

1. Separation of Powers

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Pg. No: 1-13

i. Abstract

Every country strived to make substantial work-flow of their nation during its initial period. A nation carries the burden of the welfare of its citizens. Thus, the structure of the nation must be strong. India, like many other countries, stands on three main pillars or organs viz. Executive, Legislature and Judiciary. The method and regulations of working of the three organs is termed as the doctrine of Separation of Powers. It is a fundamental principle of law that maintains that all three organs remain separate and distinct from each other to ensure that the different arms of government do not encroach upon each other. This doctrine works on a philosophy of promoting 'checks and balances' in the structure. It is always a matter of threat when too much or too little power is given to one single organ in a country. In such cases, either the organ may become autocratic and misuse the power and responsibility or it may simply become a handicap. It is a duty of the nation to avoid both the situation at any given time. This is where this doctrine comes in picture. It keeps a check on any unduly working in the system. The power given to each organ is specific but not rigid in India. The legislature has been given the power to make laws, the executive works on its enforcement and the Judiciary has the duty to undertake the cases wherein these laws are breached. Therefore, every organ is interlinked in a certain manner. However, their functions and roles may sometimes overlap.

Table of Contents

| S. No. | Title | Pg. No. |
|-------------------|---|--------------------|
| i. | Abstract | 2 |
| 1. | Introduction | 4 |
| 2. | Meaning of Separation of Power in India | 5 |
| 3. | Theory of the Doctrine | 5 |
| 4. | Criticism of the Theory | 6 |
| 5. | Separation of Power in India | 7 |
| 6. | Judicial Activism in India | 11 |
| 7. | Conclusion | 13 |

1. Introduction

It is only a soulful thought that converts itself into an inspirational concept, which then becomes the backbone of a constitution. Separation of Powers was a term coined by the great philosopher, Montesquieu in his publication ‘spirit of laws’, which was believed to be one of the greatest works of sociology and jurisprudence. Separation of Power is adapted as the basic structure of the Indian Constitution. It is indeed an essential essence of the Constitution providing fairness and justice to the citizens in several ways. However, Separation of Powers is not accepted entirely, which allows flexibility in applicability of the doctrine. It works on harmony between the working of the three organs of the Indian system. Article 50 of the Constitution of India deals specifically with the independence of Judiciary with the very object of providing its citizens fair and unbiased justice. Separations of powers between the executive, legislative, and Judiciary with appropriate checks and balances. Proper checks and balances secure discipline and affirm the smooth functioning of the organs.

Separation of Powers gives rise to Judicial Activism. 'Separation of Powers and Judicial Activism in India', is a concept that is high importance, especially, in reference to the growth of feelings and emotions among the various sections of the country's socio-political spectrum, of the need to have a healthy debate and discussion on the power and responsibilities of the different organs of our Constitution.¹ There have been several changes and amendments to the Constitution, but it is important to retain the essence and remember the object of the birth of our Constitution. Thus, it is of utmost importance to treat this concept as a guiding path to fair and unbiased Justice.

In the context of separation of powers, the state has been divided into three wings namely, judiciary, Legislature, and Executive with their function chalked out in our Constitution.

The Constitution of India is an amalgamation of the constitution and is very lengthy and explanatory. It is very well divided into parts and articles for a smooth understanding. Part III of the Indian Constitution lays down the fundamental rights that have been bestowed on the citizens of India. Article 13 of the Constitution protects Part III and mandates that no law shall be made by the state that would violate these fundamental rights. Thus, checks and balances

¹ As Expressed by Dr. K.N. Katju

are required when a law has to be formulated from the ends of both legislature and the judiciary. Judiciary of India has an added responsibility to keep a check on the legislature.

2. Meaning of Separation of Power

The Doctrine of Separation of power may have three things under its ambit:

- i. A single person has to be a part of only one of the three different organs of the government.
- ii. There must be no or least interference of one organ in the working of another organ of the government.
- iii. One part or organ has to follow its functions and must avoid doing functions of any other organ.

