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DISTRUBING TRENDS IN THE SEPARATION OF POWER

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Abstract:

In this project report, I am conducting a comparative study of this doctrine in various states such as the United States, and India. I am dealing with multiple aspects of the principle of separation of powers. In this regard, I am briefly describing the definitional crisis, followed by the various advantages and disadvantages associated with this doctrine. Finally, I am providing the current position in the United States, the United Kingdom, and India for a better understanding. In the context of India, I'm working with a variety of constitutional provisions and judicial responses to situations involving this notion. Finally, I conclude and summarize the direction in which this ideology is moving. Finally, I'll offer some thoughts and suggestions based on my understanding of this philosophy.

SEPARATION OF POWER

"The Separation of Powers" is a philosophy that has piqued many people's interest. Ancient philosophers, political thinkers and political scientists, constitution framers, judges, and academic authors have all had reason to study the doctrine.

This mainly refers to the division of powers among the executive, legislative, and judicial branches of government.

The separation of powers principle refers to three types of governmental authorities:

i. A single person should not serve in more than one of the state's three organs.

ii. No state organ should interfere with any other state organ.

iii. No one organ should perform the functions of any other organ.

In this project report, I am conducting a comparative study of this doctrine in various states such as the United States, and India. I am dealing with multiple aspects of the principle of separation of powers. In this regard, I am briefly describing the definitional crisis, followed by the various advantages and disadvantages associated with this doctrine. Finally, I am providing the current position in the United States, the United Kingdom, and India for a better understanding. In the context of India, I'm working with a variety of constitutional provisions and judicial responses to situations involving this notion. Finally, I

conclude and summarize the direction in which this ideology is moving. Finally, I'll offer some thoughts and suggestions based on my understanding of this philosophy.

The organization of a state's government into branches, each having separate, independent powers and responsibilities, ensures that the forces of one unit do not conflict with the capabilities of the others. The trialPolitica model divides the government into three branches: legislature, executive, and judiciary. In parliamentary and semi-presidential systems, where the executive and legislative branches overlap, it can be contrasted with the fusion of powers.

A system with separated powers aims to prevent power concentration by establishing checks and balances. The separation of powers model and the trialspolitical principle are frequently used interchangeably. While the trialspolitical model is a frequent split, some governments have more or fewer branches than three.

In his work Politics, Aristotle first introduced the concept of a "mixed government" or hybrid government, drawing on many of the constitutional systems seen in Ancient Greek city-states. According to Polybius (Histories, Book 6, 11–13), the Roman Senate, Consuls, and Assemblies exemplified hybrid government under the Roman Republic. Polybius was the first to outline and explain the system of checks and balances in detail, praising Lycurgus of Sparta for being the first to do so.

Separate and independent entities perform the legislative, executive, and judicial tasks of government. It has been suggested that separating the three parts of government minimizes the likelihood of arbitrary government actions because the making, enforcing, and administration of laws require the approval of all three branches.

DEFINITIONAL CRISIS

There is no precise explanation of this theory because everyone interprets it according to their own beliefs, and it is also impossible to pinpoint its original origin. Still, we can observe what Aristotle said about the idea of separation of powers for the first time in his book Politics:

"Every serious lawgiver must seek for what is advantageous to each constitution in respect of three elements; if these are correctly arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements."

The first is the deliberative, which discusses all matters of common concern; the second is the officials...and the third is the judicial element."

In his book The Second Treatise of Government, published in 1689, English political thinker JohnLockeproposed a three-fold classification of powers.

"Maybe too big a temptation to human frailty...for the same person to have the authority to establish laws, and also the capacity to execute them, whereby they may excuse themselves from allegiance to laws they make, and suit the law both in its creation and execution, to their private gain."

Montesquieu, for example, expressed division of powers as follows in his work The Spirit of Laws, published in 1748:

"There is no liberty when legislative and executive authority is combined in a single person or a single body of magistracy because one can worry that the same monarch or senate that adopts tyrannical laws will also execute tyrannical laws."

There is no liberty if judicial power is not independent of legislative control. If it were combined with legislative power, the judge would be the legislator, and the control over a citizen's life and liberty would be arbitrary. If it were linked to executive power, the judge might wield oppressive power.

All would be lost if the same man or body of principal men, whether nobles or commoners, possessed these three powers: establishing laws, carrying out public resolutions, and adjudicating individual offenses or disputes."

