

## Chapter - 12

# Separation of Power and Obstruction & Balance Theory

### Theory of Separation of Power

Separation of power is an important aspect of Political science. With the increase in the functions of the state, the possibility of struggle between the organs of administration increased. Initially, king was the only source of rule. He was the head of executive, legislation and judiciary. Later, dividing the rule into three classes, its power and functions were determined- the Executive, the Legislation and the Judiciary. This separation prevents the rule to be anarchic.

### Meaning of Separation of Power-

The meaning of the separation of powers refers to the separate and independent working of the powers relating to execution, legislation and judiciary without interfering in the others. The assumption of the theory of separation of power is that no organ of the rule should intervene in the functioning of the other organs. According to Madison, centralization of legal, administrative and judicial powers in someone whether it a the individual or group of individuals or whether it is hereditary, self declared or elected, may be said to be definition of the rule of atrocity.

### Evolution of the Theory of Separation of Powers

First, the Greek philosopher Aristotle divided his law of rule in three parts- the counsel, executionary and judicial which in the present age define the executive, legislative and judiciary. The theory of separation of powers was propounded by the French philosopher Jean Bodan in the 16<sup>th</sup> century. Later in the 17<sup>th</sup> century, in England, at the time of the Puritan Revolution, powers of execution and legislation were

separated. In the 18<sup>th</sup> century, Herigton James supported the separation of execution and legislation, while John Lock divided the powers into three parts- Executive, Legislative and the Judiciary.

Though John Bodan is called the father of the theory of separation of power, the credit of giving the final shape to it goes to the French philosopher Montesque. In his book *The Spirit of Laws*, he gave a clear explanation of this theory. In the times of Montesque, there was the despotic rule in France. Louis XIV declared, I am the state. Montesque was influenced the monarchy system of his time, and he experienced that despotic monarchy system is a danger to the personal liberty of the individual. He was in favour of the separation of powers for the sake of protection of personal liberty and for the establishment of justice. Limiting the powers of every department of administration, and not allowing them to poke nose into the other jurisdiction of the other powers, he emphasized to maintain balance.

After Montesque, the English thinker Blackstone supported the theory of separation of powers. According to Blackstone, when the right to make and implement laws is vested in one individual or individual group, there cannot prevail the liberty of the public. The famous American scholar Madison too considered it necessary for the sake of personal liberty. Jefferson called the centralization of the executive, legislative and judiciary in one hand 'anarchy'. In Section 16 of the *Right Manifesto of France*, it has been said that if in a country there is no separation of powers, there is no constitution. In the *Constitution of India*, the correlation

of the powers has been adopted at the place of separation of powers.

Like the other theories of Political science, the theory of separation of powers too has been controversial. Only very few of the thinkers give their views in its favour. Some others of them even criticize it considering it futile and unnecessary. Merits and demerits of the theory of separation can be described as follows-

### **Merits of the Theory of Separation of Power**

**1. Decentralization of Powers-** Decentralization of powers breed the possibilities of corruption and atrocities. Separation of power imparts excellence to all the functions of the government by separating the authority into three separate sections.

**2. Check on autocratic rule-** The best feature of the separation of power theory is that its practical use and adoption checks the autocratic rule in a country. On this basis the thinkers like Montesque, Jefferson and Blackstone have propounded the theory of separation of powers. The theory of separation of power first checked the monarchy and then the autocracy of executive.

**3. Protection of the liberty of the citizens-** The separation of power theory guarantees protection of the individual liberty finishing off the autocratic rule. While there is the separation of powers, no organ of government can interfere in the liberty of the citizens.

**4. Establishment of Independent and Impartial Judiciary-** The theory of separation of powers prevents the executive and the legislation from interfering in the functions of judiciary. In the absence of this theory, the judiciary is likely to fail in giving impartial justice. Prof. Lasky has said, the optimum value of the theory of the separation of powers lies in the fact that it establishes the freedom of judiciary.

**5. Use of the various qualities-** The concept of public welfare state has enhanced the functions of the rule. In

order to attain this goal, varied and different qualifications are required. The functions relating to rule are rendered by different sections. On the one hand, for law making, wide outlook and foresightedness is required, on the other hand, for the administration work, skill, commitment, determination, fearlessness etc. are necessary. For the establishment of justice, the persons capable of distinguishing between good and bad are required.

### **Criticisms of the theory of separation of power-**

**1. Non-democratic-** In the modern age the concept of public welfare state is emphasized as a result of the development of democracy. So there has been an enhancement in the functions of government as well as in the expectations of the public. In democracy, the expectations of the public are represented by executive. In such a case, the free authority of judiciary interferes in the works of public welfare of the executive.

