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Implications of Separation of Powers for Judiciary in India:The Constitutional Jostling

Dr Shruti Bedi*

When the founding fathers gathered in the Constituent Assembly to draft the Indian Constitution, the concept of separation of powers was a fundamental political maxim which dominated the thinking of the members. They desired to separate the government into three co-equal branches—judiciary, executive and the legislature.

This separation of powers doctrine developed over centuries of political and philosophical deliberations emerged as essential to the sustainability of a democratic government. Aristotle spoke of the three agencies—the general assembly, public officials and the judiciary.[1] After the conception of Parliament, John Locke developed this theory in his *Two Treatises of Government* (1689), where the three powers were defined as "legislative", "executive" and "federative".[2] Ultimately, Charles de Montesquieu (1689-1755), cultivated and expanded the doctrine based on his understanding of the English system.[3] While expounding on the significance of clearly sketching out the powers of the three branches, he noted that "there would be an end of everything, were 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"[4]. Intending to protect the liberty of the individual, Montesquieu, favoured the theory of one authority acting as a balance against the other - *Le pouvoir arête le pouvoir* - power halts power.[5]

The agenda of separating powers in India is evident from the perusal of the statements made in the Constituent Assembly which subsequently resulted in the adoption of Article 50[6] of the Constitution. The first Prime Minister of India was unequivocal in his desire to separate the judicial and executive functions.[7] The framers of the Constitution were unambiguous in their view that clearly and distinctly the "judiciary needed to be kept separate from the influences of the executive".[8]

The intention and the plan to separate the powers was obvious and precise. However, implementation was another complication. Accordingly, the separation of powers envisaged by the Indian Constitution is not as rigid as the US Constitution. While focussing on efficiency in the governmental functionality, overlapping of powers was fated to occur. It was this understanding that impelled the framers to include the concept of separation of powers as a directive. Hence Article 50 which talks about the separation of the judiciary from the executive is a Directive Principle under Part IV.

India was greatly influenced by the British Parliamentary system and consequently adopted the path of parliamentary democracy. In the USA it is the freedom of judiciary which is placed at a higher level in comparison with the Legislature/

*Dr Shruti Bedi is Associate Professor (Law), University Institute of Legal Studies, Panjab University, Chandigarh.

Congress. We in India have given a similar status to the Indian Judiciary. Justice is the first promise of the Indian Constitution as provided in the Preamble. We, the people of this nation, look to the judiciary for justice. It upholds the rule of law and is instrumental in ensuring justice to all. Consequently, the independence of the judiciary is not only a requirement but an imperative for securing justice. Further, to maintain the independence of judiciary we are obligated to warrant the separation of the essential powers and functioning of the organs of the government. This article analyses the core functions of the judiciary and why and how it needs to be separated from the other organs.

Separation of Powers: Balancing the See-Saw

Separation of powers has acquired the prominence of a basic and essential feature of the Indian Constitution.[9] It is present in the jurisprudence of the Constitution which lives up to its accolade of the longest constitution when it categorically defines and delineates the powers and functions explicitly of the three branches. However, this doctrine is not present in its rigidity but has a fluid presence. It nudges the three institutions of the Indian democracy towards a harmonious and healthier interaction rather than a stern and strict approach required in instances of fractious conduct.

A prominent element of the theory of separation of powers is the system of checks and balances, the evident purpose being to check the absolute acquisition of power by one organ and restricting it within its boundaries and domain. No one organ can acquire a predominant position over the other. Precise equality amongst the three is neither attainable nor is it a desired aim of the constitution. The provisions of the Constitution, tactfully and artfully check and balance the possible abuse of powers. Judicial review under Articles 226 and 32 is a befitting illustration of this system. J.J. Shelat and Grover in *Kesavnanda Bharti v State of Kerala*[10] had opined:

" … There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in Ranasinghe case [Bribery Commr. v. Ranasinghe, 1965 AC 172: (1964) 2 WLR 1301: (1964) 2 All ER 785 (PC)]. …"[11]

