Chapter-i

Law, Constitution

Chapter-I DOCTRINE OF SEPARATION OF POWER A) Meaning of Separation of Powers The doctrine of separation of powers implies that there should be three separate organs of government with their separate sets of functions and powers. In other words, it implies that the three organs of government should be kept apart from each other in interest of individual liberty. The functions of the government should be differentiated and performed by different organs consisting of different bodies of persons so that each department be limited to its respective sphere of activity and not be able to encroach upon the independence and jurisdiction of another. The whole idea is based on the maxim that power should be check to power. Thus, the constitution should be so designed that no organ of the government be made to do things to which it is not obliged or empowered. " Legislative bodies are concerned in the making of law; executive officials in the enforcement law; and judicial officials in the interpretation of the meaning of law and its application of it to individuals in cases of dispute or of failure to observe it. The theory that these functions should be performed by different bodies of persons, that each department should be limited to its own sphere of action without encroaching upon the others and that it should be independent within that sphere, is called theory of Separation of Powers. " Separation of power is a system of government where power is split among multiple groups and branches. This means instead of all the powers to govern a country is separated among different branches. The premise behind the separation of powers is that when a single person or group has a large amount of power , they can become dangerous to citizens. The separation of power is a method of removing the amount of power in any groups hands,

making it more difficult to abuse. For clarifying the concept of Separation of Powers, a few definitions are being given below: Montesquieu in the following words stated the Doctrine of Separation of Powers, “ there would be an end of everything , were the same man or same body, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing laws, that of executing the public resolutions, and of trying the causes of individuals. " Blackstone & Jefferson were also in concurrence with Montesquieu. They also believed that if right of making and enforcing the law or two functions of government are vested in same man, it would result in making of tyrannical laws and can precisely be the definition of despotic government. John Locke in his book, “ The Second Treatise on Civil Government", stated that, “ the three arms of government must not get into one hand for it may be too great a danger for the same person to have the power of making laws and executing them at the same time whereby they may exempt themselves from obedience of the law they make and suit the law both in its making and execution in their own interest. " Madison wrote: " the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Madison recognised the need for a division of powers in order to protect the people from tyrannical government; but it should not be assumed that the separation of powers was treated merely as a brake on power. Though the doctrine made it harder for an oppressive regime to rule, it also aimed to enhance good government. Probably the leading modern work on separation of powers is by Professor Vile, published in England in 1967: " Constitutionalism and the Separation of Powers" where the following

definition is given: A 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State. Prof. Vile has also laid down three elements of Doctrine of Separation of Powers: The First element of the doctrine is the assertion of a division of the agencies of government into three categories: the legislature, the executive, and the judiciary. The earliest versions of the doctrine were, in fact based upon a two fold division of government, or at any rate upon a two-fold division of government functions, but since the mid eighteenth century the threefold division has been generally accepted as the basic necessity for constitutional government. The second element in the doctrine is the assertion that there are three specific ‘ functions’ of government. Unlike the first element, which recommends that there should be three branches of government, the second part of the doctrine asserts a sociological truth or ‘ law’, that there are in all governmental situations three necessary functions to be performed, whether or not they are in fact all

performed by one person or group, or whether there is a division of these functions among two or more agencies of government. The third element in the doctrine, and the one which sets the separation of powers theorists apart from those who subscribe to the general themes set out above but are not themselves advocates of the separation of powers, is what, for want of better phrase, we shall describe as the ‘ separation of powers’. This is the recommendation that the three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership. It is perfectly possible to envisage distinct agencies of government exercising separate functions, but manned by the same persons; the pure doctrine argues, however, that separation of agencies and functions is not enough. These functions must be separated in distinct hands if freedom is to be assured. This is the most dramatic characteristic of the pure doctrine, and often in loose way equated with separation of powers. The final element in the doctrine is the idea that if the recommendations with regard to agencies, functions and persons are followed then each branch of the government will act as a check to the exercise of arbitrary powers by the others, and each branch, because it is restricted to the exercise of its own function will act as check. Barendt, following Vile distinguishes between " pure" and " partial" versions of the doctrine. The pure theory calls for complete separation of the three branches of the state; a strict delineation of functions between the executive, the legislature and the judiciary. The division of power acts as a restraint on the power of the state. 4 An alternative vision of the doctrine, the " partial" version, instead emphasises the significance of checks and balances within the constitution. Each of the

