
DYNAMIC FRAMEWORK: INDIA'S CONSTITUTIONAL GOVERNANCE, SEPARATION OF POWERS, AND JUDICIAL ACTIVISM

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ABSTRACT

The article presents a comprehensive examination of the key themes and concepts discussed in the paper titled "Separation of Power and Judicial Activism." It delves into various dimensions, encompassing historical origins, the separation of powers doctrine, India's constitutional status, judicial activism, and its ramifications. A significant portion of the article is dedicated to tracing the historical roots of these concepts, tracing them back to the early ideas of Aristotle and Montesquieu and their subsequent evolution in British constitutional history. The relevance of these principles in contemporary democratic governance is underscored, emphasizing their enduring importance. The doctrine of separation of powers takes center stage in the article, as it elucidates its aims: preventing authoritarianism, safeguarding individual liberties, and preserving the judiciary's independence. The three core principles of this doctrine are expounded upon, with a focus on delineating the distinct functions of each branch, advocating for non-interference, and promoting adherence to their respective mandates. The examination of the constitutional status of power separation in India is meticulous, incorporating references to key provisions and landmark court cases that have shaped the country's legal landscape. The system of checks and balances is explored, with a particular emphasis on the judiciary's pivotal role in reviewing and invalidating unconstitutional legislation. The article introduces the concept of judicial activism, delving into both its positive and negative dimensions. The evolution of judicial activism in India is traced, with a comprehensive exploration of its application in significant cases and a critical analysis of the potential for judicial overreach. In its conclusion, the article underscores the paramount importance of striking a delicate balance between the separation of powers and judicial activism to sustain a robust democratic system. It highlights how achieving this equilibrium is crucial for upholding individual rights, fostering effective governance, and ensuring the rule of law within the constitutional framework of India. In

essence, the article serves as a comprehensive guide to understanding and appreciating the intricate interplay of these vital concepts in the Indian legal and political landscape.

Keywords: Constitutional law, Separation of Power, Judicial Activism, Organs of Government.

1: Introduction

A.1. History

This concept was first seen in Aristotle's works in the 4th century BCE, when he described the three branches of government as the General Assembly, Public Officials, and Judiciary. A similar approach was seen during the Roman Empire.

Montesquieu introduced the doctrine of separation of power, stating the absolute status of the executive, legislature, and judiciary. Aristotle, the first to write about it, divided it into three branches: deliberative, executive, and judicial. He explained that constitutions have three elements: deliberate public affairs, magistrates, and judicial power.¹

In the 18th century, Locke and Montesquieu analyzed the doctrine of separation of powers in British constitutional history. The King and Parliament had a long war, leading to legislative supremacy and the Bill of Rights. The King recognized legislative and tax-paying members and judicial powers. Currently, England follows a parliamentary form of government, without this separation. However, the King still exercises executive powers, Parliament holds legislative powers, and courts exercise judicial powers.

The separation of powers, also known as *trias politica*, is a model for democratic state governance, first developed in ancient Greece and adopted by the Roman Republic. It divides the state into branches with separate and independent powers, such as an executive, legislature, and judiciary. The opposite is the fusion of powers, often seen in parliamentary democracies, where the executive, often consisting of a prime minister and cabinet, is drawn from the legislature. This principle of responsible government ensures that the legislative and executive branches are connected, but there is often an independent judiciary. The government's role in

¹ Aristotle- Politics- BOOK 4- Part XIV

parliament does not grant them unlimited legislative influence.²

A.2. The Legislature, The Executive and The Judiciary.

What is the Legislature?

The legislature's primary function is to enact legislation.

- It serves as the foundation for both the organs—the executive and the judiciary.
- It is also sometimes given priority among the three organs because there can be no implementation or application of laws unless and until laws are enacted.

What is the Executive?

The executive organ oversees putting the legislature's laws into action and enforcing the state's will.

- It is the government's administrative head.
- Ministers, including prime ministers and governors, are members of the executive.

