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Separation of Power

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ABSTRACT

Doctrine of Separation of Powers states that the personnel, functions and powers of the three organs of the government that is, the legislature, the executive and the judiciary must be kept separate, independent and distinct with no overlaps. It implies that the personnel in the legislative branch are not be involved in the functions which are to be performed by the judiciary or the executive, the judiciary is not to involve with the functions of the executive or the legislature and the executive is not to interfere and involve with the functions and duties of the legislative or judiciary.

This research paper discusses on the need, merits and demerits of Doctrine of Separation of Powers. It also gives a brief insight on the system of checks and balances evolved from the Doctrine of Separation of Powers given by Montesquieu and concludes on the impact that this doctrine has over large democracies of the world such as USA, Britain and India.

I. INTRODUCTION

The Doctrine of Separation of Powers was given by Charles De Montesquieu also commonly known as Baron De Montesquieu.

The doctrine in its most simple sense means that the powers and functions of the state must be divided amongst the three organs of the government. These organs must be kept separate and one organ should be independent from the control of another.

This doctrine states ways to avoid absolute gain of power (which may result in absolute corruption of power) by providing a need for division of power. This division of power is equal, independent and distinct.

It also provides a system of checks and balances to keep track upon the activity of an organ of the government by another as to see that the functions and powers exercised are within the fold of the jurisdiction of that organ and provides measures for maintain balance between the three bodies.

(A) Review of literature

Literature which is basically the information on the Doctrine of Separation of Powers can be

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found on various websites, articles and webpages available on search engines, writings of Carl J. Friedrich, Herman Finer, A. V. Dicey, James Madison and books by independent writers such as Anchal Malhotra and Zoltan Balazs. It can also be referenced to various provisions provided in the Indian Constitution and some international declarations.

The Doctrine of Separation of Powers emerged in Montesquieu's famous book '*Esprit Des Lois*' which translates to 'The Spirit of Laws'. This book was published in the year 1748. Montesquieu was a French philosopher and he quoted,

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

As Lord Acton expressed his opinion that, 'Power tends to corrupt and absolute power tends to corrupt absolutely'. This doctrine prevents the absolute gain of power by an individual which in turn prevents dictatorship and tyrannical rule.

The doctrine's basic features as discussed in Constitutional Law, 1960 by Wade and Phillips are as follows:

- i. *The same persons should not form part of more than one of the three organs of the government.*
- ii. *One organ of the government should not control or interfere with the exercise of its function by another organ.*
- iii. *One organ of the government should not exercise the functions of another.*

Montesquieu's theory became a model for governance of democracies all around the globe. His theory led to the adoption of 'Declaration of Rights' during French Revolution which provided that,

"Every society in which Separation of Powers is not determined has no Constitution. The French Constitution, 1791, made executive, legislative and judiciary independent of one another."

This doctrine forms the foundation for the entire structure of Constitution of United States (1787).

By separating the powers amongst the three organs of the government making them independent for the implementation of their functions without other organ's interference possesses a threat that the organ may act beyond the jurisdiction of powers vested to it. This may result in an abuse of power which makes a need for limitations which can be of the nature

of jurisdiction, function or duty to be imposed on the organs. It can be done by imposing an obligation on the organ to act under a defined jurisdiction and an authority to keep in check that the powers are exercised within the boundary limits permitted. This check could be done by the other organs. This system to check the encroachment of powers is termed as checks and balances. Its origin is specifically credited to Montesquieu.

(B) Statement of Problem

How has the Doctrine of Separation of Powers impacted the democracies around the globe?

(C) Objective of research

- i. To find out, why was there a need for Doctrine of Separation of Powers?
- ii. To find out, what are the features in terms of merits and demerits in the Doctrine of Separation of Powers?
- iii. To find out, what impact did the Doctrine of Separation of Powers caused?
- iv. To find out, what influence did Doctrine of Separation of Powers had around the world?

(D) Hypothesis

There may arise a need for Doctrine of Separation of Powers to avoid absolute gain of power as it tends to corrupt. It may also have been in need to avoid concentration of powers to the same body of individuals to maintain efficiency, independency and stability.

The doctrine helps to protect freedom from absolute power abuse and prevents tyranny. It safeguards proper functioning of organs of the government and provides stability to the government by the system of checks and balances. But the organs are inter-related and cannot be kept totally independent of each other as the functions performed by each organ is not unique and distinct from other organs.

