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# Separation of Power

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## ABSTRACT

*The doctrine of separation of power is a constitutional doctrine that separates the government into autonomous institutions to perform distinct functions. The distinction of government into the legislature, executive, and judiciary separates their powers and functions, thereby avoiding conflicts and arbitrariness. The legislative branch's role is to make laws, the executive wing enforces those laws, and the judiciary aims at the interpretation of those laws. The prime cause for the separation of power between independent branches is to prevent the over-accumulation of power in an individual or a group of individuals. The Indian Constitution does not expressly mention this doctrine, but it is enshrined in several provisions and articles that separate the power among the three branches. We can take the reference of many case laws to see the effect of this doctrine in India.*

*In this paper, we will discuss the separation of power as a doctrine and its quintessence in the separation of different government functions. It also highlights the overlapping of operations of these three branches. What might happen if there is no separation of power?*

*In the absence of such a doctrine, many problems might arise, like the aggression of power in one branch or the hands of one person, no balance among the three organs, and no liberty. Therefore, the aim is to delimitate power, eliminate arbitrariness, tyranny and introduce precision in the function of each branch.*

**Keywords:** Separation, Power, Government

## I. INTRODUCTION

The concentration of power in few hands may lead to a lack of faith, unaccountability, and the accumulation of forces of different organs, thereby affecting the Nation's overall development. The term 'separation of power' was coined by Charles de Montesquieu. Under this doctrine, the State is typically divided into the Legislature, executive, and Judiciary, combinedly known as "trias politica," each having independent powers, functions, and responsibilities. The motive behind adopting separation of power is to reduce the conflict of

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interest amongst these organs. It provides a vital system for each branch to check and balance the other by making them accountable for themselves and help in mutually reinforcing Democracy, thus preventing the abuse of power.

## II. SIGNIFICANCE

The separation of power is essential because it provides an indispensable system of checks and balances, which prevents the concentration of power. It promotes an accountable and Democratic form of government and helps in eliminating arbitrariness, tyranny, and totalitarianism. It enhances the accountability and control of different branches over each other, i.e., "the checks." It divides the power between the various components of government so that the administration is not concentrated in one hand and is referred to as "balances." It prevents the abuse of power and safeguards the freedom of everyone as unlimited power in the hands of one person or group may lead to the suppression of others, and their rights and powers may be curtailed. It prohibits the misuse of powers within the different organs by demarcating certain limits and boundaries for each branch of the government. It also allows all three branches to specialize in their respective fields to improve and enhance the efficiency of the government. This doctrine seizes the powers of one component of the government to exercise the power of another. Therefore, the principle of separation of powers is considered an essential pillar of Democracy that prevents malfeasance of power and promotes liberty and equality.

## III. BACKGROUND

The concept of separation of power was first developed in ancient Greece and was proposed by **Polybius**. The intellectual and political development led to the emergence of this concept. This was later also practiced in the Roman Republic. To draft the Constitution of the United States, a gathering of the founding fathers was organized in Philadelphia in 1787. There, the concept of separation of power was recognized as a fundamental political Maxim and was supported by the majority of the members. **Aristotle**, a Greek philosopher and a disciple of Plato, in his book "The Politics"<sup>3</sup>, described the three agencies of government, namely, The General Assembly, the Public officials, and the Judiciary.

In the 16th and 17th centuries, **Jean Bodin**, A French philosopher, and **John Locke**, a British philosopher, expressed their views on the segregation of power. As the Roman Empire quashed, the idea of a nation-state emerged in Europe. As the time fled, and the English Parliament was developed in the 17th century, John Locke, through his work 'Two Treatises

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<sup>3</sup> Aristotle, Benjamin Jowett, and H W. C. Davis. *Aristotle's Politics*. Oxford: At the Clarendon Press, 1920.

of Government<sup>4</sup> (1689)', gave the theory of three branches of government, namely, "legislative," "executive" and "Federative." These three branches were neither treated to be co-equal nor were they allowed to work independently. The legislative branch was considered the Supreme, while the functions of the other two branches were left within the Monarch's control as in that time, a dual form of government prevailed in England.

But **Baron De Montesquieu** was the first one who refined and formulated this doctrine systematically in his book "Spirit of the laws<sup>5</sup>," which was published in 1748. His theory was based on a deeper understanding of the English system, which empowered the Judiciary to be independent and made a distinction between the three branches. He wrote

"When the legislative and executive powers are united in the same person or body, there can be no liberty because apprehension might arise lest the sane Monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.<sup>6</sup> Again, there is no liberty if the judiciary power is not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions<sup>7</sup>, and of trying the cases of individuals."

