

SEPARATION OF POWERS IN INDIA

By: Devanshi Sharma
Final Year LL.B. (Hons.) Student
Jindal Global Law School, O.P. Jindal. Global University

ABSTRACT

The underlying idea of the doctrine of separation of power is that the organs of the government do not overlap or interchange the functions that are exercised by them individually. The notion of 'separation of powers' is the division of authorities and duties among the legislative, executive, and judicial branches. The power and accountability are being divided among these three organs of Indian government, viz., judiciary, legislature and executive. This doctrine makes sure that there is no amalgamation of power. This paper attempt to analyze the concept of this doctrine in India, the objective, criticism and how it is a barrier to administrative law.

INTRODUCTION

The doctrine of operation of power is an idea which talks about functioning of government is at its best when the powers are not solely given to a single authority but is sub divided into different branches. This principle is not followed in a very strict sense but is adopted by many nations. It was first adopted by United States of America. In India the doctrine of Separation of power was developed in 17th century. Where the thinkers pointed out three powers of the government which were power to make laws, power to enforce law and power to interpret law.

MONTESQUIEU'S CONTRIBUTION

The idea behind this doctrine is that no man should be empowered with all these three powers. These should be divided accordingly that the law should be made by legislative, administration of law should be done by executive and judiciary should uphold the law and provide justice.

“There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the cause of individuals.”¹

Montesquieu believed that the decentralization of power should be done or else the justice becomes capricious. The three organs Legislative, executive and judiciary should work independently and there should be no overlap between the powers of these organs. According to him the basic assumption

¹ Aldar John, *Constitutional and Administrative Law*, Palgrave Macmillan, New York, 6 Ed.

behind this principle is that if all the power is given in the hands of one body, it can be dangerous for the citizens because then the law becomes arbitrary and flawed.

MEANING OF SEPARATION OF POWER

The doctrine of separation of powers follows the principles of politics. The concept of this doctrine is to remove the abuse of power by the authorities. This doctrine says that no organ of the government can exercise the power other than what is given to them. There are four principles on which this doctrine is based upon:

- Exclusivity Principle which has divided the government into three structural organs.
- Functional Principle which gives the boundaries of the organs, and that one organ shall not perform the functions of the other.
- Check and Balance Principle suggests that check should be made on each other by these organs to look after the functions and duties performed are within the constitutional bounds.
- Mutuality Principle which aims at creating concord, not discord, cooperation not confrontation, engagement not estrangement.

SEPARATION OF POWER IN INDIA

In India there are three major powers of government and each of them is performed by separate organ. Legislature is responsible for making the laws, executive is responsible for enforcing law and judiciary is responsible for implementing laws. The major question that arises is that should there be dependence of these organs on each other or whether there should be a strict separation of powers among them. There is strict provision that defines separation of powers absolutely but there are provisions in Constitution of India that have made distinction between the powers of the organs of the government. Even though there is no express provision for this doctrine, but it is followed in India in an implied manner. It has defined the roles of each organ of the government.

The constitution of India had laid separate functions of the organs of the government in following ways:

- The judiciary is independent as laid down under Article 50. The conduct of the judges cannot be taken about in the parliament and state legislature as provided under Article 121 and 211. The powers of executive are vested with president and in a state is vested with governor as per Article 53 and 154.

- The legislature in certain cases like impeachment of the president or removing of the judges may have judicial powers. Likewise, the executive has certain powers to appoint the judges and chief justice which can affect the functioning of the judiciary.
- The executive can exercise the powers of the legislature in circumstance when the legislature is not in session and there is an urgent need to make law. This is provided as under Article 123 to promulgate ordinance.

The constitution has also provided a system where checks and balances are done to prevent misuse of powers that have been vested. This clearly shows that the constitution of India does not provide a rigid structure of this doctrine of separation of power. It is used in a broad sense and the three organs can exercise their powers and functions even with some overlap.

OBJECTIVE

Now let us have an overview of the fundamental concepts and objectives of separation of power: -

- Firstly, it aims to overcome the inconsistency, despotism and autocracy of the government and helps to make it democratic and more accountable.
- Moving on, secondly, it makes it possible to have a check on the usage of power by the different sections and areas of government, which further have the effect of disallowing the misuse of power by these specific blocks. It is clearly stated in the constitution of India regarding the minima's and maxima's of these domains and their task is to operate within these limits and get their work done. In our country, the ultimate and the sovereign epitome is the constitution and if any form of ideal or notion tends to make anything fall outside of the preview of the constitution and its provisions then it is simply taken as being either null, void or even unconstitutional.
- Thirdly, all branches of the government have their own tasks and must have the sole aim as the fulfilment of these tasks so through the concept of separation of power it makes each and every branch accountable and responsible for their own and therefore keeps a check on all of them.
- Fourthly, the concept of separation of power divides the power into three segments so that instead of it being with a specific branch wherein this would give rise to inconsistency, it rather makes it possible to have a balance of this power and makes the government more democratic and effective.
- Lastly, when each branch has a specific role to play, it makes each branch able to hone their skills using their resources and make them have an expertise in their particular role and duty, this is done with the intention to enhance, promote, multiply the efficiency of the government.

