



THE PATTERNS OF THE SEPARATION OF POWERS AND PRACTICES

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ABSTRACT

The present Article is an attempt to analyze the scheme of Separation of Powers as envisaged under the Indian Constitution and the difficulties faced by the three wings of the government in practice while implementing the provisions of the Constitution in letter and spirit. The author also draws a comparative analysis with the American Constitution scheme of Separation of Powers. Throughout the course of the paper various foreign and Indian cases have been discussed wherein the Courts have recognized that there is no clear straightjacket formula to determine separation of powers. Given the complexity of the democracies all over the world, overlap in jurisdiction is bound to arise. However, each wing of the government must keep an internal check to ensure they do not end up violating the rights of the people. The Hon'ble Supreme Court of India has recognized that Separation of Powers is a part of the basic structure of the Indian Constitution. It is in this context, that the author felt the need to examine the 'Constitutional Plan and Practice with respect to Separation of Powers in India'.

Keywords: Executive, Indian Constitution, Judiciary, Legislature, Separation of Powers.

INTRODUCTION

The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs should be separate, distinct and sovereign in its own sphere so that one does not trespass the territory of the other. Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Later other theorists like Montesquieu, John Locke and James Harrington described these functions as legislative, executive and judicial. All the theories that were forwarded by these political thinkers in relation to the doctrine of separation of powers were on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons. At this note it is important to quote Cooley who emphasizes the importance of the doctrine of separation of powers as: "This arrangement gives each department a certain independence, which operates as a restraint upon such action of others as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guarantees against attempts at tyranny".

Under the U.S. Constitution, this theory has been applied to a certain extent, giving judiciary a unique position. As Hughes

C.J., once said, "We are living under a Constitution but the Constitution is what the judges say it is." The framers of the U.S. Constitution have strictly adhered to this doctrine of separation of powers. But, in actual practice it has been seen that this rigidity in the form of watertight compartments is not possible. Therefore, functionally the constitutional provisions are premised on the principle of

checks and balances. In William Marbury v. James Madison [(1803) 2 Law Ed 69: 1 Cranch 138], the U.S Supreme Court offered a new dimension to the doctrine of Separation of Powers. Lord Atkin too contributed to the evolution of this doctrine rendered in his decision in Liver Sidge v. Anderson [(1942) AC 206].

The framers of the Indian Constitution did not recognize the doctrine of separation of powers in a rigid sense. Unlike the American Constitution, this doctrine has not been strictly applied in the Indian Constitution. It cannot be explicitly seen but can be witnessed through the differentiation made in the discharge of functions by the different branches of the government in the Constitution. This doctrine is not completely alien to our Constitution. As we retrospect, relevant classic jurisprudence like Ram Jawaya v. State of Punjab [A.I.R. 1955 S.C. 549] clearly elucidates this principle. Chief Justice Mukherjea in the instant case said:

"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 belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way".

Thus, it can be inferred from the above that these organs of the government are allowed to exercise their functions but within certain limits. These limits are silver lined constitutionally and the same also guarantees limitable encroachments.

The Constitution of India has been founded upon the fundamental principle of Rule of law. It must be remembered that the quality of excellence of governance is evaluated on the touchstone of efficacy and the strength of

Judicial mechanism.

II. ESSENCE OF DEMOCRACY

The doctrine of separation of powers is an inseparable part of the evolution of democracy. Democracy dictates a system in which every citizen can, without fear of retribution, breathe, express himself, and pursue his or her interests. It enables him to live a life of his choice to the extent he does not encroach upon the rights of the other people. It is in this context that it can be presupposed that a system of balances and counter balances exists among the three organs of the government to ensure a strong nurtured democratic system. The Legislature, the Judiciary and the Executive are the pillars of democracy. No democracy indeed contemplates conferment of absolute power in any single authority. As in the words of Lord Acton:

“Power corrupts and absolute power tends to corrupt absolutely”.

Therefore the system of checks and balances is one of the most salient features of our constitutional scheme. The three organs can practically not be segregated into three watertight compartments due to their interdependence on each other to ensure efficacious governance. They have to work in accordance and in consonance to achieve a meaningful sustenance and purposeful progress of citizens. Though, minimum encroachment is always desirable. As has been observed by the Hon'ble Chief Justice Balakrishnan, “the Constitution lays down the structure and defines the limits and demarcates the role and function of every organ of the State including the judiciary and establishes norms for their inter relationships, checks and balances.” Thus, all the three organs are expected to work in harmony instead of giving primacy to only one of the organs. Bestowing absolute power is anathema to democracy. The very objective of the historical freedom struggle was to protect and promote the democratic rights of the people.

