SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

SEPERATION OF POWER IN CANADA

Canada's system of government is based on a parliamentary model quite distinct from the presidential system operating in U.S.A. The leading constitutional writers observed that the Canada's retention of the British system o responsible government is utterly inconsistent with any separation of the executive and legislative.[1]While this is one important view it has never been approved by the supreme court of Canada.in the case of **dismantle v the queen**, [39]the supreme court refer the doctrine a '*essential feature of the constitution".* the separation of power in Canada exists only between the judiciary and the parliament, not between the executive and the legislature within the parliament has become constitutional orthodoxy. The supreme court of Canada in the case of **peter Hogg claims** that, there is no general separation of power in the constitution act 1867.the act doesn't separate the legislative, executive and judicial functions and insist that each branch of government excercise only its own functions.as between the legislative and executive branches, any separation of power would make little sense in a system of responsible government ; and its clearly established that the act doesn't call for any such separation. According to Hogg *Canada have little separation of powers doctrine*. The constitutional act 1867, establishes executive power by ss.916.these provisions vests the executive power in the queen, and calls for its excercise by the governor general and Privy Council. The constitutional act 1867, establishes significant power in the executive branch, including by s.15, the command of armed force. The constitutional act 1867 identifies and organises separate constitutional status as well for the legislature (section 17-52) and judiciary (section 96-101) and specifies their respective powers and limits. It's worth remembering that within the text of constitutional act 1867 the three branches of government are connected functionally as to give each a constitutional control over the other. Parliament is invested with the constitutional powers to enact all federal laws and to establish federal courts. Parliament is checked by the powers of the executive to call the houses of commons into session. [Sec 38].and by the power of the judiciary to declare laws unconstitutional. parliament is also checked by the powers in the executive to reserve bills passed by the house of parliament and to disallows laws enacted [sec55-7]. the veto-like powers, designed for British control of Canadian law making, have long

[1] Hogg, constitutional law of Canada ,1999 student ed., p.321 [39]
(1985),1 SCR 441,491

since fallen into disuse, but they still exist in the text and the structure of the constitution. The judicial branch has a constitutional power to try all cases, to interpret the laws in those cases and to declare any law or executive act UN constitutional. The judiciary is checked by the powers in the executive to appoint its members by power in the legislature to enact amendments that overturn judicial decision, including many constitutional decisions and also by the combined power of the executive and legislative branches to remove the judges.

SEPERATION OF POWER IN INDIA

The doctrine of separation of power in India has not accorded a constitutional status. However, the framers of the constitution don't support accumulation of power.in the constituent assembly there was a proposal to incorporate this doctrine but the same was not accepted and was dropped. In Constituent Assembly Debates Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads: "There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."

Kazi Syed Karim Uddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof. K.T. Shah. Shri K. Hanumanthiya, a member of Constituent Assembly dissented with the proposal of Prof. K.T. Shah. He stated that Drafting Committee has given approval to Parliamentary system of Government suitable to this country and Prof. Shah sponsors in his amendment the Presidential Executive. He further commented: "Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of Government. In any country or in any government, conflicts are suicidal to the peace and progress of the country. Therefore, in a governmental structure it is necessary to have what is called "harmony" and not this three-fold conflict."[2]

Prof. Shibban Lal Saksena also agreed with the view of Shri K. Hanumanthiya. Dr. B.R. Ambedkar, one of the important architects of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus: "There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution

[2] Tej Bahadur Singh; Principles of separation of powers and concentration of authority, J.T.R.I-journal 2nd year 2 & 5 march 1966.

between the executive and legislature. There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.[3]" With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negatived i.e., turned down.