The Indian Constitution provides for cooperative federalism which does not envisage a harsh and an unyielding separation of powers. Harold Laski speaks of a similar notion when he says, "Separation of powers does not mean equal balance of powers"[12]. The Supreme Court has relied upon this exposition in *Indira Nehru Gandhi* v. *Raj Narain*[13]:

"… The doctrine of separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, work-a-day principle. The division of Government into three branches does not imply, as its critics would have

us think, three watertight compartments. Thus, legislative impeachment of executive officers or judges, executive veto over legislation, judicial review of administrative or legislative actions are treated as partial exceptions which need explanation."[14]

Overlapping of Powers: A Necessary Concomitant of Democracy in India

'In modern governance, a strict separation is neither possible nor desirable.'[15] Overlapping of certain functions of the organs does not necessarily imply a violation of the principle of separation of powers. That is a consequence only in the eventuality of one organ annexing the *essential function* of another. This stance was glimpsed from the observation of Sathasivam J. speaking for the court while considering the constitutional validity of the Members of Parliament Local Area Development Scheme[16]:

"While understanding this concept [of separation of powers], two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution. Two, that in modern governance, a strict separation is neither possible nor desirable. Nevertheless, till this principle of accountability is preserved, there is no violation of the separation of powers. We arrive at the same conclusion when we assess the position within the constitutional text. The Constitution does not prohibit overlap of functions, but in fact, provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of the function of the other branch which results in wresting away of the regime of constitutional accountability. …Thus, the test for the violation of the separation of powers must be precisely this. A law would be violative of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability."[17]

Overlapping occurs under the Constitution in numerous instances. The Parliament is empowered to prescribe the number of judges in the Supreme Court [Art. 124(1)]. Pursuant to this, the Supreme Court (Number of Judges) Act, 1956 was passed. The impeachment process for the removal of a judge, both Supreme Court and High Court, is carried out through the special majority in the Parliament after an investigation into the charges [Art. 124(4)]. For carrying out this onerous responsibility, the Parliament is empowered to legislate to regulate the procedure for the presentation of an address in the impeachment process and the investigation and proof of the misbehaviour or incapacity of a Judge [Art. 124(5)]. Parliament, by law, determines the salary of a judge [Art. 125(1)] as well as their privileges, allowances etc. [Art. 125(2)]. Following this, the Supreme Court Judges (Conditions of Service) Act, 1958 has been enacted. Further, Parliament is enabled to confer on the Supreme Court, by legislation, additional powers to entertain and hear appeals and criminal proceedings [Art. 134(2)]. Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, in furtherance of this provision. Article 135 enables Parliament to make a law about the jurisdiction and power of the Supreme Court with respect of any matter to which the provisions of Articles 133 and 134 do not apply. The power of

review of the Supreme Court under Article 137 is subject to any law that Parliament may pass. Parliament can by law enlarge the jurisdiction of the Supreme Court concerning a matter conferred by the government. Parliament by law can also add to the power of the Supreme Court to issue the generally recognised writs under Article 32 [Art. 139].

There are a whole plethora of provisions of parliamentary and legislative checks placed on the judiciary, which controls its administrative functioning. However, these checks do not violate the theory of separation of powers nor do they impinge on the independence of the judiciary.[18] The powers of the three organs do not display a rigid separation, but intermingle with each other to allow checks against misuse. To quote Jackson, J. of the US Supreme Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*[19] the Constitution enjoins upon its branches "separateness but interdependence, autonomy but reciprocity". The scheme of the Constitution exhibits a certain uniqueness which is peculiar in its application to the traditions of this country. A constitutional issue will therefore only arise when there is an overlap in the form of a check concerning an essential or basic function of one organ as against the other. This article evaluates the functioning of the executive and the legislature and the overlap if any, impacting the essential and basic role of the judiciary.

The Essential Judicial Functions: Separating the Chaff

The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. The Assembly was keen to keep the judiciary out of politics to maintain and sustain its independence. This was done by fortifying the constitutional provisions. At the initial glance the provisions seem to be unduly concerned with the administrative aspects of the judicial system, tenure, salaries, allowances, retirement age, detailing of the judicial provisions and more importantly the mechanism to appoint judges. However, on a closer look, the member's interest with routine matters was to insulate the courts from the forces of the government. Independence of judiciary was to be protected and the areas of concern were prominently the appointment, removal and transfer of judges and its basic function of judicial review. This article also seeks to analyse the extent of executive and legislative control on these essential aspects of the functioning of judiciary.