institutions of state is given some power over the others; their functions are deliberately constructed so that they overlap. Friction is consequently created between the branches of state; no one institution has absolute autonomy. Both of these versions of the doctrine make two critical assumptions. First, that it is possible to identify and group certain powers as " legislative", " executive" or " judicial". Secondly, that there is a natural connection between these powers and the corresponding state institution. Barendt rejects the pure theory; some overlap of functions and office-holders is welcomed. Barendt argues that the purpose of separation of powers is to protect the liberty of the individual. It does this by making state action more difficult. This view of the doctrine gains the support of Justice Brandeis who, in Myers v. U. S., wrote that the purpose of separation of powers " was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Concerted state action is therefore made more difficult by the existence of checks and balances between the various organs of state. According to Wade & Phillips, the theory of Separation of Powers signifies three formulations of structural classification of governmental powers: (i) No person should form part of more than one organ of the state. (ii) No organ of the state should interfere in the functioning of other organs. (iii) No organ of the state should perform the functions belonging to the other organs of the state. Other meanings of the Separation of Powers are: (i) Differentiation - that governmental functions are in themselves different and require different methods of control. For example the judicial function involves ideas of impartiality and objectivity that do not apply to the

executive function of, for example, building a motorway. Even if the same person combines both functions, the way that we control or criticise him depends on which hat he is wearing; (ii) Isolation, independence and equal status- this complements the checks and balances idea. It requires governmental institutions to respect each other as equals within acknowledged separate spheres of activity. For example the courts cannot interfere with the internal affairs of Parliament and Parliament should not comment upon litigation in progress. The law of judicial review is an attempt to strike a balance between policing the powers of government and doing the government’s job for it. (iv) Geographical version- There is also a geographical version of the Separation of Powers. The idea of federalism is that power should be divided between geographical areas so that rival centres of power can restrain each other. Federalism also serves the democratic purposes of bringing power closer to the people affected by it. B) Historical evolution of Doctrine of Separation of Powers The roots of present day human institutions lie deeply buried in the past. The same is true of a country’s law and legal institutions. The legal system of a country at a given time is not creation of one man or of one day; it represents the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of a large number of people through generations. To comprehend, understand and appreciate the present legal system adequately, it is necessary, therefore, to acquire background knowledge of the course of its growth and development. To explain ‘ why it is so’, one has to penetrate deep into the past and take cognisance of the factors, stresses and strains which have moulded and shaped legal development. To understand ‘ how it is so’, one

must appreciate the problems and pitfalls which the administrators had to face in the past, and the manner in which they sought to deal with them. The doctrine of separation of powers is founded upon the need to preserve and maintain the liberty of the individual. The mechanism it adopts is to divide and distribute the power of government to prevent tyranny, arbitrary rule and so on. A reseacher of the doctrine of separation of powers cannot fail to note that its history is fragmented, and that the various periods of its development are locked within the framework of given historical epochs. The doctrine developed as it were in spurts, often without a direct link between a given period and previous or subsequent ones. The history of the doctrine of separation of powers must be considered not only as the development of the idea but also as that of practical implementation of that idea in reality. One must take into account the fact that separate periods or episodes of the development of the doctrine can be independent of each other. It is also important to bear in mind the non-Euclidean parallelism of the ancient Greek and biblical lines of development. Sometimes the doctrine developed in fact in line with practical state activity, as in ancient Athens or Rome, and sometimes purely theoretically, as in the works of Locke or Montesquieu. Separation of powers as a philosophical, political and most important constitutional doctrine has deep historical roots. The doctrine of the separation of powers finds its roots in the ancient world, where the concepts of governmental functions, and the theories of mixed and balanced government, were evolved. Mixed government, also known as a mixed constitution, is a form of government that integrates elements of democracy, aristocracy, and monarchy. In a mixed government, some issues (often

defined in a constitution) are decided by the majority of the people, some other issues by few, and some other issues by a single person (also often defined in a constitution). The idea is commonly treated as an antecedent of separation of powers. Its authorship is usually ascribed to John Locke and Charles de Montesquieu. Other scholars go further back in time, referring to the wise men of antiquity, such as Aristotle, Plato, Epicurus and Polybius. We can confidently speak of separation of powers only in a situation where the judiciary is separated, fully or partially, from the executive and legislative branches of government and enjoys sufficient independence. Yet another criterion of separation of powers is whether the actions of a head of state or of the executive branch of government fall within the jurisdiction of the courts. The theory of the separation of powers may be divided between two historical periods ancient and modern. The ancient theory can be traced back to ancient Greece and the philosophical writings of Plato, Aristotle and Polybius. These ancient philosophers and their writings have had a great influence on modern writers. The modern theory can be traced from the Glorious Revolution of 1688 in England and the writings of Locke and Montesquieu. The idea of Separation of Powers was not entirely unknown before Montesquieu. Montesquieu may have presented the framers of the Constitution with the most modern incarnation of that principle he borrows too heavily from Polybius and the ancient theory of the mixed constitution to be credited accurately as its originator. The doctrine of separation of powers developed over many centuries. This doctrine dates back all the way to the ancient Greeks. Ancient Greek philosophers such as Plato (427-347 BC), Aristotle (384-322 BC) and later the Greek historian Polybius (205-123 BC)

