SEPARATION OF POWERS AS JURISTIC IMPERATIVE *

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I. *Significance of Separation of Powers*

Separation of Powers is not adhered to in Constitutional Law solely by virtue of its force as doctrine. Surely it is doctrine, but it is also more. Because it provides the structure for Limited Government, and the Power interrelationships indispensable to a Free and Independent Judiciary, it is a basic institutional safeguard of Democracy and Civil Liberty. It is, indeed, the cornerstone in the constitutional edifice. For as put in the French Declaration of the Rights of Man, without the separation of powers, there is no Constitution. It is the thesis of this lecture that because of such socio-legal functions indispensable to constitutionalism, Separation of Powers goes beyond doctrine; it is a *juristic imperative.*

II. *Concept of Separation of Powers*

Separation of Powers is here discussed as an institutional arrangement or situation within government. Conceptually, Separation of Powers combines a definite structure of government, with a set of relationships among the component elements of such structure. Such structure of government is the Tripartite System. There is a tripartite system in a particular government, where the different powers of Legislation, Execution, and Adjudication are each lodged in a separate Branch of government. Traditionally, a Tripartite System consists of the Legislative, the Executive, and the Judicial branches. Each of these branches has a definite legal relationship to the others. Such relationships are summed up in the principles of equality and separation. On the principle of Equality, each Branch is the equal of the others; hence, it may not be controlled by the others, and in turn, it may not control either or both of them. On the principle of separation, each Branch is separate and distinct from the other branches, and may exercise only the Power lodged with it but not other Powers. This may be stated with greater particularity, as follows:

1. The Legislative branch is separate and distinct from the Executive and Judicial branches. It exercises Legislative Power, but may not exercise either Executive or Judicial Power.

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2. The Executive Branch is separate and distinct from the Legislative and Judicial branches. It exercises Executive Power, but may not exercise either Legislative or Judicial Power.

3. The Judicial Branch is separate and distinct from the Legislative and Executive branches. It exercises Judicial Power, but may not exercise either Executive or Legislative Power.

Conceptually, then, Separation of Powers is present within government, if in such government, there is a Tripartite System of Powers, and each of the three branches comprising such System is independent of the others, and enjoys a monopoly of the Power entrusted or allocated to it.

III. *Concept of the Powers: Legislative Power*

In the Separation of Powers, each of the three Powers involves the power to make law. Law, in this connection, is simply duty or prescribed behavior which is obligatory on someone. Whenever any of the Powers is exercised, the outcome, result or output is a law. Thus, the exercise of Legislative Power generally yields statutes; the exercise of Executive Power yields orders; and the exercise of Judicial Power yields judgments. Statutes, Orders and Judgments are all forms of law, although in common discourse, it is statutes that are usually referred to when laws are discussed.

Now, if each of the three Powers, when exercised, yields or results in a law, albeit in different forms, how shall each of the Powers be distinguished from the others? Let us now mark out their differences and distinctions.

Legislative Power is the power to create legal duty which is generally obligatory. There are two defining characteristics of such Power. First, it is creative and original, because by the act of legislation, legal duty arises and is imposed, where none existed before. Second, the legal duty created and imposed is not imposed by express terms of the law itself on a specific or particular person, but is made obligatory generally.

The matter of generality of the duty or obligation imposed requires explanation. The point of inquiry is, Whose is the duty imposed? Where the law itself identifies the particular person or persons who are to obey, then the law is particular, as in the case of Judgments. Where the laws does not identify the particular person or persons who are to obey, but merely defines the class of persons who are subject to the duty, then the law is general. The generality of such law is not affected by the fact that, in the actual circumstances of its operation, there is but one member of the class. The generality follows not from the actual number of persons to whom the law applies, but from the method of identification of the person or persons subjected to the duty. Where such method is by definition of a class, and by inclusion therein on the basis of stated criteria, then the

law is general. Such generality is not affected merely because, at a given time, such class of persons consists of only a few, or only one, or even none. What is essential is that there is an indefinite number in the class, present or in the future.

