

---

# **BRIDGING THE UNDERLYING GAP AND COMPLEXITIES: SEPARATION OF POWERS & ADMINISTRATIVE LAW MAKING**

---

Aashna and Ankita Singh, Jindal Global Law School, O.P Jindal Global University

## **ABSTRACT**

India being a constitutional democracy follows a Westminster model of governance, wherein its operations are divided into three essential organs, namely the legislature, the judiciary, and the executive. Each of these organs is obligated to perform its independent functions so that a 'separation of powers' is maintained and no organ can overpower the other. However, it remains pertinent to note that in a developing democracy like India wherein the legislature is ought to undertake the function of law making it may be influenced by the other organs. This leads us to our research question- Can there possibly be a balancing mechanism between separation of power and administrative law-making? And have Indian Courts struck that balance?

In this research paper, we aim to analyse the role of the Indian courts and the constitution, with respect to the maintenance of separation of powers and administrative law-making, through judicial precedents.

Keywords: Separation of powers, administrative law, legislature, executive, judiciary, constitutional law

*'If the legislative and executive authorities are one institution, there will be no freedom. There won't be any freedom anyway if the judiciary body is separated from the legislature and executive.'*

– Charles de Montesquieu

## **Introduction**

With the concept of Separation of powers being subjected to debates by many philosophers, Montesquieu, in his work 'Spirit of Law', provides us with a detailed analysis. Under Montesquieu's model, "the political authority of the state is divided into legislative, executive, and judiciary to most effectively promote liberty, wherein, these three powers must be separate and must act independently."<sup>1</sup> He believed that the three organs, their functions and responsibilities should not intersect with one another as that would reduce the liberty within the system of governance. Conjointly, separation of power is essential so that the authority within a democratic system is not vested in an individual person or body, granting them with an unfair autocratic control. However, this model has been often criticized for being too restrictive in nature, since certain philosophers believe that a strict separation between the three structures is practically not possible or viable i.e., the organs are bound to intersect and co-exist for a structured functioning of the government.

Following a Westminster model<sup>2</sup> of governance, India's union government is divided into three organs- executive, legislature, and judiciary. The executive consists of the President, Vice-President, the Council of Ministers and the Governor, with the primary responsibility to review and pass the laws that are enacted by the legislature, which comprises of the two houses of the parliament-the Rajya Sabha and the Lok Sabha. Ultimately, the Judiciary consists of a structure of courts which fundamentally settles conflicts between the executive and legislative while also interpreting laws to resolve public related conflicts.<sup>3</sup>

In this research paper we aim to analyse the role of the Indian courts and the constitution, with respect to the maintenance of separation of powers and administrative law-making, through judicial precedents.

---

<sup>1</sup> Warnock TD, Separation of Powers-An Overview, Ncsl.org (May 1, 2021), <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>.

<sup>2</sup> A Westminster model- is a parliamentary model governance.

<sup>3</sup> Government of India, Structure of Government of India, Elections in India (May 1, 2021), <http://www.elections.in/government>.

### Administrative Law Making

In addition to the legislature having the power to make laws, administrative law making is characterized by the Legislative providing authority to the Executive branch, to make rules i.e., delegated legislation being exercised by a subordinate agency. This power is permissible only when authorized by the supreme authority and within the guidelines laid down by the legislature. "Judicial review of legislation has always been an essential feature of the Indian constitutional law"<sup>4</sup>, wherein the constitutionality of the powers delegated are under scrutiny by the courts. It is of prime importance that the legislature, may not delegate its law-making powers to an outside authority as such an act could be *ultra vires*, violative of the constitution, and constitutionally prohibited.<sup>5</sup> This has been witnessed in *Raj Narain Singh v Chairman, P.A. Committee*, wherein it was held that the delegation was *ultra vires* exercise of powers as it is beyond the powers of the executive to make any modifications to the existing laws.<sup>6</sup> The case of the *Re Delhi Laws Act* provided that, unlike the US, there is no strict separation of powers in India under its 'constitutional scheme' and under certain circumstances, the delegation of law-making power by the legislative to the executive is permissible.<sup>7</sup>

While the aforementioned establishes a relationship between the executive and the legislature, the judiciary through the means of judicial review also plays an essential role in analysing the aspect of 'administrative legislation and adjudication'.

### Judicial Precedents as a Source of Law

Under any common law system, 'judicial precedents' serve as an essential element of law-making, wherein the courts serve as the guardian of the rights of the citizens and the interpret of the constitution. It is under the doctrine of *stare decisis*,<sup>8</sup> that binds the courts to follow their decisions, with reliance placed on previous judgments rendered, across all legal systems. The Indian courts have been very pragmatic in rendering their opinion on the existence of separation of powers in India.

