Doctrine of Separation of Powers: Global and Indian Perspective

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Abstract:
The doctrine of Seperation of Powers was originiated in the writings of Montesquieu in the Spirit of the Laws where he refers to the division of govt. responsibilities into three separate branches of government to limit any one branch from encroaching into the domain of another. The intent is to prevent the concentration of power and provides for checks and balances. A rigid seperation of powers as under the American Constitution or under the Australian Constitution does not apply to India or even England. Seperation of Powers is practiced in India but not that rigidly. The three main areas of the govt. in some or the other way perform the task of other.

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1. Philosophy

"Power corrupts and absolute power corrupts absolutely" is an important maxim which jurisprudence of power should never misplace. It is this reality that has made the French Jurist, Moutesquieu state that when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judicial power is not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the Judge who would then be the legislator. Were it joined to the executive, however, the Judge might behave with violence and oppression. There would be an end to everything, were the same man, the 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 cases of individuals."[1] The prominent text writers in the Administrative Law, Wade and Phillips [2] have also while defining the doctrine of separation of powers observed that the same person should not form part of more than one of the three organs of a government and one organ of the government should not control or interfere with the work of another. Accordingly, one organ of the government should not exercise the functions of another and should confine to its own area of action.

In the Constituent Assembly, Dr. K.T. Shah had suggested that an article should be inserted in the Constitution to ensure separation of powers. The suggested provision according to him should have read: "There shall be complete separation of powers as between the principal organs of the state, viz. the legislature, the executive and the judiciary."

Whether this article could have been a better choice or not can be the subject of an open debate; but this could not materialize. On the insertion of any such article Dr. B. R. Ambedkar said: "Looking at it from the point of view of responsibility, a non-parliamentary executive, being independent of Parliament, tends to be less responsible to the legislature. While a Parliamentary executive, being

[1] Del * Esprit Law, Book XI Ch, 6.
[2] Wade and Phillips, Constitutional and Administrative Law, p-48

more dependent upon a majority in Parliament, becomes more responsible. The parliamentary system differs from a non-parliamentary system in as much as the former is more responsible than the latter but they also differ as to time and agency for assessment of their responsibility. Under the non-parliamentary system, such as the one that exists in the United State of America, the assessment of the responsibility of the executive is periodic. It takes place once in four years, It is done by the electorate. In England, where the parliamentary system prevails, the assessment of responsibility is both daily and periodic. The daily assessment is done by members of Parliament through questions, resolutions, no-confidence motions, adjournment motions and debates on addresses. Periodic assessment is done by the electorate at the time of election which may take place every five years or earlier. The daily assessment of responsibility which is not available under the American system is, it is felt, far more effective than the periodic assessment and far more necessary in a country like India. The draft Constitution, in recommending the parliamentary system of government, has preferred more responsibility to more stability.[3]

According to this observation, the principle of separation of powers is implied in the system of governance in India. It is for this reason that the provision suggested by Dr. K.T. Shah has not been incorporated in the constitution.

2. Global Perspective

As pointed out above, the Constitution of the USA has very explicitly provided the doctrine of separation of powers. It vests legislative powers in the Congress, consisting of the Senate and the House of Representatives [4] executive powers in the President [5] and the judicial powers in the Supreme Court and such other Federal Courts as might be established by Congress [6] The President is elected separately for a fixed term of 4 years and his powers are separately declared by the Constitution. The Constitution makes him responsible for ensuring that the laws of the country are faithfully executed. The heads of the chief departments of the State are known as the Cabinet and the power of appointment and removal of these executive officers is vested in the President. Neither the President nor any of his secretaries can be a member of the Congress, and any member of the Congress can join the government only after resigning his membership and this is provided for keeping the separate entities between the executive and legislative organs. In normal circumstances, the President is irremovable from office but he can be removed from the office by the process of impeachment at the hands of the Senate for bribery, treason or other high crimes and misdemeanours[7]. This is clearly manifested by the resignation of President Nixon over the Watergate Scandal. The judges of the Supreme Court, once appointed are independent of the Congress and the President. But they too may be removed from office by impeachment. The supremacy of the Supreme Court was established in 1803 in Marbury v. Madison[8], wherein the Supreme Court declared both, the Acts of the legislature and the actions of the President to be unconstitutional. The Supreme Court has also ruled that the doctrine of separation of powers expressed in the Constitution excluded any extensive delegation of legislative power by Congress to executive agencies. [9]

