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DOCTRINE OF SEPARATION OF POWERS- HAS THE GROWTH OF ADMINISTRATIVE LAW AFFECTED IT?

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Abstract

The principle of separation of powers is the focus of this paper. The author first introduces the separation of powers as a concept, and then analyses its breadth via the prism of the judicial system. The separation of powers in a check and balance form is vital to a democratic country for the proper functioning of the government to guarantee individual liberty and to avoid the confrontation among the legislative, executive, and judicial branches. But in a rigid sense it is impossible in its application as it would lead to a biased or involuntary hurdle in the functioning of each branch of government. Nonetheless the separation of powers in conjunction with the principle of checks and balances is vital to maintain the balance of power and ensure a free and fair democracy. It is contended that administrative law in its scope has enlarged and expanded the use of delegated legislation leading to an increase in the powers of the executive. The judiciary in its verdicts has attempted to define the limits of the branches of the government, but the real question is whether its interpretations and principles will stand the test of time.

Keywords- Separation of Powers, Checks and Balances, Fair, Democracy, Delegated Legislation.

Research Methodology : The type of method that will be used in this paper are doctrinal in nature and the data are collected from the secondary resources like journals, articles, media reports, books, case laws and different websites. The secondary resources will be used as a reference to analyse and understand the criticism behind the study of this research paper. The researcher has conducted a comparative study on the different aspects of the separation of powers that are relevant to checks and balances which encompasses its legal structure, case analysis, and legal framework.

Hypothesis: While the separation of powers in the form of checks and balances is necessary for the protection of individual liberty from arbitrariness and the efficient operation of a democratic government, such a system must be flexible enough to adapt to the ever-evolving nature of society. It must not be an absolute and arbitrary concentration of power in the hands of a few individuals or a single branch of government.

Introduction

The separation of powers is founded on the notion of trias politica, which means three political powers. Because of the "***Magna Carta***," the doctrine of separation of powers has been the predecessor of all of the world's constitutions, which have come into existence since that time. Despite the fact that Montesquieu was under the

mistaken assumption that the concept of Separation of Powers lay at the heart of the British constitution, the principle was really conceived in the United States Constitution. Montesquieu believed it would be a cure for effective administration, but he recognised that it had its own set of limitations. Any constitution would have been invalidated if there had been a total separation of powers without proper checks and balances. In order to remain relevant to changing times, this notion was embraced by the founding fathers of numerous constitutions, but with certain alterations to make it more relevant to their times.[1]

A close relationship exists between the doctrine of "**separation of powers**," which is a classic result of scientific political philosophy, and what is referred to as "**judicial activism**." The concept of "***separation of powers***" is firmly established in the Indian Constitution as one of its fundamental principles. The Constitution of India is the source of all authority in the country. The sovereign authority has been divided into three wings: the executive, legislative, and judicial.[2] The idea of separation of powers envisions a three-tiered form of government. The Constitution allocated powers to the three organs, as well as delineated the jurisdiction of each of the three organs. The theory of separation of powers has not been given constitutional recognition in India, according to the official viewpoint. There was a proposal to include this theory in the Constitution by the Constituent Assembly, but it was knowingly not approved and as a result was abandoned. The constitutional framework, with the exception of the Art. 50 of the Directive Principles of State Policy (DPSP), which states the separation of the judiciary from the executive, does not incorporate any formalistic and dogmatic division of powers

I. Theory of Separation of Powers

The Theory of Separation of Powers is a three-part organisation of government powers that includes the following elements:

1)A reasonable individual should not be allowed to influence more than one of the three organs of the government (for example, the Executive, the Legislature, and the Judiciary).

2)It is not appropriate for one organ of government to interfere with the operations of another organ of government.

3)No one organ of the government should be allowed to perform the functions that have been delegated to another organ by the Constitution.

The concept of separation of powers refers to the appropriation of powers by specific sections of the government for specific purposes. To simplify things, all of the powers of the public authority have been imagined to fall into one of three extraordinary classes:

[1] An Analysis of Separation of Power in Relation to Administration Law, , https://www.omicsonline.org/open-access/an-analysis-of-separation-of-power-in-relation-to-administration-law-116561.html (last visited Mar 6, 2022).
[2] Shubhangi Baranwal, *An Analysis of Separation of Power in Relation to Administration Law*, 10 J. CIV. LEG. SCI. 1–6 (2021), https://www.omicsonline.org/open-access/an-analysis-of-separation-of-power-in-relation-to-administration-law-116561.html (last visited Mar 6, 2022).

