore the doctrine of separation has to be diluted somewhat to accommodate the growth of administrative process.

The American Administrative Law has certain distinctive features which a product of separation doctrine. A significant breach of the theory occurred when the courts concede the

[7] Ramjawayya Vs State of Punjab, AIR, 1955, SC, P.549

 [ISSN 2581-5369]

legislative power could be conferred on administrative authorities, and thus the system of delegated legislation came in vogue. But in a bid to reconcile the separation doctrine, the courts laid down that Congress cannot confer an unlimited legislative power on an administrative authority, that the Congress must not give up its position of primary legislation and that the Congress should therefore lay down the policy which the delegate is follow, while making the rules.[8] Under the United States of American Constitution the theory of separation of powers has been applied to a certain extent, giving a judiciary unique position.

III. THE SEPARATION OF POWERS IN INDIA:

In India, the doctrine of Separation of Powers has not been recognized in its absolute form but the function of the different parts or branches of government have been sufficiently differentiated and consequently it can very well be said that the constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also empowered, exercise judicial functions in a limited way.[9]

Under the Indian Constitution only executive power is "Vested" in the President while provisions are simply made for a Parliament and judiciary without expressly vesting the legislative and judicial powers in any person or body.

Moreover have the same system of parliamentary executive as in England and Council of Ministers consisting as it does of the members of legislature is like the British cabinet, "a hyphen which joins a buckle which fastens the legislative part of the State to the executive part."[10]

(A) Judicial Opinion of the Doctrine of Separation of Powers;

There have been several landmark judgments that have changed the face of the doctrine of separation of powers in India. In the case of Kesavananda Bharti Vs State of Kerala and the judicial articulation of the doctrine of basic structure and essential features of the constitution therein, the separation of powers is spoken as structural basis of the constitutional framework and cannot be destroyed by any amendment.[11]

In another case the honorable Supreme Court of India observed that in re Delhi Laws Act case (9).

[8] Mahendra P. Singh,"Constitution of India", Eastern Book Company, 2011, P.360
[9] ibid
[10] Supra note
[11] AIR ,1973 SC, P.1461

 [ISSN 2581-5369]

Although in the Constitution of India there is no express separation of power. It is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?"[12]

In Bandhuva Mukti Morch Vs Union of India[13] the apex court of India observed that

The Constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the division is not precisely demarcated there is general acknowledgment of its limits. The limits can be gathered from the written text of the Constitution, from conventions and constitutional practice and from an entire array of judicial decisions.[14]

It is a common place that while the Legislature enacts the law the Executive implement it and the Court interpret it, and, in doing so, adjudicates on the validity of executive action and, under the Indian Constitution, even judges the validity of the legislation itself. And yet it well recognized that in a certain sphere the Legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions and the court it its duty of interpreting the law, accomplishes in its perfect action in a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under the constitution of India between these primary institutions of the state.

Therefore, the functions of different organs are clearly earmarked so that one organ does not usurp the functions of another. In Indira Nehru Gandhi Vs Raj Narain[15] also observed that in the Indian Constitution there is separation of powers in broad sense only. The basic structure also embodies that separation of powers doctrine and none of the pillars of the Indian Republic can take over the other functions. The doctrine is useful as a means of checks and balances in a political set up.[16]

In the case of Mallikarjuna Vs State of Andhra Pradesh[17] when the Andhra Pradesh Administrative Tribunal directed the State Government "to evolve proper and rational

[12] Kumar Devinder, "Administrative Law" Allahabad Law Agency, 2007, P.20
[13] AIR, 1951, SC, P. 332
[14] Jain.N, "Principles on Administrative Law", Wadhwa & Company, 2007.P.26
[15] AIR, 1984, SC, P.802
[16] Upadhya JJ.R."Administrative Law", Central Law Agency, Allahabad, 2006, P.40
[17] AIR, 1973, SC, P.1461

 [ISSN 2581-5369]

method of determination of seniority among the veterinary surgeons in the matters of promotions to next higher rank of Assistant Director of Veterinary Surgeons". The Supreme Court quashed the aforesaid direction and observed that the power under Article 309 of the Constitution to frame rules is the legislative power which has to be exercised by the President or the Governor of the State as the case may be.

The High Court or Administrative Tribunals cannot issue a mandate to the State Government to legislate on any matter. In this way the principle of restraint prevent any organ of the State from becoming superior to another or others in action.

The Chief Justice of India Subba Rao in Golak Nath Vs State of Punjab[18] "it demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them. No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land." No organ should go beyond the role assigned to it by the Constitution. It is the obligation of the Judiciary, Executive and Legislature to strictly adhere to one of the most fundamental features of the Constitution 'Separation of Powers'.

It is needless to criticize the constitutional plan of separation of powers when the existing provisions are not being religiously observed. Undoubtedly there is need for a more robust interpretation and our dynamic constitution has enough to accommodate the same. The lofty ideal of the constitutional system needs to be protected which can be preserved only when brought into practice. There is a major gap between the constitutional plan and practice of Separation of Powers.

IV. DOCTRINE OF SEPARATION OF POWERS IN UNITED KINGDOM:

There is an old adage containing a lot of truth that "power corrupts and absolute power corrupts absolutely". To evolve effective control mechanism, man had been looking for devices to contain the forces of tyranny and authoritarianism separation of powers was conceived to be one such device. The English political theorist, John Locke (1632-1704), also envisaged a threefold classification of powers: legislative, executive and federative.