Montesquieu thought that the Parliament would never be arbitrary and denied giving all the legislative powers to the King alone. He referred to the general will of the State while describing the legislative powers, while he understood judicial powers like the power of deciding civil and criminal cases.

In ancient India, the practicality of this doctrine can be found. It has been inculcated in the Vedas where the executive powers rested with the Diwan, and the Senapati maintained law and order. But all these positions were subordinate to the King as he was the Supreme authority who made the law similar to our present Legislature.

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<sup>4</sup> Locke, John, and Peter Laslett. *Two Treatises of Government*. Cambridge [England: Cambridge University Press, 1988

<sup>5</sup> Montesquieu, Charles S, Thomas Nugent, and Jean L. R. Alembert. *The Spirit of Laws*. New York: Colonial Press, 1899.

<sup>6</sup> <https://www.scholastic.com/teachers/articles/teaching-content/spirit-laws-excerpt/>

<sup>7</sup> <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp>

#### IV. RELEVANT ARTICLES

- Article 50- This Article establishes the doctrine of "natural justice." It deals with the Directive Principles of State Policy that is not enforced by any Judiciary and gives direction to the State to keep Judiciary (subordinate Judiciary) independent of the executive, specifically in judicial appointments to maintain judicial independence.

- Article 121 and 211 of the Indian Constitution states that the judges' judicial conduct and the High court cannot be discussed in the Parliament (except in case of removal of judge) and the State Legislature.

- Article 122 and 212 of the Indian Constitution states that the rule of legislatures containing the procedures is immune from judicial scrutiny, which means it restricts the courts from inquiring in the proceedings of the Parliament (Article 122) and State Legislature (Article 212). This ensures that the Legislature is independent of the Judiciary.

- Article 361- It is an exception to the Right to Equality (Ar-14) because it provides immunity to the President and Governor of any state, such that –

- 1) They are not answerable to any court

- 2) There cannot be any criminal proceeding against them

- 3) No one can arrest or imprison them during their term of office. It also gives the power to Judiciary for Judicial review over the performance of the Executive and Legislature. Also, it lays down any law passed by Legislature and if it is found arbitrary.

#### V. CASE LAWS

##### *In Re Delhi Laws Act*<sup>8</sup>

A 7 judged bench of the Supreme Court relied on the principle that one body should not perform the functions which essentially belong to the other. The court held that though the doctrine of separation of power is not expressly mentioned in our Constitution, but is evident in some exceptional circumstances. A clear demarcation was also made between the different powers, responsibilities, and jurisdictions of the three separate organs of the State, namely, the Legislature, the executive, and the Judiciary.

##### *Ram Jawaya Kapoor v State of Punjab*<sup>9</sup>

Supreme Court held that the Executive power of the State is exclusive concerning any of the

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<sup>8</sup> (1951) 2 SCR 747

<sup>9</sup> AIR 1955 SC 549

entries mentioned in list-II (State list) of the 7th schedule and list-III (Concurrent list) end is subject to any law passed by the Parliament. Though the doctrine of separation of power is not expressly mentioned in the Indian Constitution, it is being violated when any government functions are performed by the other.

*Ram Krishna Dalmia v Justice Tendolkar*<sup>10</sup>

The honorable Chief Justice SR Das opined that even if there is an absence of specific provisions for the separation of power in our Constitution, there is under the American Constitution. However, some such division of powers among the legislative, executive, and Judiciary is implicit in our Constitution.

*Keshav Singh v Speaker, Legislative Assembly*<sup>11</sup>

The Supreme Court relied on the doctrine of separation of power and pointed that Article-211 debars the state legislature from discussing the conduct of a High Court judge. The existence of a fearless and independent judiciary is the basic foundation of the Constitutional structure in India does not provide any power to Legislature to take action under Article-194(3) or Article-105(3) against a judge for its contempt alleged to have been committed by the judge in the discharge of his duties.

*IC Golakhnath v State of Punjab*<sup>12</sup>

The Supreme Court emphasized the doctrine of separation of power. The then C.J. Subha Rao opined that:

"The Constitution brings into existence different constitutional entities, namely the Union, the State, and the Union Territories. It creates the three powerful instruments of power, namely the Legislature, the executive, and the Judiciary. It demarcates their jurisdictions minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them."