What is the Judiciary?

The judiciary is the branch of government responsible for interpreting the law, resolving disputes, and providing justice for all citizens.

- The judiciary is regarded as the protector of democracy and the keeper of the Constitution.
- It is made up of the Supreme Court, High Courts, District Courts, and other lower courts.

2: Doctrine of Separation of Power

“Power corrupts and absolute power corrupts absolutely.” – Lord Acton

² Legislative Influence available at: <http://www.legalserviceindia.com/article/116-Separation-Of-Powers.html> (last visited on September 25, 2023)

When power is concentrated in one center or authority, the likelihood of maladministration, corruption, nepotism, and abuse of power increases. This principle prevents authoritarianism from infiltrating a democratic system. It safeguards citizens from arbitrary rules.

Separation of powers splits the governance process into three branches: the legislative, executive, and judiciary. Although different authors provide different definitions, we can generalize three aspects of this philosophy.

The Theory of Separation of Powers denotes three concepts for categorizing government powers:

1. Each organ should have different people in charge of it; for example, a person with a function in one organ should not be a part of another.
2. One organ should not obstruct the functioning of the others.
3. One organ should not perform the function of another (they should only do their mandate).

Separation of powers refers to the division of authority for specific government responsibilities. All the government's powers have been divided into three broad categories:

1. The creation of laws,
2. The interpretation of those laws, and
3. Their execution; specifically, legislative, judicial, and executive.

Government has been believed to be made up of three branches, each with their own set of functions, and this classification is known as classical division.

As a result, the significance of the Separation of Powers doctrine can be summarized as follows:

1. Keeps autocracy at bay.
2. Individual liberty is protected.
3. Aids in the creation of an effective administration.

4. The independence of the judiciary is preserved.
5. Prevents the legislature from passing irrational or unconstitutional legislation.

B.1. Importance of the Separation of Power

The objective of separation of powers is to avert power abuse via a single entity. It will protect society from the state's arbitrary, unreasonable, and tyrannical powers, ensure freedom for all, and assign each function to the appropriate state organs for effective discharge of each one of their responsibilities.

B.2. Montesquieu on Separation of Power:

Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, also known simply as Montesquieu, was a French judge, writer, and political philosopher. He is the primary source of the separation of powers idea, which is used in many constitutions around the world.³

"When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty," he believes, "because apprehensions may arise, lest the same monarch or Senate execute exact tyrannical laws in a tyrannical manner." Again, there is no liberty unless the judicial power is distinct from the legislative and administrative powers. Where it joined the legislative, the subject's life and liberty would be susceptible to arbitrary control, for the judge would then be a legislator. Where it is combined with executive power, the judge may act violently and oppressively. There would be a stop to everything if the same man or same body, whether of the nobles or of the people, exercised the three functions of exacting laws, executing public decrees, and pursuing individual causes.⁴

In a nutshell, Montesquieu submission is the division of powers by function, and the theory that emerged from it is known as the separation of powers. The current notion of separation of powers was a key component in 18th-century political philosophy.⁵

³ Montesquieu on Separation of Power available at: <https://byjus.com/question-answer/doctrine-of-separation-of-powers-was-propounded-by/#> (last visited on October 03, 2023)

⁴ p. 31, Thakker. C.K., Administrative Law, (1992), Eastern book company

⁵ 1951 AIR 322: 1951 SCR 747

3: India's Constitutional Status of Power Separation

C.1. Constitutional Status of Separation of Power in India

Although not explicitly stated, the doctrine of separation of powers is part of the basic structure of the Constitution⁶. The legislature can't enact legislation that violates this principle. The Constitution specifically mentions the responsibilities of the three organs.

Ram Jawaya Kapoor V State of Punjab (1955)⁷: held that, while the Indian Constitution did not recognize the doctrine of separation of powers in its absolute rigidity, the functions of the various parts or branches of government had been sufficiently differentiated, and thus it can be effectively argued that our Constitution does not contemplate the presumption by a single body or section of the state of functions that essentially belong to another.

