



## SEPARATION OF POWERS: AN INDIAN PERSPECTIVE

By Ritu Paul

From Galgotias University, UP

### **ABSTRACT:**

The doctrine of Separation of Power in its true sense is very rigid. The main object as per Montesquieu to originate this doctrine of separation of power is that there should be government of law rather than having will and whims of the official. Another most important aspect of this doctrine of separation of powers is that there should be independence of judiciary. The judiciary is like a steelyard through which one can measure the actual growth of the state. Therefore, this doctrine do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary.

Speaking about India constitutional history, certain provisions of the Constitution of India may incline to infer that this doctrine is accepted in India, as the legislative powers are with Parliament, executive powers with the President and judicial powers with the Judiciary, i.e. Supreme Court, High Courts and the subordinate Courts.

This paper revolves around the applicability of the doctrine of Separation of Powers in India so it attempts to throw light upon whether this doctrine applies in its strict sense in India or not. The President's function and powers are enumerated in the Constitution itself. Parliament has the power to make any law subject to the provisions of the Constitution. The Judiciary is independent in its sphere and there can be no interference with its functions by any of the other to

organs. The Supreme Court and High Courts are competent to exercise the power of judicial review and they can declare any law passed by the Parliament or the Legislature ultra vires. By considering all the above mentioned aspects, some jurists are of the opinion that this doctrine has been accepted in the Constitution of India.

### **KEYWORDS**

*India, powers, legislature, executive, judiciary*

### **INTRODUCTION:**

The Separation of powers is a model for the governance of both federative and democratic states. The doctrine of separation of powers was originated in the writings of Montesquieu in the "Spirit of Laws" where he refers to the division of government responsibilities into three separate branches to limit any one branch from encroaching into the domain of another. This doctrine has emerged in several forms at different periods. The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. These three organs must be distinct and separate and must be sovereign in their own sphere. None of the three organs should trespass the territory of one another. At this note it is significant to quote Cooley who emphasizes the importance of the doctrine of separation of powers as:

"This arrangement gives each department a certain independence, which operates as a restraint upon such action of others as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guarantees against attempts at tyranny."



There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

Therefore, the doctrine of separation of powers acts as a check against Tyrannical rule. The purpose underlying this doctrine is to diffuse governmental authority so as to prevent absolutism and guard against arbitrary and tyrannical powers of the state, and to allocate each function to the institution best suited to discharge.

#### **MEANING OF THE DOCTRINE OF SEPARATION OF POWERS:**

The French Jurist Montesquieu, who for the first time formulated this doctrine of separation of powers systematically and clearly in his book “Esprit des Lois” (meaning The Spirit of Laws), published in the year 1748. Montesquieu stated that 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. Then again there can be no liberty if the judiciary is not separated from the other two organs. Therefore, the logic behind this doctrine according to Montesquieu is that when the complete and absolute power is given in the hands of a single person or group, then it may become dangerous for the citizens of that society.

An absolute and complete separation of powers is theoretically as well as practically impossible. The basic concept behind this doctrine means:

1. That the same person/group shouldn't become a party/member of more than one organ of the government.
2. That one organ shouldn't interfere with the work of the other organs of government.
3. That one organ shouldn't perform the same functions as to be exercised by any of the other two organs.

Therefore, in order to keep the democratic system of a nation intact, the above mentioned concept must be followed in its strict sense. In the end the ultimate aim is to accomplish a ‘welfare state’; so there should be mutual respect between legislature, executive and judiciary, the three organs of the government, for each other and hence, a healthy coordination among these three organs can make wonders.

#### **INDIAN CONSTITUENT ASSEMBLY ON SEPARATION OF POWERS:**

S.M. Sikri, former Chief Justice of India, explained that the concept of basic structure included: supremacy of the Constitution, secular and federal character of the Constitution, republican and democratic form of government and the most important



separation of powers between legislature, executive and judiciary.

There are mainly two reasons why the Constituent Assembly didn't explicitly include the doctrine of Separation of Powers in the Constitution of India, those are:

1. It was too late as the Indian Constitution was already drafted when the founding fathers thought to give consideration to this doctrine.
2. India adopted the British parliamentary form of government so; they thought to avoid adoption of a completely different kind of doctrine based on the American model.

During the amendment of Constitution was done, Mr. K.T. Shah said that it would be best to have an absolute separation of powers between the three organs of the government and put his reasoning for the same as "if you maintain the complete independence of all the three, you will secure a measure of independence between the Judiciary, for example, and the Executive, or between the Judiciary and the Legislature. This, in my view, is of the highest importance in maintaining the liberty of the subject, the Civil Liberties and the rule of law. If there was contract between the Judiciary and the Legislature, for instance, if it was possible to interchange between the highest judicial officers and the membership of the legislature, then, I am afraid, the interpretation of the law will be guided much more by Party influence than by the intrinsic merits of each case. The Legislature in a democratic assembly is bound to be influenced by Party reasons rather than by reasons of principle."

