

## SEPARATION OF POWER: ENCROACHING BOUNDARIES

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### Abstract

The Montesquieu's theory of separation of power states that all the organs of the government are equally powerful and independent from one another, if concentration of power in one branch or two bodies, it would diminish liberty of an individual. Each branch of the government while performing its functions tends to interfere in the sphere of working of another functionary because in strict sense the complete demarcation of function is not possible while dealing with general public. Here the main question arises whether this theory would have any utility in India and what is the actual position of separation of power in Indian Constitution. To what extent the different organ of the state have encroached into the domain of others in India. Another question which assumes the significance of this doctrine what should be the relation among these organs of the government. In real sense legislature and executives are closely connected with each other; the executive is responsible to the legislature for its action and derives its power from legislature. Indian parliamentary form of government does not make any express a provision for the separation of power in absolute form still lots of overlapping and combination of power has been given to each other organ.

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## INTRODUCTION

Due to the given complexities of democracy all over the world, the overlap of jurisdictions bound to arise. The doctrine of separation of power envisaged by Indian Constitution and recognized as basic structure of constitution but there is no clear straight jacket formula to determine this principle. No doubt each branch of the government must keep internal check and balances to ensure that they do not end up violating the rights of people.<sup>1</sup>

The Doctrine of separation of power deals with the three main organs of government legislature, executive and judiciary, and having mutual relation among these three organs. The principle of separation of power already existed in different forms of powers and function, and defined by different scholars and jurist classified the functions of government. Aristotle first time classified the functions of government into three categories such as deliberative, magisterial and judicial functions. On the other hand John Lock categories three powers of government, continuous executive power, discontinuous power and federative power. Here, continuous executive power implies the executive and judicial power, discontinuous legislative implies rule making power and federative power implies the power regulating foreign affairs.<sup>2</sup> In 1798, French jurist Montesquieu articulates the principle of separation of power in his book 'spirit of laws'.<sup>3</sup> He argued that neither a single person nor group of persons exercise all the powers of government legislature, judiciary and executive. Therefore each organ should restrict within its own sphere and restrain them from encroach the power of other organ. When same person exercise both the executive and legislative power it would leads to the infringement of freedoms or liberty, and they will act arbitrarily.<sup>4</sup>

In strict sense the complete and absolute separation of power is not possible in actual practice and theoretically. It is necessary to give broad meaning to this doctrine:

- 1) The same person should not form part of more than one of the three branch of government.
- 2) One branch should not control or interfere with other branch of government.
- 3) The branch should not exercise the function of other branch.

The whole notion of the separation of power is that collective amalgamation of power of state not only to be confined with single individual or group of person due to individual biases and prejudices. The power of the state should operate independently of one another for the rights and liberties of an individual to be preserved. At present in the modern iteration of separation of power it is more likely to be considered or prudent to be considered the independence of the judiciary because there are overlaps between executive and legislature. The judiciary should be considered paramount to be independent it is completely set aside from executive and legislature.

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<sup>1</sup> Nidhi Singh and Anurag Vijay, "Separation of Power: Constitutional plan and Practice" 3 *IJSRP* 1 (2013).

<sup>2</sup> Tej Bahadur Singh, "Principles of Separation of Power and Concentration of Authority", 2 *JTRI* 1, (1996)

<sup>3</sup> Durga Das Basu, *Administrative Law* 23, ( Kamal law House, Kolkata, 6<sup>th</sup> ed., 2004)

<sup>4</sup> *Supra* note 1 at 2

Due to this theory, the main significant principles that there is no concentration of powers, enhanced the system of check and balances, no organ having controlling power other, and this theory is necessary to preserve the liberty of the individual and for avoiding tyranny.