3. Theory of The Doctrine

The explanation of doctrine given by Montesquieu is the most relevant and accepted amongst the various theories on the Separation of Powers. According to him, if the legislative body and the executive body become part of the same entity, there is no liberty. Similarly, liberty will be lost if the judiciary is not set apart from the executive and legislative powers. If it is joined together then the people will have to face arbitrary control of power.²

The theory of separation of power as presented by the great judge and philosopher, Montesquieu had a huge impact on the advancement of the law of administration and the roles of a government. Writing in 1765, Blackstone³ had written in the year 1765 that the personal liberty of citizens shall end or die if all three functions are given to a single man. Thus, the

² I.P. Massey : Administrative Law, Edn. 1970, p. 35.

³ Commentaries on the Laws of England, 1765.

constituent Assembly of France had proclaimed in the year 1789 that the concept of a constitution will be negligible in the nation where the separation of power is absent. This doctrine in America is the base of the whole structure of the constitution. In this way, it exercised a decisive influence in the minds of the framers of the constitution of the United States. This doctrine in India has been recognized as a basic feature of the Indian Constitution and has been discussed in detail in the constituent assembly as well.

4. Criticisms to the Theory

1. **Historical Incongruity:** Historically speaking, the theory was not correct, his exposition of this theory is based on the British constitution of the first part of the eighteenth century as he understood it. In reality, there was no separation of power under the constitution of England.
2. **Division of Functions:** The assumptions behind the doctrine is that the three functions of the government namely, legislative, judiciary, and the executive are divisible from each other. The fact, however, is that it is not so in reality. there are no watertight compartments. There is overlapping with each other. As Friedman and Benjafield say, the truth is that each of the three functions of the government contains elements if the other two and that any rigid attempt to explain and set apart the roles that may cause inefficiency in the government.⁴
3. **Practical Difficulties in its Acceptance:** It is difficult to take certain actions if this doctrine is accepted in its entirety. In practice, it is almost impossible to concentrate the power of one kind in one organ only. The legislature does not act merely as a law-making body, but also acts as an overseer of the executive, the administrative organ has a legislative function. The Judiciary has an added responsibility for rule-making.
4. **Adherence to it not possible in the Welfare State:** The modern state is a welfare state and it has to solve many complex socio-politico-economic problems of a country. In this

⁴ Principles of Australian Administrative Law, 36(1962).

state of affairs, it is not possible to stick to this doctrine. According to Judge Frankfurter, the working of a modern-day government is impossible if the doctrine is conceived rigidly.⁵

5. **Organic Separation:** The position is that the doctrine of separation of powers in the strict sense is undesirable and impracticable. Therefore, it is not fully accepted in any country of the world. Nevertheless, it works the concept of checks and balances and works on prevention of abuse of the enormous powers of the executive,⁶ the goal of the doctrine is to have "A Government of law rather than of official will or whim."⁷ One of the features of this doctrine is that it has been accepted by all the jurists that the Judicial body must be independent of the other two pillars or organs of the system *vis.* Legislative and Executive. The basis of the doctrine is that the merger of all the power in the body will result in the negation of individual liberty.

5. Separation of Power in India

Article 50 of the Indian Constitution deals with the separation of power. It states that the state shall endeavor to set apart the judiciary power from the executive in the public sectors. This doctrine, however, is not strict or rigid in the Constitution. The clarity of Separation of Powers can be understood due to clear differentiation in the functions of the three organs. It is sufficiently done so to avoid unwanted overlap.

a. Constituent Assembly Discussion

During one of the Assembly debates, a member of the assembly Prof. K.T. Shah, strongly emphasized on insertion of a new Article 40-A through an amendment. The Article reads,

⁵ Frankfurter – *The Public and its Government* (1930) quoted by B. Schwartz, in *American Constitutional Law*, 1955 Page 286.