Let us examine some of the provisions of the Indian Constitution that advocate for separation of powers.

Article 50: This article requires the state to keep the judiciary separate from the executive. However, because this is a violation of the Directive Principles of State Policy, it is useless.⁸

Article 123: As the country's executive head, the President has the authority to execute legislative powers (promulgate ordinances) under certain conditions.⁹

Articles 121 and 211: stipulate that legislatures may not debate the conduct of a Supreme Court or High Court judge. They can only do so in the case of impeachment.¹⁰

Article 361: The President and the Governors are immune from legal proceedings.¹¹

Indira Nehru Gandhi V Raj Narain (1975)¹²: Ray, CJ, observed that the Indian Constitution only has a broad separation of powers. A strict separation of powers, as in the American or Australian constitutions, is not applicable to India. The Court also ruled that adjudication of a

⁶ Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225; AIR 1973 SC 1461

⁷ AIR 1955 SC 549, 1955 2 SCR 225

⁸ The Constitution of India, art. 15.

⁹ The Constitution of India, art. 123.

¹⁰ The Constitution of India, art. 121, 211.

¹¹ The Constitution of India, art. 361.

¹² 1975 AIR 1590, 1975 SCC (2) 159

specific dispute is a function of the judiciary that Parliament, even when acting under a constitutional amending power, cannot perform. Apart from the difficulties inherent in enforcing the strict doctrine of separation of powers in modern government functioning, there is also an inherent problem in defining the separation of powers into executive, legislative, and judicial.

There's a system of **checks and balances** in place in which all three organs impose checks on each other through various provisions.

- The judiciary possesses the authority to review the actions of both the legislature and the executive.
- According to Article 13, the judiciary has the authority to overturn any law approved by the legislature if it is deemed unconstitutional or arbitrary (if it infringes on fundamental rights).
- It may also nullify unconstitutional executive actions.
- The legislature also examines the executive's performance.
- Despite the fact that the judicial system is independent, the judges are appointed by the president's office.
- The legislative body can also change the basis of the decision while staying within the constitutional limits.

Checks and balances guarantee that no single organ gains too much power. The Constitution ensures that any discretionary power conferred on any organ is consistent with democratic principles.

P Kannadasan V State of Tamil Nadu (1966)¹³: It was held, “the Constitution has invested the Constitutional Courts with the power to invalidate laws made by Parliament and the state legislatures transgressing Constitutional limitations. Where an Act made by the legislature is invalidated by the Courts on the basis of legislative incompetence, the legislature cannot enact a law declaring that the judgement of the Court shall not operate; it cannot overrule or annul

¹³ 1996 5 SCC 670

the decision of the Court. But this does not mean that the legislature which is competent to enact the law cannot re-enact the law. Similarly, it is open to the legislature to alter the basis of the judgement. The new law or the amended law can be challenged on other grounds but not on the ground that it seeks to in effectuate or circumvent the decision of the court. This is what is meant by “checks and balances” inherent in a system of government incorporating separation of powers.

C.2. Independence of the Judiciary and Separation of Powers in India

The principles of judicial independence and separation of powers are critical for a country's judicial system to be fair and neutral. This independence stems from England's Act of Settlement, 1701, which established judicial independence. Prior to this, judges were removed by the King's will, and the parliamentary role in removing judges was nonexistent. The Act of Settlement 1701, required judges to follow the King's wishes, ensuring a fair and neutral judicial system. The concept of independence originated in England, with the cases of *Hampden* and *Coke* leading to its enactment.

The term "judicial independence" refers to a fair and neutral judicial system in a country that can afford to make decisions without interference from the executive or legislative branches of government. It means that the judges can render justice in accordance with their oath of office and only in accordance with their own sense of justice, free of any pressure or influence from the executive or legislative branches, the parties themselves, or their superiors and colleagues.