Illumination on this particular matter may be added by the concepts of grammar. Whenever the person or persons on whom the law imposes the prescribed duty correspond to a Proper Noun or a set of such nouns, then the law is particular. On the other hand, if the person or persons on whom the duty is imposed is identified by a Common Noun, then the law is general.

On this basis, Legislative Power is easily identified. It is to be known by its fruit. Given a law, we must ask two questions. Does such law create or impose a duty not previously existing? Then, is such duty general as to the persons subject thereto? Where the answer to both questions is affirmative, then the power that created or generated such law is Legislative Power, regardless of features or arrangements that may obscure its true nature.

IV. *Administration of the General Law*

Before discussing Executive Power and Judicial Power, we must first consider the Administration of the General Law, to which both Powers relate. Administration, in this sense, is the implementation and enforcement of legal duties, as provided for and fixed in the General Law. A legal duty exists where the law requires a particular course of action, to which a sanction is annexed or attached in case of violation or non-compliance. There are two aspects of such Administration that we must be careful to distinguish. The first aspect is Administration of Primary Duties, which are the legal duties that must be complied with or fulfilled, in order to avoid the sanction annexed thereto. The second aspect is Administration of Secondary Duties, which are the duties of officials to determine the basis for, and to apply if warranted, the sanctions prescribed for violation of Primary Duties.

Emphasis must be given the complications in the Administration of Primary Duties. While all such Duties are rooted in, or founded upon, the General Law, they are not all the same insofar as immediacy of compliance or enforceability is concerned. In this regard, Primary Duties may be classified as follows:

1. Unconditional, in that the Primary Duty is existing, actual and present. As soon as the subject determines that he is within the class of persons under such duty, immediacy of compliance arises. Illustrations are easily found in the Obligations created by Law, such as registration for military service, filing tax returns, etc.

2. Conditional, in that the law itself prescribes the conditions the existence of which would render the Primary Duty existing, present and actual. In such case, the Primary Duty remains suspended until the prescribed conditions are met. There are two kinds of conditions, generally, to which Primary Duties are made subject. Where the exercise of human will or performance of acts is prescribed as a condition, in whole or in part, the Primary Duty is dependent on Power for its existence, actuality and immediacy. On the other hand, where the prescribed condition is in the form of an event, occurrence or circumstance not involving the exercise of the human will, the Primary Duty is dependent on Fact for its existence, actuality and immediacy. On this basis, Primary Duties that are Conditional may be further classified as Power-dependent Duties, and Fact-dependent Duties.

In the case of Power-dependent Duties, the degree of contingency is high. For the existence and actuality of the Primary Duty is made dependent on particular law created by Power involving the exercise of the human will. In Private Law, Primary Duty may be dependent on Contract, Will and other forms of law created by the will of private persons and entities. The contingency is expressed in the concept of Individual Freedom or Liberty. In Public Law, Primary Duty may be dependent on Orders in various forms created by the will of public officials. The contingency is expressed in the concept of Discretionary Authority.

In the case of Fact-dependent duties, the prescribed condition may be in the form of legal facts, or in the form of standards determinable on the basis of known circumstances, events or data. Legal facts are generally prescribed, where the Primary Duty requires relative certainty, as in cases of registration of voters, listing of candidates for public office, issuance of tax assessments, registration of vehicles, and the like. On the other hand, where the relevant data for determination consists of social conditions obtaining on a large-scale or prevailing over a wide area, then administrative standards are prescribed, which, while requiring a substratum of substantial evidence, permit a high degree of official discretion.

V. *Executive and Judicial Powers*

With these premises, we now turn to the task of identification of Executive Power and Judicial Power. We have said that both are concerned with Administration of the General Law. On the one hand, Executive Power is the Administration of Primary Duties provided in such General Law, whether Conditional or Unconditional. On the other hand, Judicial Power is the Administration of Secondary Duties, or the Administration of Sanctions. Thus, the key distinction is the basis for the exercise of the power. Judicial Power can only be exercised, where there is a violation of a Primary Duty, whether actual or threatened. On the other

hand, Executive Power may be exercised independently of a violation of any law.