⁶ Indian Law Institute, *Cases and Materials on Administrative Law in India*, 1966 p. 71

⁷ Vanderbilt, *the doctrine of separation of powers and its present day significance*, 1958, p. 51

*"There shall be a complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."*⁸

This insertion was dissented by Shri K. Hanumanthiya a member of constituent assembly. Further, the chief architect of the Constitution of India, Dr. B.R. Ambedkar also disagreed to the point by Prof. Shah stating that it is indisputable that the judiciary must be separate from the executive. However, separation of the legislature from the executive isn't agreeable. The American Constitution lays a rigid separation of executive and legislature but the citizen weren't satisfied with it. He further added that the working of Parliament is very complicated and vast and it will difficult for the parliament members to make decisions without the direct views and guidance of the executive. Thus, separation of the legislature from the executive shall not be very appropriate.⁹

b. Observations of the Indian Courts

In the case of *Smt. Indira Nehru Gandhi v. Raj Narain*,¹⁰ the court observed that both American and Australian Constitutions have a rigid differentiation or separation of the three organs. India however, has not expressed such separation of powers. He stated that the doctrine of 'Separation of Powers' is not a magical formula to keep the organs confined in its framework strictly.

In case of *Rai Sahib Ram Jawaya v. State of Punjab*,¹¹ the court observed that the Constitution of India has not recognized the said doctrine in complete rigidity but function and role of each branch of power is very well defined and differentiated in our Constitution and there is no contemplation of assumptions or confusion.

⁸ Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.

⁹ Ibid p. 967, 968.

¹⁰ AIR 1975 SC 2299 at 2470

¹¹ AIR 1955 S.C. 549 p.556

c. Principles of Checks and Balances

It was observed by Justice Mukherjee that there is not much dispute on the fact that there is not much place for the doctrine of Separation of Powers in today's Indian government system.

The theory of checks and balances is very well slated in our Constitution. However, there isn't any rigidity in separation. The judicial power of impeachment rests with the parliament. Similarly, the legislative function of ordinance making also rests with the president of India. Therefore, the Constitution of India has not applied the doctrine of separation of powers in its rigid or strictest manner.

d. Working of Checks and Balances

- **Checks and Balances**

- Means that the powers of different branches of government are balanced.
- No one branch has so much power that it can completely dominate the others.
- Although each branch of government has its own special powers, the powers are checked because some powers are shared with the other branches.

- **Legislative Branch**

- Power to make laws.
- Divided into the Lower House (Lok Sabha) and the Upper House (Rajaya Sabha).
- Each house checks the power of the other by refusing to pass a law proposed by the other house.

- **The executive and judicial branches have ways to check and control the power of Parliament to make laws:**
 - When Parliament passes a bill, the president must sign it before it can become a law
 - The president has the right to refuse to sign a bill. If this happens, the bill cannot become a law unless Parliament votes again and passes the bill by a two-thirds majority of both houses.
 - The Supreme Court India can check the power of Parliament
 - The Court can declare a law to be in violation of the Constitution and, therefore, be void.

e. Judicial Independence

Independence of judiciary is necessary for maintaining the Rule of Law and fair judicial administration in the country

Judicial independence can be categorized into (1) "decisional independence," the independence of a judge in deciding cases, and (2) "institutional decision," the independence of the structure of the courts, the branch of law, or the judiciary as its own.

Decisional independence provides for an independent status to the judge with the autonomy in deciding cases without any political pressure or popular pressure and any-kind of fear. The courts can decide solely based on law; facts relevant to the said case. This sort of freedom protects the integrity of the judges and promotes fairness in all stages of the decision-making process. Decisional Independence helps the judiciary in controlling the arbitrary acts of the administration.

Institutional independence provides freedom from the influence and interference of various government machinery in the judicial functions. The purpose of providing institutional independence is to promote effective governance and management of the judiciary in the exercise of judicial powers. Institutional independence does not go-on proving that the court or

the judiciary is superior to other branches of the government. It only refers to the point that all the branches of the government are co-equal with regard to the working powers of the independent institute viz. Judiciary, Executive and Legislature, in the form of checks and balance as discussed above. Institutional independence shall also include appointments and removal of the judges. If so, vested in the hands of the hands of the executive it is to be taken a note of it that proper safeguard so that it may not be misused to affect the fairness.

The constitutional scheme has set an independent judiciary to deliver justice without any pressure and fear, it is naturally expected that "Judicial Discipline" is maintained so that society can be assured fair and integrity in the orders passed by the courts.

Separation of power concerns the independence of the judicial system from other branches of the government. Judicial Independence requires the independence of individual judges from any pressure that threatens not only actual impartiality but also the appearance of impartiality. Article 6 of the European Convention on Human Rights (ECHR) included both elements by requiring 'a fair and public hearing by an independent and impartial tribunal established by law'.