The Doctrine of Separation of Powers has impacted in the making of Constitution of America.

The Doctrine of Separation of Powers has influenced democracies around the globe by setting up a foundation for the written laws of the state which includes its features such as division of power, departmentalization of individuals in the organs and imposing boundaries on each organ.

(E) Research methodology

This research follows the doctrinal or non-empirical methodology of legal research.

The sources of information for this research are from books, articles, provisions of Indian Constitution and blogs.

II. HISTORICAL BACKGROUND

The Doctrine of Separation of Powers has emerged in history before Montesquieu has systematically formulated it in his book. It can be traced back to Aristotle in his treatise '*Politics*' where he described the three organs of the government and about their functions and their organization. He mentioned their separation from each other. A clear distinction between the legislative and executive functions was drawn by Marsilius of Padua, in the 14th century. Jean Bodin, a French philosopher from 16th century stated that 'Judicial functions must be performed by independent Magistrate, free from the influence of Monarch.' In the 17th century, John Locke who was a British political thinker concluded from a study that, '*Political power was to be divided among several bodies. The executive and federative powers can be combined but the union of executive and legislative organs shall be prohibited to protect the political liberty of people*'.

III. STORY OF ORIGIN

French philosopher, Charles De Montesquieu gave a systematic and scientific doctrine for separation of powers. In his country during his time, King Louis XIV had an oppressive and arbitrary rule over the citizens of France. The king prevailed the dictum, '*I am the State*' and exercised absolute powers over his people.

When Montesquieu visited England, he had a sense of liberty. He saw the people there experienced freedom. He compared the governance of England and France and examined separation of powers between the organs namely, the King, Parliament and the Law courts.

This made Montesquieu publish a book for the much-needed 'Doctrine of Separation of Powers' in 1748, *Esprit Des Lois*.

In this book, he enunciated some basic features of the Doctrine of Separation of Powers. He discussed on division of powers and provided reasons for the division of power between the three branches of government which were as follows:

- a) *When the legislative and executive powers are united in the same persons, there cannot be liberty. It may lead to apprehensions that the monarch may enact tyrannical laws and execute them in a tyrannical manner, as the same agency becomes the maker and executor of laws.*
- b) *Where judicial powers are combined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, as the judge would be the legislator.*

- c) *Where the judicial power is combined with the executive power, the judge might behave in a violent and oppressive manner. The prosecutor and the judge would then be the same person and authority.*
- d) *If powers are vested in one organ, or exercised without separation, governance would not be effective.*

He introduced the system of checks and balances which provides a system-based regulation allowing one organ to limit another. The maxim '*pouvoir arête le pouvoir*' which translates to 'power halts power', is applied by separating the functions of the organs and allowing and providing authority to one organ to check on other and thus, operate as a balance with regards to the functioning and exercise of powers by another organ.

This means that the legislative organ shall exercise some control over executive and judiciary; the executive organ shall exercise some control over judiciary and legislative, and the judiciary shall exercise some control over the legislative and the executive.

This does not imply that the powers provided to each organ are not independent but that the jurisdiction under which it must operate is kept in check. This simply leads to controlled, limited yet distinct division of powers between the three organs of the government.

IV. EVALUATION OF DOCTRINE OF SEPARATION OF POWERS

The doctrine can be evaluated by studying its merits and demerits.

This doctrine has the following merits:

- i. Protects liberty and rights of individuals by requiring each organ to function within the fold of its jurisdiction.
- ii. Promotes harmonious exercise of powers and functions within the organs of the government.
- iii. Increases efficiency towards performance of functions and administration by providing different personnel with respective authorities for different organs keeping them distinct and with due regard of responsibility.
- iv. Establishes independent judiciary that is free from any discretion of administration.
- v. Sets a system of checks and balances.
- vi. Prevents abuse of power by keeping check on the jurisdiction of performance or duties and functions of the organs by the system of checks and balances.
- vii. Prevents dictatorship and tyrannical rule.

- viii. Provides stability to government by distinct functions and methods to keep checks on them.

