
A LEGAL STUDY ON THE DOCTRINE OF SEPARATION OF POWERS: AN INDIAN PERSPECTIVE

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ABSTRACT

The Doctrine of Separation of Powers states that the three branches of government Legislative Branch, the Executive branch, and the Judicial branch are mutually exclusive and separated from each other. The Doctrine of Separation of Powers establishes a distribution of power and accountability among the legislative, executive, and judicial institutions. Additionally, each branch can use the system of checks and balances to prevent the other branches from acting. This theory was first observed and refined by Aristotle. However, in the book Spirit of the Laws, Montesquieu's writings served as the foundation for the Doctrine of Separation of powers. To prevent one branch of government from encroaching on another's territory, Montesquieu describes the separation of powers among the three branches of government. The structure established by the Indian Constitution's founders was intended to prevent any one branch from gaining undue authority and to guarantee that matters of public policy and welfare would be carefully considered before any decisions were made. The primary goal of establishing these principles was to avoid the consolidation of power and establish a system of checks and balances. Because of the complexity of the functions involved in a democratic structure, there will undoubtedly be overlap in the three organs' respective domains.

Keywords: Separation of Powers, Montesquieu, Legislature, Executive, Judiciary

Chapter 1

Introduction

Constitutional systems do not follow the exact separation of powers in the modern world as it is undesirable and at times difficult; yet, however, a simplified form of this idea is used in almost every country. It is widely acknowledged that power holders must be counterbalanced to stabilize the political system. The relationship between the legislative, executive, and judicial branches of government is covered under the Doctrine of separation of powers. The goal of this doctrine is to establish exclusiveness in the way all three organs act, so it aims to produce a clear separation of powers.

The development of democracy involves the doctrine of separation of powers. To ensure that no organ crosses into the other's domain, the three organs in a democratic system should be independent, separate, and sovereign in their boundaries. This theory was first observed and refined by Aristotle. Montesquieu was among the philosophers and political theorists who distinguished between the legislative, executive, and judicial branches of the constitution based on this. The basic principle of all the ideas put out by the philosophers was the defense of people against the oppression of the state since the people's freedom would be restricted if power was not distributed among several authorities.

The framers of the Constitution understood that placing all of the authority in the hands of one organ may result in social unrest and conflict, which could undermine democracy as a whole. As a result, they believed that for the three branches of government to function smoothly and in harmony for the benefit of the country, they would need to be in alignment with one another. The Indian Constitution maintains every organ at the same level and grants no organ special power or significance.

The legislative branch creates and enacts legislation, the executive branch carries out legislative orders, and the judicial branch renders decisions and implements both constitutional and legal. These three organs have overlapping tasks and functions because they are related to one another. Originally, the division of the sovereign authority among the three branches of government had been referred to as the "separation of powers" idea.

The system of checks and balances is essential to the smooth functioning of the three branches

of government. It makes sure that no branch of the government becomes overly powerful. As an example, laws are enacted by the legislative branch, signed into law by the executive branch, and subject to constitutional challenge by the judiciary branch before they become law.

1.1 Research Objectives

The primary objective of this research is to have a thorough understanding of the doctrine of separation of powers and how it is applied, particularly in India. To achieve that, research has been done on administrative law, constitutional law, and other relevant.

The division of responsibilities and powers among the three branches of government executive, legislative, and judicial is known as the separation of powers. It primarily addresses how each state organ functions and how it affects other organs. India is not quite a federal nation. To determine if these three organs have a pure distribution of power or if there is ever any crossover between them. Finding out how these three pillars of government operate presently, how their system functions, and how they compare to other nations was another goal.

Every democracy must adhere to the separation of powers idea. This theory guarantees equity in the way the government operates. But as time has gone on, the theory has become less clear. Even in nations where this theory is central to their constitutions, there is dilution. The research discusses the principles of this philosophy and the changes that have been made to it as a result.

To understand why the Indian Constituent Assembly adopted this concept. As part of a research paper, also had the opportunity to look into the Constituent Assembly member' discussions and the ideology underlying the adoption of this Doctrine.

1.2 Research Questions

1. What is the Doctrine of Separation of Powers?
2. How the debate did take place in the Constituent Assembly for adapting the Separation of Powers in the Constitution?
3. What are the Separation of Powers done in the Indian Constitution, do they operate without any interference?
4. What are the advantages and disadvantages of Separation of Powers?

5. What is the Judicial Approach to Separation of Powers?

1.3 Research Methodology

This Research Paper is purely doctrinal research with the help of Books, Papers, Online sources, and articles from Journals with knowledge and understanding of Law. Some of this Research Paper has been fully adapted from Books, Papers, Online Website Sources, and journal articles, and has been referred with all the credits to the author of that particular literature material.

