

## CRITICAL ESSAY ON APPLICATION OF DOCTRINE OF SEPARATION OF POWER IN INDIA

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### ABSTRACT

The paper reviews one of the most important question that is being asked about the doctrine of separation of power in India and whether the powers of the three bodies of the Government i.e., legislature, executive, and judiciary overlap. In the first section of the text, the author talks about the origin of the theory of separation of power as mentioned by Montesquieu in his book 'Espirit des Louis' (The spirit of the laws). The author further reviews the separation of power in India by mentioning about the various Articles from the Constitution of India as well as the Constitution of US. The text further mentions about the powers given to the legislature, executive and the judiciary. The text also talks about how the separation of power is applied in India and the problem of overlap of functions. Lastly, the text highlights various cases that discuss the doctrine of separation of power.

The paper seeks to answer the question: What is the Doctrine of Separation of Power and what powers are given to the legislature, executive and the judiciary?

It is hoped that this study will inform about the separation of power in India by in-depth analysis of the Doctrine of Separation of Power.

**Keywords:** Separation of Power; India; Judiciary; Executive; Indian Constitution

## INTRODUCTION

The Doctrine of Separation of Power is a very important part of the Indian Constitution as it controls and regulates the powers given to different bodies of Government namely, The Legislature, The Executive and The Judiciary. The Doctrine of Separation of Power was first introduced by Montesquieu, a French scholar in 1747 in his book '*Espirit des Louis*' (The spirit of the laws). According to his theory he recommended that there should be a division of power among various organs of the state. The separation of power between the various bodies of the government establishes a system of checks and balances which maintains that the various bodies and prevents them from getting too powerful in one of the branches. The main role of the legislature is to enact general rules of law that relate to the conduct of its citizens and institutes. The main function of the executive body of the Government is to enforce the laws established by the legislature. Executive powers are vested by the President and the Governor of India as mentioned in Article 53 (1) of the Constitution of India. The main function of the judiciary is to prevent the violation of laws and to protect the fundamental rights of the citizens. The Supreme Court of India is the apex court and all the judiciary power is vested in it. The Separation of Powers in India are applied by granting different powers and imposing limitations on the three bodies of the Government. The separation of power among both Judiciary and Legislature can be observed in the Article 122 and Article 212 of the Constitution of India. Article 368 grants powers to the Parliament to amend the Constitution which can only be exercised by the Legislature and the Judiciary has to abide by the changes thus made by the Parliament. Article 53 (1) of the Constitution of India vests the executive power in President and the Governor whereas, Article 124 (1) of the Constitution of India vests Judiciary powers to the highest court of the country i.e. The Supreme Court of India. In India, the Executive power is given to the President of India under Article 52 and Article 53 of the Constitution of India. The main problem with the separation of power is the overlapping of the functions of the three bodies of the Government. There are various case laws which talks about the separation of power especially, Article 368 of the Indian Constitution.

*“Power Corrupts and absolute Power tends to corrupt absolutely.”<sup>xi</sup>*

## **MONTESQUIEU'S THEORY OF DOCTRINE OF SEPARATION OF POWER**

The theory of Doctrine of Separation of Power was first propounded by Montesquieu, a French scholar in 1747 in his book '*Espirit des Louis*' (The spirit of the laws).<sup>ii</sup> The theory states that if the power is given to a single person or a group of people then it will result in tyrannical form of the government. Thus, Montesquieu recommends that there should be division of power among the various organs of the state i.e. Legislature, Executive and Judiciary. Montesquieu also suggests in his book that the Legislative and Judicial powers should not be united and if it is united then there will be no liberty. Also, if the Judicial powers are not separated from the Executive and Legislative powers then also there will be no liberty. Thus, Montesquieu in the book suggests that to achieve liberty there should be separation of powers among the Legislative, Executive and Judicial bodies of the Government.