Shri K. Hanumanthaiya from Mysore opposed the amendment suggested by Mr.

K.T. Shah by saying that "if there is separation- not separation but Prof. Shah wants complete separation- then conflicts are sure to arise between these Departments of the Government and main reason is that this house is wedded to parliamentary system of democracy and this view clause is out of place in such a constitutional structure."

Upon the above mentioned debate, Hon'ble Dr. B. R. Ambedkar said that we have adopted the separation of the executive and the judiciary as directive principle of the state policy and it was not possible for him to accept this amendment. The vice-president had put this article for voting and it was rejected by the members. So, now it becomes clear that Indian Constitution has not adopted an absolute separation of power except in Art.50 of the Constitution of India.

#### **CONSTITUTIONAL STATUS OF SEPARATION OF POWERS IN INDIA:**

There are certain provisions mentioned under the Constitution of India which may convince a person that the doctrine of separation of power has been accepted in India, those are: There are no restrictions on the law-making power of the Parliament and is competent to make laws subject to conditions as provided under the Constitution (Articles 62 to 72). As it is always said that the judiciary should be left independent in order to exercise its judicial functions without the interference of Legislature and Executive; so Article 32, 226, 227 and 136 reflect the same. The Supreme Court under Article 32 and Article 136 and the High Courts under Article 226 and Article 227 of the Constitution of India are provided the power of judicial review and if any law is found to be inconsistent with the Fundamental Rights then to declare the same as ultra vires.



The above mentioned provisions convince many jurists that the doctrine of Separation of Powers has been accepted in India. In order to implement these provisions properly, a system of checks and balances have been developed so that all the organs could check on one another.

- The judiciary is provided the power of judicial review to look over the actions of the legislature and the executive.
- It has the power to strike down any law which is found as inconsistent with the Fundamental Rights provided under the Constitution and declare them unconstitutional (ultra vires).
- It can also declare the executive actions as void, if found unconstitutional.
- Though the judiciary is considered to be independent but the judges appointed by the executives.
- The legislature has the power to review actions/functioning of the executive.
- It can even remove judges.
- It can also alter the basis of a judgment while adhering to the constitutional limitation.

Therefore, the system of checks and balances acts in a way that none of the organs become too powerful. The Indian Constitution guarantees that the discretionary power of any one organ is bestowed within the democratic principle.

### **OVERLAPPING OF THE THREE TIER MACHINERY OF THE GOVERNMENT:**

The doctrine of Separation of Powers is based upon the concept of “trias politica”. It is the philosophy according to which there has to be a strict separation between the three organs of the government of every nation, i.e., legislature, executive and judiciary. However, it is difficult for the organs to

exercise their powers and perform their functions appropriate and systematically without interfering and controlling the other organ.

So, through this research paper the occurrence of the overlapping of this three tier machinery will be explained.

### **I. OVERLAPPING BETWEEN THE LEGISLATURE AND THE EXECUTIVE**

The Indian Constitution states that the Council of Ministers (executive branch) shall be collectively responsible to the Lok Sabha (legislature branch). This indicates that it is the duty of the Parliament to supervise the government and hold accountable for its actions.

The President of India is a part of the legislature but is not a member of either of the Houses of Parliament (Article 79). As per Article 53 of the Constitution, the President is considered to be vested with the executive powers of the Union but on the other hand he is given the power to promulgate an ordinance when the Parliament is not in session or when the circumstances exists, which is a legislative function (Article 123). This shows a direct overlapping in the functioning of the legislature and the executive. In emergent situations promulgation of emergency is yet another function which falls within the sphere of the legislative branch (Article 356). Even, when the state legislature dissolves the President is vested with the power to make laws for that concerned state (Article 372). Though, the President appoints the Council of Ministers in consultation with the Prime Minister, he generally acts on the aid and advice of the Council of Ministers. This shows that the



area within which he enjoys independence is very limited and nominal. Article 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet. Certain constitutional provisions also provide for Powers, Privileges and Immunities to the MPs, Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent, in a way.

## II. OVERLAPPING BETWEEN THE EXECUTIVE AND THE JUDICIARY

The relationship between the executive and the judicial branch has always been a delicate connection. India being a nation governed by Rule of Law always prefers to separate judiciary from executive. Theoretically, separation of judiciary from executive has been expressly mentioned under Article 50 of the Indian Constitution. So, it always has been a welcome step. However, the real issue comes into vision when it comes in practice, it becomes a problematic concern.

