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Author:

Naman Sharma

Symbiosis Law School, Noida

2nd Year, BBA LL.B.

DOCTRINE OF SEVERABILITY – AN ANALYSIS

ABSTRACT

The Constitutions of all legally-advanced nations bestow upon their citizens 'Rights' which are expected to safeguard their privileges. These privileges include health, education, privacy, occupation, among others. Rights of a citizen are the ultimate defence against the authority of a sovereign state, lest they overstep the same. The Judiciary, serving as a separator of powers, is supposed to scrutinize and analyse the laws enacted by the legislation, along with striking them down as unconstitutional if necessary. This power granted to the Judiciary is called 'Judicial Review'. However, to abolish an entire statute on the fact that one of its provisions is unconstitutional would be nonsensical and detrimental to the efforts of the legislature. Therefore, the doctrine of Severability or Separation comes into play. Severability derives its meaning from the Latin word 'Separare' which means 'To Divide or Disjoin'. The purpose of this doctrine is to distinguish between those laws which are constitutional and those which are not. It finds its purpose in Contract law as well. The doctrine serves a similar purpose there as well. It excludes those parts of a Contract which is not acceptable to the parties or is void, but keeps the remainder intact. In a constitutional context, Severability is defined as a doctrine which enables a court to quash only those areas or parts of a law which are deemed unconstitutional, while the rest of the act remains constitutionally valid. The doctrine has helped the higher courts of the country to quash various pre-constitutional era sections, while still preserving the enactment itself. Since the beginning of the usage of this doctrine, it has evolved along with the changes in Constitutional law. Thus, it is vital to analyse the doctrine from a modern legal approach.

BACKGROUND

The doctrine of Severability has been in usage in English courts. It was established initially in England itself in the case of Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. (1894)[1], under the name of 'Blue Pencil Rule'. The term actually meant the cutting off of written sentences or errors with a blue pencil. In this case, The plaintiff Thorsten Nordenfelt was an arms manufacturer and had sold his business to Hiram Stevens Maxim, the defendant for a sum of £200,000. Their contract of sale stated two conditions to the plaintiff –

- They would not manufacture weapons and ammunition anywhere in the world.
- They would not compete with Maxim's products or the company itself, in any way, for 25 years.

The House of Lords in this case, held that the first condition was applicable and could be allowed, whereas the second was a too wide and is in restraint of trade. In the interest of the contracting parties, the court proposed cancelling out the second condition with a blue pencil, thus giving a name to the rule. The void condition was thus removed but the contract remained valid. However, this was established as a principle of Contract Law. With democratic advancements in today's society, Constitutions began to play a much greater role than they did before. In the United States for example, in the case of El Paso & N.E. Ry vs. Gutierrez (1909[2]), the US Supreme Court stated that –

"whenever an act of Congress (The American Parliament) *contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [a] court to so declare, and to maintain the act in so far as it is valid."*

Thus, the doctrine was perceived more as a duty to be fulfilled by the Judiciary. It was believed that Courts should refrain from quashing entire statutes and try to save as much of it as possible. It should not invalidate more than what is necessary. Since then, American Courts have always had a clear presumption of this doctrine in mind while dealing with unconstitutional laws and Judicial Reviews. Today, legal precedents such as the case of Ayotte vs. Planned Parenthood (2006)[3], have set clear principles regarding the Doctrine of Severability in the US. They are –

1. Only the parts that need to be annulled should be considered by the Court. Unnecessary nullification of the Parliament's work must not be done.
2. The law, even if unconstitutional, cannot be re-written by the Judiciary.
3. Legislative intent is the most significant aspect to be considered.

[1](1894) AC 535
[2](1909) U.S. 87
[3] -Of Northern New England, (2006) U.S. 320

With the American Constitution having a heavy influence over its Indian counterpart as regards to Fundamental Rights and Judicial Review, one can easily understand how the doctrine took shape in India. Before the enactment of the Constitution in 1950, such a doctrine did not exist. It came into being with Article 13(1) and 13(2) of the Indian Constitution. Even though the articles do not explicitly mention it, the Court always presumes Severability. Today, it has evolved even further and there exist clear rules and guidelines laid down by the courts in landmark judgements.

In the present day, many nations employ this doctrine in their constitutions. Australia, New Zealand, Canada Malaysia and many other nations have embedded the doctrine of Severability in their respective constitutions.