The Indian founding fathers believed that incorporating a complete separation of powers concept was premature because the Constitution had already been written and India had already adopted the British parliamentary system.¹⁴

Prior to independence, the executive had direct control over the criminal magistrates. There was a strong backlash against such a situation. At all levels, the public demanded that the judiciary be separated from the executive. It was vehemently argued that without such a division, the independence of the judiciary at the lower level would be a farce. This is the concept that was incorporated into the article 50 on the Indian constitution.¹⁵

¹⁴ CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS)- VOLUME VIII available at: <https://loksabha.nic.in/writereaddata/cadebatefiles/C23051949.html> (last visited on September 07, 2023)

¹⁵ Indian Constitutional Law by M.P. Jain, pg 1393, para.4

Because the primary function of the judiciary is to protect the constitution, only an independent judiciary can protect the rights that enable the rule of law to be achieved.

The primary role of the judiciary is to protect the constitution, and an independent judiciary is essential for achieving rule of law. Article 50 of the Constitution separates the executive from the judiciary, ensuring judicial independence from the executive. This independence principle is based on the belief that if the executive controls the judiciary, the people's rights may be jeopardised, and the judiciary will operate solely in accordance with the executive's decisions. The executive is the head of the state in India's parliamentary form of government, and it has the ability to abuse discretionary power, resulting in chaos and a lack of pure justice. According to the Supreme Court of India, the constitutional scheme aims to ensure an independent judiciary, which is the foundation of democracy.¹⁶

In India, the judiciary is autonomous in making decisions about its functions, with no government organ interfering in its task of delivering justice. Independence of judiciary has been recognized as a basic structure of the Indian constitution¹⁷. This independence is limited to the delivery of justice, with parliament having the authority to decide on issues such as salaries, privileges, allowances¹⁸, and the number of judges¹⁹. Fazal Ali, J., stated in **S.K. Gupta v. President of India**²⁰ that the concept of independence should be confined within the four corners of the constitution, allowing for separate powers and functions of the judiciary. This independence has been adopted as a guiding principle for Article 50²¹.

C.3. Relationship between the Legislature and the Judiciary

Even though the executive and judicial branches' functions are clearly laid out in the Constitution, the process of checks and balances guarantees that each can impose checks on the other.

- The judiciary has the authority to overturn laws that it deems unconstitutional or

¹⁶ A.C. Thalwal v. High Court of Himachal Pradesh (2040) 7 SC 1 : AIR 2000 SC 2732

¹⁷ Kumar Padma Prasad v. U.O.I. AIR 1992 SC 1213

¹⁸ The Constitution of India art.125 (1) - there shall be paid to the Judges of the Supreme Courts such salaries as may be determined by the parliament.

¹⁹ The Constitution of India art.216

²⁰ AIR 1982 SC 149

²¹ The Constitution of India art.50 - the State shall take steps to separate the judiciary from the executive in the public services of the State.

arbitrary.

- The legislature, for its part, has protested judicial activism and attempted to craft legislation to circumvent certain rulings.
- The doctrine of separation of powers is said to be violated by judicial activism.
- In some cases, the courts have issued laws and policies through judgements. For example, the Vishakha Guidelines, in which the Supreme Court issued sexual harassment guidelines
- In 2010, the Supreme Court directed the government to begin distributing food grains.
- Judicial overreach occurs when the judiciary exceeds its mandate and enters the territory of the legislature or the executive.

C.4. Judicial Supremacy and Parliamentary Sovereignty

The Indian constitution employs the following principles to strike a balance between the judiciary and the legislature:

- The British Constitution inspired the doctrine of parliamentary sovereignty.
- The American Constitution inspired the doctrine of judicial supremacy.
- The Supreme Court of India's judicial review power is narrower in scope than the Supreme Court of the United States.
- Article 21 of the Indian Constitution guarantees 'established procedure by law' rather than the 'due process of law' guaranteed by the American Constitution.
- The Indian Constitution has chosen to combine the British principle of parliamentary sovereignty with the American principle of judicial supremacy.
- On the one hand, the Supreme Court can use its judicial review power to declare parliamentary enactments unconstitutional.
- The Parliament, on the other hand, has the constituent power to amend a large portion

of the Constitution.