The conscience of our Constitution speaks through its Preamble and the dynamics of its goal is spelt-out, in its various provisions. The will of the people finds its best expression in the very words as inscribed in the Preamble “We the People of India” and “do hereby Adopt, Enact and Give ourselves this Constitution”. Thus, it is the people who are sovereign and they exercise this sovereign power in choosing their representatives to the Parliament.

III. MEANING OF SEPARATION OF POWERS

A complete and absolute separation of power is practically and theoretically not possible. Though, it is always possible to give a broad meaning to this doctrine. The basic concept of the separation of powers would mean:

- a. That the same persons should not form part of more than one of the three organs of government.
- b. That one organ of government should not control or interfere with the work of another.
- c. That one organ of government should not exercise the functions of another.

Such a clear demarcation is always desirable to keep the democratic system of a nation intact. If legislative and executive powers are vested in the same person, there would be no liberty. The same follows if judiciary was distinct from the legislature and executive. If all powers are vested in the same body it will lead to arbitrariness. Giving legislative power to judiciary would amount to biasness and executive power would lead to despotism and tyranny. As of today, the Parliament exercises political and financial control over the Executive, and there are inherent checks and balances to keep each organ within the limits of Constitutional power. There is no relationship in this world which is perfect and is prone to certain tensions and strains. But, the way out to this issue is through the development of healthy conventions. There should be mutual respect for each other keeping in mind the purpose of their exercise of these powers. Ultimately the aim is to achieve a ‘welfare state’; therefore a healthy coordination among the three can work wonders.

3.1 THE LEGISLATURE

The Legislature has been accorded high-esteem in the Indian Constitution. It is primarily concerned with enactment of general rules of law that are germane to all aspects of the conduct of its citizens and institutions. The Parliament is the Union Legislature of India comprising two bodies namely Lok Sabha and the Rajya Sabha. It enacts laws, impose taxes, authorizes borrowing, and prepares and implements the budget, has sole power to declare war, can start investigations, especially against the executive branch, appoints the heads of the executive branch and sometimes appoints judges as well as it has the power to ratify treaties. As it anchors for the will of the people by ensuring a true and intact democracy, it can be said that it cannot be done all by the Legislature itself. It is an imminent threat to democracy if an absolute power is given to the nation's purse holder. By making the executive accountable to the popular house, the Constitution ensures a proper mechanism of checks and balances to the doctrine of separation of powers. The entire system has other facets which can help achieve the same. Therefore, this brings into question the role of the other two pillars: the judiciary and the Executive.

3.2 THE JUDICIARY

The framers of our Constitution drafted it so meticulously that it provides for an independent and impartial Judiciary as the interpreter of the Constitution and as custodian of the rights of the citizens through the process of judicial review. This mandates the judiciary to interpret the laws but not to make them. They are not to lay down the general norms of behavior for the government. This brings us to the recent debate whether this behavior of the judiciary can be termed as judicial review or judicial activism? The higher judiciary in India, especially the honorable Supreme Court, the most powerful judiciary in the world, has become an epicenter of controversy over its role in entertaining and deciding public-interest-petitions. In deciding these petitions, the judiciary issues many directions to the Government which includes framing of

legislation in many areas. Is it that the judiciary is transcending its limits and trenching upon the fields of the executive or legislature? And if so is the case, then what is the legitimacy of exercise of such powers? The role of the judiciary should only be limited to scrutinizing the constitutionality of the legislation and not directing the government to enact legislation. The scope of judicial review does not extend beyond enquiring whether an impugned legislation or an executive action falls within the competence of the Legislature or of the executive authority or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

The three organs have to exercise their functions keeping in mind certain constitutionally assigned encroachments. However according to Chief Justice Subba Rao in *Golak Nath v. State of Punjab* [A.I.R. 1967 S.C. 1643] :

“It [the Constitution] 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.No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land.” Therefore

if any of the three organs tries to expand its jurisdiction it would follow an unavoidable conflict and affect the harmonious efficacy of the tripartite system of government. No organ has to superintend over the exercise of powers and functions of another, unless the Constitution strictly so mandates. Nonetheless, the interpretation by the judiciary of the laws and regulations adds flesh and blood to the basic structure of the Constitution. The Honorable Supreme Court has itself construed that the concept of Separation of powers is a “basic feature” of the Constitution. So if one encroaches the territory of the other it would be a clear violation of the basic structure of the Constitution and judiciary is not an exception to the same.