Judicial independence is an uncertain concept. It requires judges to be protected against external pressure but does not mean that they should not be accountable for their actions. Accountability has different meanings. It means, firstly, that a decision-maker must explain and justify its action and secondly, that a decision-maker might be penalized if its actions fall short of required standards. Judges are to some extent accountable in the first sense, which does not conflict with independence.

6. Judicial Activism in India

Judicial activism the thought process or a view which propagates that the Courts must use their creative interpretation of the Constitution in accordance with the need of the people while passing a judgment. This concept believes that judges are independent policymakers. It is a good way to overrule the ancient concepts and thoughts that are sometimes part of the law texts. Therefore, it goes beyond traditional ideas.

Judicial Activism in India shall be seen with reference to the review power granted to the Supreme Court.

As expressed by *Montesquieu*, the state of India has adopted the doctrine as president has the executive powers, parliament has legislative powers and the Supreme Court and its subordinate courts are vested with the judiciary powers. However, such adoption is partial.

This is the case as even though Legislature power is independent of the Judiciary still the Judiciary is empowered with the implementation of the laws which are made by the legislature. Also, the judiciary has the power to issue a list of principles and directions for the Legislative body in case of the absence of laws on a specific topic or issue.

The executive body sometimes also, intrudes upon judicial power, in matters such as the appointment of judges of the Supreme Court and High Courts. The Judiciary can in a similar manner use its review power to overlook and examine the law passed by the legislature. The legislature has the power to intervene in act of impeachment of the President of India, who is a part of the Executive. The same process of division shall also apply to the state government as well, i.e. the Governor (executive), State Assembly (legislative), High Court (Judiciary)

As previously mentioned, the concept the Judicial Activism in India can be worked with an allusion to the review power of the Supreme Court and the High Court.

It cannot be assumed that the legislative function is performed by the legislature, executive function is performed by the executive or the judicial powers by the judiciary only.¹²

It must be noted that the essential and incidental powers of the organs must be set apart. Therefore, even if one body cannot take over the essential powers of the other, it has a scope of exercising its ‘incidental’ powers which helps in the harmonious running of the nation. This distinction demarcates the amount of power, one organ can wield over the activities of another.

But is evident that the concept of Separation of Powers has not been integrated in its most rigid format in our country. Further, it has not even been given Constitutional status. However, the very approach has played a crucial role in upholding the constitutional principles and safeguarding the basic structure of the Constitution.

¹² Jayantilal Amritlal v. F.N. Rana (AIR 1964 SC 648), Bandhua Mukthi Morcha v. union of India (AIR 1964 SC 648), State of U.P. v. Umedram Sharma (AIR 1986 SC 802), Fida Ali v. State (AIR 1961 Guj. 151)

7. Conclusion

In today's era, the doctrine of Separation of Powers has come to not only mean organs such as the Executive, the legislature and the judiciary but has gained a lot more value in the base of working of our system. One completely clear outcome is that even if the work-frame of the executive and judiciary overlap; the judiciary is an organ that has to be separate at all times.

India had drafted the Constitution after a lot of research and deliberation. It was framed in accordance with the people of India. India is a democratic country. Thus, it is foolish to compare its working with countries like the United States. Our country could not have followed the said doctrine in complete strictness as even if there is the separation of powers, a constant support and coordination from all the organs to each other is required at all times for smooth working of the system. India also followed the concept of checks and balances to not overburden a particular organ with extreme powers.

The judicial review and activism functions of the judicial body of India is a vital essence element of our system. It helps the justice in keeping a check on the legislature, so that they do not surpass their roles and powers and exercise within the ambit and the procedure laid down in the constitution such the acts of the three organs do not go beyond the scope of the constitution and be declared as ultra-virus.

The Indian Constitution was very carefully framed to uphold the integrity and liberty of each of its citizens. It has embraced the guiding aspect of the doctrine instead of entirely embracing the doctrine of separation of powers. The doctrine is worked as per the needs of the nation and its citizens. Concepts like Judicial activism only guides and checks it further.