



The Doctrine of Separation of Powers in Indian Perspective

Kusum ¹

¹ Research Scholar, Department of Political Science, Singhania University, Jhunjhunu, Rajasthan.

ABSTRACT:

The doctrine of Separation of Powers emphasizes the mutual exclusiveness of the three organs of government, viz., legislature, executive and judiciary. The main underlying idea is that each of these organs should exercise only one type of function. 'Separation of Powers' is a fundamental principle whereby powers and responsibilities are divided among the legislative branch, executive branch, and judicial branch. The officials of each branch are selected by different procedures and serve different terms of office; each branch may choose to block action of the other branches through the system of checks and balances. The framers of the Constitution designed this system to ensure that no one branch would accumulate too much power and that issues of public policy and welfare would be given comprehensive consideration before any action was taken. The main objective of introducing these principles were to prevent the concentration of power and provide for check and balances. The present Article is an attempt to analyse the Doctrine of Separation of Powers as envisaged under the Indian Constitution and its context in the three wings of the government while in practice.

Key Words: Doctrine of Separation of Power, Role of Judiciary, Independence of Judiciary, Check and Balance system

Introduction

The doctrine of Separation of Powers was originally started in the writings of Montesquieu in the spirit of the Laws where Montesquieu refers to the division of govt. responsibilities into three separate branches of government to make sure that none of the branch intrudes into the domain of another. The doctrine of Separation of Powers is of ancient origin, its history is traceable to Aristotle in his book "Politics" that mentioned the three branches of the government, the deliberative, the ministerial, and the judicial. True objective of introducing these principles were to prevent the concentration of power and provide for check and balances. American Constitution, Australian constitution is very rigid as compared to Indian constitution and it does not apply to India or even England. Separation of Powers is practiced in India but not that rigidly. The

¹ Research Scholar, Department of Political Science, Singhania University, Jhunjhunu, Rajasthan

three main areas of government in some or the other way perform the task of other. The concept of Separation of Powers is a measure to protect individual's rights, acknowledging the fact that governments have historically been the major violators of such rights. The hypothesis behind the Separation of Powers is that when a single person or group has a large amount of power, they can become treacherous to citizens. The Separation of Power is a method of removing the abuse of power.

Doctrine of Separation of Power

The modern doctrine of separation of powers was a leading tenant in the political philosophy of the 18th century. it was Montesquieu French jurist who for the first time gave separation of powers a systematic and scientific formulation in his book the spirit of the laws where he visualise three structural classification of powers into legislative executive and judicial and emphasized that none of the three organs of the state legislature executive and Judiciary should interfere with the exercise of the functions of the Other organ.

Concept Separation of power in Ancient India:

The Separation of power is known as it has been found by the Montesquieu and Locke but the roots are found in the Vedas. If we study the Smritis which are ancient source of law i.e. Dharma, we find such type of separation. In Narad Smriti we trace the very principle of separation of power. At that time Deewan was head of the Executive wing of any legacy, Senapati did a job to maintain law and order and Kaji was the judicial head. At the same time we have to bear in mind that they all are subordinate to the King and King was the supreme authority who makes the law and therefore he was similar to present form of legislature. In short, what comes out is that in ancient time also there was a separation of power in one province or legacy. After all, King is known as the supreme authority of all but the functions and powers has been separated.

The Doctrine of separation of power Meaning by Montesquieu -

- a. A body or any person should not exercise all the three kinds of power.
- b. The same person should not form part of more than one of the three organs of government.
- c. One organ of the government should not interfere with any other organ of the government.
- d. One organ of the government should not exercise the functions assign to any other organ.
- e. The legislature shall never exercise the judicial or the executive powers while the executive shall never exercise the legislative or the judicial power and the judicial branch shall never exercise the executive and the legislative.

The Doctrine of separation of power Meaning by Wade and Philips

The doctrine of separation of power as one the same person should not compose more than one branch of the three branches, one branch should not control and interfere with the act of the other two branches and see one should not discharge the function of the other two branches.

The concept of Separation of Powers is a measure to protect individual's rights, acknowledging the fact that governments have historically been the major violators of such rights. The hypothesis behind the Separation of Powers is that when a single person or group has a large amount of power, they can become treacherous to citizens. The Separation of Power is a method of removing the abuse of power. The significance of this doctrine can be summed in the following points: Ending the despotism, it safeguards individual liberty.