*Kesavananda Bharati v State of Kerala*<sup>13</sup>

The Supreme Court rejected the petitioner's contention, which argued that the Legislature is no power in our Constitution to amend it and ruled that the doctrine of separation of power was a basic structure of our Constitution. The court said that all the three organs of the State, i.e., the Legislature, the executive, and the Judiciary, are bound by and subject to the

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<sup>10</sup> AIR 1958 SC 538

<sup>11</sup> AIR 1965 All 349

<sup>12</sup> (1967) 2 SCR 762

<sup>13</sup> (1973) 4 SCC 225

Constitution's provisions, which demarcates their respective powers, jurisdictions, responsibilities, and relationship with one another.

*Indira Nehru Gandhi v Raj Narain*<sup>14</sup>

The respondent challenged the constitutional validity of Article-329A, which was added by the 39th Constitutional (Amendment) Act, 1975, and argued that it is violating the primary feature of the Constitution. The court applied the landmark decision of *Kesavananda Bharati* and thus declared the impugned clause-4 of Article-329A to be unconstitutional. Justice Chandrachud said that as the pure judicial function is being transferred into the Legislature's hands, it, therefore, amounts to the violation of the principle of separation of power.

*Asif Hamid v State of Jammu and Kashmir*<sup>15</sup>

The rigidity of the doctrine of separation of power in India was absent. However, the limitations of every organ are predefined as Legislature, executive, and Judiciary have to function within their spheres as mentioned under the Constitution. Although the judicial review helps to check the unconstitutional functions of the Legislature and executive, the Judiciary must have self-imposed disciplinary provisions while exercising the powers of judicial review.

*S.C. Advocates on Records Association and another v. UOI*<sup>16</sup>

The Supreme Court held that the principle of independence of Judiciary/ Tribunals includes –

- (i) The independence of an individual judge, i.e., Decisional Independence and
- (ii) Independence of the Judiciary or the tribunal as an institution or an organ of the State, i.e., Functional Independence.

*IR Coelho v State of Tamil Nadu*<sup>17</sup>

A 9-member bench of the Supreme Court held that the laws added in the 9th schedule after the amendment made on 24th April 1973 are subject to judicial review. Nothing in the 9th schedule can encroach upon the fundamental rights of the citizens as they form the basic structure of the Constitution.

*Bhim Singh v UOI*<sup>18</sup>

The apex court held that the strict separation of power is neither possible nor desirable in

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<sup>14</sup> (1975) 3 SCR 333

<sup>15</sup> (1989) 3 SCR 19

<sup>16</sup> AIR 1994 SC 268

<sup>17</sup> AIR 2007 SC 861

<sup>18</sup> (2010) 5 SCC 538

modern governance, but this concept is inherent in the polity of the Indian Constitution. The rigidity of this doctrine is not expressly mentioned in our Constitution, and the overlapping of few functions does not violate the separation of power till constitutional accountability is maintained. Hence there is no violation of this doctrine till the principle of accountability is preserved.

*Madras Bar Association v UOI*<sup>19</sup>

The constitutional validity of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) was challenged because these tribunals are violating the basic structure of the Constitution, and the Legislature did not have powers to transfer the judicial functions of the courts to the tribunals, and this is violative of the doctrine of separation of powers. But the court upheld that the creation of NCL and NCLAT and the powers and jurisdiction vested by the High Courts in such tribunals is not unconstitutional.

The court also pointed that only the constitutional amendments are subjected to the fundamental structure doctrine, and the legislative measures are not subjected under this doctrine of the basic framework.

This independence of the institution refers to the separation from the other branches of the government. Functional independence would include selecting and the prescribed qualifications based on the members' caliber, ability, and integrity. It also protects the Judiciary from the interference of other branches and ensures its independence from the executive pressure, thereby adding to the separation of powers.

## **VI. INTERDEPENDENCE**

### **Executive over Legislative-**

- Under Article-123, the President has the power to promulgate ordinance (which has the same force as the one made by the Parliament or by the state legislature) when Parliament is not in session and when the situation arises which immediate action is required.
- The Executive exercises its powers under delegated legislation.
- Under articles 118 and 208, both the Houses of Parliament have the authority to make rules for regulating their respective procedure and conduct of business subject to the provision of the Constitution.

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<sup>19</sup> (2014) 10 SCC 1

- The President and the Governor act on the advice of The Council of Ministers, i.e., the elected members of the Legislature.
- According to Article-111, there shall be President's (executive body) consent when a bill is passed in any house of the Parliament. President has three powers, namely -
  1. to give his consent
  2. to withhold his consent
  3. to return the bill.

