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"SEPARATION OF POWER IN INDIA IN ITS DILUTED FORM"

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ABSTRACT

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. 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 executives, 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. The philosophy of the theory directly influenced the American and French revolutions and further democratic movements and constitutionalism. More concretely, we have to find the answer of "Separating power on behalf of what?" The first ideal is democracy. In one way or another, separation may serve (or hinder) the project of popular self-government. The second ideal is professional competence. Democratic laws remain purely symbolic unless courts and bureaucracies can implement them in a relatively impartial way. The third ideal is the protection and enhancement of fundamental rights. Without these, democratic rule and professional administration can readily become engines of tyranny.

Keywords : Democratic, Separation, Power, Rights, Judiciary

I. INTRODUCTION

Today all the Constitutional systems in the world 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. 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 executives, 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.

The legitimacy of an active judiciary is closely connected with the constitutional limits enshrined in the constitution which are based on a broad division of powers among the three organs of the state. In this set up, each organ is earmarked with certain specific functions any usurpation of such earmarked functions by other

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organs raises certain serious questions relating to the harmonious working of the Constitution. For these reasons, the primary objection that outs the concept of Judicial Activism' is the doctrine of Separation of Powers.

In India, we follow a separation of functions and not of powers. And hence, we don't abide by the principle in its rigidity. Because if there is a complete separation of power, the different organs of the governments will not be able to work in co-operation and harmony because all organs are interlinked there be frequently deadlocks which may bring the governmental machinery to a standstill.

Since early times, it has been a prime concern of most of the political thinkers to devise methods that can best stand as a bulwark against the arbitrary exercise of governmental powers. To this effect, it has often been many a time suggested that there should be no concentration of power in a single man or a body of men and the government should be that of a government of law and not of men. The frank acknowledgement of the role of government in a society linked with a determination to bring it under control by placing limits on its power has influenced the minds of myriad political thinkers as well as the advocates of constitutionalism who from time to time have come up with distinct theories to grapple with the burgeoning problem. As a solution to this dilemma, the doctrine of separation of powers has always stood alongside other theories, as a fundamental political maxim, surmounted with the intellectual propositions of many philosophers who in some way or the other, developed and perceived it as per their own apprehensions and understandings. A close analysis of the literature available on the doctrine goes on to suggest that even for people most closely associated with the doctrine, only concerned themselves himself with the demonstration of its adoption and its application in the constitution of United States. Further, the unanimous disagreement amongst the authorities on Montesquieu's attempt of defining the doctrine also illustrates the point.

By no stretch of imagination is the doctrine a simple and an immediately recognizable, unambiguous set of concept. It rather represents an area of political thought where there has been an extraordinary confusion in defining and the use of its attributes. Interestingly, standing alone as a theory of government, the doctrine has uniformly failed to provide an adequate basis for an effective and a stable political system. Nevertheless, having made all the necessary qualifications, the essential and vital ideas behind the doctrine still remain of utmost importance in various political systems in the world over today. An examination of the history of the past centuries reveals that despite all inadequacies, there has always been a stubborn quality about the doctrine that it persistently has re-appeared in different forms often in the very work of those who saw themselves as its most bitter critics. This per se is recognition of the fact that the very idea of division of power and separation of functions, has always prevailed persistently in the past so as to give effect to a just system of governance and avoid any concentration of power in a single body of men.

To understand the true percept of Separation of Powers. To study the importance of Separation of Powers. To estimate the origin of Separation of Powers. To underline the contribution of Montesquieu in relation to Separation of Powers. To study the Doctrine of Separation of Powers in relation to the Indian Constitution. To estimate the scope of judicial pronouncements in relation with the Doctrine of Separation of Powers. In India there is lot of quarries about a complete separation of power or not.

