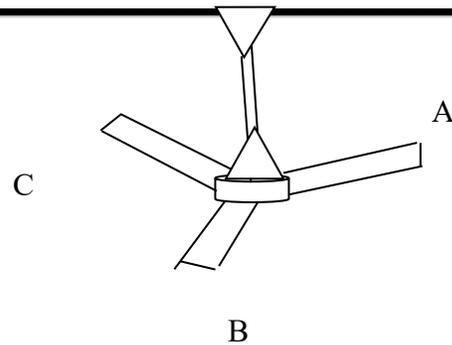




COMPASS OF SEPARATION OF POWERS IN INDIA

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ABSTRACT

Separation of power and fusion of powers, these both are the characteristic feature of Indian constitution. This article deals with the evolution, adoption and extent of the doctrine of separation of powers in India. Based on the parliamentary form of government and federal structure of government, separation of power can be classified into two forms i.e., horizontal and vertical. In horizontal form of separation of power, there is separation of power between 'Legislature and Judiciary' and 'Judiciary and Executive' but there is fusion of powers between 'Legislature and Executive' while in vertical form of separation of power, there is well distribution of functions and powers among Central, State and District. Indian Judiciary is acting as a pivoted point which is balancing the fusion and separation of powers.

(**Keywords** :- Trias Politica, governance, tyranny, arbitration, federalism, basic structure).

INTRODUCTION

The meaning of the doctrine of separation of powers (also known as *Trias Politica*) is that all the parts or organs of the governance (i.e., legislative, executive, and judiciary) should exercise their functions separately and no organ should interfere in the scope of the other organ of the government.

In the picture, it is ceiling fan having three blades A, B and C which can be assumed as the three organs of the government (i.e., legislative, executive and judiciary) which are pivoted at a single point which can be assumed as the state which performs governance. If any blade detaches or loosely pivoted with the fan, it imbalances the whole which can be acknowledged as all the organs of the government are important to each other and if any of them detaches itself, it will lead to the knock down of the government. The main function of the government constituting three different organs is to provide welfare and protection to the citizens of the state or the country.

Evolution

Aristotle was the first philosopher who implemented the idea of separation of power. He classified government into three parts (i.e., General Assembly, Public officials and the judiciary) in his book 'Politics'. His idea was not so clear in this concept but somewhere the part of its shadow overlaps his theory of Parts of the government.

After Aristotle, in 16th and 17th Century, John Locke and Jean Bodin developed the doctrine of separation of powers. Locke defined three organs of the government as 'legislative', 'executive' and 'federative' and concluded



that all the organs of the government should be independent and legislative is supreme to the other two organs of the government.

Later Montesquieu, a French philosopher in 1748 in his book 'E Spirit des Lois' (in English 'the spirit of law') gave the scientific and systematic approach of the doctrine. He categorized organs of the government into three parts:-

1. Legislative
2. Executive
3. Judiciary

Montesquieu in his book commented that the concentration of all powers to a single person or branch leads to the tyranny and arbitration in the country.

Wade and Philips also gave three conditions to be followed for the strict adoption of the separation of powers:-

1. Same person at the same time should not play different role in different organ of the government.
2. No organ should control the functions of the other organ.
3. No organ should exercise the function of the other organ.

Significance of doctrine of Separation of Powers

“Power tends to corrupt and absolute power corrupts absolutely.”¹

Concentration of power over the single body leads to the malfunctioning of that body which may be dangerous for the other depending sub-bodies. If there will be supremacy of either of the body over other

bodies of governance, it will lead to tyranny and arbitration which will affect liberty and freedom of the people of the state. To maintain democracy and rights of the people, this doctrine was adopted in many countries including India.

Applications

The first Constitution framed on the basis of the doctrine of separation of powers was the American Constitution in 1787 and later in 1789, France also adopted this doctrine and framed it in its constitution. The two different judicial branches i.e., administrative tribunals and ordinary courts, of France became the wannabe model for the other countries like England, Australia and even India which also has the likewise shadow of the French legal system.

EXTENT OF EXISTENCE IN INDIA

India has adopted the parliamentary form of government from the British (UK) Constitution and also adopted the concept of federalism from the constitution of Canada. The doctrine of separation of powers acts as the spirit of federal and parliamentary form of government of India. Even in Indian constitution, separate powers and functions are allotted to each organ of the central government². But **the doctrine is not adopted in the strict manner under Indian constitution** like the United States of America which has its long-written constitution and has adopted Presidential form of Government.

¹ Lord Acton, letter to bishop Mandell Creighton

² Constitution of India 1949, pt V



In India, separation of powers can be understood in two parameters:-³

1. **Horizontal:** - It is on the basis of three organs of the government at the union level where all the three are kept at equal status. The only thing supreme here, is the law.

Legislative powers are vested to the parliament which consists of President, Rajya Sabha and the Lok Sabha, executive powers are vested to the president and judicial powers are vested to the Supreme Court of India.

Indian constitution has separated the functions and powers of 'judiciary and executive'⁴ and 'judiciary and legislature'⁵ but the powers and functions of legislature and executive overlap in India.