Appointment, Transfer and Removal of Judges

The issue of appointment of judges to the apex court and the high courts as well as the transfer of judges had been a bone of contention for the framers and it continues to be a matter requiring careful consideration. The power to appoint judges to the Supreme Court is vested in the President. Article 124(2) further makes it mandatory for the President to consult the Chief Justice of India in all cases of appointment of judges other than the Chief Justice of India. For the initial part of the Supreme Court's history, this provision was understood to mean that the President would consult the President but was not obligated to act in accordance with the advice. In a series of cases, this issue of primacy regarding the appointment of judges was discussed and debated at length. The

affirmation to the primacy of the judiciary in the matter of appointment of judges was consciously recorded.

The Supreme Court, in 1974, in *Samsher Singh* v. *State of Punjab*[20], while keeping in mind the cardinal principle of 'independence of judiciary,' concluded that consultation with the highest dignitary in the judiciary i.e. the Chief Justice of India, in practice meant that the last word must belong to the Chief justice of India. This position was maintained in *Union of India* v. *Sankalchand Himatlal Sheth*[21] but was altered in the *First Judges case*[22] in 1981 by a seven-judge bench which held that the term "consultation" could not be read as "concurrence". However, the earlier position was restored in 1993 by a nine-judge bench in the *Second Judges case*[23] while overruling the *First Judges case*. This position was reaffirmed in the *Third Judges case*[24] by a nine-judge bench. Consequently, it is evident that historically, all the three wings of governance have uniformly maintained that while making appointments of judges to the higher judiciary "independence of the judiciary" was an accepted integral component of the Constitution. Accordingly, the term "consultation" used in the provisions under consideration had to be understood as vesting primacy with the judiciary with reference to the subjects contemplated under Articles 124, 217 and 222.[25] The *Second* and the *Third judges' cases* held that "consultation" expressed under Articles 124, 217 and 222 were to be read as vesting primacy, with the unanimous opinion expressed by the Collegium of judges headed by the CJI based on a participative consultative decision-making process. Further, while striking down the 99th Amendment, which created the National Judicial Appointments Commission, the apex court in *Supreme Court Advocates-on-Record Association v Union of India*[26] clarified that President in Articles 124(2) and 217(1) meant the President acting in accordance with the advice of the Council of Ministers headed by the Prime Minister. Since the opinion of the CJI/Collegium has finality, the advice of the Council of Ministers must be in accordance with the unanimous opinion of the Collegium with the CJI at the head.

While recognising that too much power with the Executive could be perilous, it was also perceived that too much power in the hands of a single individual, the Chief Justice of India would have its hazards. Accordingly, the opinion of the Chief Justice of India was interpreted to mean the collective opinion of the senior-most judges of the Supreme Court, which served as an internal check against making the Chief Justice singularly powerful.[27]

The removal of judges is not an internal matter of the judiciary. The Constitution provides that a judge of the Supreme Court holds office till 65 years and that of a High Court till 62 years. The judges cannot be removed before the age of retirement except on the presentation of an address by each House of Parliament passed by a specified majority on the ground of proved misbehaviour or incapacity [Art. 124(4)]. Thus, has the Constitution endeavoured to put judges of the Supreme Court above executive control. While the Executive does not exercise any control over the removal of judges, the Legislature imposes a check on judicial misuse of power through the constitutional process of impeachment. The Parliament has been circumspect

as far as the removal of judges is concerned and till date, no judge has been impeached.

The Power of Judicial Review

Another subject of concern concerning the impact of separation of powers on the judiciary is 'judicial review'. Judicial review is an essential power for the courts. The Constituent Assembly's aim, while framing the judicial provisions was to establish the foundations of the judiciary's review power and its duty to uphold the Constitution.[28] The essence of democracy is that the judiciary has been entrusted with the power to control the Executive and the Legislature whenever it is alleged that the said organs have exceeded their constitutionally assigned authority.