In Locke's analysis, the legislative power was supreme and although the executive and federative powers were distinct, the one concerned with the execution of domestic law within the state and the other with a states's security and external relations. He nevertheless took the view that 'they are always almost united' in the hands of the same persons. Absent from his

[18] kesari U.P.D, "Lectures on Administrative Law", Central Law Publications, Allahabad, 2005, PP.23,24

classification is any mention of a separate judicial power. Moreover, the proper exercise of these powers is achieved not through separation but government. Thus Locke's analysis does not, strictly speaking amount to the exposition of the separation of powers.[19]

The doctrine saw its full expansions in the hands of Charles Louis de Secondat, otherwise known as Baron de Montesquieu (1689-1755). He felt that the history of despotic Tudors and absolutist Stuarts showed that freedom was not secured, if the executive and the legislative powers were held in the same hands. He deduced his ideas of separation of powers from his observations and ideas of the relations between the Stuart King and the Parliament. He thought that Parliament would never be arbitrary, and the denial of legislative power to the king also could make the rule by extemporary decrees impossible. Montesquieu having experienced the tyrannies in the monarchical France must have watched the condition on the other side of channel with envy.

In the second half of the 17th century, he would not fail to notice that the Englishmen stood under the warm sunshine of the Magna Carta. Having lost his legislative and tax powers to the parliament, the English King was left with no prerogative. Parliament made the laws. His Majesty's government was, even though the cabinet system was not yet developed, administering the laws passed by parliament. end of the century the judges, like the great Coke, could not be dismissed by the king at his will, because the Act of settlement gave them tenure during the pleasure of his Majesty. Montesquieu concluded that the secret of the Englishmen's liberty was the separation and functional independence of the three departments of the government from one another.[20]

When legislative power is united with the executive power in a single person or in a single body of the magistrates, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will executive them tyrannically nor is there liberty if the power of judging is not separate from legislative power over the life and liberty of the citizen would be arbitrary, for the judge would be legislator if it were joined to executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised three powers; that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[21]

Viscount Henry St. John Boling Broke (1678-1751) "Remarks on the History of England"

[19] Parpworth Neil, "Constitutional&Administrative Law", Oxford University Press, United Kingdom, 2012, PP.31,32.
[20] Jain Kagzi MC, "The Indian Administrative Law", University Law publishing co.pvt.Ltd, 2002, PP.15, 16.
[21] ibid

 [ISSN 2581-5369]

advanced the idea of separation of powers. He laid emphasis on the balance of powers within the constitution because an imbalance would destroy it. He asserts that for protection of liberty and security in a state, equilibrium is needed between the Crown, the Parliament and the people. Although Montesquieu derived the concept of his doctrine of separation of powers from the British Constitution, as a matter of fact at no point of time this doctrine was accepted in its strict sense in England.

(A) Judicial Opinion:

The Lord Chancellor is head of judiciary, chairman of the executive and often a member of the cabinet. The House of Commons (Legislature),a member of the executive and often a member of the cabinet. The House of Commons ultimately controls the Legislative. The judiciary is independent but the judges of the superior courts can be removed on an address from the Houses of Parliament.[22]

In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers. In practice it is inevitable that they overlap. In such Constitutions as those of France and the United States of America, attempts to keep them rigidly apart have been made, but have proved unsuccessful. The distinction is nonetheless real and important. One of the main problems of modern democratic State is how to preserve the distinction whilst avoiding too rigid an insistence on it, in the wide border land where it is convenient to entrust minor legislative and judicial functions to executive authorities.[23]

The United Kingdom does have a kind of separation of powers but unlike United States it is informal. Black Stones theory of "Mixed Government" with checks and balances is more relevant to the U.K. Separation of powers is not an absolute or predominant feature of the U.K Constitution. The three branches are not formally separated and continue to have significant overlap. The U.K. is becoming increasingly concerned with the Separation of powers, particularly because of Article 6 of the European Convention on Human Rights which protects the right to fair trial.

The constitutional Reforms Act 2005 reforms the office of Lord Chancellor and the Law Lords will stop being in the legislature. Section 23 of the Act provides for establishment of Supreme Court of United Kingdom. The Supreme Court whose powers have been separated from the powers of Parliament has become functional since October, 2009, Section 61 of Constitutional Reforms Act, 2005 provides for Constitution of Judicial Appointments

[22] Supranote, 2,PP.19,20
[23] Supranote,3,P.16

 [ISSN 2581-5369]

Commission, for appointment of Judges in the Supreme Court as well as the court of appeal. Thus by and large independence of judiciary has been ensure by the Constitutional Reforms Act, 2005.[24]

On numerous occasions, senior judges have expressed the opinion that the British Constitution is base on a separation of powers. Thus in Duport Steels Ltd Vs Sirs, Lord Diplock stated that;

At a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based in the separation of powers; Parliament makes the laws, the judiciary interprets them. [24]

V. CONCLUSION

The Modern interpretation of the doctrine of separation of power is not a mere theoretical philosopher's conception. It is a practical work-a-day principle. The division of power between the three organs of the government does not imply, as its critics would have us think three water-tight compartments.

The machinery and procedure of legislative impeachment of executive officers and judges, executive veto over legislation and executive action are essential features of any sound constitutional system. It is said that instead of applying the doctrine in a strict sense of the functional machinery and procedures of the Government, the doctrine should be deemed to require a system of checks and balances among the three branches of the government while opposing the concentration of governmental powers in any of three departments.

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[24] supranote, 11,P.25