The American Constitution have applied this theory to certain extent and giving judiciary unique position. The framer of U.S Constitution strictly adheres to the doctrine of separation of power but in actual practice it has been seen that it cannot be applied in rigid and absolute form. In *Liver Sidge v. Anderson*<sup>5</sup> case, in which lord akin has contributed to the evolution of this doctrine of separation of power.<sup>6</sup> In US Constitution, Art. I related to the legislative power of congress, Art. II vests executive power in president, and Art. III vests judicial power in the Supreme Court. In US this principle would help to prevent the rise of tyrannical government by making it impossible for single group or branch to exercise too much power. Despite the explicit provision in US constitution, it incorporated certain exception to the principle of separation with a view to introduce check and balances.<sup>7</sup> Under non delegation doctrine, the congress may not delegate its law making power to any agency or department. In *Clinton v. City of New York*<sup>8</sup> case it was held that the Congress could not delegate a line - item veto to the president. In *INS v. Chadha*<sup>9</sup> case, the Supreme Court decide that the presumption of legislature action under Article I section I vests with all law making power with Congress and require every bill passed by the House and Senate, before becoming law presented to the president and, if he disapproves, to be re passed by two thirds of the Senate and House. It was further clarified in the case that even both Houses acting together cannot override Executive veto's without a 2/3 majority. Legislative may always prescribe regulations governing executive officers. In land mark case, *Marbury v Madison*<sup>10</sup>, it was first time when US Supreme Court declared something unconstitutional and accept the principle of judicial review. The main idea to nullify and oversee the actions of another branch of the government to maintains check and balances in American form of government.<sup>11</sup>

Here the main question arises whether theory would have any utility in India and what is the actual position of separation of power in Indian Constitution. To what extent the different organ of the state have encroached into the domain of others in India. In other word, performing the functions of other organ does not invalidate that action due to the reason that such functions belongs to other organ.

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<sup>5</sup> (1942) AC 206

<sup>6</sup> *Supra* note 1 at 1

<sup>7</sup> Information Technology Act 2000, India, Available at: <http://www.legalserviceindia.com/article/I16-Separation-Of-Powers.html> (Last visited on October 11, 2015)

<sup>8</sup> 524 U.S. 417 (1998)

<sup>9</sup> 462 U.S. 919 (1983)

<sup>10</sup> 5 U.S. 137(1803)

<sup>11</sup> Information Technology Act 2000, India, Available at: <http://www.legalservicesindia.com/article/article/separation-of-power-in-india-&-usa-483-1.html>( Last visited on October 11, 2015).

## CONSTITUTIONAL PERSPECTIVE: DOCTRINE OF SEPARATION OF POWER (INSTANCES OF ENCROACH THE POWER OF OTHER ORGANS)

In Indian Constitution, it is explicit provision that executive power of the Union shall be vested in the President and the executive power of the state shall be vested in the Governor of the state. The legislative power vested with parliament as provide under Article 79 of the Constitution. In The judicial power lies with Supreme Court as specified under Article 131 and succeeding Articles. In aforesaid provisions, no where we can find the word “exclusively”, it shows that framer of our constitution did not consciously approving the theory of separation of power.<sup>12</sup>

The Constitution lays down the function separation of branch of the government. Article 50 states that state shall take steps separation of judiciary from the executive to ensure the independence of judiciary. In the judgment, *Pandit M.S.M. Sharma v. Shri Krishna Sinha*<sup>13</sup>, the Supreme Court observed that Art. 122 and 212 provides of proceedings in Parliament and legislature cannot be called into question in any court. This ensures the separation and immunity of the legislature from judicial intervention on the allegation of procedural irregularity. Similarly the executive power of union and state shall be vested president and governor under Art. 53 and 154 respectively and they can enjoy immunity from civil and criminal liability.