Kesavananda Bharati Case (1973)²²: In this case, the SC 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 declared unconstitutional.

4: Judicial Activism

Judicial activism refers to court rulings that are based on the judges' political and personal rationality and prudence. It is a legal term that refers to court decisions that are based in part or entirely on the judge's political or personal factors rather than current or existing legislation.

Judicial activism, according to **Black's Law Dictionary**, is a judicial decision-making philosophy in which judges allow their personal views on public policy, among other factors, to guide their decisions.

Judicial activism in India implies that the Supreme Court and the high courts, but not the lower courts, have the authority to declare regulations unconstitutional and void if they violate or are incompatible with one or more constitutional clauses.

According to **SP Sathe**, an activist court is one that gives a new meaning to a provision to suit changing social or economic conditions or broadens the horizons of an individual's rights.

In its early years, the Supreme Court of India was more of a technocratic court, but it gradually became more active through constitutional interpretation. Through its involvement in and interpretation of laws and statutes, the court became an activist, but the process took years and was gradual. The court's premature and early assertions about the essence and nature of judicial review can be traced back to the beginnings of judicial activism.

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²² 1973 4 SCC 225; AIR 1973 SC 1461

D.1. Judicial Activism in India can be Both Positive and Negative.

- A court that is actively changing power relations to make them more equitable is said to be positively activist.
- A court is said to be negatively activist if it uses its ingenuity to maintain the status quo in power relations.

Judicial activism reflects the suggested administrative patterns, namely: expansion of hearing privileges over administrative lapses; expansion of judicial control over discretionary forces; expansion of judicial review over the administration; and extending the conventional translation guidelines in its pursuit of financial, cultural, and academic goals.

D.2. Course of Judicial Activism

For the first decade after independence, judicial activism was almost non-existent; the executive and legislative branches of government actively dominated and intervened in the functioning of the judiciary. The Apex Court began considering the judicial and structural views of the Constitution in the 1970s.

Just two years before the emergency declaration, the Supreme Court of India ruled in the landmark **Kesavananda Bharati**²³ case that the executive had no right to intervene and tamper with the basic structure of the constitution. Though the judiciary was unable to prevent the exigency imposed by then Prime Minister Indira Gandhi, the concept of judicial activism gained traction as a result.

The Supreme Court ruled in **I. C. Golaknath & Ors. vs. State of Punjab & Anrs.**²⁴ that fundamental rights enshrined in Part 3 are immune and cannot be amended by the legislative assembly.

D.3. Landmark cases of Judicial Activism

In **Hussainara Khatoon (I) v. State of Bihar**²⁵, the newspaper articles reflected the inhumane and barbaric conditions of the undertrial prisoners. Many of the prisoners on trial had already

²³ Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225; AIR 1973 SC 1461

²⁴ 1967 AIR 1643, 1967 SCR (2) 762

²⁵ 1980 SCC (1) 98

served the maximum sentence without being charged with the offence. An advocate filed a writ petition under Article 21 of the Indian Constitution. The Supreme Court accepted it, stating that the right to a speedy trial is a fundamental right, and directing state authorities to provide free legal services to under-trial inmates in order for them to obtain justice, bail, or final release.

In another significant case, **Sheela Barse v. State of Maharashtra**²⁶, a journalist wrote a letter to the Supreme Court describing custodial violence against female prisoners. The court treated the letter as a writ petition, took cognizance of the matter, and issued the necessary guidelines to the state's concerned authorities.