The two provisions that most emphatically express the power of judicial review under the Indian Constitution are Articles 32 and 226.[29] These provisions of the writ jurisdiction of the Supreme Court and the High Courts place a serious check on the exercise of executive and legislative power of the government. Article 32 allows the petitioners to directly approach the apex court for enforcement of their fundamental rights through the writs of *habeas corpus, mandamus, quo warranto, certiorari* and *prohibition*. Article 226 is broader in its scope and empowers the high courts to issue directions, orders and writs both for the protection of fundamental rights as well as for any other purpose. The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.[30] Abuse of power can always be checked through judicial review of the action complained of.[31]

Many times, it is the exercise of the power of judicial review by the constitutional courts which has disgruntled the Executive or the Legislature. However, being an essential and basic feature, it cannot be ignored. The 42nd amendment of the Constitution was challenged in *Minerva Mills Ltd.* v. *Union of India*[32] which provided that no amendment of the Constitution could be challenged on any ground before the courts and that there will be no limitation on the constituent power of Parliament to amend the Constitution. While observing that the Constitution had conferred limited amending power on Parliament, the Supreme Court held that judicial review to determine whether a law was to give effect to Part IV could not be excluded as the judicial review was part of the basic structure.[33] It noted that though there is no rigid separation of powers between the Executive, the Legislature and the Judiciary, there is however a broad demarcation. The Judiciary is entrusted with the duty to keep the Executive and the Legislature within the limits of the power conferred on them which is also a basic feature of the Constitution.[34]

In *L. Chandra Kumar* v. *Union of India*[35], part of Articles 323-A(2)(*d*) and 323-B(3)(*d*) to the extent it excluded the jurisdiction of the High Courts in respect of specified matters for which jurisdiction was conferred on Tribunals was struck down as violative of the basic structure. In *Raja Ram Pal* v. *Lok Sabha*[36], the question of the extent of judicial review of parliamentary matters came up for consideration. Sabharwal C.J., speaking for K.G. Balakrishnan, D.K. Jain, JJ. and himself, held that procedural irregularities in Parliament cannot undo or vitiate what happens within its four walls,

that is, internal parliamentary proceedings. However, proceedings that are substantively illegal or unconstitutional, as opposed to irregular are not protected from judicial scrutiny by Article 122(1) of the Constitution.[37]

In *I.R. Coelho* v. *State of T.N.*[38] the apex court considered the scope of judicial review of the inclusion of a law in the Ninth Schedule by a constitutional amendment thereby providing immunity from the challenge in view of Article 31-B of the Constitution. It was held that every such amendment shall have to be tested on the touchstone of essential features of the Constitution which included those reflected in Articles 14, 19 and 21 and the principles underlying them.[39]

In many instances the decisions of the Supreme Court e.g. *2G Spectrum case*[40] and *Coal Scam case*[41] the actions of the Executive were found violative of constitutional obligations causing huge loss to the public exchequer. Policies of the State for the arbitrary acquisition of land or in violation of environmental laws have been struck down by this Court. Dissolution of State Assemblies and dismissal of State Governments have also been struck down by this Court.[42] The Supreme Court also has had to deal with the issues arising out of decisions of Speakers in recognising or otherwise the defections in the Central or State Legislatures.[43] The judiciary has been assigned the role of determining powers of every constitutional organ as well as the rights of individuals. Disputes may arise between the Government of India and the States, between a citizen and the State or between citizens. They may involve issues of constitutionality or legality and also of allegations of mala fides even against the highest constitutional dignitaries. To provide justice to the people, the judiciary is required to be impartial and independent. It is imperative to keep it separate from executive control and influence. Without separation of powers and independence of the judiciary, neither the primacy of the Constitution nor its federal character, social democracy, nor the rights of equality and liberty can be effective. The Constitution establishes and envisages an extremely powerful Supreme Court to protect and guard it. However, the provisions detailed above signify what M.C. Setalvad once observed, "not the supremacy of the courts but the supremacy of the Constitution"[44].

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