This research is descriptive and analytical in nature. Accumulation of the information on the topic include wide use of secondary sources like books, e-articles etc. The matter from these sources have been compiled and analyzed to understand the concept from the grass root level. The structure of the project, as instructed by the

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Faculty of Political Science has been adhered to and the same has been helpful in giving the project a fine finish off.

As the scope covers Online journals, articles available on net, research papers ,books, power point presentation available on online, magazines.

II. MEANING OF SEPARATION OF POWERS

Understanding that a government's role is to protect individual rights, but acknowledging that governments have historically been the major violators of these rights, a number of measures have been devised to reduce this likelihood. The concept of Separation of Powers is one such measure. The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse.

It is generally accepted that there are three main categories of governmental functions

– (i) the legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State i.e. legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

As the concept of Separation of Powers' explained by Wade and Philips, it means three different things:-

i. That the same persons should not form part of more than one of the three organs of Government, e.g. the Ministers should not sit in Parliament;
ii. That one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and
iii. That one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.

A. IMPORTANCE OF THE DOCTRINE

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not strictly accepted by a large number of countries in the world. The main object, as per Montesquieu - Doctrine of separation of power is that there should be government of law rather than having willed and whims of the official. Also another most important feature of this doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where 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.

B. ORIGIN OF SEPARATION OF POWERS

The concept of separation of powers grew out of centuries of political and philosophical development. Its origins can be traced to 4th century B.C., when Aristotle, in his treatise entitled Politics, described the three agencies of the government viz. the General Assembly, the Public Officials, and the Judiciary. In republican Rome, there was a somewhat similar system consisting of public assemblies, the senate and the public officials, all operating on the principle of checks and balances. Following the fall of the Roman Empire, Europe became fragmented into nation states, and from the end of the middle ages until the 18th century, the dominant governmental structure consisted of a concentrated power residing in the hereditary ruler, the sole exception being the development of English Parliament in the 17th century. With the birth of the Parliament, the theory of the three branches of government reappeared, this time in John Locke's Two Treatise of Government (1689), where these powers were defined as legislative, executive, and federative. Locke, however did not consider the three branches to be co-equal, and nor considered them as designed to operate independently. He considered the legislative branch to be supreme, while the executive and federative functions as internal and external affairs respectively, which were left within the control of the monarch, a scheme which obviously corresponded with the dual form of government prevailing in England at that time, that is, The Parliament and The King.

During those times, in England the term executive' had a much broader connotation in contrast to how it is understood today. What we now call executive and judicial functions were then simply known as Executive Power'. The King was considered as the repository of all executive and judicial powers and was believed to be the sole protector of the laws of nature. However, the need for the independence of the judiciary from the hands of the king and his other servants was a long felt demand since early times which was further influenced by the writings of Fortes cue, a political thinker of that time. On similar lines, Chief Justice Coke in 1607 went a step further and said that judicial matters were —not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain cognizance of it. Nonetheless, it was much clear in the minds of people that the only part that the king played in administration of justice was that of the appointment of judges.

Having felt that judiciary should be separate and independent from the clutches of the King, another theory that aimed at the separation of legislative and executive (including judicial) functions grew autonomously by the influence of the writings of several other political writers of that time. Throughout the 17th and 18th centuries, English writers endeavored to expound one theory of separation in the absence of the other. It was not until Baron-de-Montesquieu that a really influential synthesis of the duo appeared.

III. MONTESQUIEU'S THEORY OF SEPARATION OF POWERS

Baron-de-Montesquieu was a French philosopher who is aptly known, criticisms apart, for the theorization of the concept of separation of powers into a profoundly systematic and scientific doctrine in his book De L Espirit des Lois (The Spirit of Laws), published in the year 1748. He based his theory on his understanding of the English system which since the time of Locke had generated a more independent judiciary and a tendency towards a greater distinction amongst the three branches.