ADVANTAGES

There are various advantages with the acceptance of this doctrine in the system;

1. 1. As a result of the separation of works, the efficiency of the state organs grew, and time consumption decreased.
2. 2. Because the experts will be handling their parts' issues, the degree of purity and correctness will increase.
3. 2. Because the experts will be taking their parts' cases, the degree of purity and correctness will increase.
4. 4. No overlapping remains in the system as a result of labor division, so no one interferes with the work of others.
5. 5. Now that the overlap has been removed, there is no prospect of rivalry between various organs.

DISADVANTAGES

As there are advantages attached to this doctrine, there are some disadvantages that can also occur

due to this doctrine;

1. 1. As I previously stated, there would be enhanced efficiency. Still, there will also be a negative consequence due to the overlapping of organ rights if we do not follow the philosophy literally, as organs may compete for supremacy over one another.
2. There's also the prospect of organs competing for dominion over one another.
3. There is also the danger of a delay in the process because there will be no supervisory authority over the organs, causing their acts to become arbitrary.

POSITION IN USA

The founders of the United States Constitution believed that power could only be adequately distributed if the three primary tasks of government, legislative, executive, and judiciary, were divided into three separate, coordinated branches. As a result, the US Constitution divides the three branches of government. The distributive articles, which make up the first three articles of their constitution, outline the form and functions of the congress (legislative body), executive, and judiciary.

They were aware of Montesquieu's concept of separation of powers and that the new constitution they approved was based on it. They were also aware that the legislature dominated the executive and judiciary in most states. The framers' system of checks and balances ensures that Congress does not have complete control over the executive and judicial parts of the federal government. Furthermore, constitutional constraints should not be formulated solely in majoritarian desires.

The Supreme Court of the United States has been given no power to settle political problems. Therefore it cannot interfere with the executive branch's exercise of power.

Through the use of the Veto power, the President of the United States of America interferes with congressional authority. With the employment of his treaty-making power, he can also make laws. Using his power to designate judges, the President also interferes with the Supreme Court's ability to function.

Similarly, Congress interferes with the President's powers through voting on the budget, approving nominees by the Senate, and ratifying treaties. By enacting procedural laws, creating special courts, and authorizing the appointment of judges, Congress also interferes with the functioning of the courts.In this way, through its power of judicial review, the judiciary interferes with the authority of Congress and the President. It is correct to state that the United States Supreme Court made more changes to the US Constitution than Congress.

In summary, we can state that in the words of the crown, "separation of powers is more specifically evident in the United States, but the total separation of powers does not exist in the United States."

POSITION IN INDIA

There are no specific provisions regarding the doctrine of separation of powers in our Constitution. However, some directive principles are given in the constitution, such as in Parts IV and V, and Article-50, which states that "the state shall take steps to separate the judiciary from the executive in the public services of the state," and there is no formal and dogmatic division of powers apart from this. There is functional overlapping in India, but there is also personal overlapping.

JUDICIARY

The Supreme Court has the authority under Articles 142 and 145 of our constitution to declare void legislation approved by the legislature and executive acts if they contradict any provision of the body or a law passed by the parliament in the case of executive activities. Even Parliament's power to modify the body is subject to the Court's review. If an amendment alters the fundamental structure of the body, the Court has the authority to declare it void. On several occasions, judges have issued policy directives to the Parliament.

EXECUTIVE

The President of India, as India's supreme executive authority, has the power to make laws in the form of ordinances under Article-123, as well as judicial powers under Article-103(1) and Article-217(3), consult with the Supreme Court of India under Article-143, and pardon under Article-72 of the Constitution. The executive also impacts the judiciary by appointing judges to the Chief Justice of India and other positions.

LEGISLATURE

The Council of Ministers is made up of legislature members, and it is in charge of the legislative. In cases of breach of privilege, impeachment of the President under Article 61, and removal of judges, the legislature exercises judicial powers. The governing body Has Article 105's penal powers

"The Constitution of India has not ceremoniously wed with Doctrine of the State," writes Gledhill.

The theory of separation of powers, on the other hand, is followed whenever possible.Powers.