1.4 Literature Review

In the writing of the Research Paper “The Doctrine of Separation of Powers in India: A Legal Study”, the following Literature, Books, Journals, and Articles have been referred to for the study of the Doctrine of Separation of Powers, history of the Doctrine, Applicability of the Doctrine in different countries, Constitutional validity of the same.

1. **Justice. C.K.Takwani, “Lectures on Administrative Law, Separation of Powers. 35-43, EBC Publication, 7th Edition, 2022.**

The term "separation of powers" has been defined by the author in this book. The Doctrine's History and Montesquieu's Theory of Power Separation. In addition, the author has conducted a comparative analysis of the Doctrine of Separation of Powers among the United States, the United Kingdom, and India.

2. **Geetika Bhatia, “The Doctrine of Separation of Powers in India: A Legal Study”, Journal of Emerging Technology and Innovative Research, Vol. 6, Issue. 4, 2019.**

The author of this article has provided in-depth information on the doctrine of separation of powers as well as a thorough analysis of the Indian viewpoint, covering the country's current state of affairs. The Three Organs of the Government's Check and Balance System have been addressed by the author.

3. **Tej Bahadur Singh (Deputy Director), “Principle of Separation of Powers and Concentration of Authority”, Judicial Training & Research Institute, Journal Second Year, Issue 4 & 5, March 1996.**

In this article, the author has given an in-depth overview of the Separation of Powers. The Author has done a comprehensive detailing in comparison of the Doctrine in different countries especially in France, along with Montesquieu's theory in detail. The Author has also mentioned the remarks and suggestions of different theorists like Wade and Philips, John Locke, etc.

4. Constituent Assembly Debates, Volume 10, Dec 1948 - <https://www.constitutionofindia.net/debates/10-dec-1948/>

The Constituent Assembly members discussed their opinions on the division of powers among the three institutions during this detailed debate. What should be done, and how, to separate the three organs? Which were documented before the adoption of the Indian Constitution. It was chaired by the Vice-President of the Constituent Assembly, Dr. H.C. Mookherjee.

5. Shriya Singh and Mukund Sarada, "A study on the doctrine of separation of power of Montesquieu in reference to current plans and practices", *Advance Research Journal of Social Science*, Volume 8, Issue 1, June 2017.

The authors of this research article have provided a thorough summary of Montesquieu's Theory of Separation of Powers, and they have conducted a comparative analysis of the doctrine's application in various nations with the doctrine's present layout and application

Chapter 2 - The Doctrine of Separation of Powers

2.1 Separation of Powers

“Power corrupts and absolute power tends to corrupt absolutely.” -Lord Acton¹

The government is composed of three main organs:

1. The Legislative (Makes the Laws)

Enacting laws is the legislature's primary duty. It is essential to the operation of the other two branches, the judicial and the executive. It is also occasionally given priority over the other two organs because laws cannot be implemented or applied until they are legislated.

2. The Executive (Implements the Laws)

Upholding state policy and enforcing laws established by the legislature are under the authority of the executive branch. It serves as the head of the administrative arm of government. The executive is made up of ministers, such as the President, governors, and Prime minister/Chief minister.

3. The Judiciary (Interpret the Laws)

The judiciary as an organ of government is responsible for interpreting the law, resolving conflicts, and providing justice to all citizens. Both the protector of the Constitution and the guardian of democracy are seen as the judiciary. The Supreme Court, the District, the High Courts, and various lower courts are included in it.

In the context of democracy, these three government tasks and powers must always be maintained distinctively and carried out by three different government institutions, according to the doctrine of separation of powers. The government's executive and judicial branches cannot be exercised by the legislature, the executive branch cannot be exercised by the judiciary, and the legislature cannot be exercised by the executive branch.

¹ <https://www.dictionary.com/browse/power-tends-to-corrupt-absolute-power-corrupts-absolutely>.

2.2 Historical Background

At various times and in various forms, the doctrine of separation of powers has appeared. Plato and Aristotle can be credited with its beginnings.. In the 16th and 17th centuries. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically, and clearly in his book *Esprit des Lois* (The Spirit of the Law), published in the year 1748.²

2.2.1 Concept of Separation of Powers in Vedic India

Although Aristotle and Montesquieu are credited with discovering the separation of powers, the Vedas are the source of this concept. Such a division may be seen if we examine the Smritis, the earliest source of law, or Dharma. We trace the entire notion of separation of powers back to Narad Smriti. Kazi headed the judiciary during the period, Senapati handled law and order, and Deewan led the executive branch of any legacy. However, we must remember that they are all under the King, who was the ultimate power and the one who enacted laws, making him comparable to the current legislative branch. In summary, the findings indicate that authority was divided in one region or legacy throughout the ancient era as well. King is seen as the ultimate authority, even if his roles and responsibilities are distinct.