The doctrine has the following demerits:

- i. Wrong interpretation of British constitution by Montesquieu as there was no separation of powers as observed by A.V. Dicey and remarked by Barnett in *Constitutional and Administrative Law* (2005)
- ii. Not fully attainable as the organs are inter-connected and their functions cannot be divided into tight compartments.
- iii. Extreme implementation of this doctrine may lead to frictions and deadlocks which prevents smooth and efficient working of the government which may further prevent unity and coordination of the three organs of the government.
- iv. The doctrine cannot be applied wholly to democracies with parliamentary form of government as the functions are merged and coordinated.
- v. Equal separation of power and independent position for the organs of the government does not fit well under the concept of a modern welfare state which has an increased and multifold role of the executive branch of the government. One such example can be seen in the concept of delegated legislation where the functions of executives are extended to include legislative activities and powers.

V. IMPACT OF DOCTRINE

The Doctrine of Separation of Powers has had a major impact on the history of politics and formation of democratic states. It gave a spark and has boosted the French revolution and led to the adoption of 'Declaration of Rights' in France in the year 1789.

It had a wide influence on major events of the past. These events carry down their effects even today. These can be pointed down into three main areas of impact which are as follows:

- a) French Revolution
- b) Independence of America
- c) Spreading democracy around the world

The French ruler and administrators were tyrannical and exercised absolute authority of powers over the citizens of their country. Though, Montesquieu lived before the French Revolution his writings and ideologies gave spark to the French Revolution and gave it a drive and motive. But the French Revolution did not follow the ideology of separation of powers and fell into tyranny again.

The doctrine and its basic features were adopted by the American constitution. It was one of the principles adopted during and after the American revolution to preserve liberty.

The doctrine gave momentum to the spread of democracy over the world especially to the colonies under the rule of Britain and it impacted greatly in the process of making the colonies independent as it provided ways to make peace between will of people and rule and conduct of law. This served as a motive to strive for freedom and achieve independency.

VI. SEPARATION OF POWER IN BRITAIN

The British monarch is the executive head. Queen is devoid of political powers and acts as a nominal executive head who holds the office by the virtue of hereditary succession of throne. It is the Prime Minister and Council of Ministers that holds the real political powers of the executive branch.

Legislature is comprised by the House of Lords and House of Commons. Prime Minister along with the Council of Minister also form a part of legislature and stay in office while they enjoy confidence of House of Commons and make subordinate legislations. They are a part of Administrative Boards and Tribunals and enjoy the authority of performing judicial functions. These along with the judiciary makes the three organs of the government. House of commons also performs the judicial functions in some cases.

We find clear overlaps between the three organs and existence and practice of the system of checks and balances.

With the introduction of Constitutional Reform Act, 2005, the powers were separated. The legislative powers vested with an elected Lord Speaker. The judicial powers were vested with Lord Chief Justice. The Lord Chancellor's department was replaced with Ministry of Justice.

Britain followed the fusion of powers rather than separation of powers.

VII. SEPARATION OF POWERS IN USA

President is the executive head. He proposes and administers the law, appoint ambassadors, negotiates treaties and other official conducts.

Supreme court of America and the subordinate courts forms the judiciary. They interpret the constitution and other laws and reviews decisions by lower courts.

Congress with its upper and lower houses also known as, Senate and House of Representatives respectively, makes up the legislative organ of the government. They write the law, ratifies treaties, confirm presidential appointments, declare wars and more official functions.

United States of America follows the Presidential form of government and its Constitution is said to be founded on Montesquieu's Doctrine of Separation of Powers. The Fathers of Constitution considered that the power should be limited, controlled and diffused. They follow the system of checks and balances.

The legislative keeps check on the executive as they may reject appointments, treaties, withhold fundings, override a veto or even impeach president and the executive keeps a check on the legislative by measures such as adjourning the congress and may even veto the bills.

The judiciary keeps a check on legislative as it may declare the laws unconstitutional. The legislative branch keeps check and maintains balance over judiciary as it may propose constitutional amendments which effects in overruling a judicial decision, may impeach supreme court judges and even reject appointments.

The executive branch keeps a check on the judicial branch with the power to appoint the judges and the judicial branch keeps check on the executive organ with an authority to declare executive actions as unconstitutional or null and void if it contravenes with the provisions of the US Constitution.

Although the President and the Congress are elected by the people, the judges are appointed by the President and their appointment is ratified by the Senate. The Supreme Court can examine the laws passed and has been vested the power of judicial review.