The landmark judgment of *Kesavananda Bharti v State of Kerala*, gave powers to the parliament to amend the provisions of the constitution, to fulfill its socio-economic obligations,

---

<sup>4</sup> SHUKLA, V.N. "JUDICIAL CONTROL OF DELEGATED LEGISLATION IN INDIA." *Journal of the Indian Law Institute* 1, no. 3 (1959): 357-74. <http://www.jstor.org/stable/43953794>.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Raj Narain Singh v Chairman, P.A. Committee*, AIR 1954 SC 569.

<sup>7</sup> *Re Delhi Laws Act*, AIR 1951 SC 332.

<sup>8</sup> The legal doctrine that puts an obligation on the courts to follow historical cases when making a ruling on a similar case to ensure that similar facts and scenarios are approached in the same way and placing a binding objective on the courts to follow legal precedents set by previous decisions.

guaranteed to the citizens under its Preamble as long as the ‘basic structure’ remains untouched.<sup>9</sup> Despite the ruling, preventing the arbitrability of the parliament to breach the fundamental rights, the court upheld the 24<sup>th</sup> and 25<sup>th</sup> Amendments and removed the right to property on the grounds of ‘judicial review’ as an element of the basic structure. In order to safeguard the democratic statehood of the nation, the courts in *Golak Nath v State of Punjab* were of the view that fundamental rights are exclusive to the reach of the parliamentary legislation and the parliament is not authorized to amend the fundamental rights enshrined under part III of the Indian constitution.<sup>10</sup> In *Indira Gandhi v Raj Narain*, the court expressed its opinion on the separation of powers being adopted in a broader sense rather than with rigidity, without a proper provision of a coherent system of checks and balances.<sup>11</sup> In *P Kannadasan v State of Tamil Nadu*, the power of judicial review is mandated to the courts under the constitution and the invalidity of the law declared by the courts cannot be challenged. This provides for ‘checks and balances’ inherent in a system subjected to the separation of powers.<sup>12</sup> In *Rai Sahib Ram Jawaya v State of Punjab*, the practice of separation of power can be witnessed in India by a model reflective of differentiation between the three organs of the government i.e., the executive, legislative, and the judiciary in terms of their authority and role, however, through the means of delegated legislation, roles of the legislative can be performed by the executive that does not breach the aforementioned.<sup>13</sup> The basic structure doctrine is the essence of the constitution that cannot be violated and any act, rule, or regulation made in the contravention is not permissible<sup>14</sup>, which was provided in *I.R. Coelho v State of Tamil Nadu*. Therefore, the aforementioned is reflective of the fact that the doctrine of separation of powers is recognized broadly however, it is not applicable in a strict sense by the court of law. An overlapping in terms of power and ‘law-making is seen among the executive and the legislative, while the judiciary serves independently, having supremacy over the other two branches through the medium of judicial review.<sup>15</sup>

---

<sup>9</sup> *Kesavananda Bharti v State of Kerala*, (1973) 4 SCC 225; AIR 1973 SC 1461.

<sup>10</sup> *Golak Nath v State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762.

<sup>11</sup> *Indira Gandhi v Raj Narain*, 1975 Supp SCC 1.

<sup>12</sup> *P Kannadasan v State of Tamil Nadu*, (1996) 5 SCC 670.

<sup>13</sup> *Rai Sahib Ram Jawaya v State of Punjab*, AIR 1995 SC 549.

<sup>14</sup> *I.R. Coelho v State of Tamil Nadu*, (1999) 7 SCC 580.

<sup>15</sup> It is the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine the consistency of these actions to be following the constitution. It is through the means of judicial review that any action by the public body being inconsistent and unconstitutional can be declared null and void.

## Separability of the 3 Branches of the Government

Under Montesquieu's model of Separation of Powers, the segregation into the executive, legislative, and the judiciary, as 3 branches of the government is created to ensure division of power and non-intervention by the other organs to prevent arbitrariness and consolidation of powers in one hand. However, it is essential to delve into the interconnection of these organs individually and circumscribe whether any overlap exists.

### (1) Relationship Between the Executive and the Legislative

In India, the Parliament which is the legislature can only enact laws but cannot govern by itself, whereas the executive which includes the council of ministers (and administrative servants) is responsible for the act of governance. The two organs are intertwined and derive their powers from one another.

