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SEPARATION OF POWER vis-à-vis INDIAN SCENARIO

Authored By- Nikita Raj

The Origin

The development of absolute position and a clear division between the executive, legislative and judicial branches of government, Montesquieu laid the groundwork for the concept of the 'Separation of Powers'. However, Aristotle was the first to write about it, though not in a straightforward manner. He states in his work that "all constitutions have three elements, with respect to which the good lawgiver must respect what is expedient for each constitution," and that "all constitutions have three elements, with respect to which the good lawgiver must respect what is expedient for each constitution."This body is divided into three parts: one that deliberates on public matters; a second that deliberates on magistrates—the subject of what magistrates should look like, how they should exercise authority, and how they should bechosen; and a third that holds judicial jurisdiction."1 Aristotle, on the other hand, does not lay much weight on it.

Locke, an English philosopher and author, specifically discusses three powers in his work "The Second Treatise of Civil Government":

(1) discontinuous legislative authority, (2) continuous legislative power, and

(3) federative power.

The ability to set wide regulations, he argues, is a discontinuous legislative power, while continuous executive power is the ability to make executive and judicial decisions, and federative power is the capability of managing international affairs.

As a result of the changes in British constitutional history throughout the early eighteenth century, Locke and Montesquieu were compelled to put up a comprehensive list of the concepts underlying the 'Separation of Powers' notion. In England, a long battle between the King and the Parliament, resulted in the development of 'Bill of Rights' where:

Parliament – entrusted with Legislative function;

King- entrusted with Executive function; and

Courts- entrusted with Judicial function.

It is known as the "trias politica" in Latin, and it refers to a governing paradigm that is used in the States that have a democratic government. In accordance with this paradigm, the State is divided into branches which having its own set of powers and responsibilities. The traditional divisions of estates are as follows: an executive, a legislative, and a judiciary.2

The 'Separation of Powers' is a basic elements of modern democracy and the 'rule of law', is one of the most important concepts in political philosophy. Because of this, it is necessary for government power to be devolved to autonomous institutions comprised of, at the very least in theory, diverse individuals. The concept of judicial independence developed parallely, and subsequently got associated with, concept of division of powers, which is also worth mentioning.

The theoretical features of the concept of separation of powers will be treated first in this project, followed by an examination of the doctrine's historical development and development. In addition,

[1]Aristotle- Politics- BOOK 4- Part XIV

[2]http://www.legalserviceindia.com/article/l16-Separation-Of-Powers.html

current constitutional law in a few countries will be discussed, and the post will conclude with some observations on present difficulties surrounding the separation of powers doctrine.

The Theory

The principle of 'Separation of Powers' classifies government authority as:
It is unacceptable for any one person to serve in more than one government-run organs. Ministers, for instance shouldn't be permitted to sit in the House of Commons.
It should not be permitted for any government organ to interfere with the operations of any other government organ.
Functions of one government organ shouldn't be performed by other government organ without their consent.
The division of authority for distinct government functions is referred to as the separation of powers. To simplify things, all of the government's powers are grouped into three categories: (1) enactment (2) interpretation (3) the execution, of legislation.

These three categories are known as legislative, judicial, and executive powers. Traditional division refers to the division of the government into three branches, each with its own set of responsibilities; this classification is referred to as classical division.

French Concept

A check on the other, according to Montesquieu's division of government into the executive, legislative, and judicial branches, and therefore power should be a check on power, is achieved through the division of government. The ability to arête it puts a stop to power—power is put a stop to power by the ability to arête it—power is put a stop to power by the ability to arête it Because "apprehensions may emerge," he says, "that the same Monarch or Senate may impose tyrannical laws and carry them out in a tyrannical way," when the Legislative and Administrative powers are merged in the same person, there can be no liberty. As previously said, liberty cannot exist unless and until the judicial power is separated from the legislative and administrative authorities. When the judiciary merges with the legislative branch, the subject's life and liberty would be vulnerable to arbitrary control, as the judge would then be a member of the legislative branch. When the judiciary comes into conflict with executive authority, the judge may retaliate brutally and oppressively. If the same man or group of men or women, whether from the Nobles or from the people, could wield the three powers of enforcing laws, carrying out public decrees, and adjudicating individual cases, everything would come to a stop."[3]
Montesquieu's submission can be summarized as the division of powers according to function, and the separation of powers doctrine that resulted from this division. It was in the 18th century that the current concept of separation of powers was established as a basic tenant of political thought.

[3] Thakker. C.K., Administrative Law, (1992), Eastern book company

The Indian Scenario

Indian Judiciary and Separation of Power

Separation of powers and judicial independence are two concepts that must be studied together since the court can only be independent if authority is divided across the government's three institutions. A country's fair and neutral court system, which has the authority to make decisions without interference from the executive or legislative arms of government, is referred to as "judicial independence" in this context. The concept of judicial independence, like many other concepts, has its beginnings in the Britain and Ireland. “The cases of Hampden (1637) and Coke (1616) resulted in the passage of the Act of Settlement, 1701,” which secured judicial independence in the United Kingdom. Judges had already been dismissed from their positions by the King's decree prior to the passage of this legislation. The wishes of the King (Charles) - the Executive must be followed by the actions of the judges. Unlike now, the parliamentary body did not play a direct role in the firing of judges at the time of the ruling.

