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With this thought, we hereby present to you

LEX BONA FIDE: LAW JOURNAL

SEPARATION OF POWER AND THE INDIAN CONSTITUTION

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ABSTRACT

There are three parts of the government which are the executive, the judiciary and legislature which represents the people and their will in a country. They are responsible for the smooth functioning of a democratic government in our society.

The paper deals with the 'Doctrine of Separation of Power' in relation to the Constitution of India. The paper aims to find out the present scenario and the functioning of the separation of power in India. The author highlighted the Doctrine of Separation of Power in Indian Constitution mainly when it comes to the point of Checks and Balance System. It is very crucial for a Democratic country for the smooth functioning of the government to safeguard the overlapping of functions between the executive, the legislative and the judiciary. The Checks and Balance System is very much required so that the three parts of government can function properly and cannot trespass with the confined area of other. With the changing need of the state and society it is important that the reasonable restrictions should be made to the three organs named executive, legislative and judiciary in a department form but not in a watertight department form. The article is limited to the Constitution of India. It specifically focuses on Indian Plan & Practice.

INTRODUCTION

The Indian Constitution has many specific attributes that differentiate it from other constitutions of the world. The Doctrine of Separation of Power was first given by a French scholar known as Montesquieu in the sixteenth century locating the power in the hands of one organ or part in a government demands autocracy. The notion of separation of powers is the introductory element for the governance of a democratic country. In India, there are three well-defined activities in the Government through which the will of the people is conveyed. The legislative part of the state makes laws, the executive part executes those laws and the judiciary applies them to the particular cases or situations arising out of the breach of law. Hence these organs are all

interrelated to each other and their role inclines to overspread with each other and it is not possible to separate these three organs from each other.

Now an important question arises, what should be the relation between these three organs of the state that is if there should be absolute separation of powers between them or there should be coordination between them?

DOCTRINE OF SEPARATION OF POWER

“Power corrupts and absolute power corrupts absolutely.” ^[1]

The separation of powers is the allocation of the Government's political, administrative, and judicial obligations. The intention is to cease the concentration of power and allow for checks and balances. The definition of separation of power can be classified into three features:

- Individuals formulating a part of organs should not formulate the part of other organs.
- One organ should not intervene with the performing of the other organs.
- One organ should not employ the function or task belonging to another organ.

Purpose: The reason behind the doctrine of separation of power came into existence was that if more and more power is conferred in the hands of a single individual or a single body then that power becomes greatly exposed to misuse.

In India, the doctrine of separation of powers has obtained a contemporary proposal and doesn't follow strictly separation of powers both in idea and practice. The idea of separation of powers is based on a trilateral system, in which powers are allocated among the three parts of the government. These powers discover the jurisdiction of each part of the government and those parts of government has to work inside the limits specified by their jurisdiction.

The three organ methods of government as directed by this doctrine are:

the legislative part is essentially accountable for enacting laws and is also known as a rule-making body that conveys the 'will of the state'. The legislative organ formulates the base of the structure and the operation of the executive and judiciary is dependent on it as until a law is formulated, its execution and application are not attainable. The judiciary, in some instances, might act as an advisory organ to the legislature but cannot intervene or control it.

- **Executive**

The executive organ is responsible for the executive and application of laws formulated by the legislature. It also functions as an administrative head of the government and is the boost of the government. A disproportion executive can exhaust the government and might result in its shrink.

- **Judiciary**

Judiciary plays a very important role in any state. The judiciary is bestowed with the power to enforce the laws and make sure that they are being enacted properly. The judiciary is mostly

kept liberated from the other two organs to uphold the proposition of a fair judiciary that is free from any kind of bias or prejudice.

The Constitution lays down the separation of the organs of the state in the following ways:

- **ARTICLE 50** states that the state shall initiate to separate the judiciary from the executive for the service of the public of the state. This is for the sovereignty of the judiciary.
- **ARTICLE 122[1] and 212** states that the rationality of the proceeding in the parliament and the legislatures cannot be questioned in any court. This separates and exempts the legislature from judicial intervention. Judicial performance and conduct of a judge of the Supreme Court and the High Court cannot be discussed in the parliament and the State Legislature, according to articles 121 and 211 of the Indian Constitution.
- **ARTICLE 53 and 154** states that the executive power of the union and the state shall be conferred with the president and the governor and they enjoy exemption from civil and criminal liability.
- **ARTICLE 361** states that the president or the governor who are the executives shall not be answerable or accountable to any court of law for the exercise and performance of the powers and obligations of his office.

By looking into the following provisions mentioned above, it is obvious that the Constitution meant that the powers of the legislative organ shall be limited to the legislature. Similarly, the judicial powers can be said to confer with the judiciary. The judiciary is liberal in its field or area and there can be no intervention with its judicial role either by the Executive or by the Legislature. Also, the executive powers of the Union and the State are conferred in the President and the Governor who is the executive.

Does India follow the rigid form of Separation of Powers?

“I say, that Power must never be trusted without a check.” -John Adams

The concept of separation of powers in its strict form is not mentioned in the Constitution of India. The background of the Indian Constitution says that the makers of the Constitution had no sympathy for this doctrine. It is accepted in India but not in its strict form but its broader form. Under the Constitution of India, executive powers are with the President, legislative powers are with Parliament and judicial powers are with Judiciary (Supreme Court, High Courts, and District and Sessions Courts).

