

PRINCIPLE OF SEPARATION OF POWERS AND CONCENTRATION OF AUTHORITY

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The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial. Locke categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power. "Continuous executive power" implies the executive and the judicial power, 'discontinuous legislative power' implies the rule making power, 'federative power' signifies the power regulating the foreign affairs.¹ The French Jurist Montesquieu in his book *L'Esprit Des Lois* (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That's why he is known as modern exponent of this theory. Montesquieu's doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive and judiciary. In other words each organ should restrict itself to its own sphere and restrain from transgressing the province of the other. In the view of Montesquieu:

"When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it is joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it is joined with the executive power, the judge might behave with violence and oppression. There would be an end of every thing were the same man or the same body to exercise these three powers..."²

Montesquieu's "Separation" took the form, not of impassable barriers and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as "checks and balances". The three organs must act in concert, not that

¹ I.P. Massey : Administrative Law, Edn. 1970, p. 35.

² Montesquieu, *De L'Esprit des lois*, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn. 199, p. 23.

their respective functions should not ever touch one another. If this limitation is respected and preserved, “it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty- the monopoly, or disproportionate accumulation of power in one sphere.”³

The man behind the principles is to protect the people against capricious tyrannical and whimsical powers of the State.

United Kingdom: The famous English Jurist Blackstone supported the doctrine of Montesquieu. According to him, “wherever the right of making and enforcing the Law is vested in the same man or in the same body of men there can be no liberty”. During the 17th century in England Parliament exercised legislative powers. The King exercised executive powers, and the Courts exercised judicial powers, but with the emergence of cabinet system of Government i.e. Parliamentary form of Government, the doctrine remains no good. The renowned constitutional Bagehot observed. “The cabinet is a hyphen which joins, buckle which fastens, the legislative part of the State to the executive part of the State.”

According to Wade and Phillips the doctrine of separation of powers implies:

- (i) The same person should not form more than one organ of the Government.
- (ii) One organ of the Government should not exercise the function of other organs of the Government.
- (iii) One organ of the Government should not encroach with the function of the other two organs of the Government.

Now the question in subject is whether this doctrine finds a place in England? In England the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government.

In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that doctrine of separation of powers is not an essential feature of British Constitution.

Donoughmore Committee has aptly remarked:

³ Carleton K. Allen: Law and Orders, Edn. 1965, p. 10,19.

“In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers.....”

U.S.A.: Usually it is said that the principle of separation of powers finds a good mention in the Constitution of United States; while the Federal Constitution of the United States of America does not expressly provide for the principle of separation of powers. Having reliance on the doctrine of Montesquieu, Madison, the Federalist observed; “The accumulation of all powers legislative, executive and judicial, in the same hands whether of one, a few or many and whether hereditary, self appointed or elective, may justly be pronounced the very definition of tyranny.” The same ideas were expressed by Hamilton in 1788.

In American Constitution we find that legislative, executive and judicial powers are vested in separate entities.

Section 1 of Article 1 declares: “All legislative powers herein granted shall be vested in a Congress of the United State”.

Section 1 of Article II says: “The executive power shall be vested in a President of the United States of America.”

Section 1 of Article III reads: “The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.....”

Let us see the actual position prevailing in America. It is clear from the above mentioned provisions that the President is the head of the executive in U.S.A. Besides he (President) possesses the power to veto bills⁴ passed by the Congress and such bills cannot become law unless they are subsequently passed again by each House, with a two thirds, majority. The character of veto power vested in the President is purely legislative. It is true that the power is one of negation only, but the history of its origin shows that even in its qualified form, it is legislative in its nature.⁵ The President also exercises legislative power in making of treaties regarding foreign affairs. As John Marshall said in his great argument of March 7, 1800, in the House of Representative, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”.⁶ The President in his legislative capacity gives information of the state of the Union to the Congress.⁷ Likewise the Congress interferes with the powers of President by casting vote on Budget. The Budget and Accounting Act, 1921 established the principle and practice of the executive budget, under which the President is responsible for formulating and presenting to Congress a complete and detailed expenditure plan for the

⁴ Article 1, Section 7(2) of U.S.A. Constitution.

⁵ Bernard Schwartz: American Constitution of Law, 1955 p.99.

⁶ United States v. Curtiss-Wright Export Corp; 229 U.S. 304,319 (1936).

⁷ Article II, Section 2 of Constitution of U.S.A.

following fiscal year.⁸ Congress also plays important role in ratification of treaties, as well as in appointments through its senators. Congress has also judicial powers. Each house may expel its members by a two thirds, votes or punish them for 'disorderly behaviour'. Congress is the sole judge of the reason for expulsion. Not only this, American judges may be removed from the office only by impeachment proceedings instituted before the Congress.

So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that legislature enacts the Law, but it is also true that in dealing with the new problems, where Law is silent, the Courts have to create the Law. The Chief Justice Hughes's remarks are most pertinent in this connection, as he candidly said- 'The Constitution is what the judges say it is.'⁹ The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers.