The range of Executive Power may be appreciated from an enumeration of the various forms of law comprehennded. On the basis of the foregoing analysis, Executive Power extends to the following:

1. Particular laws essential to the activation of Primary Duties, such as appointments, pardons, reprieves, etc.

2. Particular orders authorizing or implementing general laws, such as those concerning government reorganization plans, budgetary releases, hiring of subordinate personnel, release of alienable lands, etc.

3. Particular orders declaring facts, which effect changes in Primary Duties, such as proclamations of national or local holidays, or proclamation of martial law, etc.

4. Particular orders embodying mandates to particular officials, such as letters of instructions.

5. Particular orders applying or implementing Primary Duties, in the form of grants, awards, licenses, permits, etc.

It should be emphasized that the foregoing discussion is concerned with a purely conceptual presentation, along Weber's methodology of "ideal types." The analysis, then, is divorced wholly from any concrete example of distribution of powers in any constitution, ancient or modern. It has no reference at all to any constitutional practice now prevailing. It should be taken purely as a conceptual tool or apparatus for enhancing understanding of concrete or specific constitutional systems and practices.

VI. *Variations Through the System of Checks and Balances*

In concrete constitutional systems, substantial departures or variations are wrought by the System of Checks and Balances. Under such System, Powers are shared, such that each of the three Branches come to exercise some of the powers of the other two. Such sharing is a feature in constitutions instituting a presidential type of republican government, such as the American and Philippine constitutions. This departure from the principle of separation is often accompanied by departures from the principle of equality of the branches. Under the concept of Checks, some branches are allowed, by express constitutional grants, to control the acts of the other branches. The best example is the veto power of the Executive in the American and Philippine constitutions, and Judicial Review of legislative and executive acts.

The vitality of the Separation of Powers is not affected by the Systems of Checks and Balances in its varied forms. The principle endures and prevails so long as two conditions obtain. *First,* the Tripartite System must exist, with Legislative, Executive and Judicial Branches. *Second,* No

Branch must be empowered to prevent the functioning of the other Branches, or to exercise the Power or Powers belonging to them.

VII. *Separation of Powers in Historical Perspective*

Separation of Powers as we know it today is an institution of modern constitutions. More precisely, it is an institution of liberal democratic republics. While it is present in parliamentary democracies, as shown by Montesquieu's classic analysis of the British constitution, Separation of Powers is a more pronounced or developed institution in liberal democratic governments of the presidential type. The familiar model is the Constitution of the United States of America.

In the constitutions of the ancient world, notably in Athens and Rome, separation of powers as we know it today did not exist. There was distribution of powers, but this did not approximate the institution as known and practiced today. The reason was that the arrangements in both Athenian and Roman constitutions were vastly different from the present modern democratic governments. In these ancient city-states, the government, such as it was, was a direct democracy. The legislative power was not exercised by a representative body, but by the citizens themselves organized as a body. Whether in the *Ecclesia* of Athens, or in the *Comitia Centuriata* or *Concilium Plebis* of ancient Rome, supreme power was exercised directly by the people. The electorate was the legislative body and, at the same time, the army. In Rome, the *Comitia* exercised Judicial Power over heinous offenses, as evidenced by the institutions of *Quaestores Parricidii,* etc., which were commissions of the *Comitia.* The *Comitia Calata* of the patrician *Comitia Curiata* exercised civil jurisdiction over the social events affecting the families of the *Patricii,* notably marriage, divorce, adoption, and execution of the *Testamentum.* In Athens, the *Ecclesia* exercised criminal jurisdiction. The most notorious exercise of Judicial Power by this body was the trial and conviction of the philosopher Socrates for the crimes of impiety and corruption of the youth, for which he was condemned to drink hemlock.