developed this doctrine. After the Greeks, the Romans too adopted this doctrine. Aristotle was empirically inclined, making a study of 158 constitutions of Greek city states before formulating his theories of government. Aristotle wrote that well-ordered constitutions have three elements, one which deliberates about public affairs, another, the officers of the state, and the third, the judicial department. An analysis of government into three main divisions was first made by Aristotle. Based on his study of Athens and other Greek city states, he states, in his Politics, that there are three main governmental agencies: the general assembly, deliberating upon public affairs; the public officials, and the judiciary. But both in the actual operation of the Greek states and in Aristotle's analysis the functions of these agencies were not sharply distinguished, but varied and overlapped a good deal. The assembly deliberated about laws, exercised control over the administration, and gave judgments in important cases. " That body was at once a parliament and a government, an executive, legislative and judiciary in one"; " Executive power was comminute and distributed among a large number of boards, each consisting of many persons and restricted to a few special functions." There was no proper judicial establishment. The archons in Athens had both administrative and judicial powers. In republican Rome there was a somewhat similar organization with a more distinct but not a complete differentiation of functions. The public assemblies exercised mainly electoral and legislative functions; but also decided important questions of foreign policy, and in early times passed on appeals from death sentences. The senate was legally an advisory body in matters of administration; but its resolutions came to have the force of laws. The public officials usually

combined judicial and administrative functions. The threefold division was also recognized in the writings of Cicero and Polybius; and the three organs are considered as restraining each other in a mixed constitution, based on the principle of checks and balances. In the time of the Empire, all the public authorities came to be controlled by the emperor; but in the provincial governments a distinction was made between civil and military officials. The theory of mixed government is of great antiquity and was adurnbrated 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 away 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. The ancient Greek historian Polybius outlines three simple forms of constitution--each categorized according to the number of its ruling body: monarchy (rule by the one), aristocracy (rule by the few), and democracy (rule by the many). According to the historian, these three simple constitutions each degenerate, over time, into their respective corrupt forms (tyranny, oligarchy, and mob-rule) by a cycle of gradual decline which he calls anacyclosis or " political revolution". Polybius believes that Republican Rome has avoided this endless cycle by establishing a mixed constitution, a single state with elements of all three forms of government at once: monarchy (in the form of its elected executives, the consuls), aristocracy (as represented by the Senate), and democracy (in the form of the popular assemblies, such as the Comitia Centuriata). In a mixed constitution, each of the three branches of government checks the strengths and balances the weaknesses of the other two. Since absolute rule rests in no single body but rather is shared among the three, the corrupting influence of unchecked power is abated and stasis is achieved. In the thirteenth century, Thomas Aquinas, the scholastic theologian, favoured a mixed government, with monarchic, aristocratic, and democratic elements; and distinguished executive and legislative power, but not as completely isolated from each other, the monarchic being preponderant. In the fourteenth century, Marsiglio of Padua, in his Defensor Pacis, also noted the distinction between legislative and executive power, the former belonging to the people, and the latter subordinated to it. In the development of European governments from the end of the middle ages, there was also a good deal of differentiation of authorities and division of powers, but nothing like a systematic

classification. On the continent, the prevailing tendency until the end of the eighteenth century was toward the concentration of political power in the hands of a single hereditary ruler. A philosophical basis for this tendency was formulated in the sixteenth century by the French writer Bodin, who supported the doctrine of a single ultimate sovereignty, and opposed its division between independent authorities. Yet Bodin also urged the importance of a separate body of judicial magistrates distinct from the ruling power. Medieval and early modern thinkers have been mentioned as forerunners of the separation idea. Yet even Hooker demanded no more than that the sovereign, who is to be the maker of both mundane and ecclesiastic law as well as the supreme judge, be limited in his power by the " natural law. " Hooker, it is true, ushered in the modern concept of natural law and expounded the social-contract theory, and is therefore of fundamental importance for those later writers, notably Locke, who proposed political theories in order to curb the sovereign. Yet it cannot be maintained that he wanted the sovereign, who makes all the laws, including those of the church, and who exercises the judicial power, to be limited in his power except, of course, through the " natural law" itself. English political theorist, John Locke, gave separation concept more refined treatment in his “ Second Treatise on Government" (1690). Locke gave a tripartite division of functions, that is, he asserted three classes of powers: legislative, executive, and federative, the last being what we might today term the " foreign affairs power," and this he allocated to the executive branch. Locke argued that legislative and executive powers were conceptually different, but that it was always necessary to separate them in government institutions. Judicial powers