The court used its epistolary jurisdiction in **Sunil Batra v. Delhi Administration**²⁷, and a letter written by a prisoner was treated as a petition. According to the letter, the head warden inflicted terrible pain on another prisoner and assaulted him. The Court stated that technicalities cannot prevent the court from protecting individuals' civil liberties.

In some cases, the judicial activism mechanism resulted in judicial overreach. The Indian Parliament has held the judiciary accountable or accused it of intervening and exceeding its constitutional powers.

The Supreme Court ruled in **Supreme Court Advocates-on-Record Association v. Union of India**²⁸ that the National Judicial Appointments Commission (NJAC) Act and the constitutional amendment were unconstitutional, with a **4:1** majority. The act was declared unconstitutional because it interfered with judicial independence. And the existing collegium system for transferring and appointing judges was once again invoked. According to Justice Khehar, the absolute independence of the judiciary from other organs of government protects people's rights.

Lodha Committee report on the Board of Control for Cricket in India: The Lodha Panel was established by the Supreme Court in response to allegations of Indian cricket corruption, match-fixing, and betting controversies. The committee was formed in an effort to restore law and order to the BCCI. The committee recommended that the BCCI be subject to RTI, that cricket betting be legalised, and that only bodies representing states be granted voting rights,

²⁶ 1983 SCC (2) 96

²⁷ (1978) 4 SCC 409

²⁸ (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

while teams such as Railways and Services be given the status of associate members with no voting rights. However, because the BCCI is an independent body not controlled by any state or central government, the Lodha committee had no authority to declare such recommendations.²⁹

Christian Medical College, Vellore & Others versus Union of India and Others³⁰: The Supreme Court prohibited states from holding separate entrance exams for medical programmes and ruled that undergraduate admission to medical programmes could only be done through the NEET. The Supreme Court's rulings on the National Eligibility-Centre Test (NEET), i.e., the single exam for admission to medical colleges, the reformation of the Board of Cricket Council in India (BCCI), the filing of the post of judge, and other issues were viewed as judicial intervention by the government.

When necessary, the judiciary has attempted to regulate itself and place some constraints on its powers. In *Divisional Manager, Aravali Golf Course v. Chander Haas³¹*, The Supreme Court stated that judges must know their limits and must not try to run the government. They must be modest and humble, and they must not act like emperors. The Constitution provides for a broad separation of powers, and each organ of the state—the legislature, the executive, and the judiciary—must respect the others and not encroach on each other's domains.

5. Conclusion

In conclusion, the concepts of separation of powers and judicial activism are critical to the functioning of democratic governance. As we have seen, this concept has deep historical roots, dating back to Aristotle's initial delineation of the three branches of government to Montesquieu's 18th-century articulation of the doctrine. It acts as a vital check on authoritarianism, ensuring the protection of individual liberties, the promotion of effective administration, and the preservation of an independent judiciary.

The constitutional status of the separation of powers is implicit but essential in the context of India. The Constitution defines the roles and responsibilities of the three branches of government—the legislature, executive, and judiciary—as well as a system of checks and

²⁹ Lodha Committee available at: https://en.wikipedia.org/wiki/Lodha_Committee (last visited on October 15, 2023)

³⁰ (2016)4 SCC 342

³¹ (2008) 1 SCC 683

balances. This system allows the judiciary to review and, if necessary, invalidate unconstitutional laws, thereby preventing legislative overreach.

In India, the concept of judicial activism is a two-edged sword that can have both positive and negative consequences. While it has helped to address a variety of social and legal issues, there have been instances of judicial overreach. The ability of the judiciary to interpret and adapt the law to changing societal needs and values is critical, but it must be exercised within the framework of the Constitution and the principle of separation of powers.

To summarize, the principles of separation of powers and judicial activism are essential components of India's constitutional framework. They contribute to the delicate balance between the branches of government, ensuring that no one organ becomes overly powerful while also allowing the judiciary to play an important role in upholding the rule of law and protecting individual rights. Finding this balance is critical to the long-term success of India's democratic system.