PRACTICE IN INDIA

The Doctrine of Severability entered into usage in India with the advent of the Indian Constitution in 1950. Even though there are no articles which specifically mention or define Severability, Indian Courts have always perceived it in the backdrop of Article 13 (1) and (2) of the Constitution. The article relates to the power of Judicial Review granted to the Indian Judiciary, (another contribution from the American Constitution). Article 13 (1) states –

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

Whereas, Article 13 (2) states –

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

The language used in the laws and the phrasing itself suggests the existence of the Doctrine of Severability, i.e, "to the extent of such inconsistency" or "to the extent of the contravention". It clearly states that only those parts of the law that actually interferes with the rights of the country's citizens would be void. Severability applies to both Clause 1 and 2 of Article 13[4]. Since its enactment, the constitution has went through 104 amendments. This has been due to the constant challenging of the provisions contained in it. The Supreme Court has always looked upon the doctrine of Severability in order to prevent and reject the contentions of abolishing an entire statute. However, the same is not avoidable. This usually happens due to the impossibility in applying the doctrine of Severability. It arises as a result of the unconstitutional law being so interdependent or entwined with the laws in it that are constitutional, in as much as they cannot be

[4] V.N. Shukla, CONSTITUTION OF INDIA, P. 40 (Eastern Book Company, 13th Edition)

separated without abolishing the Act altogether. This is the only circumstance in which an entire Act may be abolished.

In In regarding the rules and principles for applying the Doctrine of Severability was that of R.M.D.C Vs Union of India[5]. In this case, The Prize Competitions Act, 2015 was challenged on constitutional grounds before the Supreme Court. The petitioner's contention was that the Act challenged the Fundamental rights guaranteed to them by the Constitution under Article 19(1)(g) -

"*Right to practise any profession, or to carry on any occupation, trade or business.*"

The Apex Court held that some provisions of the Act in question were fallible but are severable in nature from the rest of the Act. It therefore, applied the Doctrine of Severability and also gave the principles in deciding upon the same. They are –

1) The intention of the legislature behind the enactment of the law will be the prime factor in determining the severability of an Act. The test specifically, is to decide whether the law would still have been enacted by the parliament if it had known about the unconstitutionality of the rest of the act.

2) If the good and bad, i.e, Constitutional and Unconstitutional parts of an act are so entwined and interdependent that one cannot exist without another, then the entire act would have to be revoked.

3) Despite the fact that a good part and a bad part are separate from one another, if they are found to be parts of one entire objective which is to be viewed and operated as a whole, then the unconstitutionality of one part will lead to the quashing of the entire act.

Apart from these major principles, the Apex Court also decreed that if the remainder of the act becomes incomplete and cannot function without modification, then it must also be revoked as amending or modifying it would amount to Judicial Legislation, which defies the Separation of Power rule. Once an Act has been quashed by the Judiciary under Article 13, it cannot be challenged again nor can any action arise out of such an act. Doctrine of Severability was also used by the Supreme Court in the case of A.K. Gopalan vs. State of Madras (1950)[6], in which Section 13 and 14 of the Preventative Detention Act, 1950 was challenged. The former gave powers to the Central and State authorities to detain anyone whom it deemed to be detrimental to to public security and safety, national defence or foreign affairs. Section 14 decreed that the grounds of the detention under this act cannot be disclosed in a court of law. The court while still holding Section 13 of the act as valid, quashed Section 14 for being unconstitutional. It deemed Section 14 to be severable from the rest of the act and thus put the doctrine of severability into practice.

[5] 1957 AIR 628
[6] AIR 1950 SC 27

CONCLUSION

The American concept of the Doctrine of Severability being a Judicial Duty is applicable in a modern democratic setting. The Doctrine of Severability while being an important tool for the Judiciary, also requires prudence in its usage. The legislative has been given the power to enact laws in a democratic system for a reason. The Separation of Powers theory requires the branches of the system to act as checks in each other's power, not detriments or barriers to each other's work. In a recent American case[7], J. Brett Kavanaugh of the US Supreme Court stated the following –

"Constitutional litigation is not a game of 'Gotcha'[8] against Congress (The American Parliament), where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute. If the rule were otherwise, the entire Judiciary Act of 1789 would be invalid as a consequence of **Marbury v. Madison**."

Marbury v. Madison[9] is the landmark case which established Judicial Review in the United States. The learned Justice is correct in stating the importance of the doctrine of Severability. If not for this doctrine, many constitutional and functioning Acts would be held invalid on account of minor flaws.

[7] Barr v. American Assn. of Political Consultants, Inc., (2020) 207 L. Ed. 2d 784
[8] an instance of catching someone out or exposing them to ridicule.
[9] 1803 U.S. LEXIS 352