# SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

## IMPORTANCE OF THE DOCTRINE

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not strictly accepted by a large number of countries in the world. The main object, as per Montesquieu - Doctrine of separation of power is that there should be government of law rather than having willed and whims of the official. Also another most important feature of this doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power .Montisque great point was that if the total power of government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive. All the jurist accept one feature of this doctrine that the judiciary must be independent of and separate from the remaining two organs of the government viz., legislature and executive. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where the constituent Assembly of France in 1789 was of the view that ―there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted‖. The most important aspect of the doctrine of separation of power is judicial independence from administrative discretions" there is no liberty, if the judicial power be not separated from the legislative and executive.[1].In the case of Indira Nehru Gandhi v Raj Narain, [2]K.Ramaswamy J. made the following observation;

*It is the basic postulate under the Indian constitution that the legal sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the constitution. The courts are intermediary between the people and the other organs of the state*

[1] Friedmann , law in a changing society (1996) 383
[2] AIR 1975 SC 2299 para 320

*in order to keep the latter within the parameters delineated by the constitution. The can be no liberty if the power of judging be not separated from the legislative and executive power.*

Article 50 of the constitution of India, therefore enjoins the state, and in fact separated the judiciary from the executive in the public service of the state. It's the constitutional duty of the judiciary to adjudicate the dispute between the citizens and the citizens, citizens and the state, the state interse and the states and the centre in accordance with the constitution and the law. [3]

Putting emphasis on the independence of judiciary, international congress of jurist held in New Delhi in 1959, had resolved;

*An independent judiciary is an indispensable requisite of a free society under the rule of law. Such independence implies freedom from interference by the executive or the legislature with the exercise of judicial function.*[4]The separation of power has to be viewed through prison of constitutional ism and for upholding goals of justice in its full magnitude[5]

## HISTORICAL DEVELOPMENT

The doctrine of separation of power has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle.in the 16th and 17th centuries, French philosopher john Bodin and British politician Locke expressed their views about the theory of separation of powers. But it was montisque who for the first time formulated this doctrine systematically, scientifically and clearly in his book *ESPRIT DES LOIS* (the spirit of the laws) published in the year 1748.

The concept of separation of power can be traced back from 4th century B.C., when Aristotle, in his treaties entitled 'politics" described the three main agencies of government i.e. the general assembly, the public officials and the judiciary.[6]In Rome, there was also three organs of government viz., public assemblies, the senate and the public officials. After the fall of Roman Empire Europe become the centre of power.in the beginning of 18th century the birth of parliament took place in a present colour and the three organs of government Re-Appeared. According to Locke these organs are legislative, executive and federative. However it's to be kept in mind that Locke did not consider all of them independently. He consider the legislative branch to be the supreme, while the other two functions as internal and external affairs, and they were left

[3] Kartar Singh v state of Punjab (1994) 3 SCC 569
[4] Reports of international congress of jurists, vol. IV (1960)
[5] University of Kerala v council principal's colleges, Kerala AIR 2010 SC 2532.
[6] Generally Robinson; The division of governmental powers in ancient Greece's p. 614 (1903)

within the control of monarch. During those times executive and judicial functions were simply known as "executive power". The king was considered as the supreme and he holds supreme power and all the organs are sub-ordinate to king. Chief justice coke in 1607 said that judicial matters were not to be decided by the natural reason but by the artificial reason and judgments of law, which law is an act which require long study and experience before that a man can attain cognizance of it[7].the judiciary were appointed by the king ,the judge shall serve amoung other things that he will do justice without fear, to all men pleading before him, friends and foe alike, that he will not delay to so even though the king should command him by his letters or by his words of mouth to the contrary.it was clear in the minds of people that the only part that the king played in the administration of justice was that of the appointment of judges.

## PITFALLS OF SEPERATION OF POWER

Theoretically, the doctrine of separation of power was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine.

- Historically speaking, the theory was incorrect. There was no separation of power under the British constitution.at no point of time, this doctrine was adopted in England.Prof Ullman says, "England was not the classic home of separation of power."[8] . Donoughmore committee also observed that there is no such thing as the absolute separation of power between legislature, executive and judiciary.
- This doctrine is based on presumption that the three organs of the government are independent to each other. In fact it's not so. There is no watertight compartments. It's not easy to draw a distinguishing line between these with a strict mathematical calculation.
- As Paton[9] observed "its extraordinarily difficult to define precisely each particular power' 'president Woodrow Wilson rightly said;

  "The trouble within the theory is that government is not a machine, but a living thing…no living thing can have its organ offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Their cooperation is indispensable, their welfare fatal"[10]

[7] Fairlee,;The separation of power 21 Mich law rev,393 (1992) at 6
[8] Supra note 3
[9] ibid at 35
[10] Friedmann, Law in a changing society p.382

- Enforcement of rigid concept of separation of power will make modern government an impossible entity. Strict adherence to this theory is practically impossible. The modern state has to work as a pedestrian father. Gone are the days when it was police state.as the time passes the problems of the state grows. Today the state is supposed to solve the complex issues. Socio-economic problems and it's not possible to do a strict adherence of this theory. Justice Frankfurter says also observed that enforcement of rigid conception of separation of power would make modern government impossible.
- The fundamental object behind Montesquieu's doctrine was liberty and freedom of an individual, but it cannot be achieved by mechanical division of functions and powers.in England, theory of separation of power is not accepted and yet it's known for the protection of indiual liberty. For freedom and liberty, it's necessary that there should be rule of law and impartial ad independent judiciary and eternal vigilance on the part of subjects.
- In modern practice, the theory of separation of power means an organic separation and the distinction must be drawn between "essential and incidental power". And that one organ of government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function thereof.[11]

**OBJECT OF SEPERATION OF POWER**.

It has been argued that the object of separation of power is to prevent the amalgamation of legislative, executive and judicial power into a common hand. Which will result into confusion and choais.no one will take care of other, everyone will think for the welfare of its own. The constitutional philosophers argued that the object of theory of separation of power is to check and balance. The constitution distributes powers into legislative, executive and judicial power. The checks and balance will keep the every one of them within their own domain. The check and balance system will be able to guard against arbitrarily use of power by anyone branch. The principle of checks and balance suggests overlapping functions in which each branch is able to check the powers of others.

The logic behind this doctrine is of polarity, rather than strict classification, meaning there by that the centre of authority must be dispersed to avoid absolutism.in the same manner Prof Wade writes that the object of montisque was against accumulation and monopoly rather than interaction.[19]Manistique himself never used the word 'separation'. The object of this doctrine was

[11] J.J.R.Upadhyaya, Administrative law' central law agency 9th edition p.47.

not create the berries but mutual restraint and respect between the three organs of the government.in this sense this doctrine can be called as doctrine of " check and balance"

The object and purpose of the doctrine is very well summarised by chandrachud, J. (as he then was) in the case of Indra Nehru Gandhi V Raj Narain[20].

*'No constitution can survive without a conscious adherence to its fine checks and balance. Just as court ought not to enter into problems entwined in the 'political thicket' parliament must also respect the preserve of the courts. The principle of separation of power is a principle of restraint which has in it the precept, innate in the prudence of selfpreservation. That discretion is the better part of valour"*