JUDICIAL RESPONSE

There are other cases in which the Supreme Court has rendered judgments based on the facts of the case. Still, we may have a better understanding of the doctrine's status in India by looking at the following critical opinions issued by the Supreme Court:

In Ram Jawaya v. the State of Punjab

C.J Mukerjee said and held:

"While the Indian Constitution does not recognize the doctrine of separation of powers in its absolute rigidity, the functions of the various parts or branches of government have been sufficiently differentiated, and as a result, it can be safely stated that our constitution does not contemplate the assumption by one organ or part of the State of functions that essentially belong to another."

In Indira Nehru Gandhi v. Raj Narain

"Separation of powers exists only in a broad sense under the Indian constitution. India's constitution does not have the same strict separation of powers as the US or Australian constitutions."

SEPARATION OF POWER- A COMPARATIVE ANALYSIS

Although not universal, separation of powers is commonly regarded as one of the cornerstones of liberal constitutional democracy. Article 16 of the French Declaration of Man's Rights of 1789 argues that a society without guaranteed rights or established separation of powers lacks a constitution.

The doctrine of separation of powers is concerned with the interdependence of the government's three organs: legislature, executive, and judiciary. The origins of this principle can be traced back to Plato and Aristotle's time. Aristotle was the first to divide the government's functions into three categories: deliberative, magisterial, and judicial, while Locks divided the government's powers into three parts: continuous executive authority, discontinuous legislative power, and federative power."Continuous executive power" denotes administrative and judicial officer, "discontinuous legislative power" denotes rule-making reference, and "federative power" denotes control over international affairs. 1 The notion of separation of powers was first articulated by the French jurist Montesquieu in his book L. Esprit Des Lois (Spirit of Laws), published in 1748. As a result, he is regarded as a current proponent of this notion. According to Montesquieu,

"When the legislative and executive powers are united in the same person, or the same body ofmagistrates, there can be no liberty, because apprehension may arise, lest the same monarch orsenate should enact tyrannical laws, to execute them authoritatively. Again there is noliberty if judicial power is not separated from the legislative and the executive power. Where itjoined with the legislative, the life and freedom of the subject would be exposed to arbitrary control,for the judge would then be the legislator. Where it is joined with the executive power, the judge might behave with violence and oppression. Miserable indeed would be the case, where the sameman or 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 that of judging the crimes ordifference of individuals."

France had a complete and full-fledged monarchy in the 18th century. The dictatorial powers of Louis XIV were well-known. The king and his administrators acted haphazardly. The subjects had no rights or freedoms. On the other hand, Montesquieu was greatly influenced by Locke's liberal ideas. He built his doctrine on examining the British constitution during the first half of the 18th century, as he understood it. The division and functional independence of the three departments of the government, according to him, was the secret of an Englishman's liberty. The consolidation of all powers-legislative, executive, and judiciary in the same hands, may justly be regarded as the precise definition of tyranny, according to James Madison in Federalist 47. The fact that Montisque is widely credited with this claim does not imply that there should be no partial agency in, or control over, the act of one department is exercised by the same hands that control the real power of another department, thus undermining the fundamental principle of a free constitution.

OBJECT OF SEPARATION OF POWERS

It has been argued that the goal of separation of powers is to prevent the consolidation of legislative, executive, and judicial authority into a single entity. As a result, there will be misunderstandings and conflicts. No one will look after others; instead, everyone will be concerned with their well-being. The purpose of the separation of powers principle, according to constitutional thinkers, is to check and balance power. The constitution divides power into legislative, executive, and judicial. The checks and balances will keep them inside their respective sphere of influence.The review and balance system will protect against any branch using authority arbitrarily. The checks and balances principle provides overlapping functions in which each unit can check the power of the others.

This philosophy is based on polarity rather than rigorous classification, which means that the authority's center must be distributed to avoid absolutism. Similarly, Professor Wade claims that the goal of Montique was to combat accumulation and monopoly rather than interaction. 19 Manistique never used

the phrase "separation" in his writings.The purpose of this concept was not to generate berries but to promote mutual constraint and respect among the government's three institutions. In this way, this philosophy can be described as a "check and balance" doctrine.