however played no role in Locke’s thinking. Executive power referred to the work of internal affairs, including the judges and the justices of the peace, who at this time besides judicial duties controlled almost the whole of local administration. Federative power had to do with external affairs,-" war and peace, leagues and alliances." But while he considered these three powers to be distinct, Locke did not consider it necessary to place them in the hands of independent authorities. The legislative power was the supreme power; while the executive and federative powers should be under one control, since they could hardly be separated and placed in different hands. This theory corresponded with the situation in England which immediately followed the Revolution of I689. Thus Locke recognized three powers of government, one that makes the laws, another one that carries them out, and a third one that manages foreign and military affairs. The first should be separate from the two others, but the latter should be headed by one and the same organ-the king. Justice is still the king's justice, mitigated, however, by natural law to which the king, too, is subject. And he also exercises his royal prerogative whenever the law fails, or leaves him with a wide discretion, in the interest of the public good. Separation of powers can be comprehended only as the outcome of the struggle of the British Parliament with the crown in 1689. Its theory embodies the victory of the former. After the Glorious Revolution, the king seldom interfered with acts of Parliament. Since 1707 he has no longer withheld royal assent from legislative bills. Likewise he has for some time abstained from intruding in the sphere of the courts: Equity is no longer the king's prerogative exercised to develop new law or indeed to counter act the law courts, but rather a system of courts, a branch of the independent

judiciary with which the king must not meddle. He is now subject to the " law," that is, to the law as interpreted by the courts. It is probably true that this development " has merely substituted the judge's prejudice for the king's." The modern reinterpretation of the Separation of Powers doctrine as purely a system of checks and balances resulted from demonstrable misconstructions of the literature on the subject, particularly the work of Locke (1690), Montesquieu (1748) and Madison (1788). This reinterpretation also enabled the separation of powers doctrine’s detractors to deny that it was ever a part of the English Constitution. The further development and modern idea of the theory of the separation of the powers was the work of the French philosopher Montesquieu, in his Esprit des Lois (“ The Spirit of Laws" published in I748). He based his exposition on the British Constitution of the first part of the 18th century as he understood it. Chapter 6 of his Book XI contains the following passages: " In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. 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. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; f or the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of

everything, were the same man or the same body, whether of the noble so r of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.. ." His classification of powers was clearly based on a study of the English government and of Locke; but by his time the chief English judges were no longer subject to arbitrary removal by the Crown, and accordingly the French writer distinguishes the judiciary more distinctly than did Locke. He named the three divisions legislative, executive in inter-national affairs (federative), and executive in civil affairs,-the last two more briefly as executive and judicial. He further held that the separation of the various powers was indispensable to civil liberty. The judiciary power, according to Montesquieu, should be exercised by a tribunal elected by the people, where as the legislative is committed to the hereditary nobility and the people (except " such as are in some and situation as to be deemed to have no will of their own") respectively. The nobility should not be subject to the jurisdiction of the ordinary courts but only of the upper house of the legislature, so that noble men be tried by their peers. And of the three powers, " the judiciary is in some measure next to nothing: there remain, therefore, only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility is extremely proper for this purpose. Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers. But it is not proper, on the other hand, that the legislative power should have a right to stay the executive. Thus

Montesquieu, much more conservative than Locke, suggested that the aristocracy be a privileged class taking part in the legislature on an equal foot with the commoners (from whom the property less are excluded), moderating between king and legislature, and not being subject to a judiciary other than that of their own upper house. As for separation, he proposed that the three powers be separated from one another in order to preserve what Montesquieu thought to be liberty; that the judiciary power politically amounts to nothing; and that the executive power consists in, or depends on international law identical with Locke's federative power. Montesquieu, therefore, outlined a three way division of powers in England among the Parliament, the King and the Courts, although such a division did not de facto exist at the time. Nevertheless, Montesquieu believed that the stability of English government was due to this practice even though he did not use the word “ Separation". Later, Blackstone, in his Commentaries (published in 1765), also discusses the importance of separating the powers of government: " Wherever the right of making and enforcing the law is vested in the same man, or one and the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself." " Were it (the judicial power) joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their opinion, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union

