CHAPTER 7

CONCLUSION AND SUGGESTIONS

7.1 Conclusion

7.2 Suggestions
CONCLUSION

The governmental body to function without any tyranny, the human liberty has to be preserved by avoiding the concentration of powers in any one person or body of person. Montesquieu’s doctrine of separation of powers is an important pillar of modern liberal democratic theories of the state. The doctrine acts as a coherent doctrine of government. Terence Daintith and Alan Page pointed out that, “while the trinity of the executive, legislative and judicial functions may be the most powerful rationalization of the specialization process that has yet been offered, it cannot by itself capture the overall significance of any given structure of government for constitutional values such as democracy and accountability.”

The doctrine of separation of powers is the conventional way of trying to ensure a democratic system of government. The Western political philosophers had ascribed to the separation of powers i.e., triple dimensions of government and they opine that ‘the realization of real democracy depends on the independence and separation of powers both in theory and practice’. No doubt, the doctrine of separation of powers has developed in U.S.A. in its paramount aspect including most of the countries’ Constitution wherein it is codified based on the doctrine of separation of powers, considering the independence of three powers from one another as one of the principles of democracy.

Montesquieu’s doctrine of separation of powers limits the powers vested in any one authority to overcome the concentration of power in one hand and seeks for the system of checks and balances. Montesquieu was not the first to write about the doctrine of separation of powers. He was most associated with the idea of having three separate organs to function together and depend on each other to make a well running government and checking on each other. The principle of the doctrine of separation of powers lies in vesting the powers of the three organs of the government i.e., the

---

executive, the legislature and the judiciary separately and independently. It has been combined with other political ideas, the theory of mixed government, and the idea of balance, the concept of checks and balances, to form the complex constitutional theories that provided the basis of modern a Western political deliberation.

While the doctrine of the separation of powers and its practice will not necessarily be the same thing, the purpose behind the doctrine can be seen to be embedded in democracies.\(^{734}\) Constitution is the supreme law of the land. No organ should go beyond the role as assigned to it by the Constitution. It is the obligation of the Judiciary, Executive and Legislature to strictly adhere to one of the most fundamental features of the Constitution ‘Separation of Powers’. The superior ideal of the Constitutional system needs to be protected which can be preserved only when brought into practice. There is a main gap between the Constitutional plan and practice of Separation of powers. It can only be connected when all the three organs move a step ahead than all the other democracies of the world by working in fine harmony. By not doing so they are disregarding the rights of the people. They had realized that government being an organic body would never be able to realize complete separation of powers. Hence, aiming for a absolute separation of powers is equivalent to talking in vacuum. But, that does not mean that each branch has exclusive powers rather they have their Constitutional limits to be hold on to. The spirit of the Constitution is not on exclusiveness but on shared coordination. The Executive has grown very powerful in the recent time that has certainly led them to a wide misuse of powers.

The doctrine of separation of powers protects the nation from despotism and tyranny. As powers are distributed among three different organs, these organs enjoy only limited powers which prevent the rise of dictatorship. All the three organs are prime important equally to the smooth running of the government. The legislature of the state is always regarded as the primary organ of government as the work of the government begins by law-making. However, in actual practice the executive operates

as the most powerful organ of the government. As the judiciary is kept separated from the other two organs, it is always held in high esteem by the people. Hence the three organs are of highly of great important in working of the government.

In fact, at present day situations, the doctrine in its absolute form cannot be recognized and it is impractical for usage in the outfitted practices of a government. From the segment of period, States have evolved from being minimal to being welfare oriented by playing the diverse roles of arbiter, controller and protector to the people. In its ever-present role, the functions of the State have become multifarious and its problems interdependent. Hence, any serious attempt to define and separate the functions would only cause inefficiency in the government. The legislative, executive and judicial functions are interdependent and inter-related functions and therefore cannot be completely separated. Absolute separation of three organs of government is neither feasible nor desirable because, without mutual coordination among these organs, it is impossible to carry out its functions effectively and efficiently. Absolute separation of powers can actually limit the unity and co-ordination required by the three organs.

On the other hand, the function of law-making cannot be assigned only to the legislature. Since, the needs of our times have made it important to provide for law-making by the executive under the system of delegated legislation and the judiciary in the interest of the public. Hence, law-making power by the judges in the form of case law and equity law is very essential for protecting the rights of the people. Hence, complete separation of powers leads to deadlocks and inefficiency in the working of the government.