SEPARATION OF POWER AND JUDICIAL INDEPENDENCE

The rule of law includes judicial independence. Separation of powers refers to the judiciary's independence from the other government departments. Individual judges must be free of all forms of pressure to exercise judicial independence. Lord Hope said it best:

Judicial independence necessitates judges' protection from external pressure, but it does not absolve them of responsibility for their acts. "Lions supported Solomon's Throne on both sides; let them be lions, but yet lions under the throne; being watchful that they do not check or oppose any points of sovereignty," Francis Bacon wrote in his "Essay of Judicature," emphasizing the importance of the "Temple of Justice."The phrase "Solomon's Throne" denotes the majesty of our legal system, while the word "Lions" denotes the legislative and executive branches of government. In a nutshell, the "majesty of the justice system" is backed by both the Legislature and the Executive; yet, the Legislature and the Executive are under the jurisdiction of the Judiciary. The legislature or the executive should violate no point of sovereignty. It is sufficient to assert that "sovereignty" vests in the people will result in a democracy.

Almost all nations have adopted the notion that the court must be independent and free of interference from other state agencies. Independent tribunals are also mentioned in Article 10 of the UDHR, Article 14(1) of the ICCPR 1966, and Article 6 of the ECHR.

JUDICIAL PRONOUNCEMENTS

The following examples demonstrate the true meaning of India's separation of powers philosophy...

"Although there is no formal separation of powers in the Constitution of India, it is apparent that the Constitution constitutes a legislature, and elaborate procedures are made for making that legislature adopt laws," said Hon'ble Chief Justice Kania in Re Delhi Law Act case. Is it then too much to suggest that the legislature has primary responsibility for making laws, including exercising its wisdom, judgment, and patriotism in doing so? Doesn't this indicate that other executives or judicial entities aren't supposed to carry out legislative tasks unless they can be deduced from other articles of the Constitution?

The constitution creates different constitutional entities in Golakhnath vs. the State of Punjab. It establishes three key power instruments: the legislative, the executive, and the judiciary. It restricts their jurisdiction precisely and without going overboard. The theory of separation of powers is not acknowledged in India strictly.

If laws passed by the legislature or executive acts violate any constitution provision, the Supreme Court can declare them void. By appointing chief justices and other judges, the president can influence the operation of the judiciary.

It was held that Asif Hameed v. the State of J&K that.

Although the theory of separation of powers is not recognized in its extreme rigor in the constitution, the constitution-makers have meticulously outlined the functions of the various state agencies. The legislative, executive, and judicial branches must operate within their constitutionally defined areas. No organ can take over the duties of another. All powers, including finance, are vested in the legislative and executive branches of government, which are the two sides of the people's will. The judiciary has no authority over either the sword or the purse. Nonetheless, it has the power to ensure that the state's two primary organs operate within constitutional bounds. It serves as a democratic sentinel.

"The Indian Constitution, though it does not recognize the rigid idea of separation of powers, provides for an independent judiciary in the States," the Supreme Court said in Chandra Mohan v. the State of U.P.59. However, the executive had direct control at the moment. Indeed, it is general knowledge that there was a significant agitation in pre-independence India for the judiciary to be separated from the executive and that the rage was founded on the notion that unless they were separated, the court's independence at the higher levels would be a joke." (See also S.C. Advocateson-Record Case, AIR 1994 S.C. 268 at p. 272,

In Jayantilal Amritalal Shodhan V F.N.Rana, the court stated that it could not be presumed that legislative functions are only conducted by the legislature, administrative tasks by the executive, and judicial processes by the judiciary. Our constitution does not establish an absolute or rigorous allocation of functions among the three governmental entities.

Hon'ble Chief Justice S.R. Das opined in Ram Krishna Dalmia v. Justice Tendulkar56 that, in the absence of a specific provision for separation of powers in our Constitution, as there is in the American Constitution, some such division of powers legislative, executive, and judicial is nonetheless implicit in our Constitution.

"The American notion of well-defined separation of legislative and judicial authorities has no application to India," the Supreme Court said in Udai Ram Sharma v. Union of India.

DEFECTS OF DOCTRINE OF SEPARATION OF POWER

Though, theoretically, the doctrine of separation of powers was very sound and good there are many defects found when it was sought to be applied in real-life situations. The following defects were found in this doctrine:

(a) The theory was incorrect historically. There was no separation of powers under the British Constitution. At no point of time, this doctrine was adopted therein. As Prof. Ullman says: "England was not the classic home of separation of powers." Donoughmore Committee also observed: "In the British Constitution there is no such thing as the absolute separation of the legislative, executive and judicial powers." It is said: "Montesquieu looked across foggy (cloudy) England from his sunny vineyard in Paris and completely misconstrued what he saw."