**2. Inter-clash between the organs of the government-** The theory of separation of power breeds possibility of the inter-clash between the organs of the government. When all the three organs of the government work independently, there are chances of clash. Each of the organs of the government will be interested in the protection of its own powers.

**3. Non scientific-** The government is formed on the basis of the organic theory. There lies an organic solidarity between all the organs of the government. Each of the organs depend on the other organs for its functions. Prof. Lasky is of opinion that the limitation of the rights of the judiciary lies in the will declared by the executive. The separation of the organs of the government is not practically possible. This theory is neither scientific nor desirable.

**4. Not necessary for freedom-** Montesque considers the separation of powers necessary for the liberty of the individual, but it is not right. For the protection of the liberty of the individual, alongwith the good laws,

their successful implementation and justice are necessary. Despite closeness of executive and judiciary in the parliamentary system, there is no lack of the individual liberty of the citizens. Gattel has not considered the separation of powers essential for the protection of the liberty, while Prof. Laski considers constant awareness more important for the protection of liberty than separation of powers.

**Conclusion-** The theory of separation of powers emphasizes the decentralization of powers, it is impossible for the organs to be separate from each other. According to Montesque, it is not possible to differentiate between the three functions of the government. There will be practical problems while implementing it practically. In the parliamentary system, it is very important to maintain a balance between the executive and the legislation. Therefore, the theory of check and balance is better and more useful than the theory of separation of powers. The theory of check and balance wants the organs to prevent each other being autocratic and to work independently without interfering each other. It wants the executive to play a pivot role in law making, but at the same time, wants the judiciary to consider illegal the post constitutional laws if necessary. In the same way, it wants the Executive to perform the function of governance, and wants the legislation to check the autocratic conduct of the executive. For the impartial justice, it is essential for the judiciary to be free from the control of the executive and the legislature. But the check on the judiciary is equally important and essential. In India and America, the executive can remove the judges from their post if they encroach the constitutional arrangements through Mahabhiyog.

### **Important Points**

#### **Meaning of the separation of power theory-**

Three organs of the government- Executive, legislature and judiciary that enable them respectively

to make the laws, to rule through law and to impart justice.

#### **Development of the theory of the separation of power-**

In the development of the theory of separation of power, the following scholars have contributed-

1. Aristotle and Cicero
2. In the 16<sup>th</sup> century, the French thinker John Bodan
3. In the 18<sup>th</sup> century, support to the theory by Harrington James and John Lock
4. French thinker Montesque for its systematic explanation
5. The English Thinker Blackstone and the American thinker Madison and Jefferson

#### **Merits of the Theory of Separation of Power**

1. Decentralization of Powers
2. Check on autocratic rule
3. Protection of the liberty of the citizens
4. Establishment of Independent and Impartial Judiciary
5. Use of the various qualities

#### **Criticisms of the theory of separation of power-**

1. Non-democratic
2. Inter-clash between the organs of the government
3. Non scientific
4. Not necessary for freedom

### **Important Questions-**

#### **Objective Questions-**

1. "I am the state" is the statement by  
(A) John Lock (B) Jefferson  
(C) Louis XIV (D) Laski

2. The real father of the theory of separation of power is-

- (A) Montesque (B) John Bodan  
(C) Madison (D) Blackstone

3. The constitution of which country is based chiefly on the separation of powers?

- (A) America (B) France  
(C) England (D) India

4. In the manifesto of which country has the separation of power emphasized?

- (A) India (B) England  
(C) France (D) Japan

5. The author of Spirit of Laws is-

- (A) Cicero (B) Laski  
(C) Bilowi (D) Montesque

#### **Very short questions-**

1. Who is the propounder of the theory of the separation of power?

2. What is the etymological meaning of separation of powers?

3. From the administration of which country was Montesque's theory of separation of power influenced?

4. What do you mean by "I am the State"?

#### **Short questions-**

1. What is the chronology of the theory of the separation of power?

2. Clarify the meaning of the theory of the separation of power.

3. What is the theory of check and balance?

4. Separation of power is not essential for liberty. How?

5. Enlist two merits of the separation of power.

#### **Essay type Questions**

1. Clarifying the meaning of the theory of separation of power, throw light on its merits and demerits.

2. The theory of separation of power is neither practical nor desirable. Clarify.

#### **Answers (Objective questions)-**

1. (C) 2. (A) 3. (A) 4. (C) 5. (D)