2.2.2 Aristotle's Theory

"Every constitution consists of three parts, and a wise lawmaker must take each one into account. As they differ from one another, so do constitutions; when they are well-ordered, so is the constitution. One component discusses matters about public policy; a second considers judges, including what they should be, how they should be chosen, and over what they should have jurisdiction. The third component deals with judicial power."³

2.2.3 Montesquieu's Doctrine

France had a complete and complete monarchy during the eighteenth century. The dictatorial powers of Louis XIV were widely recognized. The King and his officials were behaving irrationally. The Subject had absolutely no rights or freedoms. In addition to being greatly influenced by Locke's liberal ideas, Montesquieu built his theory on a reading of the

² Justice. C.K.Takwani, "Lectures on Administrative Law, Separation of Powers. 35, EBC Publication, 7th Edition, 2022.

³ Aristotle- Politics- Book 4- Part XIV.

British Constitution in the early eighteenth century. The separation and functional independence of the three government agencies from one another, in his opinion, constituted the Englishman's liberty.⁴

According to Montesquieu, the concept of separation of powers refers to the division of the government into three parts, each of which is independent of the others but dependent on the others for the smooth functioning of the state and its constitutional machinery. One of the fundamental principles of the Indian constitution is the Montesquieu theory, which is visible in several of the articles. The division of responsibilities among the three organs is outlined in the Indian constitution. It may be claimed that each country applies a modified version of the theory, which is supported by the majority of them, though in a diluted form. It will not be possible to apply the concept in its strictest form. Give the organs absolute authority, and they may become autocrats. As a result, there is no space for doubt, and each department of government is given some autonomy.

As per Montesquieu: *“There won't be any liberty if the legislative and executive branches are consolidated under one person, body, or magistrate. Also, there will be no liberty if the judiciary is not separate from the Executive and Legislative powers. When it joins with the Legislative power, the life and liberty of the people would be exposed to arbitrary or dictatorial control, for the judges would become the legislators. When it joins with the Executive power, the judge might behave with violence and operation. Everything would come to an end if the same person or body exercised these three abilities.”*⁵

- No one or anybody should use all three types of power.
- No individual shall serve in more than one capacity within any of the three branches of government.
- No government organ should impede the operations of any other government organ.
- No branch of the government shall perform duties that have been delegated to another

⁴ Justice. C.K.Takwani, *“Lectures on Administrative Law, Separation of Powers. 36, EBC Publication, 7th Edition, 2022.*

⁵ Justice. C.K.Takwani, *“Lectures on Administrative Law, Separation of Powers. 36, EBC Publication, 7th Edition, 2022.*

branch.

- Neither the legislative nor the executive branches may ever exercise their respective judicial or executive powers, and neither the executive nor the legislative branch may ever exercise its judicial or executive powers.

2.2.4 Wade and Phillips Theory

According to the theory of separation of powers, no one individual should hold more than one branch of the three; also, no branch should exercise control over or interfere with the operations of the other two branches, nor should any branch perform the duties of the other two branches.

To safeguard individual rights, the idea of separation of powers was developed, taking into account the historical prevalence of government violations of these rights. The idea behind the Separation of Powers is that when a single entity wields enough authority, it may turn against its fellow people. One way to stop the misuse of power is to separate the powers. Here are some key elements that highlight the importance of this doctrine: It protects individual liberty and puts an end to dictatorship.

Chapter 3 - Constituent Assembly Debates

3.1 Debates in Constituent Assembly for Adapting the Separation of Powers in the Indian Constitution.

The Constituent Assembly was established to draft our Indian constitution following independence. The Indian constitution incorporates several provisions from other constitutions. For example, Indian federalism borrows elements from American, Canadian, and Australian federalism; the American system's constitutional amendment process is adopted; the British model is followed for the parliamentary form of government; the Australian constitution's center-state financial relationship is borrowed; and the Irish constitution's directive principle of state policy is borrowed.