The doctrine of separation of powers has adhered that it is unique to presidential systems and is incompatible with parliamentary ones. Democratic presidential systems seeks to the core democratic values such as preventing arbitrary government, guarding against government tyranny, defending against legislative supremacy and promoting governmental efficiency, and they deploy the separation of powers to achieve them. However, the Parliamentary systems are more concerned with promoting government
efficiency than presidential systems, while the latter are concerned with curbing the risk of tyrannical government. Ironically, presidential system normally, degenerated into tyranny, almost certainly because of the strong incentives that presidentialism presents to the head of government to act extra-constitutionally.\textsuperscript{735} The Prime Minister under Parliamentary government is usually both head of the executive branch and leader of the majority party in the legislature, which gives the executive branch much more freedom of action than a president usually enjoys in a presidential system of government.

British parliamentary system does not separate powers in the standard sense. Rather, it fuses the powers between various organs of government. The U.K. Parliamentary government follows fused powers as there is common blend of the legislative and the executive powers. The separation of powers exists between the Crown and Parliament. As it could be witnessed from the following demonstration:

(1) requires the monarch to assent to a bill that creates primary legislation because this represents the legal moment when the two sovereign authorities of England reach agreement - a moment without which primary legislation would be impossible;

(2) makes ministers responsible to Parliament because they represent the Crown and are the vehicles through which Parliament holds the Crown constitutionally and politically accountable; and

(3) creates a valuable tension between Parliament and the courts in so far as Parliament is authorized to overrule courts, which themselves derive their constitutional authority from the Crown.

Nevertheless, even under British context, separation serves for the democratic values. Firstly, by setting the Crown and Parliament in opposition, it prevents one organ from achieving ascendancy over the populace and, therefore, guards against tyranny. Secondly, it precludes arbitrary government as it is consistent with the rule of law. As the British parliamentary system fuses the legislature and the executive, it retains a

\textsuperscript{735} Richard Albert, “Presidential values in parliamentary democracies” (2010) 
Available at: icon.oxfordjournals.org/content/8/2/207.full (last visited on September 12, 2016)
separation of executive and legislative functions inasmuch as the executive must retain the confidence of the legislature, which must, in turn, approve the executive's plan for governing. This prevents the arbitrary exercise of government powers. Finally, it upholds government efficiency since Parliament pass laws under the wide awake.

Under the American Presidential system, the doctrine of separation of powers, is followed in the scheme that one branch is not permitted to encroach on the domain of another branch. The founding fathers believed that where power concentrates, there is a way for tyranny. Hence, to prevent tyranny, they separated the government into three distinct organs, viz., the legislature, the executive and the judiciary that is implicitly provided under Arts I-III of the American Constitution.

India has adopted the Britain model of parliamentary government. The federal feature of India also sets out the typical American federal system. The Constitution of India has adopted the Judicial Review of the American judicial system. It incorporates Judicial Review as a fundamental feature and entrusts judiciary a pivotal role in safeguarding the rights of the citizens. It places judiciary as a guardian of the constitutional values and assign a role of effective check against the governmental power. India embraces both the British concept of the sovereignty of Parliament and the American model of federal system. The Indian democratic system holds on to the concept of checks and balances that determines the check on the functioning of each organ of the government by the other. The other important feature of the Constitution of India is Rule of Law. It finds its place in the fundamental rights of citizens, specially the right to equality, liberty and justice and the concept of "the procedure establish by law" which is explicitly mentioned in the Arts.14 & 21. Although, India does not follow strict doctrine of separation of powers, it is one of the instruments which operate in Indian political system. And for good governance, it is necessary for all the three organs to abide by the Constitution which is supreme law of the land.

The modern day interpretation of the doctrine does not recognize the division of Government into three water-tight compartments but instead provides for crossing
rights and duties in order to establish a system of checks and balances. It has been found that the mere separation of powers between the three organs is not sufficient for the elimination of the threat of arbitrary and capricious government. Even after distinguishing the functions, if an authority exercises public power with an absolute and sole discretion, there will be a resultant of abuse of such power. Therefore, a system of checks and balances is very necessary as a matter of fact, in order to achieve the desired ends of the doctrine of separation of powers.

Similarly, if separation of powers is followed in an absolute sense, it also leads to problematic condition since each organ separated and independent from other organs than abuse of power occurs as the powers are in one hand absolutely. At this point of time, the system of check and balances is appropriate. While the doctrine of the separation of powers and its practice will not necessarily be the same thing, the purpose behind the doctrine can be seen to be embedded in democracies. Strengthening the judiciary by separating the judicial organ from the legislature and the executive helps in maintaining rule of law in a country. The judiciary must work in progress so that they can contribute without fear or favour in avoiding accusations of incompetence, corruption, or court mismanagement among judges.