Apart from natural liberty', Montesquieu laid greater emphasis on political liberty' of a citizen. He defined political liberty' as —peace of mind that arises from the opinion each person has of his security and said that in order to have such liberty, it is necessary that the government be such that one citizen need not fear another. He further observed that liberty is constantly endangered by the tendency of men to abuse governmental power and that to prevent such abuse it is necessary to construct a government where power would check power. This suggests that Montesquieu perceived a separation with an adroit admixture checks and balances. In discussing the importance of delineations of power among the three branches, he wrote:

When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions might 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 judiciary power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything, where the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.

To discover the constitutional principles which best promoted political liberty, Montesquieu looked to the English Constitution which in his belief, the only one was having liberty as its chief object. Though the English Constitution classified political power primarily in terms of legislative and executive functions and further sub-divided the latter to take into account Lock' distinction between executive and federative' functions, he decided to call the conduct of foreign affairs as executive power' and the execution of domestic law as judicial power'.

Based on this broad classification, he divided the governmental power into legislative, executive and judicial functions. He apprehended legislative power as an activity of declaring the general will of the state of informing the people through general rules of their obligations toward one another and opined that such power should reside in the body of people, for in a free state, he believed, every man who is supposed to be a free agent ought to be governed by himself. Further, he understood executive power' as that of executing the public resolutions embodying the general will of State and judicial power' as the power of deciding civil and criminal cases. Of the trio, he considered judicial power as the most frightening power since in his opinion executive could not harm a subject's life, liberty, or property until after a judicial decision.

IV. SEPARATION OF POWERS: THE TRUE PRECEPT

Being normative in nature, the doctrine, in euphemistic parlance, can be understood as being clearly committed to the achievement of political liberty, an essential part of which is the restraint on governmental power, and that this can best be achieved by setting up divisions within the government to prevent the concentration of such power in the hands of a single body of men. However, it must be admitted in this regard that the recognition of the need for government action to provide necessary environment for individual growth is complementary to, and not incompatible with the view which vehemently reiterates that restrains upon the government are in essential part of a theory.

A major problem in an approach to the literature on the doctrine of the separation of powers is that a few writers define exactly what they mean by it, what its essential tenets are, and how it relates to the other ideas.

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For this reason generally, one can find much confusion and chaos in discussions relating to its origin as the exact nature of the claims being made for one thinker or the other are not measured against any clear definition. One such attempt; is nonetheless made by Professor Vile in his book Constitutionalism and Separation of Powers. He puts it as a pure theory of separation of powers' and defines it thus.

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

From an analysis of this ideal type or benchmark definition put forth by Professor Vile, one can imply that the first element of the pure doctrine' is the assertion of a division of the agencies of the government into three categories: The Legislature, The Executive, and The Judiciary. In contrast with the earlier versions, it can be said that though they were in fact based on a twofold division of governmental powers, however, since the mid 18the century the three fold division has generally been accepted as the basic necessity for a constitutional government.

The second element of the doctrine suggests that there are three specific functions of the government. Unlike the first element which recommends that there should be three branches of government, this element of the doctrine suggests a sociological truth that there are, in all governmental situations, three necessary functions to be performed, whether or not they are in fact all performed by one person or group, or whether there is a division of these functions among two or more agencies of government.

The third element in the doctrine and the one which sets the separation of powers wide apart from those who subscribe to the general themes set out above, is what, for the want of better phrase, can be referred to as the separation of persons'. This is the recommendation that the three branches of government should be composed of quite separate and distinct groups of people with no overlapping membership.

On the touchstone of this ideal type' conception, it is worth to recall the sayings of scholars and eminent jurists who have commented, from time to time, on the utility and desirability of having the doctrine in its rigid or flexible form thereby giving effect to it in its true letter and spirit. According to Friedman, ―Strict separation is a theoretical absurdity and a practical impossibility. However there is no liberty if the judicial power be not separated from the legislative and executive. For Jaffe and Nathan, ―Separation of Power is undesirable in strict sense nevertheless; its value lies in the emphasis on those checks and balances, which are necessary to prevent an abuse of enormous power of the executive. The object of the doctrine is to have a government of law rather than of official will or whim

Having examined the doctrine from its history and origin to its ―ideal‖ precept along with the conceptions of Montesquieu and his contemporary counterparts on the subject, our discussion grows matured enough to test the doctrine as it stands imbibed.