The division of powers between the government and the judiciary was accepted as a guiding concept of public policy at the time the Constitution was written. It indicates that the Constitution did not provide the whole division of powers among the three branches of government. However, during the constitutional amendment process, Mr. K. T. Shah proposed an amendment to add Article 40-A complete separation of powers to the Indian constitution. He believed that total power separation between the three main branches of government would be ideal, and he explained this belief as;

“You will obtain some degree of independence, for example, between the Judiciary and the Legislature or between the Judiciary and the Executive, if you preserve the whole independence of all three. This is crucial, in my opinion, to preserving the subject's liberty, civil liberties, and the rule of law. If there was a 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 would be guided much more by Party influence than by the intrinsic merits of each case. In a democratic assembly, party considerations will always have a greater effect on the Legislature than moral ones.”⁶

A member of the Constituent Assembly named Kazi Syed Karimuddin fully agreed with Prof. K.T. Shah's amendment. He made a strong case in his submission that a non-parliamentary system of government is essential for achieving complete peace and tranquility in the nation

⁶ Constituent Assembly Debates Book No.2, Vol. No. VII, Para 14 (7.71.14).

because, in a parliamentary system, ministers are the legislature's slaves and must rely on their existence. Though he opposed the parliamentary system of governance, he supported the total separation of the three branches of the government.

Prof. K.T. Shah's suggestion was met with disapproval by Constituent Assembly member Shri K. Hanumanthiya. He said that the Drafting Committee had approved the Parliamentary form of government as appropriate for this nation and that Prof. Shah was a proponent of the Presidential Executive modification. He said, *"I respectfully listened to Prof. Shah's defense of his amendment. I fear the new clause he has moved is completely out of tune with the constitutional structure that this House has proposed and the Drafting Committee has adumbrated. We in this House have given our approval to the parliamentary system of government, and one may argue that Prof. Shah endorses the Presidential executive in his amendment. Of course, we can argue about the merits and demerits of both the systems, but we have come to accept the Parliamentary system to be suitable to this country, and for very good reasons that system seems to be better adapted to conditions in India than the Presidential executive. I think instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we, as he says, completely separate the executive, judiciary, and legislature, conflicts are bound to arise between these three Departments of Government. In any country or any Government, conflicts are suicidal to the peace and progress of the country. Peace is the primary basis for a government or society to function, and if there is division not just partial separation, as Prof. Shah desires then disputes between these three government departments are certain to occur. As a result, I argue that "harmony" as opposed to this triple conflict is essential in a governmental framework.*⁷

Prof. Shibban Lal Saksena had the same opinion as Shri K. Hanumanthiya.

For two main reasons, the majority of the participants in the constituent assembly believed that a complete separation of powers should not be included.

1. Since the constitution has already been created and any revision would alter the entire framework of the document, it is too late to reform this kind of concept.
2. In addition, we have chosen the parliamentary system of governance over the American one. The British system offers greater authority, and given the British tradition of

⁷ Constituent Assembly Debates Book No.2, Vol. No. VII, Para 27 (7.71.27).

separating powers throughout history, it makes sense to avoid adopting total separation like the American system.

One of the main architects of the Indian Constitution, Dr. B.R. Ambedkar, disagreed with Prof. K.T. Shah's position and argued as follows: *“There is no dispute whatsoever that the executive should be separated from the judiciary. The separation of the executive from the legislature, such a separation does indeed exist in the Constitution of the United States; but many Americans themselves were quite dissatisfied with the strict division between the legislative and executive branches that is reflected in the US Constitution. The work of Parliament is so vast and complex, in my opinion as well as the opinions of many Political Science students, that it would be extremely difficult for Members of Parliament to continue the work of the Legislature unless they received direct direction and initiative from the Executive while they were seated in Parliament. Therefore, in my opinion, there won't be any significant losses if we don't follow American practice and divide the Executive from the Legislature.”*⁸

The Hon'ble Dr. B. R. Ambedkar stated that he could not support this modification as the separation of the government and judiciary has been recognized as a directive principle of state policy. The members rejected the piece of literature that the vice president had submitted for vote. It is now obvious that the Indian constitution does not uphold a strict division of powers, except Article 50, which serves as a guiding principle.

The move to add a new Article 40-A in the Indian Constitution addressing the separation of powers was rejected, in light of the factors mentioned above.

⁸ *Constituent Assembly Debates Book No.2, Vol. No. VII, Para 45,46 (7.71.45,46).*

Chapter 4 - Indian Constitution on Separation of Powers

4.1 India's Constitution's Separation of Powers

One would be misled to conclude that India accepts the idea of the separation of powers after reading the country's constitution. As per the Indian Constitution, the President holds the executive authority, the Parliament holds the legislative power, and the judiciary has the judicial power. The President is in office for a specified amount of period. The Constitution explicitly outlines his duties and authority. The legislative authority of the Parliament is unrestricted and it can enact any legislation, subject to the restrictions of the Constitution. In the same way, neither the legislative nor the executive branch may interfere with the judiciary's ability to carry out its separate duties. Simultaneously, the Court is not authorized to assume any role that falls under the purview of the other two branches the legislative and the executive. The judicial review powers granted to the Supreme Court and High Courts allow them to declare any statute passed by the Legislature or Parliament to be unconstitutional or extra vires.⁹

However, a close examination of the Constitution's provisions reveals that India does not, in general, recognize the theory of separation of powers in its fundamental sense. The allocation of power among the three branches of government is not addressed in the Constitution itself. The President and the Governors, respectively, hold the executive powers of the Union and the States under Articles 53(1)¹⁰ and 154(1)¹¹ of the Constitution, but no clause in the latter provides the other two organs with the authority to enact laws and administer justice.

