

RMM LAW COLLEGE SAHARSA

ADMINISTRATIVE LAW

IIIrd Part

Paper -VII

TOPIC- Separation of power

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Defects

Though theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine:

1. Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point in time, this doctrine was adopted in England.

As Prof. Ullman says: "*England was not the classic home of separation of powers.*" It is said: "*Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw.*"

2. This doctrine is based on the assumption that the three functions of the Government viz legislative, executive and judicial are independent of distinguishable from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision.
3. It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone, committing a breach of its privilege; nor can it delegate any legislative function even though it does not know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the courts frame rules of procedure to be adopted by them for the disposal of cases. Separation of Powers thus can only be relative and not absolute. d) Modern State is a welfare State and it has to solve complex socio-economic

problems and in this state of affairs also, it is not possible to stick to this doctrine. Justice Frankfurter said; “Enforcement of a rigid conception of separation of powers would make modern Government impossible.” Strict separation of powers is a theoretical absurdity and practical impossibility.[xvi]

4. The modern interpretation of the doctrine of Separation of Powers means that discretion must be drawn between ‘essential’ and ‘incidental’ powers and one organ of the Government cannot usurp or encroach upon the essential functions belonging to another organ but may exercise some incidental functions thereof.[xvii]
5. the Fundamental object behind Montesquieu’s doctrine was liberty and freedom of an individual, but that cannot be achieved by mechanical division of functions and powers. In England, the theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be Rule of Law and impartial and independent judiciary and eternal vigilance on the part of subjects.[xviii]

Indian Outlook

In India, the doctrine of separation of powers has not been accorded constitutional status. Apart from the directive principle laid down in **Article 50** which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.[xix]

The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*[xx], held:

“Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the State of functions that essentially belong to another.”

In *Indira Nehru Gandhi v. Raj Narain*[xxi], Ray C.J. also observed that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. However, the Court held that though the constituent power is independent of the doctrine of separation of powers to implant the story of basic structure as developed in the case

of *Kesavananda Bharati v. State of Kerala*^[xxii] on the ordinary legislative powers will be an encroachment on the theory of separation of powers. Nevertheless, 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 of the Constitution cannot be changed even by resorting to **Article 368** of the Constitution.

In India, not only is there a functional overlapping but there is personnel overlapping also. The Supreme Court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. Even the power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the **Constitution**.^[xxiii] The President of India in whom the Executive Authority of India is vested exercises lawmaking power in the shape of ordinance making power and also the judicial powers under **Article 103(1)** and **Article 217(3)** to mention only a few. The Council of Ministers is selected from the Legislature and is responsible to the Legislature. The Legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The Executive may further affect the functioning of the judiciary by making appointments to the office of the Chief Justice and other Judges. ^[xxiv]

Judicial Opinion on the Doctrine of Separation of Powers

The separation of power there were times where the judiciary has faced tough challenges in maintaining and preserving the Doctrine of separation of power and it has in the process of preservation of the above said Doctrine has delivered landmark judgments which clearly talk about the independence of judiciary as well as the success of judiciary in India for the last six decades.

The first major judgment by the judiciary in relation to Doctrine of separation of power was in *Ram Jawaya v State of Punjab*^[xxv]. The court in the above case was of the opinion that the Doctrine of separation of power was not fully accepted in India. Further, the view of Mukherjea J adds weight to the argument that the above-said doctrine is not fully accepted in India. He states that:

“The Indian constitution has not indeed recognized the doctrine of separation of powering its 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 functions that essentially belong to another”.

Later in *I.C. Golak Nath v State of Punjab*^[xxvi], Subha Rao, C.J opined that

“The constitution brings into existence different constitutional entities, namely the union, the state and the union territories. It creates three major instruments of power, namely the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them”

The above opinion of the court clearly states the change in the court’s views pertaining to the opinion in the case of *Ram Jawaya v State of Punjab* related to the doctrine of separation of power. This came one of the most landmark judgments delivered by the Supreme Court in *Keshvananda Bharti v Union of India* the court was of the view 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 other⁷. Hence this further confirmed the opinion of the court in relation to the doctrine of separation of power.

Then in *Indira Gandhi Nehru v. Raj Narain*, where the dispute regarding P.M. election was pending before the Supreme Court, opined that adjudication of a specific dispute is a judicial function which parliament, even under constitutional amending power, cannot exercise i.e. the parliament does not have the jurisdiction to perform a function which the other organ is responsible for otherwise there will be chaos as there will be overlapping of the jurisdictions of the three organs of the state. Also, the constituent Assembly Of France in 1789 was of the view that *“there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted.”* So if there is a provision then there should be proper implementation and this judgment emphasis on that point only.

Also in *I.R. Coelho vs. State of Tamil Nadu*^[xxvii], S.C. took the opinion opined by the Supreme court in *Kesavananda Bharati* case pertaining to the doctrine of basic structure

and held that the Ninth Schedule is violative of the above-said doctrine and hence from now on the Ninth Schedule will be amenable to judicial review which also forms part of the basic structure theory.

From the above few case laws right from *Ram Jawaya v state of Punjab* in 1955 to *I.R. Coelho v. State of Tamil Nadu* in there has been a wide change of opinion as in the beginning the court was of the opinion that as such there is no Doctrine of Separation of Power in the constitution of India but then as the passage of time the opinion of the Supreme Court has also changed and now it does include the above said Doctrine as the basic feature of the Constitution.

Evaluation of the Doctrine

In a 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 nowadays. Government is an organic unity. It cannot be divided into watertight compartments.

History proves this fact. If there is a complete separation of powers the government cannot run smoothly and effectively. The 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 a 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.”

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.*”