V. SEPARATION OF POWERS & THE INDIAN CONSTITUTION

The Constitutional history *of* India reveals that the framers of the Indian Constitution had no sympathy with the doctrine. This is evident from its express rejection in spite of attempts being made. It even sheds no light to the application of the doctrine during the British Regime. The Constituent Assembly, while in the process of drafting the Constitution, had dwelt at length for incorporating the doctrine and ultimately rejected the idea in toto. Dr. B.R. A. Ambedkar, who was one among the members of the Constituent Assembly, while comparing the Parliamentary and Presidential systems of India and America respectively, remarked as thus.

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 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 exists in U.S.A. the assessment of the responsibility of the executive is periodic. It takes place once in two years. It is done by the electorate in England, where the Parliamentary system prevails; the assessment of responsibility is both periodic and daily. The daily assessment is done by the members of the Parliament through questions, resolutions, no confidence motions, adjournment motions and debates on address. Periodic assessment is done by the electorate at the time of the 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 than stability. The above view of Dr. Ambedkar thus substantiates that Indian Constitution does not make any absolute or rigid separation of powers of the three organs owing to its pro-responsibility approach rather than having stability at the centre stage. This has, however been further supplemented and reiterated by the Indian Supreme Court in Ram Jawaya Kapur v. State of Punjab, the Court through Mukherjee J. held that. The Indian Constitution has indeed not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of 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.

A more refined and clarified view taken in Ram Jawaya's case can be found in Kartar Singh v. State of Punjab, where Ramaswamy J. stated.

It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution.

The functional classification and sufficient demarcation, as is held by the Supreme Court, indeed does not suggest the application of the doctrine in its absolute terms. Rather it just gives a slight glimpse as to the character of the Indian Constitution which it shares with the pure doctrine' discussed above, that is, inter-alia the acceptance of the philosophy behind the doctrine pertaining to rigors of concentration of power and the avoidance of tyranny, of having a rule of law and not rule of men. The same can be substantiated through a detailed analysis of the provisions of the Constitution which is the next course of action this chapter attempts to take.

―Executive in India, like any other Westminster system, is a subset of legislature and virtually there is a fusion between them, thus generally no friction arises between them. The Constitution of India has indeed adopted the British Parliamentary system, wherein the political executive controls the Parliament. In addition, the Cabinet or the Council of Ministers enjoys a majority in the legislatures and virtually controls both, the legislature as well as the executive. Just like the British Cabinet, its Indian counterpart can be called as ―a hyphen which joins a buckle which fastens the legislative part of the state to its executive part. Under the Indian Constitution, the executive powers are vested with the President and Governors for respective states. The President is, therefore, regarded as the Chief Executive of Indian Union who exercises his powers as per the constitutional mandate on the aid and advice of the council of ministers. The president is also empowered to promulgate ordinances in exercise o his extensive legislative powers which extend to all matters that are within the legislative competence of the Parliament. Such a power is co-extensive with the legislative power of the Parliament. Apart from ordinance making, he is also vested with powers to frame rules and regulations relating to the service matters. In the absence of Parliamentary enactments, these rules and regulations hold the field and regulate the entire course of public service under the Union and the States. Promulgation of emergency in emergent situations is yet another sphere of legislative power which the President is closed with. While exercising the power after the promulgation of emergency, he can make laws for a state after the dissolution of state legislature following the declaration of emergency in a particular state, on failure of the constitutional machinery.

Like the British Crown, the President of India is a part of the legislature though he is not a member of any house of the Parliament. No Bill for the formation of new states or alteration of boundaries etc. of the existing states, or affecting taxation in which States are interested or affecting the principles laid down for distributing money to the states or imposing a surcharge for the purposes of the Union and no Money.