## **THE DOCTRINE OF SEPARATION OF POWERS IN INDIA AND THE US**

The doctrine of separation power states that separate powers are given to the Legislature, Executive and the Judiciary and these powers should not intertwine with each other. This doctrine of separation of power is embedded in various Articles of the Constitution like Article 154 of the Constitution of India which states the Executive powers of the State. Article 154 (1) states that, "*The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution.*"<sup>iii</sup> Other Articles of the Constitution of India that deals with the separation of powers are Article 50, 53, 121, 122, 123, 124 (1) 154, 211, 212 and Article 361 which gives various powers and state restrictions to the various bodies of the government. The object of the doctrine of separation of powers between the three bodies of the Government is to give exclusive powers to the various bodies in specific matters. In India there is no strict separation of powers like that in the US which is mentioned in Article I, II and III of the Constitution of United States giving exclusive powers to the legislature, the Presidency (Executive) and the

Judiciary respectively. The separation of power between the various bodies of the government establishes a system of checks and balances which maintains that the various bodies do not get too powerful in one of the branches. This is one of the main aims of the separation of powers among the three objects of the government. All the three bodies of the Government act as a pillar of democracy in India.

## **SEPARATION OF POWERS AMONG THE THREE BODIES OF GOVERNMENT**

### ***Legislative Powers***

The legislature enacts general rules of law that are primarily related to the conduct of its citizens and institutes. Lok Sabha and the Rajya Sabha are the two bodies of the Union Legislature of India and helps in the enactment of laws, authorizes borrowing, imposes taxes and to write, debate and pass bills which are in turn passed to the President for approval. A bill becomes a law only after it is signed and approved by the President. Thus, emphasising the system of checks and balances. This power is granted to the President under Article 123 of the Constitution of India.

### ***Executive Powers***

The main function of the executive body of the Government is to enforce the laws established by the legislature. Executive powers are vested by the President and the Governor of India as mentioned in Article 53 (1) of the Constitution of India. They can veto laws and plays a major role in the appointment of judges and can grant pardons to the convicts. Thus, maintaining the system of checks and balances over the judiciary body of the Government.

### ***Judiciary Powers***

The main function of the judiciary is to prevent the violation of laws and to protect the fundamental rights of the citizens. The Supreme Court of India is the apex court and all the judiciary power is vested in it. The judiciary has the role of interpreting the laws created by the

legislature but cannot make new laws. In this sense they are dependent on the legislative body of the Government. Article 124 (1) of the Constitution of India grants various rights to the judiciary by creating Supreme Court of India. Article 124 (2) states that the judge of the Supreme Court shall be appointed by the President which is the executive, thus creating a system of checks and balances on the Judiciary.

## **HOW IS THE SEPARATION OF POWERS APPLIED IN INDIA?**

The Separation of Powers in India are applied by granting different powers and imposing limitations on the three bodies of the Government. As mentioned earlier different powers are granted to Legislature, Executive and Judiciary thus the comparison of these powers among these bodies will throw some light on the differences between the three and also lay emphasis on the system of check and balances among them.

### ***Judiciary and Legislature***

As mentioned earlier, the powers of the judiciary are to prevent the violation of laws and to protect the fundamental rights of the individuals. These laws and fundamental rights are laid down and created by the legislative body of the Parliament. The separation of power among both Judiciary and Legislature can be observed in the Article 122 and Article 212 of the Constitution of India. Article 122 and Article 212 reads as, “*Courts not to inquire into proceedings of Parliament*”<sup>iv</sup> stating that the judiciary cannot question the validity of any proceedings of the Parliament thus giving the legislature separate powers than the judiciary. Article 368 grants powers to the Parliament to amend the Constitution which can only be exercised by the Legislature and the Judiciary has to abide by the changes thus made by the Parliament.

### ***Executive and Judiciary***

As mentioned earlier, the executives have the responsibility of enforcing the laws created by the Legislature. Judiciary supplements the executive by making sure that the rule of law that the executive body of the Government has to enforce is followed properly and that the laws are not violated including the fundamental rights of the individuals. Article 50 of the Constitution

of India states the separation of powers of the judiciary from the executive. The Article reads as, “*Separation of judiciary from executive*”<sup>v</sup>. The intention (of the separation of powers among judiciary and executive) is always to ensure that the judiciary does not decide cases under the influence of the executives, rather follows the principle of Rule of Law.<sup>vi</sup> Article 53 (1) of the Constitution of India vests the executive power in President and the Governor whereas, Article 124 (1) of the Constitution of India vests judiciary powers to the highest court of the country i.e. The Supreme Court of India.