### **Judiciary over Legislative-**

- Article-13 talks about the Judicial review under which the Legislature makes the law, and this process is known as judicial. It refers to the Judiciary's power to interpret the Constitution and declare any such law and order of the Legislative and Executive to be void if found unconstitutional.
- Article 145 and 225 provides Legislative Powers to the High Court and the Supreme Court by which they can formulate rules to regulate their procedure. There have been many instances where the emergence of laws and policies can be seen in their judgments. For example, the Vishakha guidelines were the supreme court a mod guidelines on sexual harassment.

### **Executive over Judiciary-**

- The executive made for effect the functioning of the Judiciary by making appointments to the office of the chief justice and other judges.
- Under Article-71, the President performs judicial functions while granting pardons, reprise, respites, or remission of punishment, remit or commute the sentence of any person convicted of any offense (must be judicial).
- Under Article-124 (2A) and 217(3), the President discharges his judicial functions in resolving disputes related to the age of the Judges of the Constitutional Courts for retirement from their judicial office.
- The Tribunal and other Quasi-judicial bodies also perform the judicial functions, which are a part of the executive.
- In Administrative adjudication, the Executive agencies have the power to hear and decide cases involving a particular future of any administrative activity.

## **VII. POSITION IN OTHER COUNTRIES**

### **1. USA**

The USA was the first country that expressly introduced the doctrine of separation of power in its Constitution, which significantly impacted the USA's administrative law. The applicability of this doctrine is found to be flexible over the years. The majority of jurists and scholars also highlighted its importance and its contribution to the evolution and growth of administrative law in the country. The American Constitution is equipped with Article- I, II, and III to demarcate the Legislature, Executive, and Judiciary powers, respectively.

Under Article- I of the Constitution, Congress is provided with the sole power to legislate for the country such that its powers cannot be given to any other agency. The Executive branch is vested with the powers under Article- II of the Constitution, and the Judiciary has the power to decide the cases and controversies under Article- III. In the USA, the Presidential form of government is being followed, unlike the parliamentary form of the Indian Republic. There, Congress makes laws that are later enforced and executed by the President. The President of the USA can be removed by the method of 'impeachment' whose proceedings can be freely initiated in Congress. The President appoints the judicial members on the advice of his council and senates. The 'judicial review' empowers the Judiciary to interfere in the exercise of powers by Congress and the President. The state Constitution of Massachusetts in the U.S. states that:

"The Legislative Department should never exercise the executive or judicial powers, or either of them; the Executive shall never exercise the legislative and judicial powers or either of them; the Judiciary shall never exercise the legislative or executive powers, or either of them; to the end, it may be a government of law and not of men."

The President of the USA is both the head of the State and its chief executive, and neither the President nor any member of the executive is a member of the Congress. Also, a division is being maintained between the Legislature and the executive wings. To introduce the system of checks and balances, the Constitution of the U.S. is incorporated with some exceptions to the doctrine of separation of power. For example, the President can also exercise the legislative functions as it can reject the bill passed by Congress. Also, the senate's approval is required for the appointment of certain higher officials, which amounts to its executive function.

In the case of *Panama Refining Co. v. Ryan*<sup>20</sup>, Justice Cardozo said –

"The doctrine of separation of powers is not a doctrinal Concept to be made use of with pedantic rigor. There must be a sensible approximation; there must be lost city of adjustment in response to the practical necessities of government which cannot force you today the development of tomorrow in their nearly infinite variety."

## 2. FRANCE

The flexibility of the doctrine of separation of power can also be seen in the French Constitution. In France, a system of dual courts is being followed according to which the civil matters and the administrative matters are heard in different courts, which shows the practicality of this doctrine. Article-1 and Article-2 of the French Constitution separate the Legislative branch from the Executive branch. The three different organs, namely, the Legislature, the Executive, and the Judiciary, are given the powers to make the laws, implement these laws, and settle the disputes. To maintain a system of checks and balances, the Executive branch is provided with a 'veto' power that may prevent a particular law from being passed to keep a check on Legislature. Also, the Judiciary can question the constitutionality of the laws passed by the Legislature. The judges are appointed after the approval of the choices of the executive by the Legislative branch.

With the swearing of Emmanuel Macron as the President of France, several questions were raised on the new constitutional reforms, which weakened the doctrine of separation of power in France. In July 2018, he made a policy speech in the Parliament against the French notion of separation of power that "interdiction d'entrée Dans Les hémicycles parlementaires," Which means that the President should not be allowed to appear in the Parliament. He has proposed various changes in their Constitution, which are recognized as a threat to this doctrine of separation of power.