The entire debate of limitation of each organ's power has gone through a drastic change in the past two decades. Justice Pathak in *Bandhua Mukti Morcha v. Union of India* [1984 3 S.C.C. 161] said:

“It is a common place that while the Legislature enacts the law the Executive implements it and the Court interpret it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognized that in a certain sphere the Legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions, and the Court, in its duty of interpreting the law, accomplishes in its perfect action in a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State”. It can be clearly inferred from the above that one may exercise the other one's function up to a limited extent but the issue that predates the Indian scenario is whether this system is working in a well-balanced manner.

3.3 EXECUTIVE

The Executive can veto laws, can command of the military, makes decrees or declarations (for example, declaring a state of emergency) and promulgate lawful regulations and executive orders, can refuse to spend money allocated for certain purposes, can appoints judges, and has the power to grant pardons to convicted criminals. Like the other two pillars of democracy, the Executive is equally expected to be free of intrusions from the other two. It is always said that Executive is independent of the two but the incongruity persists. It is completely eroded in actual practice. The reason is that each time the executive is questioned for its actions by the judiciary and the Legislature. This dilutes the independence of the Executive to the maximum. It's not that the question of answerability pops up only in the case of executive. The judiciary and legislature are equally answerable but in their cases, a built-in system from within would be available for discharging those functions. This is the real state of affairs, which exists in practice.

Though the Indian Constitution allocates executive powers to the President and Governors (Article 53 (1) and Article 154 (1), they are empowered with certain legislative powers (Articles 123, 213 and 356) and certain judicial powers (Articles 103 and 192). Similarly the legislature exercises certain judicial functions (Articles 105 and 194) and judiciary exercises few legislative and executive functions (Articles 145, 146, 227 and 229). However the judiciary is made separate from the executive in the public services of the State (Article 50). In Bihar, the scheme of the separation of the judiciary from the executive was introduced on an experimental basis but later on it was extended throughout the State. In some states, complete separation of judiciary from executive has been achieved through legislation. In seven states, complete separation of judiciary from executive has been effected through executive orders.

IV. THE EXECUTIVE AND THE LEGISLATURE IN THE INDIAN

CONSTITUTION

In the early years of the Republic, the Supreme Court had already recognized that the Indian Legislature had a distinctly superior position vis-à-vis the other organs of the State. The observation made by Justice S.R. Das is a testimony to this in the famous case of *A.K.Gopalan v. State of Madras* [1950 SCR 88]: “Although our Constitution has imposed some limitations... [It] has left our Parliament and the State Legislature supreme in their respective fields. In the main, subject to limitations...our Constitution has preferred the supremacy of the Legislature to that of the Judiciary...and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate Legislature...and this is a basic fact which the Court must not overlook.”

Article 52 and 53 of Indian constitution says:

52. The President of India - There shall be a President of India.

53. Executive power of the Union. - (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(3) Nothing in this article shall-(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or (b) prevent Parliament from conferring by law functions on authorities other than the President.

Executive powers: All the executive actions of the Union government are taken in his name. He appoints officials of the Union Government, Prime Minister, and Council of ministers at the advice of the Prime Minister, Chief Justice and judges of Supreme Court and High Court at the advice of the Chief Justice of India. He appoints the chairman of UPSC, Comptroller and Auditor general of India, Attorney General of India, Chief Election Commissioner and other Election Commissioners, Governor of the states, members of Finance Commission and ambassadors.

Judicial powers: The President appoints the Chief Justice of the Supreme Court and other judges on the advice of the Chief Justice. The President enjoys legal immunity. He can grant pardon, reprieve, respite or remission of punishment. The President can dismiss the judges by two-thirds majority of the members present in two houses. If they consider a question of law or a matter of public importance which has arisen, they can ask for the advisory opinion of the Supreme Court. However they may or may not accept that opinion.

Legislative powers: The President summons both houses of the Parliament and prorogues the session of the two houses and can dissolve the Lok Sabha but uses these powers according to the advice of the Council of Ministers headed by the Minister. The inaugural speech of the Parliament at the beginning of the first session each year is delivered by him where he outlines the new policies of the government. A bill that the Parliament has passed can become a law only after the President gives their assent to it. He can return a bill to the Parliament for reconsideration but this not so in case of money bill. But in case the Parliament sends it back for the second time, the President is obliged to sign it. The President can promulgate ordinances when the Parliament is not in session but must get it ratified within six weeks. Moreover this is so only in case of the Union and Concurrent list.

