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Comparative Study of Separation of Power in India, U.K. And U.S.A.

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ABSTRACT

The doctrine of Separation was coined by Aristotle and further developed by Montesquieu. The doctrine talks about division of power among three forms of government i.e. Legislature, Executive and Judiciary in order to maintain effective form of government system as well as to keep check and balances within the three forms of government. The main idea behind the concept is to have a transparency in the mechanism of government and to assure liberty of citizens with effective implementation of all the law formulated by the State.The paper will trace out the history from where the concept came into existence and how successful it has been till date. The paper will be focusing on various countries where the doctrine is applicable and how the doctrine has been proved to be an effective mechanism in assuring the liberty of individual.

The paper will also look into criticism of the doctrine as to why some country has not adopted it completely and why this mechanism has proved to be not that successful as it was supposed to be. The concept is quite effective in theory but cannot be applicable completely practical life due to some loopholes, the paper tries to point out the reasons of its applicability or rather say, failure.

I. INTRODUCTION

"Power corrupts and absolute Power tends to corrupt absolutely".

In order to make a political system stable, the power needs to be divided and balanced. The doctrine of Separation of Power talks about the relationship among the three forms of government i.e. Legislature, Executive and Judiciary. The theory of Separation of Power states that the three forms of government must be separate and independent from each other. If there will be any combination of the functions of these three forms into a single or two organs, it will be harmful and dangerous for individual liberty. The main purpose of the doctrine is to bring exclusiveness in the functioning if the three organs of government and therefore it aims to create a strict demarcation of powers and functions of the forms of

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government. This doctrine ensures that there should be division of power so that one person or body of persons should not exercise all the powers. The principle of Separation of Power promotes that all the three organs of government should exercise three different set of functions. This doctrine states that the powers and responsibilities of all the three organs should be clearly defines and kept separate which is mandatory for ensuring the liberty of people.

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

- The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in Parliament.
- One organ of the government should not interfere with any other organ of the government.
- One organ of the government should not exercise the functions assigned to any other organ.[2]

In every state, there are 3 (three) organs of the Government, which are- (i) Legislature, (ii) Executive; and (iii) Judiciary. So, there must be a division of functions on the following basis:

- the Legislature should make laws, but not administer or enforce them;
- the Executive must administer the made laws, but neither influence the legislature in the making of the laws nor stand in judgment of the same; and
- the Judiciary must determine rights and uphold justice without taking over the functions of law-making or administration.[3]

II. LITERATURE REVIEW

(A) Separation Of Power, A Concept Of Assuring Liberty[4]

As the doctrine is normative in nature, it is committed to the achievement of political liberty, which is an essential part to keep government power under restrictions. This can only be achieved by creating a compartmentalization among the three forms of government so that the concentration of power in a single body of men will be prevented. The division of power

[2]Christopher John Kemp(2010). Madison, Montesquieu and the Separation of Power. Conference Paper, RESEARCH GATE, (Jan. 13, 2010) https://www.researchgate.net/publication/270286063_Madison_Montesquieu_and_the_Separation_of_Powers
[3]Fairlie, J. A., The Separation of Powers. ML R, 393-436 (n.d.)
[4]Oonagh Gay, The Separation of Powers,LIBRARY OF HOUSE OF COMMONS, 01-11(n.d.).

into three branches of government is essential for the establishment and maintenance of political liberty. To each of these branches there is a corresponding identifiable function of government, legislative, executive and judicial. There must be strict water-type compartmentalization and each branch of the government is required to be confined to exercise its own function and should not be allowed to encroach upon the functions of other branches. Moreover, the body of persons who compose these three agencies of government must be kept separate and distinct, and no individual should be allowed to be at the same time a member of more than one branch. This is the way to keep a check on each other and no single group will be able to control the machinery of the State.

(B) Separation of Powers in Thought and Practice[5]

Montesquieu was of the view that the concept of Separation of Power would be a panacea to good governance but it had its own drawbacks. A complete Separation of Power without adequate checks and balances would have nullified the basic concept of constitutionalism. If there will be rigid separation of power among the three organs of government, it will hinder the working of the government. There should be a co-operation and harmony maintained among the three organs of the government. If there will be water-tight compartmentalization among the three organs, the attainment of administrative efficiency will also be difficult because then each organ will try to preserve their own power, neglecting the requirements of other organs.