The President's legislative authority is broad. After the State legislature is dissolved, he can pass laws, issue ordinances, formulate laws for the State, or make any required amendments. The use of these legislative powers is exempt from judicial review.¹²

Many legislative responsibilities are assigned to the executive branch, but the Parliament still has the authority to enact any legislation that does not conflict with the Constitution. The Parliament also has judicial authority in some situations. It can therefore determine if there has been a breach of its privilege and, if shown, punish the offending party. When a president is

⁹ *Union of India v. Jyoti Prakash*, AIR 1971 SC 1093.

¹⁰ *INDIA CONST*, Article, 53, cl.1.

¹¹ *INDIA CONST*, Article, 154, cl, 1.

¹² *INDIA CONST*, Article, 356.

impeached, one house takes on the role of the prosecutor while the other looks into the allegations and determines whether or not they are true. The latter is entirely a judicial duty.¹³

The judiciary performs all judicial activities, but it also performs some executive or administrative duties.¹⁴ All lower courts and tribunals are subject to supervision by the High Court. Case transfers are another authority held by the Supreme Court and the High Courts. Legislative authority is also vested in the High Courts and the Supreme Court, which establish rules governing their processes for handling cases.¹⁵

Therefore, the Indian Constitution does not entirely follow the theory of separation of powers. We might conclude that the separation of powers concept has not been completely adopted in any of the countries because it is undesirable and unworkable in its strictest sense. The United States Constitution imposes strict adherence to the notion of separation of powers, however, the Supreme Court is increasingly easing its position. Although it isn't shown in practice, it might be assumed that India has accepted the idea of separation of powers based on an overview of the constitution.

4.1.1 Indian Constitution: the Executive and the Legislature

The Supreme Court acknowledged the Indian Legislature's better position than the other government bodies soon after Independence. As Justice S.R. Das said in the well-known case of *A.K. Gopalan v. State of Madras*¹⁶ *"Despite the limitations it has imposed, our Constitution has made our Parliament and State Legislatures the most important bodies in their respective fields.. Subject to certain restrictions, our Constitution has generally favored the Legislature's primacy over the Judiciary's because the Court lacks the jurisdiction to contest the logic or intent of the legislation that the relevant Legislature has properly enacted. And the Court should not ignore this fundamental reality."*

*Art. 52 says that there shall be a President of India.*¹⁷

Art. 53 says that the executive power of the Union shall be vested in the President and shall be

¹³ M.P Jain, *Indian Constitutional Law 56* (Wadhwa and Company, Nagpur, 5th Edition,, 2005).

¹⁴ INDIA CONST, Article, 227.

¹⁵ INDIA CONST, Article, 125.

¹⁶ 1950 SCR 88.

¹⁷ INDIA CONST, Article, 52.

*exercised by him either directly or through officers subordinate to him by this Constitution.*¹⁸

Art. 53(3) says that nothing in this article shall-

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

*(b) prevent Parliament from conferring by law functions on authorities other than the President.*¹⁹

The President is the one who signs all executive orders issued by the Union government. On the Prime Minister's recommendation, he chooses representatives of the Prime Minister, the Central Government, and the Council of Ministers. On the Chief Justice of India's recommendation, he appoints the Chief Justice as well as the judges of the Supreme Court and High Court. He selects the Chief Election Commissioner and other Election Commissioners, the Attorney General of India, the Controller and Auditor General of India, the Governors of the states, the members of the Finance Commission, and the ambassadors.

The President enjoys legal immunity in matters of adjudication. He has the authority to remise, commute, or reprieve punishment. A two-thirds majority of the members in both houses must vote for the President to dismiss the judges. The President may request the Supreme Court's advisory opinion when faced with a legal issue or a significant public concern. He might or might not agree with that viewpoint, though.²⁰

The President can dissolve the Lok Sabha and call a meeting of both houses of Parliament. However, he can only exercise these powers by the Prime Minister's Council of Ministers' advice. Every year, the President gives the inaugural speech to introduce the new government policies and plans at the start of the first session of Parliament. The President's approval is required for a measure approved by the Parliament to become law. He can send a measure back to the Parliament for review, but not when it comes to money bills. However, the President

¹⁸ INDIA CONST, Article, 53.