France: Under the despotic Rule of Louis XIV (1643-1715) France enjoyed a commanding influence in European affairs. Louis XIV had the same Kingship that James I had tried in vain to induce the English people to accept. It was the thinking of Louis XIV that the subject should obey the King absolutely without asking any question or making any criticism. because of this capricious behaviour he was known as autocrat ruler.

On the other hand Montesquieu, the most profound of the political writers of the eighteenth century, being impressed by the thoughts of Locke propounded his theory of separation of powers, based on British Constitution. He pointed out that the freedom which Englishmen enjoyed was due to the fact that the three powers of the Government- legislative, executive and judicial- were not as in France in the same hands. Parliament made the Laws, the King executed them, and the Courts independent of both, saw that they were observed. He believed that the English would lose their liberties so soon as these powers fell under the control of one person or body of persons. His doctrine of separation of powers was also incorporated in French 'Declaration of Rights of Man'. Article 16 of this declaration declares that there could be no constitutional or democratic government without separation of powers, but in practice this attempt has proved unsuccessful.

India: The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government

⁸ C. Herman Pritchett: The American Constitution 3rd Edn. p.163.

⁹ Hendel, Charles Evans Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz in American Constitutional Law 1955 page 130.

have been sufficiently differentiated, so that one organ of the Government could not usurp the function of another.

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.”¹⁰

Kazi Syed Karimuddin (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.”¹¹

Prof. Shibban Lal Saksena also agreed with the view of Shri K. Hanumanthaiya.

Dr. B.R. Ambedkar, one of the important architect 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 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

¹⁰ Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.

¹¹ Ibid p. 962.

very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.”¹²

With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negated i.e. turned down.

In Indian Constitution there is express provision that “Executive power of the Union shall be vested in the President,¹³ and the executive power of the State shall be vested in Governor..” (Article 154(1) of Indian Constitution). But there is no express provision that legislative and judicial powers shall be vested in any person or organ.

Now we have to see what is the real position in India regarding the separation of powers?

President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate Ordinances in order to meet the situation as Article 123(1) says “If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require”. When Proclamation of emergency has been declared by the President due to failure of Constitutional machinery the President has been given legislative power under Article 357 of our Constitution to make any Law in order to meet the situations. A power has also been conferred on the President of India under Article 372 and 372-A to adapt any Law in country by making such adaptations and modifications, whether by way of repeal or amendment as may be necessary or expedient for the purpose or bringing the provisions of such Law into accord with the provisions of the Constitution.

The President of India also exercises judicial function. Article 103(1) of the Constitution is notable in this connection. According to this Article “If any question arises as to whether a member or either of House of Parliament has become subject to disqualification mentioned in clause (1) of Article 102, the questions shall be referred for the decision of the President and his decision shall be final”. Article 50 lays emphasis to separate judiciary from executive. But in practice we find that the executive also exercises the powers of judiciary as in appointment of judges. (Articles 124, 126 & Article 127). The legislative (either House of Parliament) also exercises Judicial function in removal of President (Article 56) in the prescribed manner.¹⁴ Judiciary also exercises legislative power, High Court and Supreme Court are empowered to make certain rules legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy it declares the

¹² Ibid p. 967, 968.

¹³ Article 53(1) of Indian Constitution.

¹⁴ Article 61 of the Indian Constitution.

same null and void, and then amendments may be incorporated in the Legal System. Some time High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character.

Separation of powers and Judicial opinion:

The following cases explain the real position of doctrine of separation of powers prevailing in our country.

In re Delhi Law Act case¹⁵ Hon'ble Chief Justice Kania observed:

“Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is 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 the 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?” To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon'ble Chief Justice B.K. Mukherjea observed:

“Although in the Constitution of India there is no express separation of powers, 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 the 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?” To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon'ble Chief Justice B.K. Mukherjea observed:

“The Indian Constitution has not indeed recognised the doctrine of separation of powers in the 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 the functions that essentially belong to another.”

In Ram Krishna Dalmia v. Justice Tendolkar reported in AIR 1958 S.C. 538 at p. 546, Hon'ble Chief Justice S.R. Das opined that in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial- is nevertheless implicit in our Constitution. Same view was expressed in Jayanti Lal Amrit Lal v. S.M. Ram, AIR 1964 SC 649.

¹⁵ AIR 1951 S.C. 332 at p.346 = (1951)S.C.R. 747.

The judiciary is independent and separate wing of the Government. The executive or legislature has no concern with the day to day functioning of the judiciary. In terms of Biblical apologue, Francis Bacon in his “Essay of Judicature” showing the importance of ‘Temple of Justice’ has expressed thus:

“Solomon’s Throne was supported by lions on both sides; Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.” (Quoted in S.C. Advocates-on-Record Association v. Union of India, AIR 1994 SC 268 at p. 301).

Here the expression “Solomon’s Throne” symbolizes the majesty of our justice system and the word ‘Lions’ represents the Legislature and the Executive. Briefly it may be stated as” ‘Majesty of Justice system’ is supported by the Legislature and the Executive from both sides, nevertheless, these Legislature and Executive are under the control of Judiciary. Legislature and Executive must not go against any point of Sovereignty. As regards ‘Sovereignty’ it is enough to state that in a democracy it vests in the will of people.