(1) the sanctioning of law-making,

(2) the understanding of those laws, and

(3) their implementation; - to be specific Legislative, Executive, and Judiciary powers have been imagined. Government has traditionally been thought of as consisting of three branches, each with its own set of capabilities, and such a classification is regarded to be an "old-fashioned" way of categorising government.[3] According to Montesquieu, by isolating the components of the Legislative, Executive, and Judicial departments of government, one might operate as an equilibrium against another, and, as a result, power should be a mental power rather than a physical one. "Le pouvoir arête le pouvoir" means "the ability to stop the exercise of power."[4]

According to his viewpoints, "When the Executive and Legislative powers are combined in the same individual or in a similar collection of judges, there can be no freedom, on the grounds that anxieties may arise in the event that a similar Monarch or Senate should correct overbearing laws, causing them to be executed in a domineering manner. If the judicial authority is not completely separated from the executive and legislative branches, there can be no freedom. The subject's life and freedom would be exposed to self-assertive control in the event that it came into contact with the legislative branch; for the designated authority would then be a legislator. A judge may continue to be harsh and abuse people where it has joined forces with the main force. There would be an end to everything, where a comparable man or body, regardless of whether it be of the Nobles or of the individuals, would practise those three capabilities, namely, the ability to demand laws, the authority to execute public purposes, and the power to provide reasons to individuals."

Consequently, Montesquieu's accommodation is the division of forces according to work, and the theory that emerged as a result of this division is known as the division of forces hypothesis. One of the most important tenants of the eighteenth-century political style of thought was the cutting-edge notion of separation of powers.[5]

In ancient India, there was a division of authority. It should be noted that the separation of powers is well-known since it was discovered by Montesquieu and Locke, but the roots of the separation of powers may be traced back to ancient Indian texts. If we look at the Smritis, which are ancient sources of law such as the Dharma, we will see that there is a similar type of division. As a result, in the Narad Smriti we see adherence to the fundamental principle of power separation. The executive wing of any historical organisation was headed by Deewan at the time, Senapati was doing something crucial to preserve the peace, and Kaji was in charge of the legal department of the organisation. But we must not lose sight of the fact that they are all subservient to the

[3] Separation of Powers and its Relevance - iPleaders, , https://blog.ipleaders.in/separation-of-powers-and-its-relevance/ (last visited Mar 6, 2022).
[4] Indian Constitution And Separation Of Powers, , https://www.lawteacher.net/free-law-essays/constitutional-law/indian-constitution-and-separation-of-powers-constitutional-law-essay.php (last visited Mar 6, 2022).
[5] Separation of Powers - Relationship between Executive, Legislature & Judiciary - Indian Polity, , https://byjus.com/free-ias-prep/separation-power-indian-constitution/ (last visited Mar 6, 2022).

Ruler, who possessed unparalleled authority and, as a result, acted in a manner similar to the present-day ruling body.[6]

As a result, it seems that there was also a division of powers in one region or inheritance during antiquity. Overall, King is widely regarded as the greatest authority in all areas, with the exception of capabilities and forces, which have been excluded. In the Indian context, this means India's Constitutional Provisions for the Separation of Powers have no different provisions in our Constitution with regard to the Doctrine of Separation of Powers than those that exist in other countries. As a result, there are some standards set forth in our constitution, such as those found in Parts IV and V, and Article 50 of our Constitution, which states that "***the state shall take steps to separate judiciary from executive in the public services of the state***," but aside from this, there is no formal and overbearing division of power in our country. In India, both utilitarian and individual covering are available, and the latter is the more popular of the two.[7]

If there is an occurrence of inconspicuous activities behind the law, the Supreme Court has the authority to declare void the laws passed by Parliament and activities undertaken by the executive on the grounds that they are in contravention of any provision of the constitution or law passed by the legislature, as set out in Article 142 and Article 145 of our Indian Constitution. Indeed, it is the Court's examination that determines whether Parliament will be able to modify the constitutional provisions in question. In the case that a revision alters the fundamental structure of the constitution, the Court may declare the adjustment null and invalid. In a number of situations, the courts have provided headings for the Parliament to use in developing plans. Following a decision by the Supreme Court of India, it has been said that "***the constitutional structure seeks to provide an independent judiciary, which is the cornerstone of democracy***." The independence of the court has also been seen as a fundamental structural feature of the constitution. According to Fazal Ali, J., who wrote the decision in ***S. P. Gupta v. President of India***, "***independence of the judiciary is a fundamental structure of the constitution, but the idea of independence must be contained within the four corners of the constitution***." In a nutshell, we have distinct authorities and functions for the judiciary, at least to some extent. Article 50 is governed by the idea of independence of the court, which has been approved.[8] In the executive context, the President of India, who is the incomparable leader expert in India practise law making power under Article-123, as well as Judicial Powers under Article-103(1) and Article-217(3), he has the counselling capacity to the Supreme Court of India under Article-143, and he also has the exculpating power under Article-72. The leader also has an impact on the functioning of the judiciary by deciding with the office of the Chief Justice of India and other appointed officials.[9]

[6] The Separation of Powers – Why Is It Necessary? | Austrian Parliament, , https://www.parlament.gv.at/ENGL/PERK/PARL/POL/ParluGewaltenteilung/index.shtml (last visited Mar 6, 2022).

[7] separation of powers | Definition & Facts | Britannica, , https://www.britannica.com/topic/separation-of-powers (last visited Mar 6, 2022).