Nonetheless, it cannot be said that the principle of separation of powers does not apply to the relationship between the executive and legislature. In spite of such explicit powers of the Executive, there are certain grey areas which call for a better application of the principle. It is important to maintain the separation of powers between the executive and the legislature is where the legislators exercise executive powers. Legislators exercise their check over the executive many a times through their power to head executive boards and agencies of various descriptions, the capacity to participate in executive committees which award contracts or select beneficiaries

of various welfare schemes. Secondly, the grant of an annual fund to the legislators to carry out activities in their constituency gives them executive powers in disguise which leads to corruption over a period of time. Though, the President appoints the Council of Ministers in consultation with the Prime Minister, he generally acts on the aid and advice of the Council of Ministers. This shows that the area within which he enjoys independence is very limited and nominal. Article 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet. 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.

V. THE EXECUTIVE AND THE JUDICIARY IN THE INDIAN

CONSTITUTION

The relationship between the judiciary and the executive has always been a delicate question. A society governed by Rule of law always demands for separation of the judiciary from the executive. The rule of law is always exposed to the danger of being encroached by the executive. It is in this context that proper functioning of a democracy requires a clear separation of the two. The primary function of the judiciary is the administration of justice and justice can never be rightly administered without the fear or favor unless there is a separation of the judiciary from the executive. Article 50 of the Constitution provides that "The State shall take steps to separate the judiciary from the executive in the public services of the State." The intention of the framers of the Constitution was to bring about changes wherever possible and shall be done immediately, without any delay, and where immediate operation of this principle is not possible, it shall nevertheless be accepted as an imperative obligation.

Theoretically, separation of judiciary from the executive is always a welcome step. The intention is always to ensure that the judiciary does not decide cases under the influence of the executive, rather follows the principle of Rule of Law. But, the real problem comes in practice where its separation is a problematic concern. The role of judiciary under the British Rule had always cautioned the framers of the Indian Constitution of the inherent limitations of the judiciary. These limitations of the judiciary pose a challenge to the separation of the two organs. Alexander Hamilton wrote in the Federalist papers: "The judiciary is beyond comparison the weakest of the three departments of power. It has no influence on either the sword or the purse; no direction either of the strength or wealth of the society; and can take no active resolution whatever. It may truly be said to have neither "force" nor will, but merely judgment. So it only has the "power of judgment".

Thus, it can be said that if each of the three organs insists on independence, judiciary is likely to be pushed to the wall being subordinate to the executive department. Thus,

it is submitted that it is difficult to achieve independence of judiciary from the executive as the ever increasing power of the executive is likely to topple the balance on which the Indian Judicial System rests. Now-a-days, there are many instances where judiciary has intervened in matters entirely within the domain of executive. In *People's Union for Civil Liberties v. Union of India* [1997 1 SCC 301] the Court observed that rule making is the function of the executive. As the learned Chief Justice Verma has pointed out in his Dr. K.L.Dubey Lecture:

"Judiciary has intervened to question a 'mysterious car' racing down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the Judge's pool, monkeys capering colonies to stray cattle on the streets, cleaning public conveniences, and levying congestion charges at peak hours at airports with heavy compliance of its orders. Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance."

The Indian Judiciary is now moving from Judicial Activism to Judicial Adventurism. Policy decisions are best left to the executive. It is indisputable that Courts cannot run the government. If it tries to do that it would defeat the very purpose of the Constitution.

VI. THE JUDICIARY AND THE LEGISLATURE UNDER THE

INDIAN CONSTITUTION

The provisions of the Chapter IV of Part V of our Constitution dealing with Union Judiciary provides for a close relationship between the Judiciary and Legislature. Article 122 of the Indian Constitution provides that the Court shall not call validity of any proceedings in Parliament in question on the ground of any alleged irregularity of procedure. And Article 212 provides that the Court should not enquire into the proceedings of the Legislature. But certain judicial anomaly has been felt in the recent past. The most prominent being the famous *Jagdebika Pal* case of 1998 involving the Uttar Pradesh Assembly and the Jharkhand Assembly case of 2005. The Interim Order of the Supreme Court in both the cases is a clear violation of the principle of separation of powers between the Judiciary and the Legislature. The judiciary blames Legislature for not doing anything worthwhile over the past three decades, whereas Legislature accuses Judiciary of doing the job of the legislature. When judiciary is not held accountable for the legislative functions they what is the legitimacy behind the exercise of such powers?