might soon be an overbalance of the executive.'' James Madison [1751—1836, one of the founding fathers of the USA] saw the concept of Separation of Powers even more clearly than Montesquieu himself, who of course realised that the powers of legislature and executive in Britain were anything but separate. Like Montesquieu, Madison preferred the term ' distribution of power' and proceeded to look for ' the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.' And this seems quite clear to Madison, as it does to common sense, that it does not make sense to assume ' that the legislative, executive and judiciary departments should be wholly unconnected with each other'; on the contrary, the real question is how they are ' connected and blended.' Madison recognised the need for a division of powers in order to protect the people from tyrannical government; but it should not be assumed that the separation of powers was treated merely as a brake on power. Though the doctrine made it harder for an oppressive regime to rule, it also aimed to enhance good government. Madison was the first person to detect the misreading of Montesquieu that gave rise to the myth. In Federalist, Madison insisted that the separation of powers had been " totally misconceived and misapplied" by opponents of the proposed U. S. Constitution. They misread Montesquieu and the British constitution that served as his model. He noted that " the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other" in Britain. The executive is part of the legislature and appoints and dismisses members of the judiciary, and one part of the legislature serves judicial and constitutional functions. One cannot infer from Montesquieu's work that the

branches of government should have " no partial agency in, or no control over, the acts of each other." Rather, Montesquieu must have meant " where the whole power of one department is exercised by the same hands that possess the whole power of another department, the fundamental principles of a free constitution are subverted." Montesquieu's target was, of course, the absolutist state, not parliamentarism. Madison then described the essence of British parliamentarism and insisted that it was consistent with Montesquieu's maxim: The magistrate in who the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department. Some of the early American States and the French constitution of 1791 tried to strictly give effect to this doctrine but failed. The strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances has developed (and needs to continue to develop). The United States

Constitution of 1787 incorporates the doctrine of separation of powers with a system of checks and balances. After the end of the war of independence in America by 1787 the founding fathers of the American constitution drafted the constitution of America and in that itself they inserted the Doctrine of separation of power and by this America became the first nation to implement the Doctrine of separation of power throughout the world. The constituent Assembly of France in 1789 was of the view that " there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted". In France, where the doctrine was preached with great force by Montesquieu, it was held by the more moderate parties in the French Revolution 3. However the Jacobins, Napoleon I and Napoleon III discarded the above theory for they believed in the concentration of power. But it again found its place in the French Constitution of 1871. Later Rousseau also supported the said theory propounded by Montesquieu. The English scholar, James Harrington, was one of the first modern philosophers to analyse the doctrine. In his essay, " commonwealth of oceana" (1965), Harrington; building upon the works of earlier philosophers like Aristotle, Plato and Machiavelli , described a utopian political system that included separation of powers. It is therefore goes without saying that Harrington, Locke, Montesquieu and other writer saw the concept of separation of powers as a way to reduce or eliminate the arbitrary powers of unchecked powers. C) Significance of Doctrine of Separation of Powers Some writers see the separation of powers as vital, others as superfluous. Some state that a strict adherence is important but that its value lies in emphasising the dangers and thus promoting the existence of essential character of checks &

balances to prevent abuse where there is a break down in the separation. John Adams's early Thoughts on Government said that separation of powers would guard against: passionate partiality, absurd judgments, avaricious and ambitious self-serving behavior by governors, and the inefficient performance of functions. The Doctrine of Separation of Powers holds a great significance. The following points will support the argrument: (i) Proper administration - The separation of the judiciary from the executive is regarded as a very necessary element for proper administration of justice in the country. (ii) Avoids tyranny - Strict separation of powers avoids tyranny. The American doctrine of separation of powers grew out of the fear of tyranny. James Madison put it clearly: The accumulation of all powers: Legislative, executive and judiciary in the same hands may justly be pronounced the very definition of tyranny. Only strict separation of powers can enable each organ to check the other and prevent tyranny. (iii) Checks and balances - Separation of Powers is important because it provides a system of " checks and balances" on the Government with three separate branches working together, no one branch can impose their own agenda that goes against the interest of the people. The system of " checks and balances" limits government corruption, since it is much harder to get an unfair agenda passed when it would have to go through three different people. Thomas Jefferson wrote: checks and balances are our only security for the progress of mind, as well as the security of body. Thus separation of powers is the most important constitutional doctrine invented by mankind, which envisages constitutional balance for the always unbalanced ambitions of governmental officials. (iv) Liberty of Individual - Barendt argues that the

purpose of separation of powers is to protect the liberty of the individual. It does this by making state action more difficult. This view of the doctrine gains the support of Justice Brandeis who, in Myers v. U. S., wrote that the purpose of separation of powers " was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." The purpose of the doctrine, according to Barendt, is not, primarily, to identify the best, or natural, holder of a particular power. The doctrine rather aims to protect liberty through division of power. (v) Efficiency of state - Separation of powers brings efficiency in the working of the state. when all the powers of state were vested in a single body " none of them can be used with advantage or effect." Liberty was imperilled by the inability of the omnipotent body to create, enforce and adjudicate upon laws to protect the citizen. The efficient allocation of functions to institutions is the allocation that best served to protect, and to promote, liberty. (vi) Division of Labour - As a practical matter, it also makes the governing of the country easier. The responsibility is divided up, so no one single branch has to control all aspects of governing a country. This is similar to Taylors' ' Division of Labour' which brings accountability, responsibility and efficiency into the system. The division of work creates an understanding and mutual dependence. There will also be constant and intimate cooperation between them. All this results in elimination of conflicts and strikes. Henri Fayol on ' Division of work' says that specialisation of labour produces more and better work with the same effort. (vii) Public welfare - Separation of Powers assures that the statutory law is made in the common interest. It also allows the people's