The doctrine of Separation of Power in stricter sense is unpractical and also undesirable. Therefore, till now the doctrine has not been fully accepted in any country, but this does not mean that the doctrine is of no relevance in today's world. The main logic on which the doctrine stands still holds a lot of importance. The main logic behind the doctrine is of polarity rather than the strict clarification, meaning thereby that the centre of authority must be dispersed to avoid absolutism. Hence, the doctrine can better be appreciated as the doctrine of 'check and balance' rather than Separation of Power.

III. ORIGIN

Montesquieu is called the father of the doctrine of Separation of Power. Although he was not the first scholar who discussed about the concept of Separation of Power. The origin of this doctrine can be traced back to Aristotle, the father of the Political Science. However, Aristotle did not discuss the term in detail, he only analyzed the functions of the three branches of government (the deliberative, executive and the judiciary) without suggesting

[5]Jeremy Waldron,Separation of Powers in Thought and Practice, 54(2) B.C.L. Rev., 433, 466-468 (2013)

that there should be separation. Many other scholars from 13th century onwards gave some attention towards the theory of Separation of Powers. Jean Bodiri one of the earliest thinkers of the modern period sees the importance of separating the executive and judicial powers. But actually, it acquired greater significance in eighteenth century. John Locke was one of the eighteenth-century philosophers to pay greater attention to the problems of concentration of governmental power. He argued that the executive and legislative powers should be separate for the sake of liberty.[6] Montesquieu discussed about the concept in his book De l'Esprit des Loix (The Spirit of the laws) which was published in 1747 in which he explained the following things:

1. If the legislative and executive powers will be vested with the same organ, then the liberty of the citizens will be threatened as it will lead to a tyrannical exercise of these two powers.
2. If the legislative and judicial powers will be combined then interpretation of laws becomes meaningless because this will create a situation where the law-maker also acts as the law interpreter and the law-maker will never accepts the errors in the laws made by him.
3. If the executive and judicial power will be combined then there will be no meaning of administration of justice and also it will become faulty because then the police (Executive) will become the judge (judiciary).
4. If all the three organs of the government will be combined and powers will be given to one person or one organ then there will be concentration of power in one hand and liberty will be compromised. It will lead to despotism of that person or organ.[7]

Montesquieu observed that if the power should be concentrated in a single person's hand or a particular group then there are more chances of having tyrannical form of government. In order to avoid such kind of situation and to keep a check on arbitrariness of the government, he suggested that there should be clear cut division on power among the three organs of government.

IV. SEPARATION OF POWER IN INDIA

On a bare reading at the provisions of Constitution of India, it may seem that the doctrine of Separation of Powers is accepted in India. Under the Indian Constitution, executive powers are vested to the President, Parliament is vested with Legislative powers and Judicial powers

[6]Dr. Reetesh Jain, Separation of power in India, 3(1)RJIF, 280, 286-288 (n.d.)
[7]Sunita Zalpuri, Training Package on Administrative Law, Legal Brief, pp. 18-20, (n.d.).

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are vested to the Judiciary (Supreme Court, High Courts and Subordinate Courts). The functions and powers of President are enumerated in the Constitution. The Parliament is competent to make law subject to provisions of Constitution. The Judiciary is independent in its field and there can be no interference with its judicial functions either by the Executive or by the Legislature. In case of I.C.Golak Nath v. State of Punjab[8], it was observed: "The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. 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.[9]

However, when we look at the provisions of the constitution carefully, it is clear that the doctrine of Separation of Powers has not been accepted in India in stricter sense. In India, there is functional overlapping as well as personnel overlapping also. The Supreme Court was given the power to declare void the laws passed by the legislature and the actins taken by the executive if they violate any provisions any provision of the Constitution or the law passed by the legislature in case of executive actions. The executive can affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. One can go on listing such examples yet the list would not be exhaustive. In Indira Nehru Gandhi v. Raj Narain[10], it was observed: "That in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of doctrine of Separation of Power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of Separation of Power is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of velour[11]." Thus, doctrine of separation of powers is not fully accepted in the Indian Constitution. It can be said with the observation of Mukherjee, J. in Ram Jawaya v. State of Punjab[12]: "The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially

[8]1967 AIR 1643, 1967 SCR (2) 762 (India)
[9]I.C. Golak Nath v. State of Punjab, 1967 AIR 1643, 1967 SCR (2) 762(India)
[10]1976 (2) SCR 347(India)
[11] Indira Nehru Gandhi v. Raj Narain, 1976 (2) SCR 347(India)
[12]AIR 1955 SC 549(India)

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belong to another[13]."