Apart from the check kept on them by the Judiciary, media and NGOs have played a vital role in exposing the misdeeds of Government functionaries. Ultimately, the endeavor is to protect the rights of the people. In a democracy, vigilant attitude of the people can help assuring a proper functioning and prevent arbitrary exercise of the power.

In the strict sense, the doctrine of separation of powers cannot be applied in any modern Government. Government is an organic unity. It cannot be divided into water tight compartments. If there is a complete separation of powers the government cannot run smoothly and effectively. Smooth running of government is possible only by cooperation and mutual adjustment of all the three organs of the government.\textsuperscript{736}

\textsuperscript{736} Tej Bahadur Singh (1996).
As pointed out by John Stuart Mill, ‘a complete separation and independence of the various departments of the government would result in frequent deadlocks and general inefficiency’. According to Laski, the spectacle of separation of powers is a spectacle of confusion of powers. According to Finer, it throws the government in coma and convulsions. The government would suffer from deadlocks and delays, from jerks and jolts. The government based on doctrine of separation of powers would lack unity, harmony and efficiency. In practice, it has been observed that one organ depends upon the other for its efficient working. The legislature in modern times performs certain executive and judicial functions. Likewise, the executive is performing legislative and judicial duties. A similar position applies to the judiciary. According to Maclver, “the line between legislative enactment and executive or judicial decision is never hard and fast.”

There is even democratic objection to the doctrine of the separation of powers, because this doctrine imposes a limitation on the powers of the executive. They say that during Montesquieu’s time the main function of the state or the government was to protect the country from foreign invasion, maintain law and order and establish judicial system. At that time it was considered that it was good for the government not to interfere in the affairs of the people because most of the rulers were absolute and selfish. The idea of the welfare state had not gained popularity then. But today, the idea of welfare state has gained much importance. Therefore, the powers and functions of the executive have increased considerably. Further due to emergence of political parties, the separation of legislature from the executive has almost been abolished and co-ordination has been established between the two. J.S. Mill in his book, “Representative Government”, writes, “If the principle of separation of powers is applied in its complete form disintegrating the realities, governmental machinery will come to a standstill”. Dr. Finer says that the principle of the separation of powers makes the administration

---

737 Dafe Akpedeye, 'Separation of Powers; Constitutional and Media Perspectives' (2013).
Available at: dailyindependentnig.com/2013/05/separation-of-powers-constitutional-and-media-perspectives/ (last visited on September 14, 2016)
inactive and autocratic. Blackstone also realised this and he said that complete separation of powers is as dangerous as their concentration.\textsuperscript{738}

It is evident that governments either in U.K., U.S.A. or India, in their actual operation, do not choose for the strict separation of powers because it is undesirable and impracticable. The implications of the doctrine could be seen in almost all these countries in its diluted form. The inconsistencies between the plan and practice, if any, are based on these very grounds that the ideal plan is impractical for everyday use. In the absence of a spirit of democracy, rule of law, independence of judiciary, fundamental rights and economic equality, there can be no liberty even there exist a complete separation of powers. As a matter of fact, absolute separation of powers is not possible in any form of Government. If there is a complete separation of powers the government cannot run smoothly and effectively. Smooth running of government is possible only by co-operation and mutual adjustment of all the three organs of the government. Professor Laski has aptly remarked: “It is necessary to have a separation of functions which need not imply a separation of personnel.” Prof. Garner has rightly said, “the doctrine is impracticable as a working principle of Government.” It is not possible to categorize the functions of all three branches of Government on mathematical basis.\textsuperscript{739} Nevertheless, the doctrine is itself a part of the founding structure of the Constitution of all democratic nations. The concept of the doctrine of separation of powers is essential for the effective functioning of a democracy by means of checks and balances.

Available at: www.publishyourarticles.net/ (last visited on September 14, 2016)

\textsuperscript{739} Tej Bahadur Singh, “Principle of Separation of Powers and Concentration of Authority” (1996).
Available at: www.ijitr.nic.in/articles/art35.pdf (last visited on September 12, 2016)
The research scholar provides the following suggestions:

1. The research scholar highly appreciates an innovatory contribution of the Supreme Court by inventing the theory of ‘basic structure’ and ‘basic feature’. The Hon’ble Supreme Court in the famous case of Kesavananda Bharati v. State of Kerala\(^{740}\), has held that the theory of separation of powers in India is the basic feature of the Constitution, but, then the research scholar is of the view that the theory of basic structure and basic feature is not a static preposition. Whereas, the said theory is a dynamic one. As a result, there is all possibility of the changes that would occur in the concept of the theory of ‘basic structure’ and ‘basic feature’.