In his revered work, the Constitution and What it Means Today, [10]Edward S. Corwin, while dealing with this doctrine has observed, "The Nixon years and their aftermath raises a perplexing question as to the fear of the doctrine of separation of powers. Are the vigorous efforts of the Congress to re-assert itself as harbinger of the future or an anomaly to fend off the assertion of power of the only

[3] H.R. Khanna, Making of the Indian Constitution, p. 68-69.
[4] The US Constitution, Article I
[5] Id, Article II
[6] Id, Article III
[7] Id.
[8] I Chanch 137
[9] S. Chechter Poultry Corpn, K.S. 295
[10] E.S. Corwin, The Constitution and What it Means Today, p. 3

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American President to resign while in office?" But Wade and Phillip[11], while dealing with this question say that the Watergate Scandal showed not only the strong position of the President elected into office by popular vote, it also showed how a combination of constitutional powers exercised by Congress and the Supreme Court, as well as such forces as public opinion and the press could combine to remove even the President from office.

Some other constitutions of the world have adopted the doctrine of separation of powers in different dimensions. The Constitution of Australia has preferred the delegation of legislative powers to executive agencies than to the judicial.[12] The Constitution of Srilanka is also held to be based on this doctrine. The impact of this doctrine can also be seen in the French Constitution.

In the United Kingdom, in the absence of a written constitution, there is no formal separation of powers and hence no Act of the Parliament may be held to be unconstitutional if any power is conferred in breach of the doctrine. The absolute sovereignty of the Parliament is maintained, there under which the Crown governs through ministers who are the members of the Parliament and responsible to it. The independence of the judiciary is firmly established by the Act of Settlement, 1700. Many disputes which arise out of the process of the government are dealt with not by the ordinary courts but by the administrative tribunals. However, the impartiality of the tribunals is maintained through preservation of essential features of 'fair judicial procedure.

3. Indian Perspective

The Constitution of India, as mentioned above, does not contain any provision to make any absolute or rigid division of the functions of the three organs of the government. The legislative and judicial powers are frequently entrusted to the executive but nevertheless the, functional, separation of the different powers has been stressed. On analysis, it is found that under, the various provisions of our Constitution like Articles 53(1) and 154(1), the executive powers of the union and the states are vested in the president and the governors respectively. As per this scheme, the president is the chief executive of the Indian union who exercises his powers constitutionally on the aid and advice of the council of ministers under Article 74(1). The three- fold division of powers is partially recognized and no unbridled" legislative powers have been vested in the Parliament and the state legislatures and the judicial powers in the Supreme Court and other courts. The Constitution of India has adopted a mid-way route regarding this matter. 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. This is to make, the parliamentary form of government functional as well ensure the rule of law. The Constitution also empowers the President to promulgate ordinances in exercise of his legislative powers which extend to all matters which are within the legislative competence of the Parliament. Under Article 123, during the recess of both the Houses of the Parliament, the President has the power to promulgation an ordinance if found necessary.

The President performs the judicial functions also and in this process he is empowered to decide a disputed question regarding the age of the High Court and the Supreme Court judges for the purpose of retirement from judicial office.[13] In this regard, as has been held by the Supreme Court, the President has to consult only the Chief Justice. Since in such a case, he performs judicial functions of grave importance he cannot act in this matter on ministerial advice. Under Article 60 the President is oath bound to preserve, protect and defend the Constitution and he can be impeached for violation of the constitutional provisions under Article 61. In the event of impeachment of the President, one of the Houses acts as the prosecutor and the other House investigates the charges and declares whether such charges have been sustained or not. As regards Council of Ministers, under Article

[11] Wade and Phillips, Constitutional & Administrative Law, p. 47
[12] C. Howard, Australian Federal Constitutional Law, Ch. 3 B.
[13] Union of India v. Jyoti Prakash, AIR 1971 SC 1093