Article 50 of the constitution which enjoins the separation of judiciary from the executive, the constitutional scheme doesn't embody any formalistic and dogmatic division of power[4]. The Indian constitution doesn't speak of the functions of the three organs of the state. Under the entire constitution article 53 provides only the executive power is vested within the president and it shall be exercised by him in accordance with the constitution either directly or through sub-ordinate officers appointed by him. The supreme court in the case of *Ram Jawaya Kapur v state of Punjab*[56]observed that the *"Indian constitution hasn't indeed recognized the doctrine of separation of power in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our constitution doesn't contemplate assumption by one organ or part of the state of function that essentially belong to another".*

Just like article 53(1) and 154 (1), where the executive power of the union and of the states vested with the president and of the governors respectively, there is no corresponding provisions in our constitution which provides legislative power and the judicial power to a particular organ. Accordingly *in Indira Nehru Gandhi v Raj Narain*[44]the court observed the Indian constitution adopts separation of power in broad sense only. A rigid separation of power as under the American constitution or under Australian constitution doesn't apply in India.in the result, there is no bar against vesting the judicial powers of states in tribunal other than the courts strictly-so called. The very fact that the article 136 (1) and 227(1) of the constitution mentions both courts and tribunals show that the judicial power of the state may vested in courts and tribunals, even though the two class of judicial authorities may differ as to the nature as the question referred to them, the procedure to be followed by them and the like.

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[3] Constituent assembly debates book no 2, vol no VIII second print 1989 p,967-968

[4] Upendra Baxi; development in Indian administrative law, in public law in India, 1982(A.G.Noorani, ED) p.136.

[5] Air 1955 SC 549

[6] SUPP SCC 1; AIR 1975 SC 2299

if we study the provisions of constitution carefully on can find that the doctrine of separation of power had not been accepted in India in strict sense but one can inclined that the doctrine of separation of power has been accepted in India. In the case of *Golakhnath v State of Punjab*[7], Subba Rao, C.J. 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"*

In Bandhua mukti morcha v union of India, [8]Pathak J. (as he then was) observed;

"The constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the power is not precisely demarcated, there is generally acknowledgment of its limits. The limit can be gathered from the written of the constitution, from conventions and constitutional practices, and from an entire array of judicial decisions'

In India, not only there is functional overlapping but there is personal overlapping also. The Supreme Court has power to declare the laws void passed by the legislature and the actions of executive if they violate any provision of the constitution or of any law passed by the parliament. The power to amend the constitution of parliament is subject to judicial Scrutiny of the court. Every law passed by legislature is void if they violate the basic structure of the constitution as propounded by the supreme court of India in the Kesavananda Bharati case. The president of India who is the executive head also enjoys law making power in the form of ordinance-making power, making laws for a state after the state legislature is dissolved. also, judicial power under article 103(1) and article 217(3), to mention only a few. He decides disputes regarding the age of judge of a high court or the Supreme Court for the purpose of retiring him[9].the president also enjoys the power regarding dis-qualification of any members of any house of parliament.[48]The executive furthered affect the judiciary by making appointment to the office of chief justice and other judges.

Likewise, the parliament exercise legislative function and is competent to make any law not inconsistent with the provisions of constitution, but many legislative functions are delegated to the

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[7] AIR 1967 SC 1643

[8] AIR 1984 SC 802

[9] Article 217(3) inserted by the constitution 15th amendment act 1963 [48] Article 103,of the constitution [49] Article 66, of the constitution.

executive.in certain situations the parliament perform judicial functions as well. Article 105 of the constitution of India gives power to parliament to decide the question of breech of its privilege and if proved can punish a person concerned.in case of impeachment of president, one house acts as prosecutor and the other house investigates the charge and decides whether they were proved or not. The latter is purely judicial function.[49]

On the other hand, the judiciary is supposed to perform judicial functions but they perform executive and sometimes legislative functions as well. Under article 227 of the constitution, the high courts have supervisory powers over all sub-ordinate courts and tribunals, and also the power to transfer cases. The high court and the Supreme Court frames rules, regulations, regulating their own procedure for conduct and disposal of cases.[10] High court rules, Supreme Court rules are few examples of it. Judiciary under Indian Constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and function within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the Constitution, had observed that[1112]-

"The doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned"

[10] Article 145,225 of the constitution

[11] Citied in Glanville Austin, the Indian constitution; corner stone of a nation-174 (1966)

[12] SCR 747 AIR 1951 SC 332