representatives to call executive officials to account for the abuse of their power. D) Analysis of Doctrine of Separation of Powers Though, theoretically, the doctrine of Separation of Powers was very sound, many defects surfaced when it was sought to be applied in real life situations. (i) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. England was not the classic home of Separation of Powers. The Donoughmore Committee was of the view, " in the British Constitution there is no such thing as absolute separation of the legislative, executive and judicial powers. " It is said, " Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw. " He had in his mind longing for liberty against the autocratic powers of Kings and princes. Britain presented to him a sharp contrast with the conditions prevailing in his own country. Without forming a real idea of the actual working of a democratic government, more so a responsible, he concluded that liberty can be secured only by a mechanical check of one department over the other. For him this was above all else a practical recipe for political liberty. But Montesquieu wrote at a time when institutional checks appeared to be the only feasible ones. The value of the doctrine by dispersing functions among different political institutions is that it attempts to provide a limit to political power and a brake on actions by constitutional devices. Power must be limited if liberty is to exist, for unchecked power is as dangerous as the unity of temporal and spiritual powers. This is precisely what Montesquieu enunciated. (ii) Separation of Powers or Functions? Much has been said about the theory of the Separation of Powers. But what kind of Separation of Powers is needed? Here much of the clarity is obscured by the

use of the ambiguous term “ power". The government has certain functions to perform in order to serve the purpose of the state. If functions are taken as powers, then, the idea of service entirely disappears and the organs of government become invested with power. Whenever there is power there is force. A government having its foundation on power becomes an engine of force. The use of the term power is most unfortunate and, accordingly the cause of so much confusion. The doctrine of Separation of Powers is itself a protest against power and its meaning can be better analysed and appreciated, if we drop the reference to ‘ powers’ and substitute for it ‘ functions’ of the organs or branches of government. “ A branch is an organisation of agencies with their personnel. The services they undertake are their functions. " The functions of the government are legislative (rule making), executive (rule application), and judicial (rule application). Accepting this as a criterion of our distinction, the doctrine of Separation of Powers can be restated in the following manner: the activities of government group themselves into three divisions. These divisions are not a matter of theory, but it is a practical fact associated with the character of the functions themselves. It is one thing to legislate, another to administer, and third to judge. By assigning each of these functions to different branches of government composed of separate personnel and following their mode of action, separation is obtained. Such a statement transfers the doctrine from realm of theory to that of political fact. (iii) Absolute Separation Impossible. This doctrine is based on the assumption that the three functions of the government, viz. legislative, executive and judicial are divisible from one another. But in fact, it is not so. There are no watertight compartments.

There is overlapping with each other. Supplementation with the system of checks and balances removes some of the defects, but some of them still survive, the examples of which can be seen in the situation of deadlock. In the 1930s the American President (Roosevelt), in a mood of irritation, went to the extent of calling his constitution ‘ a relic of horse and buggy days’ for the reason that what he desired to do so as to meet the problems arising out of the conditions of great depression could not be done by him in the face of judicial decisions given by the Supreme Court invalidating laws and executive actions in the name of being unconstitutional. It should be remembered that the government is like a living organism; if its part are kept apart, it would be a dead weight. Thus, even an American writer admits: “ In an extreme form, therefore, both the doctrines of Separation of Powers and of checks and balances are dangerous to good government. Extreme Separation of Powers prevents the unity and coordination necessary to administer the legally expressed will of the state; extreme checks and balances create frictions and deadlocks that prevent smooth and efficient government. " As Friedmann and Benjafield say, “ The truth is that each of the three functions of the government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in government". It is not easy to draw a demarcating line between one power and another with mathematical precision. It is difficult to take certain actions if this doctrine is accepted in its entirety. In practice it has not been found possible to concentrate power of one kind in one organ only. Thus if legislature can only legislate, then it cannot punish anyone committing breach of its privilege; nor can it delegate