Showing the importance of judiciary, Supreme Court in the same case has also observed: “Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged.” (p.338)

In Chandra Mohan v. State of U.P., AIR 1966 SC 1987 at p. 1993 Supreme Court held: “The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States..... But at the time the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the power levels would be a mockery.” (See also S.C. Advocates-on-Record Case, AIR 1994 S.C. 268 at p. 272).

The State in the present day has become the major litigant and the superior courts, particularly the Supreme Court, have become centres for turbulent controversies some of which with a flavour of political repercussions and the courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace. (S.C. Advocates-on-Record Case, AIR 1994 S.C. 268 at p. 344).

In *Udai Ram Sharma v. Union of India*, AIR 1968 S.C. 1138 at p. 1152, Supreme Court held that “The American doctrine of well-defined separation of legislative and judicial powers has no application to India.”

In *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461 at p. 1535, Hon’ble Chief Justice Sikri observed:

“Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution; this structure cannot be destroyed by any form of amendment.”

In *Smt. Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299 at p. 2470, Hon’ble Justice Chandrachud observed: “The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, legislative and judicial. It is essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions.”

In *Hari Shankar Nagla v. State of M.P.*¹⁶ It was observed:

“The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislature function consists in the determination of the choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.”

Virtually, absolute separation of powers is not possible in any form of Government. In view of the variety of situations, the legislature cannot fore-see or anticipate all the circumstances to which a legislative measure should be extended and applied. Therefore, legislature is empowered to delegate some of its functions to administrative authority (executive). But one thing is notable that legislature cannot delegate its essential legislative power. On this point following cases are notable:

- (1) *Sri Ram v. State of Bombay*, AIR 1959 S.C. 459,473,474
- (2) *Makhan Singh v. State of Punjab*, AIR 1964 S.C. 381,401
- (3) *Laxmi Narayan v. Union of India*, AIR 1976 S.C. 554.

¹⁶ AIR 1954 SC 465 at p. 468 = (1955) SCR 380.

In these cases the Supreme Court held that excessive delegation is not permissible. So many other cases are also notable on the point.

In *Sita Ram v. State of U.P.*, AIR 1972 S.C. 1168 at p. 1169. Hon'ble Hegde J. expressed the current attitude of the Court regarding delegation of legislative power in following words:

‘However much one might deplore the New Despotism of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive. Text book doctrines evolved in the 19th century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it.’

In *Asif Hameed v. State of Jammu and Kashmir* reported in AIR 1989 S.C. 1899 the Supreme Court observed:

“Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs.”

In the beginning public interest litigation cases were filed against violation of human rights, to protect the condition of labourers (as in *Asiad Case* AIR 1982 SC 1473). Then emerged the period of environmental litigation. The Courts are taking one of the top bureaucracy and the politicians. The apex Court has begun to realise that by not acting on a matter of public concern, it could lead to a state of political anarchy.’¹⁷

The Government (State) cannot escape from its prime duty (i.e. rendering services for the welfare of the citizens) showing that is over-burdened with day to day functionings.

The functions of a modern State unlike the police States of old are not confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. (*Ram Jawaya v. State of Punjab*, AIR 1955 S.C. 549 at p.553,554).

¹⁷ The Sunday Times of India February 4, 1996 (Lucknow City edition).

Nowadays in response to public interest litigation writs, the courts have begun to direct the Government on everything from clearing garbage off the streets to cleansing the polity of political sleaze.

With the widening of the horizons of “Judicial Activism” criticism emanated from a few percent of the people that the judiciary is overstepping its bounds and taking over the Government functions, but this is not a justifiable thought. The Supreme Court and the High Courts act as a watch-dogs to keep Executive and Legislature within the bounds of law.

Today millions of the people are suffering in the country. It is the judiciary which is holding out hope for them.

Evaluation of the Doctrine:

In strict sense the principle of separation of powers cannot be applied in any modern Government either may be U.K., U.S.A., France, India or Australia. But it does not mean that the principle has no relevance now a days. Government is an organic unity. It cannot be divided into water tight compartments.

History proves this fact. If there is a complete separation of powers the government cannot run smoothly and effectively. Smooth running of government is possible only by co-operation and mutual adjustment of all the three organs of the government. Prof. Garner has rightly said, “the doctrine is impracticable as a working principle of Government.” It is not possible to categorize the functions of all three branches of Government on mathematical basis. The observation of Frankfurter is notable in this connection. According to him “Enforcement of a rigid conception of separation of powers would make Government impossible.”¹⁸

It is my opinion that the doctrine of Montesquieu is not merely a ‘myth’ it also carries a truth, but in the sense that each organ of the Government should exercise its power on the principle of ‘Checks and Balances’ signifying the fact that none of the organs of Government should usurp the essential functions of the other organs. Professor Laski has aptly remarked: “It is necessary to have a separation of functions which need not imply a separation of personnel.”

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¹⁸ Frankfurter – The Public and its Government (1930) quoted by B. Schwartz, in American Constitutional Law, 1955 Page 286.