



Separation of Powers Law and Practice in India

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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 present Article is an attempt to analyse the scheme of Separation of Powers as envisaged under the Indian Constitution and the difficulties faced by the three wings of the government in practice while implementing the provisions of the Constitution in letter and spirit.

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

INTRODUCTION:

The doctrine of separation of power is known to us by Montesquieu as he gave an absolute status and difference between the functions and powers of- the executive, the legislature and the judiciary. But Aristotle was the first one who wrote about it, but not in obvious manner. In his book, analysis has been found of three parts or we can say branches the deliberative, executive and judicial and has explained it as "All constitutions have three elements, concerning which the good lawgiver has to regard what is expedient for each constitution. When they are well-ordered, the constitution is well-ordered, and as they differ from one another, constitutions differ. There is one element which deliberates about public affairs; secondly that concerned with the magistrates- the question being, what they should be,

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over what they should exercise authority, and what should be the mode of electing to them; and thirdly that which has judicial power.”¹

According to *Mr. Justice Story* “when we speak of a separation of three great departments of government and maintain that the separation is indispensable to public liberty, we are to understand the maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely and distinct and have no link connection or dependence.”²

MEANING:

The separation of powers is based on the principle of *trias politica*. This Doctrine related to power, that owes its inception to the era of the ‘Magna Carta’, is the forerunner to all the constitutions of the world. Montesquieu’s belief of the formation of this theory as per the British constitution was negated when he learned about the fact that it was first introduced in America.

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.³

IMPORTANCE:

Briefly, the significance of this doctrine can be summed in the following points:

1. Ending the despotism, it safeguards individual liberty.
2. It emphasizes on the necessity of independence of judiciary.
3. It not only maintains the efficiency in administration but also protects the people from the arbitrary rule of the executive.
4. 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.

¹ Aristotle- Politics- BOOK 4- Part XIV

² Kilbourn v. Thomson 103 US 168, pg 190

³ <https://www.lawctopus.com/academike/separation-of-powers-a-comparative-analysis-of-the-doctrine-india-united-states-of-america-and-england/> by Dristhi.

CHECKS 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. The following examples illustrate the checks and balances:

1. Judiciary exercises judicial review over legislative and executive actions. Judiciary has the power to void laws passed by the Parliament. Similarly, it can declare the unconstitutional executive actions as void.
2. Legislatures review the functioning of the executive.
3. Executive appoints the judges.
4. Legislative branch removes the judges. It can also alter the basis of the judgment while adhering to the constitutional limitation.

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.

JUDICIAL PRONOUNCEMENTS

- In *Keshavanand Bharti case* (1973), the Supreme Court held that the amending power of the Parliament is subject to the basic features of the constitution. So, any amendment violating the basic features will be held unconstitutional. This scheme cannot be altered by even resorting to Art.368 of the constitution.
- In *Ram Jawaya v. Punjab* (1955) case, the Supreme Court held up the observation 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 *Indira Nehru Gandhi v. Raj Narain* (1975) case, the Supreme Court held that adjudication of a dispute is a judicial function and parliament cannot even under constitutional amending power is competent to exercise this function.
- In *Swaran Singh case* (1998) the Supreme Court declared the Governor's pardon of a convict unconstitutional.

In subsequent judgments, the Supreme Court upheld the rulings of the *Keshavananda Bharti* case regarding the non-amend ability of the basic features of the Constitution and strict adherence to the doctrine of separation of powers.

THE FUTURE OF SEPARATION OF POWERS

Some questions arise when we are thinking about past era when constitution was drafted and new era after the sixty-nine years of drafted constitution:

1. Did the architects of our Constitution envisage the nation as we are today?
2. our Constitution is still adequate to address the present problems?

The answer to these questions can be found in the underlying principles of our holy Constitution. Our Constitution embodies fundamental principles such as republicanism, secularism, equality, fraternity, social, economic and political justice that are self-sufficient in it to keep our system intact for the next fifty-years or so.⁴

CONCLUSION

It is crucial to understand that the doctrine of separation of powers has come a long way from its theoretical inception. 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. In its omnipresent role, the functions of the State have become diverse and its problems interdependent hence, any serious attempt to define and separate the functions would only cause inefficiency in the government.

⁴ Separation of Powers: Constitutional Plan and Practice by Nidhi Singh & Anurag Vijay

In conclusion, it is evident that governments in their actual operation do not opt for the strict separation of powers because it is undesirable and impracticable, however, implications of this concept can be seen in almost all the countries in its diluted form. The discrepancies between the plan and practice, if any, are based on these very grounds that the ideal plan is impractical for everyday use. Otherwise, the doctrine is itself a part of the founding structure of the Constitution of all democratic nations. Whether in its theoretical conception or its practical usage, the Doctrine of Separation of Powers is essential for the effective functioning of a democracy.

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