PRACTICAL APPLICATION OF SEPARATION OF POWER

Apart from the separation of judiciary provided by directive principles under Part IV of the Constitution but apart from this there is no division of power. After the constitution was adopted there have several judgments by the supreme court which have created boundaries by applying the doctrine of separation of power.

The question raised in the case *Keshvananda Bharti Sripadagalvaru and Ors. v. State of Kerala and Anr.*², was that till what extent the constitution can be amended by the legislature. The argument was that judiciary should not interfere if the parliament decides to change the law even if it was unconstitutional. However, the court held that the argument is vague and the doctrine of separation of power is the basic structure of the constitution, and it shall not be violated. This has always been integral part of the constitution and the judiciary along with executive and legislature are bound to follow the constitution which has provided distinction between the relationship of these three organs. After this decision the doctrine was recognised as an integral part of the basic structure of the Indian constitution.

Further in *Ram Jawaya Kapur v State of Punjab*³, it was held by the court that even though the doctrine of separation of power is not mentioned in the constitution but the functions of one organ should not be performed by the other. These organs should exercise its powers beyond what is provided by the constitution. Even in the case of *Indira Nehru Gandhi v Raj Narain*⁴, it was observed that the basic structure of the constitution cannot be changed even when Article 368 provides the amendment of the constitution. The court further observed that the doctrine in India has a broad sense than that of UK and USA which follow the doctrine in a very rigid manner.

“The constitution of India is supreme, and no other authority can be above it”. The functions of the three organs should be carried out within the respective power as provided by the law of land. All the organs should work as per the law of land, as observed in the case of *Golak Nath v State of Punjab*⁵.

In reality a strict follow of doctrine of separation of power is not possible. There exists inter-dependance. From the above judicial pronouncements, it can be seen that the doctrine of separation of power is followed in a broad sense in India.

OBSTACLE TO ADMINISTRATIVE LAW

² AIR 1973 SC 146.

³ AIR 1955 SC 549.

⁴ AIR 1975 SC 2299.

⁵ 1967 AIR 1643.

Administrative law is a subset of public law that governs the structure, powers, and responsibilities of administrative agencies. The idea of separation of powers establishes a boundary between the three branches of government. However, administrative law is now incompatible with this principle. The Administrative agencies are not only performing the administrative functions but also quasi-judicial and quasi legislative functions as well which might violate the doctrine of separation of power. In order to develop efficient and adroit government and assure competent law enforcement, it is now an absolute requirement to delegate further legislative and judicial responsibilities to administrative authorities. These tribunals were created with an objective to reduce the burden of the legislature and the courts. It will also speed up the lawmaking process and also provide timely justice. However, this not possible if the doctrine of separation of powers is followed in a strict sense because it limits the administrative law.

CRITICISM

Like every pointed end has a blunt side, the same way every doctrine has two faces to its effects. Even though the concept of separation of power into 3 heads might sound like an amazing concept, but the same when put to task in the real world lacks the appeal as now is the time when the edge of the blunt side comes to light. The problem arises when we make an attempt to make a distinction between these 3 heads, namely legislature, executive and judiciary. The only way that a government can operate in a correct and timely manner is when these powers have cohesiveness and cooperation. If we try to make these sections execute independently it might lead to a system failure and even ineffective working of the government. Now let us suppose that we adopt this idea in its full-fledged existence. It will make it practically impossible to carry forward and take actions in certain and specific matters. Think of it this way that the legislature which has the capability to delegate powers won't be able to do it for the executive which might have the genesis and expertise of any subject which is being considered. Also, the courts which dictate and make laws for all matters will not be able to do so for the courts itself and the proceedings.

In the present systematic world scenario, it is the job of the state to bring its foot forward and work for the prosperity and the welfare of its people. Whatever the case, from the common to the complex issues, it must be able to solve them within the society. So, when taken into consideration, the separation of power does seem and portray to be impossible. This means that as long as the rigid and stringent concepts of this doctrine are being imposed, it will not be able to fulfil the objectives of the modern state. Therefore, it can be concluded that separation of power is theoretically improbable and practically impossible. This theory was backed by Montesquieu, whose aim was to ensure freedom and liberty of an individual while protecting and safeguarding the same. But this is not at all possible if the stringent concepts of separation of power are at play.

CONCLUSION

The theory in debate i.e., the separation of power theory must be judged not only in an absolute way but in relation to its actual purpose. The only way to fully extract its meaning is to have a broader view and perceive it within a wide context, especially in this age of privatization, anarchy, and globalization. Limiting it to just the idea of being used as a medium of categorizing that too in a rigorous way should not be done, instead should be used in good spirit of unity, collective enhancement and for the greater good of the people. It can be argued that this idea or notion is not compatible to work in its literal meaning, but it can do so and succeed by laying emphasis on the checks and balances that are placed so as to make it a good government in its true form and make it possible to eradicate power manipulation and misuse by the different sections and domains of the government. It is seen that states do not follow this doctrine in strict sense, and it is very impractical to follow the doctrine of separation of powers. India with the help of this doctrine check and look after the functions of the three organs of the government. The effective working of a democracy requires doctrine of separation of power to be an essential part of the constitution however it should not be used in a strict sense.