any legislative function even though it does not know the details of the subject matter of the legislation and the executive authority has expertise over it; nor could the courts frame rules of procedure to be adopted by them for the disposal of cases. The real problem, according to MacIver, “ is so to articulate these that responsibility should not be divorced from efficiency. " The functions of the department are divided into different departments so that each department does its job to the best of its efficiency and with due regard to its responsibility. Efficiency demands expert knowledge of the problems which face a country and responsibility means the diversion of that knowledge towards those channels which are responsive to the needs of the people. This is the first principle of democracy. The separation of powers is, accordingly needed for proper articulation and not for the division of the organs of government into water tight compartments. To put in the language of Almond and Powell the theory of separation of powers is pre-eminently a functional theory. “ Among its central concerns are the nature of legislative executive and judicial powers; the question of how best to maintain their separateness; the values resulting from their separation; and the problem of how best to mesh these separate institutions of government with the structure of society. " There cannot be any isolation or disharmony between the different departments of government. Isolation is not the essence of the doctrine and Montesquieu never suggested it. Each department performs some functions which actually do not belong to it. In fact in all modern systems institutions exercise overlapping functions of some kind or provision is made for some degree of cooperation between the different organs and branches to perform the work of government. The legislative department is

not wholly and solely confined to the legislative mode of action, although it is primarily and mainly concerned with the judicial mode of action but not necessarily confined to that mode. There is judicial organ primarily and mainly concerned with other modes of action, but not necessarily confined to that mode. There is similarly an executive organ which may be concerned with other modes of action besides the executive. A judge for example makes a new law when he gives a decision on a point covered by law or in which there does not exist a precedent. Here is a case in which the judicial functions combine as a result of natural process. Again the executive everywhere possesses the power of issuing ordinances and proclamations. This is a device of practical utility but it has to be admitted that ordinances and proclamations are a formidable substitute for legislation. The executive is a legislature in another sense too. It suggests and guides the process of law making by legislative organ. It does so under the American system of division of functions between the president and congress; and it does so even more under cabinet system such as British and the Indian. The legislature too performs various executive functions. In a parliamentary government it creates the real executive retains it in office and controls its functions. In the presidential system as obtainable in the United States, the senate has a share in making appointments and ratifying treaties. Executive and legislative departments perform judicial functions too. The chief executive head of the state everywhere possesses the power of pardon. The House of Lords is the highest court of appeal in Britain. The senate in the United States acts as a court of impeachment. (iv) Inequality between the three organs. The conventional analysis of the doctrine of separation of

powers assumes that the three wings of the government are co-ordinate and equal. But this is not precisely true. With the growth of democracy the executive has been reduced to a subordinate position. The legislature is really the regulator of administration. By its control over finances of the country, it limits and controls the executive, howsoever independent theoretically the executive may be. In a cabinet system of government the subjection of the executive to the legislature at every step is undisputable. The judiciary, too, is obviously subordinate to the legislature, although its independence is the most coveted maxim of democracy. It does not, however, mean that legislature is not subject to any kind of check. The bounds of the sovereign legislature are many and various. In the first place, legislature is bound by moral and ethical codes. All proposals for law are essayed on the touchstone of practical utility and moral consideration. No parliament can pass laws which are against the facts of nature or are against the established codes of public or private morality. Secondly, the legislature, like the whole of government, is limited both by the purpose it fulfils and the mode of action it follows. The most important limit on the legislature is the limit imposed by the development and activity of political parties. There is, what has been described as, a parliamentary forbearance. The minority agrees that the majority should govern, and the majority agrees that the minority must criticise and oppose. Opposition is an effective restraint on the vagaries of the majority party in the legislature. Both the party in office and the opposition understand the rules of the game and know that at some future date their positions may be reversed. Thus, the concept of Separation of Powers, in its traditional analysis, has been impossible to realize in

complete way. The judiciary's role has also come in fore front by judge made law in areas where legislature law is proving insufficient and due to inaction of executive. (v) Modern socio-economic problems- The modern state is a welfare state and it has to solve many complex socio-economic problems and in this state of affairs also, it is not possible to stick to this doctrine. As Justice Frankfurter says, " enforcement of a rigid conception of Separation of Powers would make modern governments impossible. " According to Basu, in modern practice, the theory of Separation of Powers means an organic separation and the distinction must be drawn between ' essential' and ' incidental' powers and that one organ of the government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function thereof. The line between the three branches of state has become increasingly blurred; modern institutions often span two or three of Montesquieu's categories. In the European Union, for example, the Commission plays a part in legislative, judicial and executive activities. The Commission has a wide power to create law in co-operation with other European institutions, and in some circumstances has unilateral legislative power. The Commission also has an executive role: it seeks to ensure that directives are correctly applied within Member States, and plays a part in the policing of state compliance with European law. It can also investigate alleged breaches of competition and anti-dumping rules by private bodies. This leads on to the Commission's judicial role: having investigated apparent abuses by member states and private companies, the Commission is empowered to make preliminary judgements as to their guilt and to issue fines. This mix of powers is not merely the limited overlap