The list furnished by the Supreme Court on ‘basic structure’ and ‘basic feature’ is not exhaustive. Hence, the research scholar is of the view that on the pretext of independence of the judiciary in India, the Supreme Court and the High Courts should not exhibit over activism towards defeating the principles of separation of powers. Equally the role and responsibilities of the legislature and the executive should also be kept in mind while interpreting the law by the judiciary. If this is done there will be harmony between the three organs of the government for a successful democracy. It is only the Parliamentary democracy which can earn the talents of our multi-ethnic, multi-culture, multi-lingual and multi-religious society to make India a major power in the new millennium.

2. The research scholar wishes to draw the attention of the comment made by K.K. Venugopal, which are as under:

   “today the Supreme Court of India is disposing of about 50,000 cases a year, but nevertheless falling short of the filings that year, by about 3,000-4,000 cases every year. The US Supreme Court with nine judges

\(^{740}\) AIR 1973 SC 1461
sitting en banc is able to dispose of only 80-100 cases a year. The judicial committee of the House of Lords or the Supreme Court of United Kingdom, after the Constitutional Reform Act, 2005, (which has come into existence from 1st October, 2009) is able to dispose of only about 180 cases a year. In the case of Supreme Court of India, I have no doubt that it will easily be able to deal with 1000-2000 cases a year without the lawyers or clients feeling that they have not been given a full and complete hearing in the matter. I believe that, we can no more afford to be complacent. If one has to beg for a hearing date even after 3-4 years have elapsed after filing of a case, and still cannot get a date within a month or two, it means that the system has failed. No other solution has been found so far and it does not appear that the increase of the judge strength by five judges would miraculously make the arrears of 50,000 cases disappear. It is time to take bold decisions, and if we hesitate any more, without finding solution, one should have failed the nation and the litigant public.”

Hence, the research scholar, with due respect suggest to take note of the above mention cautioned given by Sri. K.K. Venugopal, a senior advocate, Supreme Court, and work out the solution for appointment of the judges to the higher judiciary at regular intervals of time to safeguard Independence of judiciary for promoting spirit of theory of separation of powers.

3. The research scholar in context with judicial activism suggests that, the higher judiciary, especially Supreme Court of India, should always have the activist approach as a part of its decision-making process, since it has to be an organ of progress and social change. It is the over activism and over enthusiasm (judicial overreach), which cause some problem. In safeguarding the independence and integrity of judiciary. Therefore, the research scholar suggests that the judiciary should itself put restraint where ever necessary for protecting the role of other organs of the government (legislature and executive). Hence, this approach which must be re-looked by the judiciary itself, for it is this organ of the
government, which is to act most sensibly and rationally above and beyond everything to uphold the constitution, its basic structure (one of which is the ‘separation of powers’) and its supremacy. Restraint is required against the over-activism, not vis-à-vis normal activism, for judiciary must be active and alter, so as to see that the sanctity of the constitution remains unaffected.

4. Before the research scholar makes a suggestion in the matter of Supreme Court striking down the Constitutional Amendment for appointment and transfer of judges to the higher judiciary to following passage published in the newspaper, “The Hindu” is worth quoting:

“The constitutional amendment was struck down in 2015 by the Supreme Court as violative of judicial independence, which is the part of Constitution’s Basic Structure. The Court’s institutional memory, of the emergency and its aftermath, played a significant role in the decision. A subsequent order also directed the government to finalize a new memorandum of procedure in order to regulate fresh appointments. After the first judgment, unconfirmed judges were confirmed in their posts. Appointments were recommended and processed in many cases, including some appointments to the Supreme Court. The government has sought to retain the powers to veto candidates recommended by the collegiums on grounds of “public interest” or “national security”. The judiciary led by the collegium has refused to let in a trojan horse into it citadel of independence. Over 75 appointments to the High Courts and some transfer appear to be struck in the process for 8 months. In a country with around 1,200 judges in the Constitutional Courts, nearly 400 vacancies at that level, this is an unacceptable position. Judges retired regularly, and if no fresh appointments are made, it is possible to bring a system to complete halt.”

In view of the above position, the research scholar humbly submits that it is high time for Indian judiciary to slightly dilute its stand on the method of Collegium system of appointment and transfer of judges to higher judiciary. Further, it is suggested that the higher judiciary should experiment a new method for appointment and transfer as suggested by the NJAC Act, 2014.

In view of this position, the Research Scholar submits that the executive powers should not bypass the legislative powers in the pretext of constitutional power of promulgating ordinance. If this trend of over use and misuse of Constitutional powers of ordinance promulgation is continued then there is all possibility for the destruction of theory of separation of powers in India.