The legislative vested with law making power but exercise judicial powers in cases of breach of its privilege, impeachment of the president and the removal of the judges. The executive may further affect the functioning of judiciary by making appointment to the offices of Chief Justice and other judges. The legislature having amending power, if amendment is against constitution provision the judiciary can declare it void and revalidating it.<sup>14</sup> The legislature discharging the function judiciary while disqualifying its members and impeachment of the judges. Legislature can impose punishment for exceeding freedom of speech in the parliament (under the powers and privileges of the parliament). It is always necessary for legislature that they exercise their power in conformity with due process.<sup>15</sup>

On the other hand, the provisions of Indian Constitution do not lay down prohibited areas of these three organs of the government. Due to which there is liberal mixture of function performed by one and other organ. There are many instances where each organ exercising the function of other organ. The legislature exercising the functions of executive such as Voting in the election of president and vice – president and their removal (Article 55, 66 and 67 respectively), control of council of ministers ( Article 75), and removal of the judges of Supreme Court and High Court ( Article 124 and 217).

The legislature performs the functions which are judicial in nature such as impeachment of the president (Article 61) and certification of money bills through speaker (Article 110). The

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<sup>12</sup> P. M. Baxi, “Comparative Law: Separation of Power in India” 42 *ABAJ* 553 (1956)

<sup>13</sup> AIR 1960 SC 1186

<sup>14</sup> *L Chandra Kumar v. Union of India*, 1995 1 (SCC) 400

<sup>15</sup> *Keshav Singh v. Speaker, Legislative Assembly*, 1965 1 SCR 413

executive performing legislative functions such as ordinance making power of the president (Article 123), President power to make recommendation on money bills (Art. 117 and 304), president power to certify state law (Art. 31), President having legislative power to proclaim emergency due to failure of constitutional machinery (Art. 357), Article 372 and 372-A power has been conferred on president to adapt any law in country whether by way of repeal or amendment as may be necessary for making necessary or expedient to bring the provision of law in accordance with the provisions of constitution<sup>16</sup>, president power to give assent to the amendment of the constitution (Art. 368), pardoning power of the president (Art. 72) and so many others article relating to president power. The judiciary performs the functions of legislature such as making rules for regulating its practice and procedure (Art. 145). The executive perform the functions of judiciary such as appoint officers and servants of High Court (Art. 46).<sup>17</sup> In Article 103(1) president exercise judicial function; if any question arises as to the whether member of either house of parliament has become subject to disqualification in Article 102 (1) the question shall be referred for the decision of president and his decision shall be final.<sup>18</sup> In actual practice, executive exercise power judiciary in appointment of judges under Article 124, 126 and 127. On the other hand legislature also exercises judicial function in removal of president under Article 56. Judiciary also make certain rules which are legislative in character whenever High Court or Supreme Court finds certain provisions of law against the Constitution or public policy and it declares the law null and void, and amendment to be made for formulate the law. Sometimes it is expedient for High Court or Supreme Court to formulate the principle on the point where law is silent.<sup>19</sup>

Adam Smith in his book, '*The Wealth of Nation*' explained the concept of Montesquieu theory of separation in relation with property rights, and offered two explanations first in function sense and another in structural sense. The functional explanation invoked to critique judicial activism and structure of regulatory bodies. In structural sense, it akin to the Montesquieu theory of separation of powers that concentration of power in one branch leads to the violation of rights and liberties. At present the growing economics literature understand this principle in structural sense.<sup>20</sup>

## DUE PROCESS AS SEPARATION OF POWER

The doctrine of basic structure has caused power imbalance between judiciary and parliament especially in respect of constitutional amendment. At the time when constitution was made, the importance of due process was consciously deleted which has led to unjustifiably decisive supremacy of the judiciary over all other branches of the government.<sup>21</sup> In *Maneka Gandhi case*<sup>22</sup>, "it was held while interpreting the Article 14 that all the articles on fundamental rights

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra* note 6 at 554

<sup>18</sup> *Supra* note 1 at 6

<sup>19</sup> *Ibid.*

<sup>20</sup> Jaivir Singh, "Separation of Power and the erosions of 'rights to property' in India" 17 *CPE* 314 (2006).

<sup>21</sup> Pran Chopra (ed.), *The Supreme Court Verses The Constitution: A Challenge to Federalism* 63 (SAGE Publication, New Delhi, 2006).