Apart from the legislative functions performed by the President being the head of the executive power, he is assigned with the judicial activities when a case of disqualification of a member of the House of Parliament comes forward. Though there are several provisions under the Constitution of India which implies the judicial branch to be independent, but anyway a handful of provisions directly imply the role of an executive branch member to be performing judicial functions. For instance, the President and the Governors are given the power to pardon and reprieve, which shows direct overlapping of the executive and the judiciary.

Now the Indian Judiciary is moving from Judicial Activism to Judicial Adventurism. Courts can't run the government is an indisputable issue, if it tries so then it would defeat the whole purpose of the Constitution.

## III. OVERLAPPING BETWEEN THE JUDICIARY AND THE LEGISLATURE

In India, there exists a tug of war between the legislature and the judiciary. The main power in the hands of the judiciary is to declare any law made by the legislature unconstitutional if it so considers it. The Chapter IV of Part V of the Constitution of India throws light upon the overlapping of the functions of the judiciary and the legislature. The judiciary blames Legislature for not doing anything worthwhile over the past recent decades, whereas the Legislature accuses Judiciary of doing the job of the legislature.

Article 145 and Article 225 lays down that the Supreme Court and the High Courts have the legislative power to frame rules regulating their own procedure for the conduct and disposal of cases. So, the legislature has protested on its part against judicial activism and has tried to frame laws to circumvent certain judgments.

Apart from this, there are has been several instances where the judiciary has assumed the role of legislature without taking into account the practical difficulties and financial constraints. It has gone to the extent of not only framing guidelines but also the policies. As the doctrine of Separation of Powers is not codified in the Indian Constitution, there is a need that each of the organs of the government must evolve and work in harmony and adopt a healthy trend to respect the powers as well as responsibilities of one another.



### **NEED FOR HARMONY:**

The major need for a democratic nation to evolve and mature is to ensure a harmonious relationship between the three tier machinery of the state. An intact and mature democracy would always prefer the discharge of functions of the three organs of the government to be done with a proper balance. In order to fulfill the whole concept of “trias politica”, the Legislature, Executive and Judiciary have to realize the unseen boundaries and should not encroach into each other’s territories. If the philosophy of trias politica is achieved then a ‘welfare state’ could be established which will help in upholding the rights of the citizens.

Therefore, it is significant to realize and try to maintain a harmonious relationship between the three pillars of the government in order to have a good and intact democracy. It is not only the obligation of the government but also the duty of the citizens of the nation to perceive the fundamental sanctity of the Indian Constitution.

### **JUDICIAL PRONOUNCEMENTS UPHOLDING THE DOCTRINE OF SEPARATION OF POWERS:**

In India, the doctrine of Separation of Powers is exercised in an implied manner. So, it is clear that this doctrine has not been implemented in its strict sense in our nation nor a clear constitutional status, but a modern and dilute approach is made guide and aid the Indian parliamentary form of governance. The argument of implementation of the Separation of Power doctrine in its strictest sense has continued through several landmark judgments given by the apex court (Supreme Court), some of them are mentioned below:

In *Re Delhi Laws Act*<sup>1</sup> case, the Supreme Court held that: “It does not admit of serious dispute that the doctrine of separation of powers has strictly speaking, no place in the system of the Government that India has at present day under our Constitution unlike the American and Australian constitutions, the Constitution of India does not expressly vest the different sets of powers in different organs of the state. Our Constitution though federal in form is modelled on the British Parliamentary system, the essential feature of which is responsibility of the Executive to the Legislature”.

In short the Court held that despite the doctrine of Separation of Powers isn’t codified and there are no express provisions under the Indian Constitution, there are certain provisions which try to implement a reasonable separation of the functions of the three pillars.

Justice B.C. Ray stated in the case of *Sub-Committee on Judicial Accountability v. Union of India*<sup>2</sup> that, “Although the powers of State have been distributed by the Constitution amongst the three limbs, that is the Legislature, the Executive and the Judiciary, the doctrine of Separation of Powers has not been strictly adhered to and there is some overlapping of powers in the gray areas.”

He further opined that, “...that rigid Separation of Powers as under the American Constitution or under the Australian Constitution does not apply to our country and many powers which are strictly judicial have been excluded from the purview of the courts under our Constitution.”

<sup>1</sup> AIR 1951 SC 332

<sup>2</sup> 1991 SCR (2) 741



Justice Y.V. Chandrachud was of the same view and so opined in the case of *A.K. Roy v. Union of India & Anr*<sup>3</sup> that, “there is no place in our Constitution for the doctrine of the political question”, since that doctrine is based on, and is a consequence of, a rigid separation of powers in the U.S Constitution and our Constitution is not based on a rigid separation of powers.”