Though such legislative powers can only be exercised vested with the President is no higher and no lower than that of the law making power of the Parliament. See Cooper v. Union of India AIR 1970 SC 564.

Bill or Bill involving expenditure from the consolidated fund of India can be introduced for legislation except on the recommendation of the President. Besides this, he also has powers to grant pardons, reprieves respites or remissions of punishment or to suspend, remit or commute; the sentence of any person convicted any offence which is of judicial nature. He also performs similar judicial functions in deciding a dispute relating to the age of the judges of the constitutional courts for the purpose of their retirement from their judicial office.

In a similar manner, Parliament also exercises judicial functions. While performing judicial functions, it can decide the question of breach of its privilege and if proved, can punish the person concerned. While doing so, the Parliament is the sole judge and Courts cannot generally question the decision of the Houses on this point. Moreover, in case of impeachment of the President, one House of the Parliament acts as a prosecutor and the other House investigates the levelled charges and decides whether they substantiate or not.

There is, however, a considerable institutional separation between the judiciary and other organs of the government. The Constitution confers wide powers however; a certain amount of executive control is vested in the higher judiciary with respect to subordinate judiciary. At the same time, the power of appointment of high courts and Supreme Court judges including the Chief Justice of India, vests partially with the executive, that is to say, the President of India who in turn exercises this power in consultation with the Governors of the concerned states and the Chief Justice of the concerned High Court in case of a high court judge and Chief justice of India in case of a Supreme Court judge. Moreover, the judges of constitutional courts cannot be

removed except for proved misconduct or incapacity and unless an address supported by two-thirds of the members and absolute majority of the total membership of the House is passed in each House of the Parliament and presented to the President. exercising routine judicial functions, the superior constitutional courts also performs certain executive and administrative functions as well. High courts have supervisory powers over all subordinate courts and tribunals and also the power to transfer cases. In addition, the High Courts as well as the Supreme Court also have legislative powers by virtue of which they can frame rules regulating their own procedure for the conduct and disposal of cases.

The foregoing exercise establishes the proposition expounded by the Supreme Court in Ram Jaway's Case. The analysis clearly shows that the concept of separation of powers, so far as the Indian Constitution is concerned, reveals and artistic blend and an adroit admixture of judicial, legislative and executive functions. Separation sought to be achieved by Indian Constitution is not in an absolute or literal sense. Despite being evident that the constitution nowhere expressly bows in line to the concept, albeit it remains an essential framework of the constitutional scheme. Agreeing on this premise, it has also been accorded the status of basic structure by the Supreme Court. Therefore, it can axiomatically be said that Indian Constitution does not contemplate separation as embodied in the pure doctrine', it rather perceives and accords to it in its central sense, that is to say, not in its literal sense, rather in its purposive sense, i.e. non conferment of unfettered powers in a single body of men and to motivate checks and balances.

Another point of concern, which requires clarification, is whether the three organs, though not rigidly separate, can usurp their powers or are they required by the constitution to work only within the respective area earmarked in a narrow-sense. To put it differently, whether the constitution mandates encroachment by one organ into the domain of another on the pretext of failure or inaction of the other organ is the next question that needs to be addressed in is context.

Though theoretically, the Supreme Court has addressed this issue, however, in has failed to cater an effective basis in practice which is evident from the growing amount of judicial encroachment in the domain of other organs. In AsifHameed v. State of J & K, it has been held that

―Although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislative, Executive and Judiciary have to function within their respective spheres demarcated under the constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people's will, have all the powers including that of finance. Judiciary has no power over sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits. It is the sentinel of democracy.