advocated by those who believe in the importance of " checks and balances" between institutions. It is a complete re-drawing of Montesquieu's division of the state. The powers of the Commission may be justified by the unique set of tasks it has to perform. (vi) Totalitarian Objection. The totalitarian reject the doctrine of Separation of Powers from beginning to end. Separation of Powers is aimed at preventing despotism whereas totalitarianism believes in unity and oneness of power. One of the communist jurists wrote, “ The Separation of Powers belongs to a political rea in which political unity was reduced to a minimum in the interest of an autonomous bourgeois society. However national and ethnic unity and oneness demand that all political powers be gathered in the hand of one leader. The Communists reject the doctrine outright as it is bourgeois principle. " Vyshinsky wrote, “… From top to bottom the soviet social order is penetrated by the single general spirit of the oneness of authority of the toilers. The programme of the All Union Communist Party rejects the bourgeois principle of Separation of Powers. " Soviet writers argued that Montesquieu developed the theory as a means of limiting the absolute powers of the Kings of France. In the Soviet Union there was no class conflict and hence there was no need to limit one branch of government by another. All organs of government had to work in the same interest. The fundamental object behind Montesquieu’s doctrine was the liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be rule of law and an impartial and independent judiciary and eternal

vigilance on the part of the subjects. The middle position in such cases is the best alternative to take. The governing law in separating powers among the three organs is to avoid tyranny on the one hand and avoid anarchy on the other hand. The balance of power should always be measured on the following principles: (i) Security: The ability of government to protect the country and all its citizens under any emergence or threat without undue delay or unnecessary internal divisions among the three organs. (ii) Liberty and freedom: The ability of the three organs to protect the human rights and freedom of the individual and groups and enhance the common good. On this point, certainly, the Judiciary ought to concentrate and exercise its full independence without fear of or favour to any side. (iii) Accountability: Once a system is set in place for the accountability of each organ and institutions established to effectively enforce it, the autonomy and cooperation of each organ would certainly be promoted. (iv) Efficiency: Where the separation of power among the three organs is exaggerated, there is inefficiency in the work of government, unnecessary delays, bureaucratic arrangements, lack of clarity on who bears responsibility for the plan of government, where, however, efficiency is aimed at, a working relationship is established among the organs to the benefit of all. (v) Development: Good government is committed to development of the country, all parts of it and each individual in it. Once the three organs share this vision and commitment, the necessary cooperation is discovered to achieve the common objective. (vi) Capacity for change: Rigidity in maintaining the constitutional arrangements among the three organs is desirable. It should not, however, turn out to be an incapacity for change when such change is desired by the people and necessitated by

circumstances which are in the interests of the common good. The only condition necessary should be that whatever is changed or modified is done constitutionally with the approval of the people or their elected representatives. It is concluded that Doctrine of Separation of powers implies that there should be three separate organs of the government with their three separate sets of functions and powers. Montesquieu’s definition on Separation of powers is considered to be a major source. The gist of Montesquieu’s definition is that there would be end of everything, were the same man or the same body given all the three functions of government. Later authors like Blackstone, Jefferson, John Locke and Madison said the similar thing as Montesquieu. However, Modern author, Prof. Vile gave ‘ pure doctrine’, according to which separation of agencies and functions is not enough. These functions must be separated in distinct hands if freedom is to be assured. The history of Separation of powers is fragmented in various periods without a direct link between a given period and previous or subsequent one. The theory of Separation of powers may be divided between two historical periods, ancient and modern. The ancient theory can be traced back to Greece and the philosophical writings of Plato, Aristotle and Polybius. These ancient philosophers and their writings have had great influence on modern writers. The modern theory can be traced from the glorious Revolution of 1688 in England and writings of Locke and Montesquieu. The theory of Separation of powers has great significance. It is very helpful in the proper administration of the country and brings efficiency in the working of the government. It avoids tyranny and works for the liberty of individual & public welfare. When the doctrine was analysed, it was found

that England was not the classic home of doctrine as conceived by Montesquieu. The doctrine is also being criticized on the issue that it is not separation of powers but functions. Also, absolute separation is impossible. The three organs cannot be put into watertight compartments. More so, in modern welfare state, conditions are such that one organ has to perform function of other in order to have smooth functioning. The theory of Separation of powers means an ‘ organic separation’ and the distinction must be drawn between ‘ essential’ and ‘ incidental’ functions. That one organ of government cannot usurp or encroach upon the essential function belonging to another but may exercise some incidental function thereof.

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