### ***Legislature and Executive***

As mentioned earlier, the role of the legislature is to make laws whereas the role of the executive is to enforce those laws. In India, the executive power is given to the President of India under Article 52 and Article 53 of the Constitution of India. He (The Executive) appoints officials of the Union Government, Prime Minister, and Council of ministers at the advice of the Prime Minister, Chief Justice and judges of Supreme Court and High Court at the advice of the Chief Justice of India.<sup>vii</sup> Once a bill is drafted by the legislature, it goes for the approval of the executive i.e. The President. The President can then accept or reject the bill. In this sense there is a system of checks and balances that exists between the legislature and the executive.

## **PROBLEMS WITH SEPARATION OF POWER IN INDIA – OVERLAP OF FUNCTIONS**

In India the separation of power is not absolute as the three different bodies of the Government depend on each other for their functioning. The legislature exercises the power to make laws but also exercises judicial power in case of breach of their privilege and the removal of the judges. The tribunals are a part of the executive, but they also exercise the judicial functions. The executives can also make laws under delegated legislature. If someone exceeds the freedom of speech in the Parliament then the legislature can impose punishment. There also exists a system of checks and balances among the three bodies of the Government as mentioned earlier which also makes one body depends on another and vice versa. Thus, the Indian Constitution does not provide a strict separation of powers.

## INDIAN CASE LAWS ON SEPARATION OF POWER

### 1. *Kesavananda Bharati Vs. State of Kerala*<sup>viii</sup>

In this case Article 368 of the Constitution was challenged. Article 368 assigns power to the Parliament to amend the Constitution and the procedures therefor. In this case it was decided that even though the Parliament is given the power to amend the Constitution, but they do not have the absolute right to amend and if there is a question to amend the basic features of the constitution then it will be struck down to be unconstitutional.

### 2. *Ram Jawaya Vs. State of Punjab*<sup>ix</sup>

In this case it was held by the Hon'ble Supreme Court that there is no rigid separation of power that is being exercised in India. The Supreme Court held that the executives are derived from the legislature and is dependent on it, for its legitimacy.<sup>x</sup>

### 3. *Indira Gandhi Nehru Vs. Raj Narain*<sup>xi</sup>

This case deals with the dispute regarding Prime Minister elections that was pending before the Supreme Court. It was held that the decision of a specific dispute is the role of the judiciary and the parliament cannot by using Article 368 exercise their amending power. It was decided that the Prime Minister elections would not be void but it was held ultra vires following the principle of separation of power.

### 4. *Delhi Development Authority Vs. M/S UEE Electricals Engg. Pvt. Ltd.*<sup>xii</sup>

In this case it was said that the judicial review should only be used for protection and not for undue interference in executive functions.

## CONCLUSION

The concept of separation of power is embedded in the Constitution of India. The system of checks and balances makes sure that the power exercised by various bodies of the Government i.e. The Legislature, The Executive and The Judicial are not misused and followed in the true sense. In India, the separation of power is not followed in strict sense as there is an overlap of functions among different bodies of the Government. In India, according to Article 122 and

Article 212 the courts cannot inquire into the proceedings of Parliament. Article 50 of the Constitution of India separates the powers of the judiciary from the executives. Article 52 and Article 53 gives the executive powers to the President of India. Once a bill is drafted by the legislature, it goes for the approval of the executive i.e. The President. The President can then accept or reject the bill. In this sense there is a system of checks and balances that exists between the legislature and the executive. Article 368 of the Indian Constitution which gives the power to the Parliament to amend the Constitution has been challenged at multiple times. In the landmark judgment in the case of *Kesavananda Bharati Vs. State of Kerala* it was held that even though the Parliament is given the power to amend the Constitution, they do not have the absolute right to amend and if there is a question to amend the basic features of the constitution then it will be struck down to be unconstitutional.

Thus, according to the Doctrine of Separation of Power in India the powers of the three bodies of the Government namely, judiciary, executive and legislature are divided so as to prevent in creating a tyrannical form of the government.

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## ENDNOTES

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<sup>iii</sup> The Constitution of India, 1950, Art. 154

<sup>iv</sup> The Constitution of India, 1950, Art. 122, 212

<sup>v</sup> The Constitution of India, 1950, Art. 50

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