Thus, it is proved that the Separation of Power is practiced in India but not that rigidly. It is not embodied in the constitution but still practiced. The three main powers do cross their limits and interfere in each other's task whenever.

V. SEPARATION OF POWER IN USA

The doctrine of Separation of Power forms the basis of American constitutional structure. The Article I, II and II delegate and separate powers and also exemplify the concept of separate of powers. Art. I vest legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme Court[14]. The ideal concept of separation of power in functional and personnel is yet unrealized. 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; to the end it may be a government of law and not of men.[15]

In USA, there is presidential form of government which is based on the theory of separation between the executive and the legislature. The President is the head of the State as well as 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[16].

In U.S.A., 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 his 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

[13] Ram Jawaya v. State of Punjab, AIR 1955 SC 549(India)
[14] Dr. J.J.R.Upadhaya, Administrative Law-Paperback-1, 36-40(Central Law Agency, 2006)
[15] N Jain, Principles of Administrative Law, W&C,01, 24-16,(2007)
[16] Parpworth Neil, Constitutional & Administrative Law, 18-19 (Oxford University Press United Kingdom, 2010)

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effective leadership to the legislature and it is not always that the Congress accepts the programme and the policy proposed by the executive. The constitution guarantees the independence of Supreme Court.

VI. SEPARATION OF POWER IN ENGLAND

Although Montesquieu has derived the concept of Separation of Power from British Constitution, but still at no point of time this doctrine was accepted in strict sense in England. On the contrary, England has adopted the theory of integration of power. It is true that the three powers are vested in three organs and each has its own peculiar features, but it cannot be said that there is no 'sharing out' of the powers of the government. Thus, the king is the executive head as well an integral part of the Legislature. Similarly, all the Ministers are also members of one or the other Houses of the Parliament. The Lord Chancellor is head of judiciary, Chairman of 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 both Houses of Parliament.[17] In UK, the concept of Separation of Power exists but not in formal sense as it is in USA. The concept of mixed government with Checks and balances given by Blackstone is more predominant in UK. The three branches are not formally separated and continue to have significant overlap as in India. On numerous occasions, senior judges have expressed the opinion that the U.K. Constitution is based on a separation of powers. Thus, in Duport Steels Ltd. v. Sirs (1980), 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".[18]

VII. CRITICISM & CONCLUSION

1. The government is a single entity. Its three organs can never be completely separated. The legislative, executive and judicial functions are interdependent and inter-related functions and hence cannot be fully separated.

[17] Commentary: Jain M.P & S.N Jain, Principles of Administrative Law, 31 (Wadhwa & Company Nagpur, 2007)
[18] Parpworth Neil, Constitutional & Administrative Law, 26-27(Oxford University Press United Kingdom, 2012)

2. It is not desirable because without among mutual coordination these cannot carry out its functions effectively and efficiently. Complete separation of powers can seriously limit the unity and co-ordination needed by the three organs.
3. We cannot fully use separation of powers. The function of law-making cannot be entrusted only to the legislature. The needs of our times have made it essential to provide for law-making by the executive under the system of delegated legislation. Likewise, no one can or should prevent law-making by the judges in the form of case law and equity law.
4. The theory of Separation of Powers is unhistorical since it has never been operative in England. While formulating and advocating this theory, Montesquieu advocated that it was at work in England. The British Constitution has never been based on the theory separation of powers.
5. The Theory of Separation of Powers wrongly assumes the equality of all the three organs of the government. However, in reality the three organs are neither equal nor equally respected.
6. Separation of powers can lead to deadlocks and inefficiency in the working of the government. It can create a situation in which each organ can get engaged in conflict and deadlocks with other two organs.
7. The name 'Separation of Powers' is wrong because this theory really advocates a separation of functions.

In contemporary world, the doctrine of Separation of Power is only structural and not functional. The doctrine cannot be fully executed in its rigidity because the needs of the vast and diverse population. But it is being practiced in a modified form in order to avoid corruption and tyranny of any one organ of the government. The modified form include division of three organs structurally as well as functionally so that any of the branch doesn't act beyond the scope of its authority except in cases of emergency or application of checks and balances in order to prevent despotism. Therefore, it can be rightly concluded that Montesquieu's concept is not a myth but it actually holds truth, but in a modified sense. In today's environment this doctrine should be exercised in the manner in which the best interest of the citizens can be achieved.

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