The President and the Secretaries do not form a part of the legislative branch but President has the power to call upon special sessions of Congress and veto the bills. The Congress may delegate law making powers to the executive after laying down legislative policies.

The Doctrine of Separation of Powers thus finds its best expression in the constitutional structure and governmental framework of USA.

VIII. SEPARATION OF POWERS IN INDIA

India follows Parliamentary form of government. The three organs of the government are constituted by Rajya Sabha and Lok Sabha as the legislature; President, Vice President and Prime minister along with his council of ministers as the executive and Supreme Court of India, High Courts and the subordinate courts as the judicial branch.

Parliament consists of the House of the People, the Council of States, Prime minister and his Council of ministers. They propose and vote for a bill in the Parliament. The President also has legislative powers as to pass ordinances for immediate action during the recess of the legislature as discussed under Article 123 of the Indian Constitution. He may also be authorized

with the powers of the legislature during a state emergency.

The feature of independent judiciary is inculcated in the provisions of the Constitution of India. One such provision is Article 50 of the Indian Constitution.

Judicial organ of the government interprets the constitution, provides remedies and decides upon issues filed in the court of law. They also play the role of legislature as they lay down its own procedures for allotment of justice.

- The powers and functions of the legislature are derived from the Constitution of India.
 - **Article 264** provides that the Parliament and the Legislatures of the States have powers to make laws.
 - **Article 368** provides for the powers of the Parliament and procedure for amendment of the Constitution.
- Constitutional status of Doctrine of Separation of Powers are as follows:
 - **Article 50** of the Indian Constitution provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.
 - **Article 53** of the Indian Constitution provides for the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officer subordinate to him in accordance with this Constitution.
 - **Article 154** of the Indian Constitution executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officer subordinate to him in accordance with this Constitution.
 - **Article 121** of the Indian Constitution states that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.
 - **Article 211** of the Indian Constitution states that no discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.
 - **Article 123** of the Indian Constitution states that the President, being the executive head, is empowered to exercise legislative powers in certain conditions.
 - **Article 361** of the Indian Constitution is an exception to Article 14 (which discusses on the Right to Equality). It provides immunity to the President and the Governors

from court proceedings and states that they shall not be answerable to any court of law for the exercise and performance of their powers and duties in their office.

India has also adopted the system of checks and balances from Montesquieu's Doctrine of Separation of Powers to prevent arbitrary and absolute use of power which may disregard the democracy of India. Indian constitution does not provide strict separation of powers as described in Montesquieu's Doctrine of Separation of Powers because we can observe the occurrence of overlapping powers and functions amongst the three organs of the government.

Hence, the Indian constitution has not adopted the separation of powers but separation of functions and that too not in a very strict sense.

IX. CONCLUSION

The hypothesis for the need for Doctrine of Separation of Powers was found out to be true. The Doctrine of Separation of Powers was based on the idea to provide liberty and put an end to the tyrannical rule. It promotes division of power and restricts abuse of absolute power or power in general.

The merits and demerits as of the Doctrine of Separation of Powers as reported from the data collected can be concluded as the doctrine does do good in providing stability to the working of the government and makes obligations to the functions and duties vested to be performed which results in efficiency but, the application of this doctrine completely as it directs, in the real world is far from possible as the three organs of the government always overlap for some or the other functions of each other which disrupts the element of independency. The organs balances the operations by the system of checks and balances.

The hypothesis for the impact of doctrine was quite precise as the doctrine had its impact on the independency of colonies, French revolution and American revolution and American Constitution.

On detailed study of influence of Doctrine of Separation of Powers on a few major democracies around the world we can conclude that it has led to separate and distinct recognition of the three organs of the government and defined the functions, powers and duties they are to be obliged and vested with under the law or under the Constitution of the State.

Hence, from the latent analysis of the data I collected, I can conclude that Doctrine of Separation of Powers has had major influence on the basic structure of the democratic state and it has laid down the foundation for existence of the three pillars or the three organs of a democratic government. It is hard to apply in its truest sense but its elements can be enunciated

in the written documents by vesting and putting obligations on the organs, with their distinct and major powers to be exercised and performed. Smaller functions are provided to other organs to avoid concentration and/or abuse of power, maintain balance and keep check that an organ so as to the organ is not stretching their arms full of powers beyond the prescribed boundaries or jurisdiction of authority.

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