

Separation of Powers

There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

The question which assumes significance over here is that what should be the relation among these three organs of the state. Whether there should be complete separation of powers or there should be co-ordination among them.

An analysis into these three organs and the relations between them is to be done with the experience in different countries along with India which will give a clear idea about this doctrine and its importance in different Constitutions.

Today all the systems might not be opting for the strict separation of powers because that is undesirable and impracticable but implications of this concept can be seen in almost all the countries in its diluted form.

Background

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government.

Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executive, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

Montesquieu in the following words stated the Doctrine of Separation of Powers-

There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Through his doctrine Montesquieu tried to explain that the union of the executive and the legislative power would lead to the despotism of the executive, for it could get whatever laws it wanted to have, whenever it wanted them. Similarly the union of the legislative power and the judiciary would provide no defence for the individual against the state. The importance of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons.

The same was expounded by the **Madison** as-

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.

Therefore, separation of powers doctrine acts as a check against Tyrannical rule. The purpose underlying the separation doctrine is to diffuse governmental authority so as to prevent absolutism and guard against arbitrary and tyrannical powers of the state, and to allocate each function to the institution best suited to discharge it.

Separation of Powers Under Different Constitutions

Despite the safeguards it gives against tyranny, the modern day societies find it very difficult to apply it rigidly. In principle they go for separation of powers and dilution of powers simultaneously.

U.S.A.

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Art. I vests the legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme Court. The framers of the American constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical government by making it impossible for a single group of persons to exercise too much power. Accordingly they intended that the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation doctrine prevents any organ to become supreme.

Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but its not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldnt become a member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organs doesnt behold the powers absolutely.

This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

U.K.

Before we go to India, it's important to know the constitutional setup of the country to which India was a colony and ultimately owes the existence of the form of government it has. U.K. follows a parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the Cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature, it even holds the power to dissolve the assembly. The resting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.

India

Though, just like American constitution, in Indian constitution also, there is express mention that the executive power of the Union and of a State is vested by the constitution in the President and the Governor, respectively, by articles 53(1) and 154(1), but there is no corresponding provision vesting the legislative and judicial powers in any particular organ. It has accordingly been held that there is no rigid separation of powers.

Although prima facie it appears that our constitution has based itself upon doctrine of separation of powers. Judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or the legislature. Constitution restricts the discussion of the conduct of any judge in the Parliament. The High Courts and the Supreme Court has been given the power of judicial review and they can declare any law passed by parliament as unconstitutional. The judges of the S.C. are appointed by the President in consultation with the CJI and judges of the S.C. The S.C. has power to make Rules for efficient conduction of business.

It is noteworthy that A. 50 of the constitution puts an obligation over state to take steps to separate the judiciary from the executive. But, since it is a DPSP, therefore its unenforceable.

In a similar fashion certain constitutional provisions also provide for Powers, Privileges and Immunities to the MPs, Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent, in a way. The Constitution provides for conferment of executive power on the President. His powers and functions are enumerated in the constitution itself. The President and the Governor enjoy immunity from civil and criminal liabilities.

But, if studied carefully, it is clear that doctrine of separation of powers has not been accepted in India in its strict sense. The executive is a part of the legislature. It is responsible to the legislature for its actions and also it derives its authority from legislature. India, since it is a parliamentary form of government, therefore it is based upon intimate contact and close co-

ordination among the legislative and executive wings. However, the executive power vests in the President but, in reality he is only a formal head and that, the Real head is the Prime minister along with his Council of Ministers. The reading of Art. 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet.

Generally the legislature is the repository of the legislative power but, under some specified circumstances President is also empowered to exercise legislative functions. Like while issuing an ordinance , framing rules and regulations relating to Public service matters , formulating law while proclamation of emergency is in force . These were some instances of the executive head becoming the repository of legislative functioning. President performs judicial functions also .

On the other side, in certain matters Parliament exercises judicial functions too.

It can decide the question of breach of its privilege , and in case of impeaching the President; both the houses take active participation and decide the charges Judiciary, in India, too can be seen exercising administrative functions when it supervises all the subordinate courts below . It has legislative power also which is reflected in formulation of rules regulating their own procedure for the conduct and disposal of cases So, its quite evident from the constitutional provisions themselves that India, being a parliamentary democracy, does not follow an absolute separation and is, rather based upon fusion of powers, where a close co-ordination amongst the principal organs is unavoidable and the constitutional scheme itself mentions it. The doctrine has, thus, not been awarded a Constitutional status. Thus, every organ of the government is required to perform all the three types of functions. Also, each organ is, in some form or the other, dependant on the other organ which checks and balances it. The reason for the interdependence can be accorded to the parliamentary form of governance followed in our country. But, this doesnt mean that this doctrine is not followed in India at all.

Except where the constitution has vested power in a body, the principle that one organ should not perform functions which essentially belong to others is followed. This observation was made by the Supreme Court in the re Delhi Laws Act case, wherein, it was held by a majority of 5:2, that, the theory of separation of powers is not part and parcel of our Constitution. But, it was also held that except for exceptional circumstances like in A. 123, A. 357, it is evident that constitution intends that the powers of legislation shall be exercised exclusively by the Legislature. As Kania, C.J., 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. 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?

In essence they imported the modern doctrine of separation of powers. While dealing with the application of this doctrine, it is quintessential to mention the relevant cases which clarify the situation further.

Separation of Powers and Judicial Pronouncements in India

In India, we follow a separation of functions and not of powers. And hence, we don't abide by the principle in its rigidity. An example of it can be seen in the exercise of functions by the Cabinet ministers, who exercise both legislative and executive functions. A. 74(1) wins them an upper hand over the executive by making their aid and advice mandatory for the formal head. The executive, thus, is derived from the legislature and is dependant on it, for its legitimacy. This was the observation made by the Honble S.C. in *Ram Jawaya v. Punjab*.