How is legislature overlapping executive in India?

- As said by Wade and Philips, for strict adoption of the doctrine of separation of powers, same person at the same time should not play different role in different organs of the government but in India, President is vested with the central executive powers and at the same time he is also the Member of Parliament.⁶
- President has to exercise all his functions under the advice of the council of ministers headed by Prime Minister of India.⁷
- President has the power to call both the legislative houses for the sessions whenever he thinks fit and also has the power to

prorogue both or either of the houses and to dissolve Lok Sabha.⁸

- After the passing of the bill by both of the houses and before the enactment of the bill, it should be passed to the President for his assent which is the legislative procedure.⁹
- President shall present the annual financial statement (which is the expenditure of the Government of India) before both the legislative houses of the parliament.¹⁰
- President has the power to pass the ordinance when both the houses of the parliament are not in session and the situation makes the passing of such ordinance important. He can also dissolve the ordinance passed by him.¹¹

2. **Vertical:** - It is based on the federal structure and the hierarchy status set by the Indian constitution among union, state and district. The constitution of India has credited separate powers and functions to central, state and district.¹²In India, states are conferred equal powers and thus, any disputes among them cannot be resolved by themselves because they are equal in status. Here, parliament plays the important role and supervises over the states and is the supreme authority over all of the states. State is neither above the any other state nor above the parliament.

³ Shri CBP Srivastava, Basic structure of Indian Constitution, YouTube lecture

⁴ Constitution of India 1949, art 50

⁵ Constitution of India 1949, arts 121, 211 and 212

⁶ Constitution of India 1949, arts 53 and 79

⁷ Constitution of India 1949, art 74

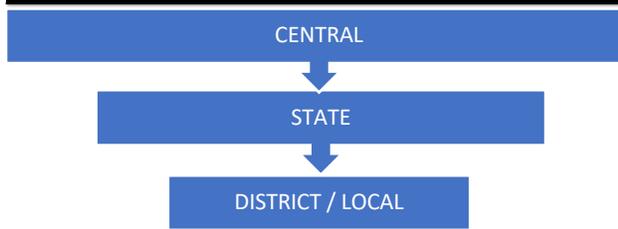
⁸ Constitution of India 1949, art 85

⁹ Constitution of India 1949, art 111

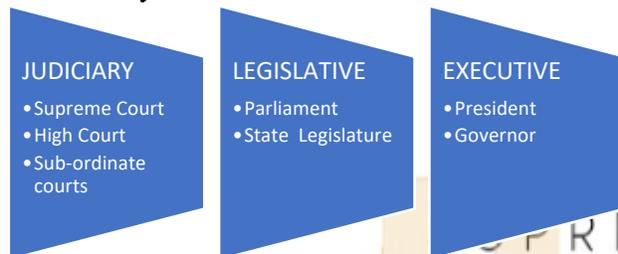
¹⁰ Constitution of India 1949, art 112

¹¹ Constitution of India 1949, art 123

¹² Constitution of India 1949, pts V - IX B



The below given diagram shows the division of authority between central and state.



- The constitution of India has established Supreme Court at union¹³, High Courts at states level¹⁴, and Subordinate Courts at district level.¹⁵
- Parliament is established at the union level¹⁶ and the state legislature at the state level.¹⁷ Also they have separate lists of the matters on which they can take their own decisions.¹⁸
- At the union level, executive powers are vested to the President while at the state level, the same are vested to the Governor.

JUDICIAL PRONOUNCEMENTS

Whenever the question has been raised against the doctrine of separation of powers, the Indian judiciary has well explained and applied this doctrine. Some highlighted cases have been discussed below where judiciary has descriptively applied the doctrine.

• **Ram Jawaya Kapoor v. State of Punjab.**¹⁹

Background :-

Petitioner was a publisher of High school and secondary education books in the State of Punjab. The Education department made a scheme according to which the books were to be directly taken from the authors for educating students of Higher and Secondary Education. Excluded publishers from the whole transacting deal.

Being unsatisfied by the scheme, the petitioner filed a petition questioning the legislation of Education department as it is the executive body and also the infringement of his right conferred by the Indian Constitution under Article 19 (g).

Court’s Decision :-

In this case, the Hon’ble Supreme Court observed that the doctrine of separation of powers is not adopted in India in a strict manner as like USA. But the powers and functions of each organ of the Indian government are specified clearly under the constitution of India.

The executive body of the state has the legislative power in the form of delegated legislation. On this basis, the executive body can perform legislative functions to some extent. Making of any policy by the Education department of state Government cannot be declared as unconstitutional because it is delegated with some powers to do so.

¹³ Constitution of India 1949, art 124

¹⁴ Constitution of India 1949, art 214

¹⁵ Constitution of India 1949, pt VI chap VI

¹⁶ Constitution of India 1949, art 79

¹⁷ Constitution of India 1949, art 168

¹⁸ Constitution of India 1949, art 246

¹⁹ AIR [1955] SC 549



Based on the above-mentioned observations, the Hon'ble Court held that the policy made by the Education department of the State Government does not infringe fundamental right of the petitioners.