¹⁹ INDIA CONST, Article, 53, cl. 3.

²⁰ Dr. APJ Abdul Kalam, "Harmonious Relationship among Legislature, Executive and Judiciary", 32 Indian Advocate (2005).

must sign the bill if the Parliament returns it after review. When the Parliament is not in session, the President may also enact ordinances, but they must be confirmed within six weeks.

Nonetheless, the study mentioned above does not support the claim that the connection between the legislative and the executive branch is exempt from the idea of separation of powers. A superior application of the theory is necessary in certain ambiguous areas, aside from possessing such stated powers. Maintaining the separation of powers between the legislative and the executive is essential. Legislators frequently use their authority to oversee executive boards and agencies of different types, as well as their participation in executive committees that choose recipients of social benefits and make contract awards, to exert control over the executive branch.

The yearly budget that is given to lawmakers to conduct activities inside their constituencies is a covert form of executive power. Despite consulting with the Prime Minister before appointing the Council of Ministers, the President often follows the Council of Ministers' counsel and recommendations. This demonstrates clearly how little and insignificant the domain of his freedom is. *The executive head must act in line with the assistance and advice provided by the cabinet, as stated in Article 74(1) of the Indian Constitution.*²¹

4.1.2 Indian Constitution: the Judiciary and the Executive

The relationship between the government and the judiciary has always been a divisive subject of study. The separation of the executive from the judiciary is always necessary for a democratic society governed by the rule of law. There is always a chance that the executive may violate the rule of law. It is in this context that a clear distinction between the two organs of government is necessary for the proper operation of a democracy. The administration of justice is the judiciary's fundamental duty, and justice cannot be properly administered without fear or favor unless the judiciary and the executive branch are separated.

Article 50 of the Indian Constitution provides that “*The State shall take steps to separate the judiciary from the executive in the public services of the State.*”²² The founders of the Constitution intended for modifications to be made whenever practicable. These changes must

²¹ INDIA CONST, Article 74, cl, 1.

²² INDIA CONST, Article, 50.

be made quickly and without delay. If this concept cannot be immediately implemented, it will nonetheless be recognized as a fundamental commitment.

Theoretically, it is always a good thing when the judicial and executive branches are kept apart. The goal is always to ensure that the judiciary upholds the Rule of Law and does not make decisions on cases under the influence of the executive branch. However, the actual problem is in the practical aspects, where the separation becomes a significant issue. The Indian Constitution's founders were always aware of the judiciary's inherent limitations due to its position during British rule. The two organs' independence is put at risk by these judicial constraints. Therefore, it is argued that it is challenging to establish the judiciary's independence from the executive because of the likelihood that the executive's growing authority would upset the delicate balance that the Indian judiciary depends on.²³

It is without question that courts are not fit to govern. Should it attempt to do so, the whole intent of the Constitution would be compromised.

4.1.3 Indian Constitution: the Judiciary and the Legislature

The Union Judiciary provisions of Chapter IV of Part V of our Constitution demonstrate the connection between the Legislature and the Judiciary. *Article 212 of the Indian Constitution states that the Court may not investigate the actions of the Legislature,²⁴ whereas Article 122 states that the Court may not examine the legitimacy of any proceedings in Parliament due to any procedural irregularities.²⁵* However, there have been some persistent legal irregularities in the past. The most notable were the Jharkhand Assembly case in 2005 and the widely publicized Jagdambika Pal case involving the Uttar Pradesh Assembly in 1998. In both cases, the Supreme Court's Interim Order violates the notion of the separation of powers between the Legislature and the Judiciary in a justifiable manner. The legislature accuses the judiciary of doing the duties of the governing body, while the judiciary condemns the legislature for accomplishing little constructive during the past few decades.

A few instances show that the judiciary and parliament sometimes had greater authority over revision control. The 42nd Amendment Act of Parliament remarkably altered the Constitution's

²³ J.C.Khurana, "Separation of the Judiciary from the Executive", 3 *Journal of Bar Council of India* (1974).

²⁴ *INDIA CONST, Article, 212.*

²⁵ *INDIA CONST, Article, 122.*

provisions. *The amendment changed Article 368, which grants the Parliament the authority to alter the Constitution, to the point that any further changes would be untouchable in a court of law. The legislature had the upper hand in terms of authority.*²⁶

In the end, the Supreme Court decided in *Minerva Mills v. Union of India*²⁷ that the Parliament could not abolish "judicial review" as it is an essential component of the Constitution. Apart from this, there are a few instances where the judiciary has fulfilled the legislative job without taking into account the practical issues and financial imperatives. It has even gone so far as to formulate policies and guidelines.