On the question that where the amending power of the Parliament does lie and whether A. 368 confers an unlimited amending power on Parliament, the S.C. in *Kesavananda Bharati* held that amending power was now subject to the basic features of the constitution. And hence, any amendment tampering these essential features will be struck down as unconstitutional. Beg, J. added that separation of powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over the functions assigned to the other. This scheme cannot be changed even by resorting to A. 368 of the constitution. There are attempts made to dilute the principle, to the level of usurpation of judicial power by the legislature.

In a subsequent case law, S.C. had occasion to apply the *Kesavananda* ruling regarding the non-amendability of the basic features of the constitution and a strict adherence to doctrine of separation of powers can be seen. In *Indira Gandhi Nehru v. Raj Narain*, where the dispute regarding P.M. election was pending before the Supreme Court, it was held that adjudication of a specific dispute is a judicial function which parliament, even under constitutional amending power, cannot exercise. So, the main ground on which the amendment was held *ultra vires* was that when the constituent body declared that the election of P.M. won't be void, it discharged a judicial function which according to the principle of separation it shouldn't have done. The place of this doctrine in Indian context was made a bit clearer after this judgment.

Though in India strict separation of powers like in American sense is not followed but, the principle of checks and balances, a part of this doctrine is. Therefore, none of the three organs can usurp the essential functions of the organs, which constitute a part of basic structure doctrine so much so that, not even by amending the constitution and if any such amendment is made, the court will strike it down as unconstitutional.

Conclusion

It has been well said by Lord Acton:- Power corrupts and absolute Power tends to corrupt absolutely. Conferment of power in a single body leads to absolutism. But, even after distinguishing the functions, when an authority wields public power, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such power. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely.

The status of modern state is a lot more different than what it used to be. It has evolved a great deal from a minimal, non-interventionist state to an welfare state, wherein it has multifarious roles to play, like that of a protector, arbiter, controller, provider. This omnipresence of the state has rendered its functions becoming diverse and problems, interdependent and any serious attempt to define and separate those functions would cause inefficiency in government. Hence, a distinction is made between essential and incidental powers of an organ. According to this differentiation one organ can't claim the powers essentially belonging to other organ because that would be a violation of the principle of separation of powers. But, it can claim the exercise of the incidental functions of another organ. This distinction prevents encroachment of an organ into the essential sphere of activity of the other.

It is the exercise of incidental powers only which has made executive grow everywhere in this social welfare state. It has assumed a vital role but, it has not usurped any role from any other wing. It just happened that the other two organs, namely, judiciary and legislature, became unsuitable for undertaking the functions of this welfare state and as a consequence the functions of the executive increased. As controller and provider, the judicial processes were very time consuming and the legislature was overburdened with work. Therefore, it was in natural scheme of things which made the administrators end up performing a variety of roles in the modern state including those of legislature and judiciary too, to an extent.

Further, the check of the adjudicators over functionings of the other two has been regarded as an essential feature of the basic structure theory. The judicial review power is a preventive measure in a democratic country which prevents administrators and law-makers to exercise their whims and caprices on the lay man and turn it into a despotic regime. There have been cases where the judiciary has dictated the ambit of their power to the implementers and the mode to exercise it. Not even the representatives of people are immune to the power of the courts. Two recent Supreme Court judgments- on the cash-for-query case and on the Ninth Schedule have once again brought the powers and roles of the legislature and the judiciary into focus. In the case of the former, the court upheld the Lok Sabhas decision to expel members of Parliament, who were caught on camera taking bribes, but clearly rejected the contention that it cannot review parliaments power to expel MPs and claimed for itself the role of final arbiter on decisions taken by the legislature. The judgment on the Ninth Schedule has curtailed Parliaments power to keep certain progressive laws outside judicial Review.

In the Second case, i.e., *I.R. Coelho vs. State of Tamil Nadu*, S.C. took the help of doctrine of basic structure as propounded in *Kesavananda Bharati* case and said that Ninth Schedule is violative of this doctrine and hence from now on the Ninth Schedule will be amenable to judicial review which also forms part of the basic feature theory. The basic structure theory and the Golden triangle comprising of A.14, 19, and 21, will now be the criterion in scrutiny of the Ninth Schedule.

In a democratic country goals are enshrined in the constitution and the state machinery is then setup accordingly. And here it can be seen that constitutional provisions are made as such to support a parliamentary form of government where the principle can't be followed rigidly. The S.C. rulings also justify that the alternative system of checks and balances is the requirement, not the strict doctrine. Constitutionalism, the philosophical concept of the constitution also insists on limitations being placed upon governmental power to secure basic freedoms of the individual. Hence, the conclusion drawn out of the study is that there is no strict separation of powers but the functions of the different branches of the government have been sufficiently differentiated.

Bibliography

Books Referred:-

- 1) Bakshi, P.M., The Constitution of India, Universal Law Publishing Co. Pvt. Ltd., 2005.
- 2) Massey, I.P., Administrative Law, Eastern book Company, Lucknow, Sixth Edition, 2005
- 3) Takwani, C.K., Lectures On Administrative Law, Eastern Book Company, Lucknow, 2004
- 4) Sathe, S.P., Administrative Law, Lexis Nexis, New Delhi, Seventh Edition, 2004
- 5) Basu, D.D., Administrative Law, Kamal Law House, Kolkata, Sixth Edition, 2004
- 6) Jain, M.P., Treatise on Administrative Law, Wadhwa and company Law Publishers, Agra, Edition 1996
- 7) Jain, M.P., Indian Constitutional Law, Wadhwa and company, Nagpur, Fifth Edition, 2005