



RESEARCH COMMUNICATION

Doctrine of Separation of Powers and Significance and Importance of Judicial Powers in India

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ABSTRACT

In the introduction it is explained that separation of powers and judicial review are important. The principle of checks and balances and its history and necessity are also explained. Montesquieu theory is in brief explained, if all the powers joining in one organ there can be tyrannical laws. Therefore all these three should be separate. Political theorist in the 17th century evolved that theory of separation of powers and theory of checks and balances are very closely related. In the second chapter it is compared with the Indian constitutions and also discussed the importance and necessity of exercising judicial powers. In the third it is concluded that administration of justice is primary function of the state. It should be maintained without any doubt and to be proved its efficiency and effectiveness in maintaining the administration of justice system properly. The Judiciary must bring confidence and faith among the public.

Keywords : Powers Separations, Judicial Powers, Indian Constitutions.

1. INTRODUCTION

1.1. Concept of Separations of Powers

In the context of separation of powers, judicial review is crucial and important. We have three wings of the state, judiciary, Legislature and Executive with their function clearly chalked out in our Constitutions.

Article 13 of the constitution mandates that the “state shall make no law, which violates, abridges or takes away rights conferred under part III”. This implies that both the Legislature and judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the Legislature.

Montesquieu : The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu (1689-1755) in his great work *Espirt De Lois* (the spirit of Laws) published in 1748. The

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conclusions of Montesquieu are summarized in the following quoted passage.

“When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors”

To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the distinct or separate bodies of persons.

2. PRINCIPLES OF CHECKS AND BALANCES

The doctrine of separations of powers may be traced back to an earlier theory known as the theory of mixed government from which it has been evolved. That theory is of great antiquity and was adumbrated in the writings of Polybius, a great historian who was captured by the Romans in 167 BC and kept in Rome as a Political hostage for 17 years in his history of Rome Polybius explained the reasons for the exceptional stability of Roman Government which enabled Rome to establish a worldwide empire. He advanced the theory that the powers of Rome stemmed from her mixed government. Unmixed systems of government that is the three primary forms of government namely, Monarchy, Aristocracy and Democracy – were considered by Polybius as inherently unstable and liable to rapid degeneration. The Roman constitutions counteracted that instability and tendency to degeneration by a happy mixture of principles drawn from all the three primary forms of government. The consuls, the senate and the popular Assemblies exemplified the monarchical, the aristocratic and the democratic principles respectively. The powers of Government were distributed between them in such a way that each checked and was checked by the others so that an equipoise or equilibrium was achieved which imparted a remarkable stability to the constitutional structure. It is from the work of Polybius that political theorist in the 17th Century evolved that theory of separation of powers and the closely related theory of checks and Balances.

3. SEPARATION OF POWERS- INDIAN CONSTITUTIONS

Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping.

The judiciary versus the Executive or Legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point.

Justice Mukherjee observed, “it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day”.

The theory of checks and balance has been observed in the Indian constitutions. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

4. JUDICIARY –IMPORTANCE AND ITS NEED

Judiciary – Its Importance : An endeavor is being made to highlight the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. The judiciary in a democratic polity governed by the rule of law stands as a bulwark against abuse or misuse of excess use of powers on the part of the executive and protects the citizens against the government lawlessness.

Judiciary – It Need : Expressing the needs for and importance of judiciary a learned jurist aptly remarks: “middle class people are combating with the government powers through media of the courts”.

The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

5. INDEPENDENCE OF JUDICIARY

“Judiciary is unlimited”- an unelected judiciary which is not accountable to any one except its own temperament has taken over significant powers of Indian Governance. The courts have gone well beyond ensuring that laws are implemented. Now, the Supreme court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of all this. The issue is whether the courts have arrogated vast and uncontrolled powers of themselves which undermine both Democracy and Rule of law, including the question is not to undermine both Democracy and Rule of Law including the powers exercised under the doctrine of separation of powers.

6. CONCLUSION

Administration of justice is a divine function. In fact a nation’s rank in the civilization is generally determined according to the degree in which justice is actually administered. This sacred function is to be an institution manned by men of high efficiency, honesty and integrity. As the old adage goes, “Justice delayed is Justice denied”. This phrase seems to be true in so far as the administration of justice in India is concerned. While the people have reasons to feel disappointed with functioning of the legislatures and the executive, they have over the years clung to the belief that they can go to the courts for help. But unfortunately, the judiciary is fast losing its credibility in the eyes of the people for one of the main reasons that justice delivery systems have become costlier and highly time consuming. It is needless to say that the ultimate success of a democratic system is measured in terms of the effectiveness and efficiency of its administration of justice system. More rightly

observed by Lord Bryce, “There is no better test of the sexcellence of a Government than the efficiency of its judicial system”.

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