The prime point of our concern here is whether the judicial organ of the State is conferred with a constitutional mandate so as to overstep its limits while discharging its main functions. That is to say whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so, or it cannot do so simply by virtue of the fact that the concept of separation of powers puts fetters on it. To answer these points, one needs to ascertain as to what status the judiciary has been accorded in the Indian Constitution. Is it supreme as compared to the other organs or is subordinate thereto?

Judiciary under Indian Constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their

powers and function within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the Constitution, had observed that

The doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned.

It can thus very aptly be said that creation of judicial organ in India was not at all meant to give to it a supreme status as compared to the other co-ordinate organs. Rather, with powers and functions sufficiently distinguished and demarcated, what is expected out of judiciary is to act as a watchdog to oversee and prods to keep the other organs within the constitutional bounds. The essence of the Constitution is that it produces a system which is the result of amalgamation of the principle of separation of powers with the doctrine of parliamentary sovereignty in a manner to give effect to both, yet without the rigidity of the two systems. The Parliamentary democracy is cemented as the corner stone of constitutional edifice in preference to the Presidential system of governance.

VI. SEPARATION OF POWERS AND JUDCIAL 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. Art.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 dependent on it, for its legitimacy, this was the observation made by the Hon'ble S.C. in Ram Jawaya v. Punjab.

On the question that where the amending power of the Parliament does lies and whether Art.368 confers and unlimited amending power on Parliament, the S.C. in KeshavanandBharti held that amending power was now subject to the basic features of the constitution. And hence, any amendment tapering these essential features will be struck down as unconstitutional. Beg. J. added that separation of powers is a part of the basic structure of 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 Art.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 Keshavanand ruling regarding the non-amend ability of the basic features of the Constitution and strict adherence to doctrine of separation of powers can be seen. In IndiraNehri Gandhi 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 ultravires 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 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.

VII. ARGUMENTS IN FAVOUR OF THE DOCTRINE

- If the power is allowed to go unchecked, sooner or later it becomes a damage to the liberty of the individuals

- It is desirable to keep the legislative and executive functions is separate hands. Otherwise, arbitrary laws may be made and enforced in harsh manner
- It is also necessary to separate judicial powers from the executive, otherwise same personnel's or body become the prosecutor
- Legislative and the judicial powers must also be separated
- The executive and judicial functions require persons of different temperament and quality

IX. CRITICISMS

- The separation is true only in parts
- It is very effectively destroyed the dynamic leadership in government
- The traditional triad of separation of powers is not very meaningful- it may lead to interlocking among organs of government
- There may be jealousy and distrust or internal friction of governmental function
- Separation of powers doesn't mean an equal balance of power
- Montesquieus's conception of the state was mechanical- it would prefer to speak differentiation of functions rather than of the separation
- It cannot be accept literally- because the governmental function is not like watertight compartment- the rigid separation may lead to inarticulation and deadlock of government
- The growth of party system making the separation of powers meaningless-especially in a parliamentary form of government
- This theory is not found in authoritarian states

X. CONCLUSION

- The philosophy of the theory directly influenced the American and French revolutions and further democratic movements and constitutionalism
- The theory should not considered as mechanical point of view but it can be the spirit of government
- Madison quoted that Motesquieu is the oracle who is always consulted and cited in the subject
- But in modern times the working of separation of powers should be analysed with institutional efficiency which is completely empty unless it is lined to more sustentative ends.
- More concretely, we have to find the answer of "Separating power on behalf of what?" The first ideal is democracy. In one way or another, separation may serve (or hinder) the project of popular self-government. The second ideal is professional competence. Democratic laws remain purely symbolic unless courts and bureaucracies can implement them in a relatively impartial way. The third ideal is the protection and enhancement of fundamental rights. Without these, democratic rule and professional administration can readily become engines of tyranny.
- In India the Constitutional systems in the world 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.
- In India, we follow a separation of functions and not of powers Because if there is a complete separation of power, the different organs of the governments will not be able to work in co-operation and harmony

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because all organs are interlinked there be frequently deadlocks which may bring the governmental machinery to a standstill.

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