<sup>22</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

bear the relationship with one another and any law depriving the rights and liberties any person must not satisfy the requirement of Article 21 'procedure established by law' but also article 19 equality before the law. By interpreting the article 14 with the principle of reasonableness or non-arbitrariness which is essential attribute of equality impacting on the freedoms under article 21." That was the indeed a clever way to introducing 'due process clause' in place of the 'procedure established by law.' The extraordinary power of Indian Supreme Court under the basic structure and due process of law led threat to the democratic system itself.<sup>23</sup>

## JUDICIAL REVIEW AND SEPARATION OF POWER

The power and function of each organ is subjected the restriction which would function of other organ to maintain check and balance in democracy. The laws made by the parliament and state legislature which would subject to judicial review. Art. 13 states that any law that is contravention to the part III would be declared ultra vires by the Supreme Court and High Courts in exercise the function of judicial review. It was held by Supreme Court in the Judgment *Keshavanand Bharti v. State of Kerala*, that the power to amend the constitution by the parliament is subject to the scrutiny of the court. The Court may declare any law void it affects the basic structure of the Constitution.

The judicial review are the power of the Supreme Court and High Courts under article 32 and 226 respectively, the courts to check the constitutionality of every law made by parliament and the legislatures. This power of judiciary applicable to executive action and can be challenged on the golden trilogy of Article 14, 19 and 21. The Judicial review in India is based on assumption that the constitution is the supreme law of the land, and all governmental organs which owe their origin to the Constitution and derive their power from its provisions, must function within the frame work of the Constitution.<sup>24</sup>

The supremacy in appointment of judges to the higher judiciary is with the Executive with the consultation of the Chief Justice, this is while ensuring the independence of judiciary. The land mark Judgment *Minerva Mills Ltd. v. Union of India*<sup>25</sup>, the apex Court observed:

*"In our country, the "Constitution is supreme lex, the paramount law of the land and there is no authority, no department or branch of the State, which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority. Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution."*

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<sup>23</sup> *Ibid.*

<sup>24</sup> V. N. Shukla, *Constitution of India*, 52 (Eastern book company, Lucknow 10<sup>th</sup> ed., 2006)

<sup>25</sup> (1980) 3 SCC 625



The Constitution divides the legislative power between the centre and the state, and forbids either of them to encroach upon the power given to another. Who is to decide whether legislature or executive has acted in excess of its power or in contravention to the restriction imposed by the constitution on its power? So obviously this function assigned to court. Dr, Ambedkar had stated that judicial review and writ jurisdiction that gave quick relief against the infringement of fundamental right constituted the heart and soul of constitution.<sup>26</sup>

## JUDICIAL PRONOUNCEMENT

In *re Delhi Law Act case*<sup>27</sup>, The Chief Justice Kania observed that, “*Although in Indian constitution there is no explicit provision relating to separation of powers. Under constitution the duty to make law is primary function of legislature. Does it not imply that unless it can be gathered from other provisions of the constitution, other bodies’ executive or judicial functions are not intended to discharge legislative function?*” Our Constitution does not contemplate assumption, by one organ of the government, of function that essentially belongs to another. In *Ram Jawaya v. State of Punjab*<sup>28</sup> case, it was held by the Supreme Court that we follow separation of function, not a separation of power. The apex court observed that executive power connotes the residue of government functions that remain after legislative and judicial function taken away. The Indian Constitution has not indeed recognized the federal principle or doctrine of separation of power in rigid way but the functions of the different parts or branches of the government have been sufficiently differentiated. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when empowered, exercise judicial functions in a limited way.

*Golak Nath v. State of Punjab*<sup>29</sup>, The Supreme Court observed, “*Constitution brings into existence different constitutional entities, namely the Union, the States and the Union Territories. It creates three major instruments of power, namely legislature, executive and judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. It is clear that the doctrine of separation of power has not been accepted in India in strict sense. The Supreme Court has power to declare void the laws passed by legislature and the actions taken by the executive if they violate any provision of the constitution. The executive can affect the functioning of judiciary by making appointment to the office of Chief justice and other judges*”.