Of the three branches in the Tripartite System that we know today, the first to develop to full maturity was the Judiciary. Legislative Power and Executive Power are basically creations of modern times. In the archaic as well as primitive societies, the Judiciary had an edge because they administered a Law that was immutable: Tradition and Custom. The rudimentary level of culture and technology held the king or his equivalent to the traditional functions of military leader, religious symbol, and peacemaker. On the other hand, the immutable character of sacred tradition and custom hindered the growth of Legislative Power. The *Comitia* of Rome and the *Ecclesia* of Athens, as well as the *Witanegamot* of the German tribes, functioned more as electoral colleges, administrative units, or judicial forums, than as legislatures.

The key to understanding the underdevelopment of Legislation in archaic as well as primitive societies, is the pervasive homogeneity of their population, culture and tradition. Because of such homogeneity, the level of conflict was low and well within the capacity of Custom and Tradition to remedy. The social equilibrium hindered change; hence, there was stability and continuity in the Law. There was therefore simply no need to legislate.

As soon, however, as substantial differentiation develops within the society, in terms of population, culture and economic position, Custom and Tradition are unable to hold the society together, or to resolve the resultant differences to the general satisfaction of all concerned. Profound changes in the law may be required. This may be done through avowed or acknowledged changes through Legislation. Or adaptation may be effected through various devices, including Interpretation and Legal Fictions.

These social truths are reflected in the legal history of Rome, the United Kingdom of Great Britain, and the United States of America. In the early Roman Republic, Roman Law was the Law of the Congregation, consisting of the patrician Families. It consisted of Sacred Tradition and Custom, under the jealous custody of the college of pontiffs, and was administered by a *Rex* who was also *Pontifex Maximus*. When the security of the city state drove Rome to the conquest of its neighbors, which was later extended to the whole of Italy and beyond, Rome had to incorporate the plebeians into the body politic, convert its farmer citizens into legionnaires, and conscript volunteers from among its allies. As Roman conquests extended to more and more parts of the Mediterranean basin, and then further inland into Gaul and Germany, even greater changes were brought about. Such changes are reflected in far-reaching transformations in Roman Law. The codification of Custom and Tradition into the Twelve Tables was the outcome of the plebeian struggle for publication of the Law affecting them. Their struggle for equality compelled statutory changes (through a series of *Leges*) that gave the plebcians various political and civil rights till they were virtually at par with the patricians before the end of the Republic. As farmers remained soldiers, and slaves from conquered peoples flowed into Rome, profound changes were triggered in the Law. The *Comitia* increasingly could not meet; hence, the Senate legislated and decreed, and the *Praetor* legislated, changes in the Civil Law, through the formulary system, and later through the Praetorian Edicts. When the peregrine came under Roman rule following the conquests, Roman pride balked at extending the Civil Law, the law of the Roman Congregation, to these subject peoples. Hence, a new Praetor, the *Praetor Peregrinus,* was designated to provide the law to govern disputes arising between peregrines of different nationalities. The *Praetor Peregrinus* drew principles found in the different systems of law of the peoples under Roman rule, and eventually evolved from common principles and precepts, the *Jus Gentium,* or the federal common law of Rome. It was such common law that was amal

gamated by the jurisconsults who were put to work by the emperors during the Roman Empire, and their work reached its zenith in the *Corpus Juris Civilis* framed under Emperor Justinian.

In Great Britain, the creator of the Common Law was the Judiciary under the authority of the King. The techniques were Interpretation and Legal Fictions, which gradually accommodated the mercantile and industrial classes, while retaining the flavor of feudal institutions. But once the Industrial Revolution had done its work, clearly defining class lines, and making more pronounced economic disparities, the Common Law could no longer hold the conflicting sectors of society, and Parliament had to respond to the emergent general will by instituting essential changes through Legislation, particularly in the field of economic and industrial relations.