4.2 Theory of Checks and Balance

The successful operation of the three branches of government depends on the checks and balances system. It ensures that no branch of the government grows to be excessively dominating. As an illustration, the legislative branch enacts laws, the executive branch signs them into law, and the judiciary branch has the authority to declare legislation unconstitutional and prevent it from becoming law. Judges who are not doing their duties effectively may potentially be removed by the legislative branch. The executive branch appoints judges, and the legislative branch gives its approval. Once more, the branches counterbalance one another to prevent any branch from gaining excessive authority.

This is how the checks and balances idea is explained. In the context of India alone, three government agencies have been given varied but non-absolute powers. Each of the three has its authority and purpose, but if one of them violates a provision of the Constitution in a particular way, another may interfere with that purpose.

Regarding the checks and balances, the Indian Supreme Court has held that *“where an Act made by State legislature is invalidated by the courts on the ground that in addition to lacking the authority to do so, the State legislature is unable to pass legislation overriding or annulling a court ruling or proclaiming that the judgment of the court will not be implemented. Nevertheless, this does not preclude the legislature, which possesses the authority to pass such legislation, from doing so. Complying with the constitutional restriction, a legislature may also change the judgment's foundation. When such happens,*

²⁶ INDIA CONST, Article, 368.

²⁷ AIR 1980 SC 1798.

*the court's ruling is rendered null and void. The new law cannot be challenged on the ground that it seeks to circumvent the decision of the Court. The Court observed that this is what was meant by "checks and balances" inherent in a system of Government incorporating the concept of separation of powers."*²⁸

Chapter 5 - Advantages and Disadvantages of Separation of Powers

5.1 Advantages of Separation of Powers

The duty is distributed among the three groups due to the division of the functions. When multiple teams, efficiency increases, and more work gets done in less time. It is essential to the state's efficient operation. The three organs appoint experts on the topic. Because the experts are competent to manage tasks entrusted to them under distinct organs and because they work under their respective organs, the job they accomplish is guaranteed to be exact and correct. The division of the tasks and functions makes it easier to identify and distinguish between the labour and skill requirements. Given the unique differences and the check-and-balance mechanism.

The division establishes an organized system for governing the nation. The distinct separation assists in eliminating work overlap, which prevents interference with the work of others. Additionally, since each organ is responsible for its task, the elimination of overlap also eliminates competition. Because it offers a vital system of checks and balances that prohibit the concentration of authority, the division of powers is crucial. It aids in the removal of tyranny, authoritarianism, and arbitrariness and supports a democratic and responsible system of governance. It strengthens the responsibility and authority that various branches have over one another, or the checks.

It is referred to as "balancing" because it distributes power throughout the many branches of government rather than concentrating it in one place. It stops power abuse and protects everyone's freedom since unchecked power in the hands of one individual or organization can result in the repression of others and the limitation of their rights and freedoms. It imposes restrictions on the abuse of authority within the several branches of government by clearly defining the bounds and restrictions of each branch. To increase and improve the effectiveness

²⁸ *P. Kannadasan & Ors. v. State of Tamil Nadu 1996(5) SC 670.*

of the government, it also permits each of the three branches to focus on their areas of expertise. According to this theory, one branch of government might usurp the authority of another.

As a result, the idea of the separation of powers is seen as a fundamental component of democracy as it guards against the abuse of authority and advances equality and liberty.

5.2 Disadvantages of Separation of Powers

The doctrine of separation of powers proposes that the legislative, executive branch, and judiciary roles of the legislative, executive branch, and judiciary are distinct and not represented in actuality. As the system of checks and balances, the three roles do overlap. However, this clause could lead to increased efficiency and competitiveness. The division might result in conflicts and deadlocks between the two organs. It is impossible to concentrate one type of power under one body, both in theory and in actuality. Therefore, the concept is both unfavorable and impracticable in the strictest sense.

Chapter 6 - Judiciary on Separation of Powers

6.1 Judicial Approach to Separation of Powers

The Indian judiciary has occasionally faced difficult obstacles in upholding the doctrine of separation of powers. However, while preserving the aforementioned doctrine, the court has produced significant rulings over the past six decades that demonstrate the judiciary's independence and effectiveness in India.