Article 50 of the constitution describes the separation of the executive from the judiciary and this is the only article which talks about the separation between two organs. It means that there should be judiciary service without any executive control. It emphasizes on the necessity of independence of judiciary. It not only maintains the efficiency in administration but also protects the people from the arbitrary rule of the executive. This theory admonishes the executive and the administrative wings of the government not to interfere with the process of law and justice, so as to ensure the liberty of the individuals in the society. Separation of powers means distribution of powers for specified functions of the government. All the powers of the government have been conceived as falling within one or another of three great classes, as – (1) the enactment of making laws, (2) the interpretation of that laws and (3) their enforcement; namely- legislative, judicial and executive. Government has been deemed to be made up of three branches having for their functions and such classification is recognized as classical division. The framers of the Indian Constitution did not perceive in an inflexible way the assumption of the division of forces.

However, many conflicts that arise from the government process are dealt with by the administrative tribunals rather than by the ordinary courts. Nevertheless, the tribunals' impartiality is maintained by preserving essential features of 'fair judicial procedure'. It is found, on analysis, that under the various provisions of the Constitution, such as Article 53(1) and 154(1), the executive powers of the union and the states are vested respectively in the president and the governors. According to this scheme, the president is the chief executive of the Indian union who exercises his powers constitutionally in accordance with Article 74(1) on the assistance and advice of the Ministerial Council. The threefold division of powers is partially recognized and the parliament and the state legislatures and judicial powers in the Supreme Court and other courts have been given no unbridled "legislative powers. India's constitution has taken a midway route on this issue Article 50 of the Constitution provides that the state shall take measures to separate the judiciary from the executive within the State's public services. The constitution also empowers the President to issue ordinances in the exercise of his legislative powers which extend to all matters falling within Parliament's legislative competence. Under Article 123, the President shall have the power to promulgate an ordinance when it deemed necessary during the recess of both houses of Parliament.

In *Minerva Mills's* case, the Supreme Court by striking down sections 4 and 5 of the 42nd Amendment Act to be ultra vires maintained its supremacy and its role as the watchdog of the Constitution. About Sections 4 of the said amendment, which sought to oust the jurisdiction of the Court, Mr. N.A. Palikhivala 21 has observed that provision was clearly ultra vires the amending power of the Parliament. That destroyed the balance of

power between the legislatures and sought to deprive the citizens of the modes of redress which are guaranteed by Article 32.

Theory of Check and Balances

The doctrine of separation of powers is a part of the basic structure of the Indian Constitution even though it is not specifically mentioned in it. Hence, no law and amendment can be passed violating it. The system of checks and balances is essential for the proper functioning of three organs of the government. Different organs of the state impose checks and balances on the other. Article 50 of the constitution describes the separation of the executive from the judiciary and this is the only article which talks about the separation between two organs. Checks and balances acts in such a way that no organ of the state becomes too powerful. The constitution of India makes sure that the discretionary power bestowed upon any organ of the state does not breach the principles of democracy. For instance, the legislature can impeach judges but as per the condition i.e. two third majority.

The system of checks and balances is a part of proper functioning of three branches of government. It guarantees that no part of the government becomes too powerful. For example, the legislative branch makes law, the executive branch passes the valid law and the judicial branch may also say that the law is unconstitutional and thus make sure it is not a law. The legislative branch can also remove judge that is not doing his/her job properly. The executive branch appoints judges and the legislative branch approves the choice of the executive branch. Again, the branches check and balance each other so that no one branch has too much power. This is what describes the theory of checks and balance.

The current practices of the Doctrine of separation of power in India

The Indian Constitution does not define the separation of power. It does not state anywhere clearly of the distinction of powers but it implies. Even though there are no clear provisions stating the distinction between the three organs, there are many provisions under the Indian Constitution that states the reasonable separation of powers.

Article 50: State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary, Article 122 and 212: validity of proceedings in Parliament and the Legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity, Articles 53 and 154 respectively, provide that the executive power of the Union and the State shall be vested with the President and the Governor and they enjoy immunity from civil and criminal liability. Article 361 the President or the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office.

Legislature: Responsible for making laws and amendment in the made laws The Council of Ministers shall be chosen from among the members of the Legislature and this Council shall be responsible for the Legislative Council. Article 61: Impeaching the president and removal of judges.

Executive: The Indian President, the top executive authority of the state is the authority who gives clearance when making any law. He can reject if he finds any law not just, and refuse to sign it. Also “Article-123, also the Judicial powers under Article-103(1) and Article-217(3), he has the consulting power to the SC of India under Article-143 and also the pardoning power in Article-72 of the Constitution. The executive also affecting functioning of the judiciary by making appointments to the office of Chief Justice of India and other judges.” It should also be noted that the executive appoints the Chief Justice of India, affecting the Judiciary.