The "legislature exercises a degree of political and financial authority"<sup>16</sup> over the executive, and within a parliamentary democracy such as in India, the executive owes accountability for its actions to the parliament. While the parliament does not exercise direct control over the executive, it does hold them accountable *ex post facto*, i.e., after something has already been done to ensure that the disposal of their duties is in an orderly manner, acting "in conformity with their obligations under the approved policies and utilized the powers conferred on it for purposes for which they were intended."<sup>17</sup> In certain financial matters such as that of the 'budget' the executive does exercise freedom however the ultimate authority of "modifying taxes, voting of grants, etc"<sup>18</sup> rests with the Parliament. Additionally, the specific constitutional powers of the legislature are also laid down under the Seventh Schedule of the Indian Constitution which contains three lists- Union list, State list, and Concurrent list. These lists distribute and allocate legislative powers between the Union and States while some powers under the Concurrent list are jointly exercised by both. While the legislature does seem to have strict exclusive powers, in exceptional cases, for instance, in Article 123, 352, and 356 the Executive too overtakes certain powers of the legislature.<sup>19</sup> Therefore, it remains pertinent to note that the parliament's function is to enact legislations while also advising and criticizing the Executive, it also holds the primary responsibility of venting grievances and protecting the

---

<sup>16</sup> "EXECUTIVE-ITS ACCOUNTABILITY TO PARLIAMENT" (*Rajya Sabha - Executive-Its Accountability To Parliament*) [https://rajyasabha.nic.in/rsnew/practice\\_procedure/naccount.asp](https://rajyasabha.nic.in/rsnew/practice_procedure/naccount.asp).

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at Note 16.

<sup>19</sup> Note: This list of Articles is not exhaustive however only certain key Articles have been discussed herein due to the word limit.

interests of the citizens, thus, the relationship of the two organs is based on mutual trust wherein the parliament does not interfere with the day-to-day governance of the executive and the executive, in turn, owes accountability to the parliament for its actions. Hence, it remains unmistakable that the two organs do not follow a strict separation of power.

### **(2) Relationship Between the Executive and the Judiciary**

It is under Article 50 in Part IV comprising the Directive Principles of State Policy (DPSP),<sup>20</sup> that a separation between the executive and the judiciary is constitutionally established. With the composition as aforementioned, there are certain restrictions imposed on both branches. The constitutionality of the legislations can only be decided by the judiciary and the executive officers are not authorized to function in that capacity.<sup>21</sup> Additionally, the courts cannot intervene in the performance of the executive, as long as it is in compliance with the constitution and the executive officers are immune from the impeachment by the judges.<sup>22</sup> The separability of the organs is maintained, however by the means of judicial review exercised by the courts, an intersection exists, creating a system of checks and balances. However, the judiciary has supremacy over the executive by the means of judicial review i.e., any decision exercised by the executive officers, within their duties, being against the basic structure or immoral to the public interest and policy can be declared null and void i.e., the act becomes unconstitutional. Thus, the separation of powers cannot be applied in a strict sense.

### **(3) Relationship Between the Legislative and the Judiciary**

The power of judicial review is recognized by Articles 32 and 226 of the constitution<sup>23</sup> that provides an upper hand to the judiciary, to establish its supremacy over the other two branches. However, in terms of practical application, an overlap in the disposal of authorities of the legislature is seen with the judiciary, for the process of impeachment and removal of judges under Article 124 & 218, amending the laws being ultra vires to the constitution i.e., the maintainability of the doctrine of the basic structure under article 368 and Supreme Court functioning as an executive authority under Article 142.<sup>24</sup> While the subject matter and roles of

---

<sup>20</sup> Constitution of India, 1950.

<sup>21</sup> Tarumoy Chaudhuri, 'Relations of the Judiciary and Executive in India' (2010), <https://poseidon01.ssrn.com/delivery.php?>

<sup>22</sup> *Ibid.*

<sup>23</sup> It authorizes the Supreme Court (under Article 32) and the High Courts (under Article 226)- within their jurisdictions, to issue writs for the enforcement of the Fundamental Rights of the citizens.

<sup>24</sup> The objective is to ensure that complete carriage of justice throughout the territory of India for any matter pending.

the branches are different, interdependence and co-relation are existent, wherein the acts of one are dependent on the failure or miscarriage of responsibilities by the other. This maintains a system of checks and balances however, the overlap between the rights of the organs breaches the strict separation of powers.

### **Conclusion**

We are of the view that, in a developing country like India, a strict model of separation of power is difficult to be applicatory, wherein it is evidentiary that the legislature itself delegates its powers to the executive. Conjointly, for a balanced and holistic functioning of the government, there needs to be a system of 'checks and balances' wherein each organ must be able to exercise a degree of control over the other, preventing arbitrariness and autocracy. A balanced system of governance requires all organs to perform their individual functions with a degree of co-dependence and assistance. However, the aforementioned is reflective of the fact that the Judiciary, through its mechanism of 'judicial review', exercises a great amount of control over the other two organs, while interpreting legislative enactments and acting as a 'watchdog' of the democracy. Similarly, a degree of accountability is on the executive as a subordinate organ to the legislature for the discharge of delegated legislation.

Thus, conclusively, Indian courts have been unable to strike a balance between administrative law-making and separation of power, reflective of a 'strict' model as unattainable with its system of governance.