• **Indra Nehru Gandhi v. Raj Narayan.**²⁰

Background :-

Indra Nehru Gandhi and Raj Narayan were battling against each other in Lok Sabha election from Rae Bareli in 1971. Indra Gandhi won the election and was elected as the Prime Minister of India. Raj Narayan filed a petition in Allahabad High Court against Indra Gandhi for adopting corrupt practices which helped her in winning the election.

Allahabad High Court found Indra Gandhi guilty of adopting corrupt practices in Lok Sabha election of 1971.

Indra Gandhi filed an appeal against the order of High Court in 1975. Then president Fakhruddin Ali Ahmed declared national emergency in India due to internal aggression. At the time of national emergency, legislature passed 39th amendment act which competed the jurisdiction of Judiciary against the election of Prime Minister, President and Vice President.

Court's Decision :-

The Hon'ble Supreme Court observed that the 39th amendment act of Indian Constitution was completely unconstitutional because it violates the doctrine of separation of powers by competing the jurisdiction of the Hon'ble court in the matters of

questioning the elections of Prime Minister, President and Vice president of India.

It also violates the basic structure of the Indian Constitution which confers democracy to each citizen of India. The government is made by the people and for the people. Thus, in this democratic country it is the right of the people under Article 32 of Indian Constitution to file a writ petition against the government in case of infringement of their rights.

On the basis of the above observations, the Hon'ble Court held that the clause (4) of Article 37A is unconstitutional and struck down the whole 39th amendment of 1975.

• **I.C Golakhnath v. State of Punjab.**²¹

Background :-

The petitioner was holding 500 acres of land in the State of Punjab. Punjab government amended the Punjab security & reform Act according to which people in Punjab could hold only few acres of land, no person was permitted to hold excessive land. The excessive land was to be taken by the government for further distribution to the tenants.

Being unsatisfied by the land reform Act, Golakhnath filed a petition in Supreme Court of India under Article 32 of the Indian constitution against infringement of his right to property conferred by article 19(f) of the constitution.

Court's Decision :-

The Hon'ble Supreme Court observed that all amendments done by the Indian legislature are considered as law and lies within the

²⁰AIR [1975] SC 2299

²¹AIR [1967] SC 1643



ambit of Article 13 of the Indian Constitution. Thus, Indian legislature are bounded by the doctrine of severability. They cannot make any amendment which infringes any fundamental right of people conferred under part III of Indian constitution. Part III of constitution is an integral part and soul of the constitution. Thus, part III should always be taken at supreme position by the legislature. The Hon'ble court declared the amendment of Punjab security & reform Act as unconstitutional.

Keshavanand Bharti v. State of Kerala²²

Background :- After independence, India was industrially backward there was concentration of resources by wealthy people. To distribute these resources equally and to make out an economic and social stand of Indian states, government of different states enacted different acts including Kerala land Reforms Act, 1963 which aimed at equal distribution of land in the state of Kerala. It restricted the excessive holding of land by single person in the state.

Central government also introduced 24th, 25th and 29th Amendment Act which conferred some powers to the parliament. These amendments state that the parliament has the power to amend any part of the constitution, it can curtail right to property and any cant under 9th schedule cannot be challenged by Judiciary.

Being aggrieved by the Act, the petitioner filed a writ petition in the Hon'ble Supreme Court under article 32 of Indian constitution against the act which infringed the right to hold property.

Court's Decision :-

The Hon'ble Supreme Court laid down the doctrine of basic structure and marked restrictions over the power of parliament to amend constitution enriched under article 368 of Indian Constitution. The Hon'ble Court approved validity to 24th and 25th Amendment Act and stated that if any act under 9th schedule acts in contradiction of any provision of the constitution, the procedure of judicial review will be applicable to the act.

The Hon'ble court held that legislature while exercising its functions and powers under Indian constitution, legislature should not abridge the doctrine of basic structure. All the amendments made by legislature are legally termed as law and come under the ambit of article 13 of the constitution and can be reviewed by Judiciary.

This judgement overruled the Golaknath case judgement in which it was held that parliament cannot amend the fundamental rights of people enshrined under part III of the constitution but in the present judgement, the Hon'ble Court held that parliament could amend fundamental rights but without violating the basic structure of Indian constitution.

CONCLUSION

In India separation of power prevails only in the matters of 'judiciary and legislature' and 'judiciary and executive' but there is fusion of functions and powers between legislative and executive. In the horizontal way of separation of powers, it is not strictly adopted. Also, in the vertical way of separation of powers, the separate powers are conferred to each authority of different levels

²² AIR [1973] SC 1461.



but here, the hierarchy status sometimes suppresses the doctrine of separation of powers. Judiciary has always protected the doctrine of basic structure and on the basis of this doctrine, judiciary has also well balanced the fusion and separation of powers in both horizontal and vertical perspective. Thus, it can be concluded that Constitution of India has adopted the doctrine of separation of power but not in a strict manner. The Indian constitution has balanced features of opposite natures which make it unique.