There are several instances that show that there has been a tilt of amendment power in favor of Parliament and sometimes Judiciary. The 42nd Amendment Act of the Parliament brought a drastic change in the provisions of the Constitution. Under this amendment Article 368, which gives amending power to the Parliament, was so modified that any further amendment of the Constitution would be immune from being questioned in Court of law. The power tilted in favor of the legislature. Ultimately in *Minerva Mills v. Union of India* [A.I.R. 1980 SC 1798] Supreme

Court ruled that the 'judicial review', being a basic feature of constitution, cannot be taken away by the Parliament by amendment of the Constitution. Apart from this, there are has been several instances where the judiciary has assumed the role of legislature without taking into account the practical difficulties and financial constraints. It has gone to the extent of not only framing guidelines but also the policies.

VII. THE FUTURE OF SEPARATION OF POWERS

The Constitution of India was drafted sixty years ago. Today in the era of Globalization where everything has become so advanced, can it be assumed that our Constitution is still adequate to address the present problems? Did the architects of our Constitution envisage the nation as we are today? The answer to these questions can be found in the underlying principles of our holy Constitution. Our Constitution embodies fundamental principles such as republicanism, secularism, equality, fraternity, social, economic and political justice that are self-sufficient in it to keep our system intact for the next fifty years or so. Though, they'll require different interpretations at different points in time. Similarly, the principle of separation of powers will require a more robust interpretation to guide the three organs of the government.

VIII. NEED FOR HARMONY

One of the major characteristics of a mature democracy is to ensure a harmonious relationship between the three organs of the government. It is indisputable that a good and intact democracy calls for a proper balance in the discharge of functions by the Executive, Legislature and Judiciary. There is no drawn map or an enunciated demarcation beyond which each of them cannot cross. What is most expected out of each of them is that they consciously realize the unseen boundaries and respect each other's sovereignty. This realization would help in upholding the rights of the citizens and establishing a 'welfare state'. It is important to value the efforts of the framers of our Constitution who envisaged the nation's future as a harmonious relationship between the pillars of the government. It is not only the duty of the tripartite to realize the same but also the obligation of the citizens to realize the ultimate sanctity of the Constitution.

IX. CONCLUSION

Constitution is the supreme law of the land. No organ should go beyond the role as assigned to it by the Constitution. It is the obligation of the Judiciary, Executive and Legislature to strictly adhere to one of the most fundamental features of the Constitution 'Separation of Powers'. It is needless to criticize the Constitutional Plan of separation of powers when the existing provisions are not being religiously observed. Undoubtedly, there is a need for a more robust interpretation and our dynamic Constitution has enough space to accommodate the same. The lofty ideal of the Constitutional system needs to be protected which can be preserved only when brought into practice. There is a major gap between the Constitutional

plan and practice of Separation of powers. It can only be bridged when all the three organs move a step ahead than all the other democracies of the world by working in sheer harmony. By not doing so they are disregarding the rights of the people. The founding fathers of the Constitution had also defined the position and the powers of the three organs of the state. They had realized that government being an organic entity would never be able to achieve complete separation of powers. Therefore, aiming for a complete separation of powers is equivalent to talking in vacuum. But, that does not mean that each branch has exclusive powers rather they have their Constitutional limits to be adhered to. The spirit of the Constitution is not on exclusiveness but on shared coordination. The Executive has grown very powerful in the recent time that has certainly led them to a wide misuse of powers. Apart from the check kept on them by the Judiciary and Legislature, media and NGOs have played a major role in exposing the misdeeds of Government functionaries. Ultimately, the aim of the three organs is to protect the rights of the people. In a democracy, vigilant attitude of the people can help ensuring a proper functioning and prevent arbitrary exercise of the power. The three organs have to be at peace for our prosperity. In India, we follow a separation of functions and not of Separation of powers. And hence, we don't abide by the principle in its rigidity. Though in India strict separation of powers like in

American sense is not followed but, the principle of 'checks and balances', exists as a part of this doctrine. Therefore, none of the three organs can usurp the essential functions of the organs, which constitute a part of the '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.

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