In the judgment of *S.P. Gupta v. Union of India*<sup>30</sup> regarding the appointment of the judges, the Supreme Court held that Article 124(2) is to be made by the President in consultation with such of the judges of the Supreme Court and the High Court as the President may deem fit. The consultation with Chief Justice of India is mandatory in case of appointment of a

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<sup>26</sup> S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 34 (Oxford University Press, India, 2<sup>nd</sup> ed., 2003)

<sup>27</sup> AIR 1951 SC 332

<sup>28</sup> AIR 1955 SC 549

<sup>29</sup> AIR 1967 SC 1643

<sup>30</sup> AIR 1982 SC 149

judge other than the Chief Justice. This had created a balance of power in appointment of judges to the higher judiciary. The Hon'ble Supreme Court has through a series of judicial interpretations have shifted the supremacy from the President to itself. The Hon'ble Court has created an extra- constitutional body called collegiums and vested with the power of appointment.<sup>31</sup>

In land mark judgment of *Kesavanand Bharti v. State of Kerala*<sup>32</sup>, it was held that separation of power is a part the basic structure of the Constitution. The Justice Chandrachud in the judgment of *Indira Gandhi Nehru v. Raj Narain*<sup>33</sup>, also observed that “the political usefulness of the Doctrine of the Separation of power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of separation of power is a principle of restraint has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour”. The Supreme Court observed the strictly adherence to the Doctrine of separation of power. The entire debate on this doctrine has gone through a drastic change in the past two decades. Justice Pathak in *Bandhua Mukti Morcha v. Union of India*<sup>34</sup> case observed that, “it is well recognized that in certain sphere the legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions, and it is duty of court to interpreting the law, accomplishes in its perfect action in a marginal degree of legislative existence. Nonetheless a fine and delicate balance is envisaged under our constitution between these primary institutions of the state. It was clearly inferred that one branch may exercise functions of another up to limited extent”.

## CRITICISM

It is not desirable that there should complete separation of power, if this doctrine exist in absolute form it leads to non co – operation and disharmony between the different organs. That will result into frequent deadlock which may bring the government machinery to a standstill. According to Mill, the Doctrine of separation of power result into clash between the three organs of the state, as each organ will take interest only in their own powers. If each branch become independent and separate each will try to safeguard their own interest or power not protect the power of other branch that will exposed to un attainment of administrative efficiency. The gradual growth of delegated legislation and administrative adjudication leads against the doctrine of separation of power.

## CONCLUSION

The general proposition that each branch of the government should perform functions within their own sphere, if each organ overlaps or usurp the function of other organ it may further

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<sup>31</sup> Information of Technology Act, 2000 India, Available at: [http://www.lawyersclubindia.com/articles/print\\_this\\_page.asp?article\\_id=3014](http://www.lawyersclubindia.com/articles/print_this_page.asp?article_id=3014) (Last visited on October 12, 2015)

<sup>32</sup> AIR 1973 SC 1461

<sup>33</sup> AIR 1976 SCC 321

<sup>34</sup> 1984 3 SCC 161



held to be void on the ground that it discriminates against any person or group without justification, individual will infringe the rights of others without compensation or unreasonable restraint, or it may lead to undue delegation of powers. The purpose of separation of powers, to retain the autonomy of the organs without compromising the functional zone of the other organs, remains only in theory. Separation of powers, quintessential in a democratic country with a parliamentary form of government, has to be recognized and enforced in its true sense.

The Montesquieu theory of separation in strict sense cannot be applied in modern government or a developing democratic country like India. However, it does not mean it has no relevance. If there will be complete separation of powers the government cannot run effectively. For smooth running of government mutual the harmony and co – operation among the different organs will be at paramount.