Ram Jawaya vs the State of Punjab, [12 April 1955][2]

Justice Mukherjee, in this case, held that the doctrine of separation of power has not been recognized in its strict sense but the role and function of all three parts of government have been distinguished. It can be said that this doctrine is recognized in India but not in a strict sense. He further added that *“There is no proviso in the Indian Constitution which states the doctrine of separation of powers except Article 50 of the Constitution states the separation of the executive*

from the judiciary but this doctrine is in practice in India. All three organs can interfere with each other's functions whenever necessary."

FUNCTIONAL OVERLAPPING]

While separation of powers is the key to the workings of the Indian Government, no democratic system exists with an absolute separation of powers or an absolute lack of separation of powers.^[3] Government powers and obligations intentionally overlap sometimes. And as a result, there is an intrinsic course of competition and dispute between the organs of Government. Every organ in some or the other way overlaps in its practical performance with the other two organs of the Government.

This overlapping allows the organs to act as a check on each other without too much intervention.

How overlapping of powers takes place between the three organs of the government?

The overlapping takes place in many ways:

- The legislative organ except using its law-framing powers utilizes judicial powers in case of infraction of its privilege, the removal of the judges, and the impeachment of the President.
- The executive also may affect the performance of the judiciary by making designations to the office of Chief Justice and other judges.
- Legislative organ utilizing judicial powers in case of amending law asserted ultra vires by the Court and validating it again.
- While removing the function of disqualifying its members and judges impeachment, the legislature discharges the functions of the judiciary.
- Judiciary organs have the powers to confer pardons, respite, or suspension of punishments or sentences of any individual declared guilty of any offense.
- The tribunals and other quasi-judicial parts which are a part of the executive organ also discharge judicial functions.
- Legislative power that is being vested with the legislative organ in some circumstances can be used by the executive as well.
- On whose advice the President and the Governor acts are appointed members of the legislature that is Council of ministers.

CHECKS AND BALANCES

The Indian constitution separated the government into three parts or organs: executive, legislature, and judicial. This was the consequential decision as it gave the specified powers to each part and invented something known as the system of checks and balance. The idea of checks and balance system was to ensure that no one organ or part of government would be able to get more powers to dominate which would result in separation of powers.

For example, the legislative organ makes laws but the executive organ can make that law unconstitutional and inadmissible, in another side again the president from the executive part can have veto power but the legislature can prevail that veto power with a majority.

“The political purpose of the doctrine of separation of power is not widely recognized. No provision can be properly implemented without a check and balance system. This is the principle of restraining which has in its precept, innate in the prudence of self-preservation that discretion is better than its valor.” - Justice Chandrachud[4]

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. Accordingly, separation of powers is fixed officially between executive and judiciary through checks and balances so that none of them has complete powers. The checks and balances system is significant for the proper functioning of the three parts of the government. Different organs of the government force checks and balances on the other.

The following instances demonstrate the checks and balances system:

- Legislative organ review or scrutinize the performance of the executive.
- Judiciary practices judicial review above legislative and executive actions. Judiciary has the power to void laws passed by the legislature. Similarly, it can declare the inadmissible executive actions as null and void.
- The legislative part removes the judges. It can also reform or amend the basis of the judgment while sticking to the constitutional limitation.
- The executive organ designates the judges.
- The judicial organ uses its judicial review power to declare treaties unconstitutional.

Checks and balances intend no absolute power in the hands of one organ. The Indian constitution ensures that the discretionary power conferred upon any part of the state does not violate the principles of democracy.

For example, the legislative organ can charge judges but as per the specific condition that is a two-thirds majority.

JUDICIARY AND THE SEPARATION OF POWER

In India, the doctrine of separation of powers has not been accorded constitutional status. Apart from the directive principle laid down in Article 50 which enjoins the separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.[5] There were times where the judiciary faced difficult challenges in maintaining and conserving the doctrine of separation of power and in the time of preservation of separation of power doctrine it has furnished landmark verdicts that precisely talks about the sovereignty of judiciary as well as the success of judiciary in India from the last six decades.

In the case of **Kesavananda Bharati and others v. the State of Kerala and another** [6], the power which was conferred by Article 368 of the Indian constitution to amend the constitution was limited by the Honourable Supreme Court of India. The apex court held that the power of amendment conferred to the legislature is subject to the basic structure of the Constitution. Any amendment infringing the basic structure will be specified unconstitutional.

In the case of **Indira Nehru Gandhi v. Raj Narain (1975)**, [7] the Court held that the legal ruling of a dispute is a function of judiciary and legislature under no circumstances; even under constitutional amending power is not competent to use this function.

In the case of **I.R. Coelho v. State of Tamil Nadu** [8], the Supreme Court preferred the doctrine of basic structure as advanced in the Kesavananda Bharati case and said that the Ninth Schedule that gave protection to certain provisions from the judicial review is an infringement of this doctrine.

CONCLUSION

“The truth is that all men having power ought to be mistrusted.” - James Madison

The Indian constitution is the supreme law. No organ of the government should go beyond the jurisdiction which has been assigned to it by the constitution and I also agree with the idea of Madison of not having all powers in one hand which will result in tyranny and autocracy, so it must be divided into three organs named executive, legislative and judiciary and no organ should intervene in the working of other organ and should not cross the limit of powers allotted to them but, I being practical also believe that absolute and strict separation of power is also destructive to the development of any state. Thus as per the above discussion, it is precise that under the Constitution of India, the doctrine of separation of power is not approved or practiced in strict use but based upon the system of checks and balances.

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