The doctrine of Separation of Powers hasn't expressly been made essential nor denied by the Supreme Court of India. The landmark judgments given by the apex court such as in the case of *I.C. Golaknath v. State of Punjab*<sup>4</sup>, it was held that the three pillars of the government are expected to perform their functions without interfering with one another while demarcating their jurisdiction minutely. Then in another landmark case of *Keshavananda Bharati v. State of Kerala*<sup>5</sup>, the Supreme Court held that despite by resorting to Article 368 of the Indian Constitution any amendment proposed by the Parliament under its amending power is found violating the basic structure of the Constitution, will be held as ultra vires. Therefore, by this landmark judgment the doctrine of Separation of Powers was included in the Constitution as a part of basic structure, so any amendment giving control of one organ over the other will be held as unconstitutional.

In the case of *Indira Gandhi v. Raj Narain*<sup>6</sup>, the Supreme Court asserted the *Kesavananda* ruling and upheld the basic structure as well as the doctrine of Separation of Powers. The issue in this case was regarding the Prime

Minister elections, where the constituent body had declared that the elections weren't void, thus acting in a judicial capacity. This made the actions of the constituent body ultra vires. It was thus held that, the Parliament cannot under any constitutional amending power or the like take on the role of the judiciary. Therefore, the position of separation of powers was upheld and asserted in this case.

In another case of *Ram Jawaya Kapoor v. State of Punjab*<sup>7</sup>, the Court observed that the Constitution of India has definitely not recognized the doctrine of Separation of Powers and its rigidity, but successfully to some extent has differentiated the functions of the organs of the government.

Justice Ramaswamy in the case of *Kartar Singh v. State of Punjab*<sup>8</sup> stated that, “It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution.”

In the recent case of *Delhi Development Authority v. UEE Electricals Engg. Pvt. Ltd.*<sup>9</sup>, the Supreme Court clarified the meaning and aim of judicial review as a shield and not a feature to cause undue interference in executive activities. The Supreme Court stated that, “One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is “illegality”, the second

<sup>3</sup> AIR 1982 SC 710

<sup>4</sup> 1967 AIR 1643

<sup>5</sup> AIR 1973 SC 1461

<sup>6</sup> 1975 SCR (3) 333

<sup>7</sup> AIR 1955 SC 549

<sup>8</sup> 1962 SCR (2) 395

<sup>9</sup> 118 (2005) DLT 255



“irrationality” and the third “procedural impropriety.”

Therefore, this research paper makes out the inference that the three pillars of the state should remain separated and the doctrine of Separation of Powers has been upheld in several landmark rulings made by the courts. None of the organs of the government can encroach to one another’s territory and to ruin their sphere of powers and despite this if an attempt is made to encroach or cross the boundaries, the law/amendment shall be held as unconstitutional in order to uphold the basic structure doctrine.

### **CONCLUSION & SUGGESTIONS:**

*“Power corrupts and absolute power tends to corrupt absolutely” – Lord Acton*

This means that whenever a person has a power over others, it makes him/her corrupt. It morally destroys their nature and fills them destructive pride. But even if the functions are distinguished, when an authority wields power, it gets absolute power to influence his discretion within his own sphere; therefore, abuse of power takes place.

The Constitution is the grundnorm and is the paramount source of law in a nation. No organ or law must create inconvenience and go beyond the scope assigned by the Constitution. It is the obligation of the three pillars of the government (Legislature, Executive and Judiciary) to adhere to the most important fundamental feature of the Constitution and that is the ‘Separation of Powers’.

The founding fathers are generally criticized to not to codify the doctrine of Separation of

Powers into the Constitution of India when the provisions which already distinguish the functioning of the organs are not followed in their strict sense. This shows a great gap between the Constitutional Plan and the practicality of Separation of Powers.

In India, instead of separation of powers, separation of functions is followed. And hence, we are not abiding by the doctrine in its rigidity. Instead of strict application of Separation of Powers, a system of ‘checks and balances’ is exercised as part of the separation of powers doctrine.

Hence, none of the three organs can encroach the demarcated functions of one another, which constitutes to become a part of the doctrine of basic structure, even amending the Constitution cannot break these boundaries and if it does then amendment will be struck down by the Courts declaring it unconstitutional.

Therefore, the status of doctrine of Separation of Powers in India is that it has not been recognized to its absolute rigidity but the constitution – makers have precisely and diligently distinguished the functions of the organs of the government.

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