Even more remarkable were the developments in the United States of America, where the Industrial Revolution and the political freedoms ushered in by the Revolution gave greater impetus to Legislation, particularly by the state legislatures. What precipitated the legal changes associated with the Welfare State was the Great Depression. While production boomed, the net product or income was held largely by the industrial, commercial and banking elite. The insufficiency of disposable income meant demand was well below the available supply; hence, prices fell and the stockmarket crashed. To meet the situation, the New Deal was launched, instituted by federal legislation measures in line with the Welfare State ideas of Lord John Maynard Keynes. A large number of federal regulatory agencies were set up to supervise and superintend economic affairs, with particular emphasis on matters affecting interstate commerce.

While they were part of the Executive branch, most were independent, in that their decisions and orders were not subject to the control of the Chief Executive but were reviewable by the federal courts. The work of these federal agencies gradually mapped out the special zones of Executive Power, now known as Quasi-Legislative and Quasi-Judicial.

VIII. *Separation of Powers as Outcome of Differentiation of Social Function*

It is not only in historical development that the three Powers of Legislation, Execution and Adjudication are differentiated. More fundamental is their differentiation in terms of social function, and the methods implicit therein. The distinctiveness or individuality of each Power flowing from such differences, renders each one *Sui Generis,* and justifies their separation as a juristic imperative.

Legislation is the creation of the General Law, which ideally should be the expression of the general will of the society. It is therefore its social function to reflect the consensus, i.e., the shared values and interests within

the society. For adequate fulfillment of this social function, certain methods are inescapable. *First* is adequate representation of social interests. This is institutionalized through a legislature consisting of a fairly large number of representatives, freely elected by their constituencies in the different electoral districts in the country. *Second* is free Debate as the method for determining the consensus. There are two aspects to such Debate. Formally, it takes place in the committees of the legislature, in its public hearings, and in the proceedings on the floor. Informally, it takes place in the various forums of public discussion in the larger society, including the various organs of public opinion and information. Through amendments incorporating accommodations, counter-proposals and compromises, the measure, in the standard case, moves toward, and eventually approximates the consensus, thereby ensuring its passage or approval. *Third* is the institution of Majority Vote for securing a decision on controversial measures. The great variety and complexity of social interests makes conflicts over values ineludible. Such conflicts are, at bottom, not resolvable by debate or appeals to reason, because the ultimate issue is not Truth but whose Desire shall triumph. So that such conflicts can be surmounted, a majority vote is agreed upon to constitute approval by the society. This method is analogous to the resolution of conflicting or opposing forces in traditional physics.

Adjudication, on the other hand, is the creation of Particular Law in the form of Judgments. Ideally, every Judgment is an application of the General Law in point to the Facts established by the evidence on record. The social function of Adjudication is thus the realization of Justice according to the Law in the particular case. There is Justice, first, because there is rectification of a violation of law when determined to exist; and second, because such determination is made on the basis of facts found on the evidence of record. In short, Law is applied to the individual, in accordance with Truth duly established.

In effectuation of this social function, certain methods are established by tradition or presupposed by the judicial process. *First,* the judgment must be the outcome of a proceeding before an independent tribunal presided over by an impartial judge learned in the law. The independence of the tribunal is buttressed by the expertise of the judge, and by the security of his compensation and tenure. *Second,* such proceeding must be initiated by a proper pleading filed in the name of the person with the right to do so. This is the Right of Action, i.e., the right of one whose right is violated, or threatened with violation. *Third,* the party charged with the violation, actual or threatened, must be brought before the court, either on summons or on volutary appearance. *Fourth,* there must be a hearing, in which the parties are provided the opportunity to present their evidence in support of their respective positions on the issues. *Fifth,* the judge must frame or formulate the Judgment in accordance with his independent consideration of the evidence on record, and on the basis of his findings of fact and the

law applicable to the case. All these methods and techniques are summarized in the concept of Procedural Due Process.