Judiciary: Article 142 and Article 145 of the Indian Constitution states or talks about the power vested in the Judiciary that makes it an independent body. The Supreme Court has the power to declare the laws enacted by the legislature void if it harms the Indian Constitution as well as take appropriate actions against the executive. The amendment of the laws is also subject to the scrutiny of the Court. As seen in *Kesawananda Bharati v. State of Kerela* it was held that the Parliament couldn't amend the provision in such a way that violates the basic structure.

Advantages of Separation of Power

Since the functions are divided, the work is hence divided to the three groups. This increases the efficiency with the work, when every group is working on different aspects simultaneously, hence increases the amount of work done in less time. It is necessary for the smooth running of the state. The three organs appoint the experts of the field. The experts work under their respective organs and are capable in handling the work assigned under different organs hence; with efficiency it ensures the work done to be correct and accurate. Since the functions and the work is divided, it clears and creates the distinction of skills and labour required. Since there is a clear distinction and a system of check and balance, there is no arbitrary ruling and no autonomy. The division creates a systematic procedure to run the country. The clear distinction helps eradicating the overlapping of work, and hence there is no interference with others work, and since the overlapping is removed with the organs having its individual work, it helps in removing competition. The separation of power is essential because it provides an indispensable system of checks and balances, which prevents the concentration of power. It promotes an accountable and Democratic form of government and helps in eliminating arbitrariness, tyranny, and totalitarianism. It enhances the accountability and control of different branches over each other, i.e., "the checks." It divides the power between the various components of government so that the administration is not concentrated in one hand and is referred to as "balances." It prevents the abuse of power and safeguards the freedom of everyone as unlimited power in the hands of one person or group may lead to the suppression of others, and their rights and powers may be curtailed. It prohibits the misuse of powers within the different organs by demarcating certain limits and boundaries for each branch of the government. It also allows all three branches to specialize in their respective fields to improve and enhance the efficiency of the government. This doctrine seizes the powers of one component of the government to exercise the power of another. Therefore, the principle of separation of powers is considered an essential pillar of Democracy that prevents malfeasance of power and promotes liberty and equality.

Disadvantages of Separation of Power

The theory behind doctrine of the separation of power states that the functions between the legislature, the executive and the judiciary are separate which cannot be seen in reality. The three functions do overlap each other as the system of check and balance. But this provision may result in the efficiency and increase in competition. The separation may lead to deadlocks and may get engaged in some conflict between two organs. As well as in practice it is not possible to dedicate one kind of power under one body. And hence, the doctrine is impractical in its absolute sense as well as not favourable.

Judicial Approach towards the Doctrine of Separation of Power

In *Ram Jawaya v. Punjab*²(1955) case, the Supreme Court held that the executive is derived from the legislature and is dependent on it for its legitimacy. Cabinet ministers in India both executive and legislative functions. Art. 74(1) gives the upper hand to the cabinet ministers over the executive by making their aid and advice mandatory for the President, who is the formal head of the State.

In *Re Delhi Laws Act*³ A 7 judged bench of the Supreme Court relied on the principle that one body should not perform the functions which essentially belong to the other. The court held that though the doctrine of separation of power is not expressly mentioned in our Constitution, but is evident in some exceptional circumstances. A clear demarcation was also made between the different powers, responsibilities, and jurisdictions of the three separate organs of the State, namely, the Legislature, the executive, and the Judiciary.

In *Ram Krishna Dalmia v Justice Tendolkar*⁴ The honorable Chief Justice SR Das opined that even if there is an absence of specific provisions for the separation of power in our Constitution, there is under the American Constitution. However, some such division of powers among the legislative, executive, and Judiciary is implicit in our Constitution.

In *Keshav Singh v Speaker, Legislative Assembly*⁵The Supreme Court relied on the doctrine of separation of power and pointed that Article-211 debars the state legislature from discussing the conduct of a High Court judge. The existence of a fearless and independent judiciary is the basic foundation of the Constitutional structure in India does not provide any power to Legislature to take action under Article-194(3) or Article-105(3) against a judge for its contempt alleged to have been committed by the judge in the discharge of his duties.

In *IC Golakhnath v State of Punjab*⁶The Supreme Court emphasized the doctrine of separation of power. The then C.J. Subha Rao opined that: "The Constitution brings into existence different constitutional entities, namely the Union, the State, and the Union Territories. It creates the three powerful instruments of power, namely the Legislature, the executive, and the Judiciary. It demarcates their jurisdictions minutely and expects

² AIR 1955 SC 549

³ (1951) 2 SCR 747

⁴ AIR 1958 SC 538

⁵ AIR 1965 All 349

⁶ (1967) 2 SCR 762

them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.