(b) This doctrine is based on the assumption that the three functions of the Government i.e. legislative, executive and judicial are separated from each other. But in reality, 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. President Woodrow Wilson of Great Britain has given the reason of the same when he stated that the Government is not a machine, but a living thing. No living thing can have its organ offset against each other as checks, and live. He has stated that the life of one organ is dependent upon the cooperation of another organ; therefore, their cooperation is indispensable, their warfare fatal.

According to Friedman and Benjafield, "it is true that each of the three functions of the Government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause severe inefficiency in Government.

(c) This doctrine cannot be accepted totally. Thus, if the legislature only to legislate, then it cannot punish anyone, nor it can delegate any legislative function even though it does not know 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. Therefore, the doctrine of separation cannot be absolute.

(d) Modern State is a welfare State, and it has to solve many complex socio-economic problems. Hence, it is impossible to stick to this doctrine for modern Government enforcement of a rigid conception of separation of powers.

(E) 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:

(a) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point of time, this doctrine was adopted in England. As Prof. Ullman says: "England was not the classic home of separation of powers." Donoughmore Committee also observed: "In the British Constitution there is no such thing as the absolute separation of the legislative, executive and judicial powers." It is said: "Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw." (emphasis supplied)

(b) 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.

As Paton stated, "it is extraordinary difficult to define precisely each particular power." President Woodrow Wilson rightly said: "The trouble with the theory is that Government is not a machine, but a living thing.... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Their cooperation is indispensable, their warfare fatal'(emphasis supplied).

According to Friedmann and Benjafield, 'the truth is that each of the three functions of the Government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in Government'.

(c) 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.

SEPARATION OF POWER BRUCE ACKERMAN

The Federalist Constitution has shown to be a great success, one that unitary nation-states and parliamentary democracies worldwide would do well to emulate. I give it the majority of the credit for our society being the wealthiest, most technologically sophisticated, and most socially just in human history, not to mention that we have quickly become a military powerhouse... The rest of the world is rightfully impressed with us, and it is no coincidence that the United States of America has become the world's largest single exporter of public law. Written constitutions, federalism, separation of powers, bills of rights, and judicial review are all gaining popularity around the world right now, and with good cause. They outperform all of the other options that have been tried. Steven Calabresi's triumphalism may be typical now, yet it stands in stark contrast to prior American sentiments.[1] This country was even more

[1] *Supra* note 5.

potent in the world a half-century ago than it is now. America's moralistic pretensions were at their pinnacle as the only large nation to escape massive damage during World War II.Nonetheless, its constitutional mandates were a lot pickier about what they ate. To be sure, the US-backed written constitution bills of in postwar Japan, American influence peaked, with General MacArthur's legal team presenting a draught constitution to the Japanese in a shockingly short period.[2] Despite their haste, the draughtsmen, did not suggest a separation of powers in the manner of the United States. They did not, for example, demand that Japan accept an American-style presidency as a condition of defeat.hts, judicial review, and even federalism on occasion.[3] But what about the principle of separation of powers?

Instead, a separate regimetype evolved, which I shall refer to as "restricted parliamentarianism." To stay in power, Japan's Prime Minister and his Cabinet, like those in the United Kingdom, must maintain the confidence of the Diet. The Japanese Parliament, however, is not totally sovereign, unlike the Westminster model. A written constitution, a bill of rights, and a supreme court limit its legislative powers.

CONCLUSION

The notion of separation of powers was explicitly incorporated into the constitutions of the United States of America and Australia. On the other hand, in countries such as England, India, and Canada, separation of powers is implicit rather than explicitly stated. Whether the theory is expressly or implicitly stated, strict adherence to the doctrine's applicability is impossible since it is humanely impossible to precisely divide the state's functioning into three organs.The state's organs must be arranged so that they overlap one another. Separation of powers ideologies is a theoretical idea that leads to the system's downfall. Prof. Garner is correct in his assessment that the concept is unworkable as a governing principle. It is impossible to categorize the functions of the three branches of government mathematically.In this regard, Frankfurter's observation is noteworthy. According to him, enforcing a strict separation of powers would render government impossible. In my opinion, Montesquieu's teaching is not just a myth, but also a truth, in the sense that each organ of government should exercise its power according to the principle of Checks and Balances, which means that none of the government's organs should usurp the essential functions of the others. Professor Laski has made an excellent observation. Separation of parts is required, but this does not entail separating individuals.

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[2] *Ibid.*

[3] *Ibid.*