*Ram Jawaya v. State of Punjab*²⁹ was the first significant judgment given by the judiciary regarding the doctrine of separation of powers. "In the aforementioned case, the court expressed its opinion that India did not completely adopt the doctrine of separation of powers. Mukherjee J. observed that although the Indian constitution does not fully acknowledge the theory of separation of powers, the several branches of government have their respective responsibilities split."

In *I.G. Golak Nath v State of Punjab*³⁰ In the opinion of Subba Rao, C.J., the union, the state, and the union territories are three separate constitutional entities that are brought into existence by the constitution. Moreover, it creates the three main branches of government: the legislative, executive, and judicial. It clearly defines their area of responsibility and expects them to carry out their duties within those boundaries—that is, inside the spheres assigned to them.

It clearly defines their area of responsibility and expects them to carry out their duties within those boundaries that is, inside the spheres assigned to them.

The Hon'ble Supreme Court then delivered the most significant landmark decision in *Keshvananda Bharti v. Union of India*³¹ "The court concluded that the legislature's modifying powers did not apply to the basic structure of the constitution. Therefore, any modification that is likely to compromise on these fundamental elements will be declared invalid and unlawful. Beg, J. held that the fundamental framework of the constitution includes the division of powers.

²⁹ AIR 1955 SC 549.

³⁰ AIR 1967 SC 1643.

³¹ AIR 1973 SC 1461.

The roles delegated to one of the three separate organs of the state cannot be assumed by another.”

Next in **Indira Gandhi Nehru v. Raj Narain**³² “*The Supreme Court ruled in a case involving a disagreement over the election of the prime minister that parliament, even with the authority to amend the constitution, cannot resolve specific disputes via the exercise of its judicial duty. In other words, the legislature lacks the authority to carry out tasks that other organs of government should perform, as doing so would lead to tyranny due to the overlapping of the three democratic republican organs' respective jurisdictions.*”

Bandhua Mukti Morcha v. Union of India³³ “*Pathak J. It is usual for the Legislature to establish laws, the Executive to carry them out, the Court to interpret them, and in the process, to decide if executive conduct is lawful and, by our Constitution, even to decide whether the legislation itself is lawful. However, it is widely acknowledged that the legislature has some judicial authority in a particular area, the executive branch has some legislative and judicial authority, and the court, in carrying out its legal interpretation duties, perfectly executes a small amount of legislative activity. However, our Constitution anticipates a delicate and tight equilibrium between these fundamental State institutions.*”

I.R. Coelho v. State of Tamil Nadu³⁴, “*In the Kesavananda Bharati case, the Supreme Court upheld the basic structure doctrine's decision. It concluded that the Constitution's Ninth Schedule violates this doctrine and, as a result, will be subject to judicial review going forward, thereby becoming a part of the basic structure doctrine.*”

From the aforementioned few case laws, it can be presumed that there has been a significant shift in opinion. Initially, the court believed that the Indian Constitution did not recognize the doctrine of separation of powers. However, over time, the Supreme Court's opinion also changed, acknowledging the doctrine as a fundamental component of the Constitution.

³² AIR 1975 SC 2299.

³³ 1984 3 S.C.C. 161.

³⁴ AIR 2007 SC 861.

Chapter 7

Conclusion

The Constitution is the supreme law. No organ should perform functions beyond those specified by the Constitution. One of the most important aspects of the Separation of Powers Constitution is something that the legislative, executive branch and courts must all scrupulously abide by. Without a doubt, a more comprehensive interpretation is required, and there is sufficient space to support it.

The noble ideal of the constitutional system must be upheld, and this can only be done by putting it into reality. The separation of powers practice and the Constitutional design differ significantly. The three branches of government and their respective roles were also outlined by the founding fathers in the Constitution. They had concluded that the government could never attain total separation of powers since it was an organic body.

Therefore, striving for total separation of powers is like speaking in a vacuum. That does not, however, imply that any branch has supreme authority; rather, it means that each branch must respect its constitutional bounds. The Executive has become incredibly strong in recent years, which has undoubtedly resulted in widespread power abuse.

The judiciary and legislature have kept an eye on government officials, but the media and non-governmental organizations have been crucial in bringing their wrongdoings to light. The three organs' ultimate goal is to uphold individuals' rights. In a democracy, those who take initiative will contribute to maintaining order and discouraging the abuse of authority. The harmony of the three organs is necessary for our success. Instead of a division of powers, they follow a division of tasks in India. As a result, we disregard the idea because of its rigidity.

Even if India does not adhere to a strict separation of powers, its doctrine includes the idea of "checks and balances." Because the vital tasks of the bodies are so deeply ingrained in the theory of the "basic structure," none of the three organs may usurp them, not even by constitutional amendment. Should such an adjustment be made, the court would have to declare it unconstitutional.

Chapter 8

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