In *Indira Nehru Gandhi v Raj Narain*⁷ The respondent challenged the constitutional validity of Article-329A, which was added by the 39th Constitutional (Amendment) Act, 1975, and argued that it is violating the primary feature of the Constitution. The court applied the landmark decision of *Kesavananda Bharati* and thus declared the impugned clause-4 of Article-329A to be unconstitutional. Justice Chandrachud said that as the pure judicial function is being transferred into the Legislature's hands, it, therefore, amounts to the violation of the principle of separation of power.

In *Asif Hamid v State of Jammu and Kashmir*⁸ The rigidity of the doctrine of separation of power in India was absent. However, the limitations of every organ are predefined as Legislature, executive, and Judiciary have to function within their spheres as mentioned under the Constitution. Although the judicial review helps to check the unconstitutional functions of the Legislature and executive, the Judiciary must have self-imposed disciplinary provisions while exercising the powers of judicial review.

In *Madras Bar Association v UOI*⁹ The constitutional validity of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) was challenged because these tribunals are violating the basic structure of the Constitution, and the Legislature did not have powers to transfer the judicial functions of the courts to the tribunals, and this is violative of the doctrine of separation of powers. But the court upheld that the creation of NCL and NCLAT and the powers and jurisdiction vested by the High Courts in such tribunals is not unconstitutional. The court also pointed that only the constitutional amendments are subjected to the fundamental structure doctrine, and the legislative measures are not subjected under this doctrine of the basic framework. This independence of the institution refers to the separation from the other branches of the government. Functional independence would include selecting and the prescribed qualifications based on the members' caliber, ability, and integrity. It also protects the Judiciary from the interference of other branches and ensures its independence from the executive pressure, thereby adding to the separation of powers.

Interdependence of three powers

1. **Executive over Legislative**-Under Article-123, the President has the power to promulgate ordinance (which has the same force as the one made by the Parliament or by the state legislature) when Parliament is not in session and when the situation arises which immediate action is required. The Executive exercises its powers under delegated legislation. Under articles 118 and 208, both the Houses of Parliament have the authority to make rules for regulating their respective procedure and conduct of business subject to the provision of the Constitution.

⁷ (1975) 3 SCR 333

⁸ (1989) 3 SCR 19

⁹ (2014) 10 SCC 1

2. **Judiciary over Legislative-** Article-13 talks about the Judicial review under which the Legislature makes the law, and this process is known as judicial. It refers to the Judiciary's power to interpret the Constitution and declare any such law and order of the Legislative and Executive to be void if found unconstitutional. Article 145 and 225 provides Legislative Powers to the High Court and the Supreme Court by which they can formulate rules to regulate their procedure. There have been many instances where the emergence of laws and policies can be seen in their judgments. For example, the Vishakha guidelines were the supreme court a mod guidelines on sexual harassment.
3. **Executive over Judiciary-** The executive made for effect the functioning of the Judiciary by making appointments to the office of the chief justice and other judges. Under Article-71, the President performs judicial functions while granting pardons, reprise, respites, or remission of punishment, remit or commute the sentence of any person convicted of any offense (must be judicial). Under Article-124 (2A) and 217(3), the President discharges his judicial functions in resolving disputes related to the age of the Judges of the Constitutional Courts for retirement from their judicial office. The Tribunal and other Quasi-judicial bodies also perform the judicial functions, which are a part of the executive. In Administrative adjudication, the Executive agencies have the power to hear and decide cases involving a particular future of any administrative activity.

Conclusion

The doctrine of separation of powers in India is not strictly adhered to. Instead, it is interpreted and used as the Doctrinal Division of Functions, which means that although theoretically and strictly the executive must only implement or execute laws, the Legislature should only make laws, and the Judiciary should only interpret the laws. Constitution is the terrestrial supreme law. No organ should go beyond the role which the constitution assigns to it. It is the duty of the judiciary, executive and legislature to adhere strictly to one of the most fundamental features of the Separation of Powers' Constitution. In a democratic country like India goals are enshrined in the constitution and the state machinery is then setup accordingly. And here it can be seen that constitutional provisions are made as such to support a parliamentary form of government where the principle can't be followed rigidly

Today, the doctrine in its absolute form is only recognized in letter as it is entirely unfeasible and impractical for usage in the operational practices of a government. With the passage of time, States have evolved from being minimal and non-interventionist to being welfare oriented by playing the multifarious roles of protector, arbiter, controller and provider to the people.

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