5. In the recent times, there is a discussion and debate amongst political parties, intellectuals and academicians that the present NDA Government in power is promulgating Ordinances by virtue of the powers conferred by the Constitution on President. The Ordinance making power is gradually leading to the diminish of the role of the legislature.

6. The members of government retain their seats in Parliament and must publicly maintain complete loyalty to the government’s policies under the Convention of “collective responsibility”. Governmental decisions, however, may be contested in private. Government officials’ power to retain their seats in Parliament while performing their cabinet duties in the most dramatic example of the lack of separation of powers in Britain in comparison to the United States. The United States’ Constitution explicitly prohibits such a structure. The government’s dominance is enhanced by the Convention that requires rest of the majority party minister of Parliament (MPs) called the ‘Back Benches’, to comply with their leaders wishes on specific votes. Except in the rare cases the MPs do not have discretion to vote in the way they think best represents their constituency and their nation. The ‘Back Benchers’, however, retain power to criticize their leaders, replace the Prime Minister in annual election and force a new election
by joining the opposition for a vote of no confidence. Upon a vote of no confidence, the ‘Back Benchers’ can force the Prime Minister to resign or to dissolve Parliament. Consequently, the Research Scholar suggests that one must study both Parliament’s internal structure and that of the major political parties to comprehend the British Constitution. The said suggestion is made due to the fact that British Constitutional students study internal party structures, internal Parliamentary procedures and the structure of the executive unlike their American counterparts who study a few sections of the United States Constitution and some of the myriad cases interpreting those sections. As a result, the Research Scholar makes the suggestions due to the reasons that the British Prime Minister has huge discretionary powers to hire and fire his cabinet colleagues.

7. The Research Scholar is of the view that although the American Constitution has a theoretically a superior mode of government, America’s future will depend far more on its cultural evolution than its legal Constitution. Drug addiction, illiteracy and greed are greater threats to a free civilization than most commingling of powers. Hence, the Research Scholar suggests that the Americans theory of separation of powers should be implemented with more caution for preventing the acts of greed and over-nationalism, for the purpose of maintaining a stable society with a social and economic order.

8. The Research Scholar hereby suggests to keep in view the reforms suggested by the justices of Supreme Court of U.S.A. while deciding the cases such as *Chevron U.S.A. Inc. v. NRDC* 742 and *Clinton v. City of New York* 743, where the judges cautioned that real reform of the pathologies caused by the congressional committee system and its involvement in over sight can only come from congress itself. Congress needs to take action to prevent its members from gravitating to, and staying for decades on, committees that are uniquely

---

743 524 US at 446-47
important to their Home States. Congress should assign its members to committees randomly, the way Federal Courts of appeals panels are assigned their cases, and congress should then adopt strict term limits for the number of years, a member of Congress can serve on any one committee. If these reforms suggested by the judges are implemented than there would be better scope for true implementation of theory of separation of powers in U.S.A.

9. Further the Research Scholar suggests that with respect to the executive branch, 21st century Americans need to make sure that federal agency are not under the thumb of congressional oversight and appropriations committees that are trying to bend the execution of federal law in some way that improperly benefits their Home States or Districts. There are two solutions to this problem: the unitary executive and judiciary review. The unitary executive puts the President, who is elected nationwide, in charge of law execution instead of Senator or Representative, who represents only a state and district. This counteracts interest group capture of agencies by the congressional committee. Judicial review without too much Chevron deference, also ameliorates the problem of interest group capture of congressional committees and of the agencies they regulate. Finally, 21st century, Americans should demand that the administrative law judges in the various independent and executive branch agencies be given life tenure so that they are employed under Art. III and not under Art. II. The notion of allowing agencies both to prosecute and to adjudicate the same ought to be clearly and decisively rejected.

10. The innovation of issuing of Super-Injunctions of the Supreme Court of Britain since from 2011 is a greater concern for the Parliamentarian who exercises their Parliamentary privileges and immunities. The concern is due to the reason that there is more probability for flouting the Super-Injunction in the pretext of protecting Parliamentary privileges. Therefore, it is high time for the British Government to that Joint Committee of both Houses in Britain would be established to examine the issues privacy and the use of anonymity injunctions
in light of the observation made by the Attorney-General of British on 23rd May, 2011. If the above referred observation is followed than the right to privacy and family life is safeguarded under the Human Rights Act, 1998 read with Art. 8 of the European Convention on Human Rights provided there is a check on the Supreme Court of U.K. in the matter of issuing Super-Injunctions. Further, this in a way will help the protection of the principles of theory of separation of powers in U.K.