According to the term "judicial independence," a country's fair and unbiased judicial system, which is free to make decisions without the influence of the executive or legislative branches, is considered to be independent pertaining to the federal government.

Prior to independence, criminal justice system was under the direct supervision of the federal government. The general public was strongly opposed to such a situation. The public requested that the judicial and the executive be separated at all levels of government. Those in favour of the ‘separation of powers’ fiercely argued that without it, the judiciary's independence at the lower levels would be a charade. Essentially, this is the principle upon which Art. 50 is based.[4]

Because the primary purpose of the judiciary is to uphold the constitution, only an independent judiciary is capable of protecting the rights that are necessary for the establishment of the rule of law. Provision 50 of the constitution describes the separation of the executive and judicial branches of government, and it is the only article in the constitution that discusses the separation of two organs. It suggests that the judiciary should be able to operate independently of the executive branch of government. The concept of judicial

independence serves as the foundation for this clause of the constitution. If the executive has influence over the judiciary, it is possible that the rights of the people will not be protected, the rule of law will not be established, and the judiciary will function only in accordance with the executive's wishes. It will be the executive's responsibility to oversee all functions, including the administration of justice. In a parliamentary form of government, such as the one that India has embraced, the executive is the head of state, and as such, it has the authority to control everything it deems necessary. This discretionary power could be exploited, resulting in massive turmoil throughout the country as pure justice does not always triumph over political expediency. The apex court said that: "the constitutional design aims at securing an independent judiciary, which is the cornerstone of democratic institutions."[5]

In other words, judicial independence refers to the court's ability to make decisions about its own functions without interference. No other government agency is permitted to interfere with the Department of Justice's function of delivering justice. In India, the exercise of this autonomy is limited to the administration of justice. There are a number of additional matters that Parliament

[4] Indian Constitutional Law by M.P. Jain, pg 1393, para. 4
[5] A.C. Thalwal v. High Court of Himachal Pradesh [(2000) 7 SCC 1].

has the jurisdiction to act on that are related to the judiciary. Examples include salaries, privileges, allowances, and other related topics,6 and parliament has the authority, among other things, to increase the number of judges in the country7. The independence of the court has also been deemed to be a fundamental component of the constitution in some quarters. While judicial independence is an essential element of the constitution,8 Fazal Ali, J. held that it must be preserved within the four corners of the constitution, as was the case in S.K. Gupta v. The President of India13. Shortly stated, we have independent judiciary authority and powers to a certain extent. Article 50 now incorporates judicial independence as a guiding principle, which is a significant improvement.

"Checks And Balance" And "Separation Of Powers"

The system of checks and balances is critical to the proper functioning of the three branches of government, as well as the general public. It makes certain that no part of the government gets an excessive amount of authority. If the legislative branch passes a law, the executive branch signs it into force, and the judiciary branch declares a bill unconstitutional, the bill is prevented from becoming law. A judge who is not carrying out his or her responsibilities properly may be removed from office by the legislative branch. Judiciary appointments are made by the executive branch, while their confirmation is made by the legislative branch. Once again, the branches check and balance one another, ensuring that no single branch has an excessive amount of power. According to this definition, the theory of checks and balances exists. Three government entities are given a wide range of capabilities in a predominantly Indian context, although these powers are not absolute in nature. All three have independent authorities and functions, albeit one may interfer with the other's if the former has broken constitutional standards in the manners specified above.
Several constitutional provisions for such checks and balances between three organs are included, such as the following:
In the case of judges, they are considered members of the judiciary; nonetheless, they can be dismissed by the President in circumstances when they have not acted adequately in response to an address submitted in the same session by both chambers of Parliament. Each house's total membership must support the address, as well as a majority of not less than two-thirds of the members present and voting in each house, in order for it to be adopted. As a result, two objectives are met: As a matter of principle, the judiciary may not remove any judges by exercising its discretionary power in any situation, even situations where a judge has acted inappropriately and situations where there is political pressure or prejudice against a judge For the time being, a judge cannot be removed for any reason unless and until the legislature acts. Second, a judge

can be impeached by a legislative body, but only with a two-thirds vote of the members of the legislative body. In other words, the legislature has the authority to intervene in the judicial process, but only under specific conditions, such as a two-thirds majority vote.

[6] Article 125 (1) .

[7] Article 216 - Constitution of India, 1950.

[8] Kumar Padma Prasad v. U.O.I. [AIR 1992 SC 1213]. [13] AIR 1982 SC 149.

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Another example is the Supreme Court of India's judicial branch, which has the jurisdiction to overturn laws passed by the country's legislative arm of government.
Furthermore, it has the authority to declare executive actions null and void if they are in contravention of the constitution or legislation enacted by the legislature. On the basis of these two examples, we may conclude that the Indian constitution has divided powers since the various branches of government do not have excessive power or discretionary power, which are both damaging to democratic norms.

Conclusion

Finally, while the idea of separation of powers cannot be exercised in its traditional sense, it is used in conjunction with checks and balances in accordance with the particular nation's constitution. "The political usefulness of the idea of separation of powers is now widely recognised...", writes Chandrachud J. In today's context, this philosophy should be used in a way that serves the best interests of the citizens.