We now turn to the Executive Process. Focus will be centered on the exercise of Discretionary Authority, rather than on the performance of ministerial duties. The outcome of such exercise is generally Intermediate Law, in the form of Orders and Proclamations geared to the creation of official duties towards implementation of Primary Duties. Ideally, Execution is the mobilization of the officialdom through directives and orders, towards the efficient and speedy administration of the General Law. Its social function is the faithful and speedy implementation of the laws, according to perceived priorities and in the national interest. In line with such function, the technique is simple: the speedy issuance of Orders decided upon by the Executive, presumably after consultation with advisers, including the head of the Department or Office concerned. Such method has the advantages of initiative, decisiveness, and swiftness of action. Unlike the Judiciary, the Executive can act on his own, without waiting for any complaint or petition. He can act on the basis of his own determination, without having to hear anyone. In determining the situation to be dealt with, he is not limited by any record, but may avail of any information available to the bureaucracy. At the same time, he can act, if he wishes, on the basis of informed judgment, for he can have the best advisers and experts in the land.

In summary, we can point out the essential differentiation obtaining among the Powers. Legislative Power has the primary task of framing and laying down the General Law, binding on all because it expresses the consensus or the amalgam of dominant interests in society, aggregating such interests through the method of broad electoral representation, and refining it through the processes of debate and compromise. The Executive Power has the task of Administration of the State, by mobilizing through orders and directives, the vast machinery of the bureaucracy towards a faithful implementation and enforcement of the General Law, and acting decisively and swiftly to deal with any peril, threat, catastrophe or other emergency that may threaten the national safety and well-being. For the adequate discharge of this supreme and delicate task of stewardship of the State, he is given control of the enormous resources of Government and given great latitude of action, without the encumbrances of mandatory proceedings, debate, and hearings on the merits. While Legislation is collective action because it must strive to reflect the consensus, Execution must be the decision of the Chief of State in its most delicate aspects, for there must be initiative and speed in responding to the urgent needs as they arise in the course of day to day affairs.

The Judicial Power is tasked with the Administration of Justice, which is compulsion and enforcement of legal duties allegedly violated in particular cases, on the basis of Truth determined in accordance with procedural

Due Process and in accordance with the mandates of the General Law determined to be applicable to each particular case. Adjudication, like Legislation, is deliberative and participative, and must move according to the prescribed stages of defined and canalized proceedings. But while the action of the Legislative Power must be founded on Truth affecting the entire society, the quest of the Judiciary in every case is confined to the molecular scale, for its judgments and orders must be founded on Truth concerning the individual case, affecting particular parties. And while the concern of Executive Power even in dealing with particular matters, many of them controversial, is the effectuation of the national interest through adherence to the policy laid down in the General Law, the primordial concern of the Judiciary is the framing of a Judgment in every case that will do Justice and avoid Injustice. Hence, the striving for the full Truth cannot be sacrificed to any exigency, for any error in the material facts would be fatal to the standard of Truth as the basis for application of the Law.

Such disparities among the three Powers in social function, methodology and technique as well as operational structure, rule out their concentration in the hands of a few. In the interest of efficiency and a well-ordered administration of public affairs, as well as for the sake of Civil Liberty, the Separation of Powers must be deemed a juristic imperative flowing from the rationality of Law as a means to social ends.[1]

[1] Among the works consulted by the author in the preparation of this paper were: AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE; BARKER, REFLECTIONS ON GOVERNMENT; BENTHAM, FRAGMENT OF GOVERNMENT; BRYCE, THE AMERICAN COMMONWEALTH; CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPT IN THE MIDDLE AGES AND MODERN TIMES; HART, THE CONCEPT OF LAW; HOBBES, LEVIATHAN; HOLMES, THE COMMON LAW; JEFFERSON, DEMOCRACY; KELSEN, GENERAL THEORY OF LAW AND STATE; KELSEN, PURE THEORY OF LAW; LASKI, DEMOCRACY IN CRISIS; LOCKE, SECOND TREATIES ON CIVIL GOVERNMENT; MAINE, ANCIENT LAW; MAINE, POPULAR GOVERNMENT; MILL, J.S. ON LIBERTY; MLNTESQUIEU, THE SPIRIT OF THE LAWS; POUND, THE SPIRIT OF THE COMMON LAW; ROUSSEAU, SOCIAL CONTRACT.