75(5), no individual can be a member of the Council of Ministers for more than six months unless he is a member of either House of the Parliament. There is neither a specific provision nor an established convention debarring a member of the Rajya Sabha from becoming the Prime Minister of India which is clearly proved by the appointment of Mrs. Indira Gandhi in 1966 as the Prime Minister of India. The Council of Ministers is collectively responsible to the House of the People [14] and the ministers including the Prime Minister must sit in one of the Houses to which they belong by virtue of their membership and vote in passing legislative bills and other motions. The principle of collective responsibility to the House of the People is a direct negation of the doctrine of separation of powers. It creates an interministerial responsibility and the collective accountability under the control of the House of the People.[15]

The doctrine of judicial review of the legislation as incorporated in Articles 13, 245 and 246, gives by necessary implication, adequate powers to the Supreme Court to pass orders upon the validity of legislation, subject only to limitations of the 25th Amendment. The fact is that the framers of the Indian Constitution did not intend to confer unfettered powers on the Supreme Court for fear of creating a super legislature. But inspite of all these limitations and other constraints, the Supreme Court of India plays a very significant role in the constitutional process as the final arbiter of the Constitution and, therefore, as a law maker. Since the inception of the Republic, courts in India have given a number of decisions expounding the, various provisions of the Constitution. However, in the absence of a specific provision for separation of powers and overlapping of functions, the marginal cases are readily accepted. The constitutional framework is inclined towards the requirements of expediency and efficiency, rather than the doctrine of separation of powers strictly. The Supreme-Court, In re Delhi Laws Act, [16]has held that: "It does not admit of serious dispute that the doctrine of separation of powers has strictly speaking, no place in the system of the Government that India has at present day under our Constitution unlike the American and Australian constitutions, the Constitution of India does not expressly vest the different sets of powers in different organs of the state. Our Constitution though federal in form is modeled on the British Parliamentary system, the essential feature of which is responsibility of the Executive to the Legislature".

Chief Justice Kania has, however, shown conservatism about the doctrine of separation of powers as follows: "Although in the Constitution there is no express separation of powers, it is clear that a legislature is created and detailed provisions are made for making that legislature to pass the laws. It is then too much to say that under the Constitution the duty to make laws is primarily cast on legislature."

The Supreme Court of India has, therefore, not expressly denied the doctrine of separation of powers although the doctrine has not been expressly made essential. The judicial creativity in law making process reached in India to a prominent height in the cases of: Golak Nath [17] and Kesavananda Bharati[18]. After the Bharati's case and the judicial articulation of the basic framework in Indira Gandhi's Case[19], the Supreme Court itself granted approbation to the doctrine of separation of powers. It vehemently demolished the jurisdictional bar established by 39th Amendment about special provision as to elections of Parliament in the case of Prime Minister and Speaker. The Supreme Court maintained its appellate jurisdiction in the matter. The court declared Cl. 4 of Art 329 A to be invalid *inter alia* on the ground that the separation of powers was an essential feature of the Constitution. It also held that although the constitutional power of amending the Constitution

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[14] The Constitution of India, Article 75(2).
[15] M.C.J. Kagzi, The Indian Administrative Law, p. 20
[16] AIR 1951 SC 352
[17] AIR 1967 SC 1643
[18] AIR 1973 SC 1461
[19] In DIRA ga NDHI V. Raj Narain, AIR 1975 SC 2299

knew no separation of powers, yet the possession of all powers by the constituent body was distinct from their exercise by overruling the erroneous decision of Golak Nath. The amending power was, therefore, not the same as legislative power.

In Minerva Mills's case[20], the Supreme Court by striking down sections 4 and 5 of the 42nd Amendment Act to be *ultra vires* maintained its supremacy and its role as the watchdog of the Constitution. About Sections 4 of the said amendment, which sought to oust the jurisdiction of the Court, Mr. N.A. Palikhivala [21] has observed that provision was clearly *ultra vires* the amending power of the Parliament. That destroyed the balance of power between the legislatures and sought to deprive the citizens of the modes of redress which are guaranteed by Article 32.

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[20] AIR 1980 SC 1789
[21] N.A. Palkhivala, We the People, p. 207.