## 3. ENGLAND

The doctrine of separation of power was not accepted in a strict sense in England. The doctrine of a mixed or balanced Constitution consisted of an equilibrium between the Monarchical, Aristocratic, and Democratic elements since the 18th century. The British Constitution is mainly unwritten and does not include a strict separation of power; instead, a system of checks and balances is being followed to keep an eye on the arbitrary use of power. Thus, this theory of integration of power ensures the sharing of power among the three organs of the government. The theory of 'Mixed Government' given by Blackstone emphasizing the

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<sup>20</sup> 293 U.S. 388 (1935)

principle of checks and balances is more relevant in the U.K. Although the three branches have their separate powers and peculiar features, they continue to have significant overlapping.

The Crown is a nominal head in England. It exercises both the Legislative and Executive functions as it comprises the cabinet consisting of the Prime Minister and the Cabinet ministers. The British legal system appoints a Lord Chancellor to be the head of the Judiciary and is responsible for other judges' appointments. He is also a member of the Parliament and is also appointed as a speaker in the House of Lords. Therefore, The Lord Chancellor's post is often criticized as violating the separation of power and concentrating Executive, Legislative and Judicial functions in one person. On numerous occasions, the senior judges have expressed the importance of separation of power in the British Constitution. In *Duport Steels Ltd. v. Sirs*(1980)<sup>21</sup>, Lord Diplock stated that:

"At a time when more and more cases involve the application of Legislation which gives effect to policies that are bitter subjective public and parliamentary controversy, it cannot be too strongly emphasized that the British constitution, though largely unwritten, is formally based on the separation of powers; Parliament makes the laws, the judiciary interprets them."

#### 4. DENMARK

The Danish Constitutional Act, 1849 divides the power into three independent branches to prevent the abuse of power. The government is provided with executive power, which ensures the implementation of the laws; the Parliament and government together constitute the Legislative power and enact the laws in the country. The courts of justice constitute the Judicial powers and pronounce judgments between citizens and between the authority and citizens. The separation of power is stipulated in Section-3 of the Danish Constitution, which says – "The legislative power is jointly vested in the King and the Parliament. The Executive power is vested in the King. The Judicial power is vested in the courts of justice". "The King" today means "The Cabinet."

In 1901, the separation of power was modified as a Parliamentary principle and was added in Section-15 of the Constitution. Therefore, Section-3 of the Constitution lays down the principle of separation of power along with the Parliamentary principle of Section-15. The former focuses on separating the three wings, i.e., Legislative, Executive, and Judiciary. At the same time, the latter prioritizes the Folketing, i.e., the Danish Parliament, and strengthens people's sovereignty.

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<sup>21</sup> 1 WLR 142, 157B-158C

## 5. AUSTRALIA

By applying the theory of separation of power in Australia, the governmental institutions are divided into Legislative, Executive, and Judiciary. This doctrine is deeply seated in the Australian Constitution and provides checks and balances to separate each of these institutions from each other. An asymmetrical nature of this doctrine can be seen between the Legislative and Executive arms. Chapter-1 of the Australian Constitution provides the Legislative powers of the Commonwealth to the federal Parliament. The executive power of the Commonwealth rests with the Queen and is expressly mentioned in Chapter-2. The High Courts, the Federal Courts created by the Parliament, and the other courts are invested by the Federal Jurisdiction and are provided with the judicial powers under Chapter-3. These judicial powers are exercisable only by courts comprising judges holding office per Section-72 of the Australian Constitution. The tribunal's power to punish or to enforce its awards was a part of the judicial power, but the function of making arbitral power was not.

## VIII. CONCLUSION

In India, the doctrine of separation of powers is not strictly adhered to. Instead, it is interpreted and used as the Doctrinal Division of Functions, which means that although theoretically and strictly the executive must only implement or execute laws, the Legislature should only make laws, and the Judiciary should only interpret the laws. However, in the actual use of this power, the distinction between the executive, Legislature and Judiciary is not strong, and there are many gray areas of overlapping power.

With the smooth running of any government, the combined effort and cooperation between these three spheres of government is compulsory. It has been well said by **Roy Moore**, "The basic premise of the Constitution was the separation of powers and the system of checks and balances because the man was seen as a fallen creature and would always yawn to gain more power."

In my view, this doctrine is a very important part of the Constitution as it protects individual's liberty and helps us to get away from the Monarchical system.

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