[8] S. P. Gupta v. President of India AIR 1982 SC 149

[9] All you need to know about the separation of powers in India, , https://blog.ipleaders.in/separation-of-powers/ (last visited Mar 6, 2022).

II. Principle of Checks and Balances

The Checks and Balances Principle is a fundamental concept in governance. One may trace the idea of separation of powers back to an older theory known as the theory of mixed governance, which was later developed into the doctrine of separation of powers. It was adumbrated in the works of Polybius, a brilliant historian who was taken by the Romans in 167 BC and held as a political hostage in Rome for 17 years, in his history of Rome, which is considered to be the first known example of this notion in existence.[10]

Polybius provided an explanation for the remarkable stability of the Roman government, which allowed the city-state to develop a worldwide empire under its control. He promoted the view that the powers of Rome arose as a result of the fact that she had a mixed administration. Polybius believed that unmixed systems of governance – that is, the three major types of government – namely, monarchy, aristocracy, and democracy – were essentially unstable and prone to fast degeneration, and that they should be avoided. The Roman constitutions countered such instability and inclination to degeneration by incorporating elements from all three basic types of governance into a harmonious whole that worked well together. The consuls, the Senate, and the popular Assemblies were all examples of the monarchical, aristocratic, and democratic ideas, respectively, in the Roman world.[11]

The powers of the government were divided amongst them in such a way that each checked and was checked by the others, resulting in a state of equipoise or equilibrium, which provided a remarkable level of stability to the constitutional system. Polybius' work was the inspiration for political theorists in the 17th Century, who developed the idea of separation of powers, as well as the closely related notion of checks and balances, both of which were derived from his work.[12]

Effects

It is widely acknowledged that the idea of separation of powers, as articulated by Montesquieu, had a significant influence on the development of administrative law and the operation of government institutions. It was praised by both English and American jurists, and it was approved by political leaders as well. When William Blackstone wrote his book 'Commentaries on the Laws of England' (1765), he noticed that if a single individual were to be granted the power to legislate, administer the courts, and judge cases, personal liberty would be destroyed. Furthermore, Madison asserted that "the concentration of all powers — legislative as well as executive and judicial — in the same hands — whether held by a single individual or a group of individuals — whether hereditary, self-appointed or elected — may justly be pronounced the very definition of tyranny." It

[10] Separation of Powers--An Overview, , https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx (last visited Mar 6, 2022).
[11] All you need to know about the separation of powers in India, *supra* note 9.
[12] Baranwal, *supra* note 2.

was announced in 1789 by the French Constituent Assembly that there would be no such thing as a Constitution in a society that did not recognise the theory of separation of powers.[13]

Importance

This rigidity is a contributing factor to the fact that the idea of separation of powers is not adopted by a significant number of governments throughout the world. According to Montesquieu, the primary goal of the doctrine of separation of powers is to ensure that the rule of law prevails over the will and whims of the officials. Another key characteristic of the above-mentioned philosophy is that the judiciary should be independent, that is, it should be free from interference from other organs of the state, and that if this is the case, justice would be given correctly to the people of the country.

It is the judiciary that serves as the yardstick by which one can assess the actual development of a state. If the judiciary is not independent, it is the first step towards the establishment of a tyrannical form of government, in which power is concentrated in a single hand, and in which there is a one-hundred percent chance that power will be abused. As a result, the doctrine of separation of powers plays an important part in the formation of a fair government, as well as in the administration of fair and proper justice by the court, which is made possible by the judiciary's independence.[14]

The relevance of the idea of separation of powers may also be traced back to as early as 1789, when the Constituent Assembly of France declared that "there would be nothing like a Constitution in a country where the doctrine of separation of powers is not adopted." It was also in 1787 that the American constitution was amended to include the doctrine of separation of powers, which was drafted at the same time that the constitution was amended.[15]

III. India and the Doctrine of Separation of Powers

Unlike in many other countries, India has not given constitutional recognition to the theory of separation of powers. The constitutional structure does not incorporate any formalistic or dogmatic division of powers other from the directive principle enshrined in Article 50, which enjoins the separation of the judiciary from the government.

However, in ***Ram Jawaya Kapur v. State of Punjab***[16], the Supreme Court held that while the Indian Constitution does not recognise the doctrine of separation of powers in its absolute rigidity, the functions of the various parts or branches of government have been sufficiently differentiated, and as a result, it can be very well

[13] Separation of Powers and Its Development with Special Reference to India, , http://www.legalservicesindia.com/article/1617/Separation-of-Powers-and-Its-Development-with-Special-Reference-to-India.html (last visited Mar 6, 2022).
[14] Doctrine Of Separation Of Power - Academike, , https://www.lawctopus.com/academike/doctrine-of-separation-of-power/ (last visited Mar 6, 2022).
[15] The Separation of Powers – Why Is It Necessary? | Austrian Parliament, *supra* note 6.

[16] Ram Jawaya Kapur v. State of Punjab AIR 1955 SC 549

stated that our Constitution does not contemplate the assumption by one organ or part of the State of functions that essentially belong to another.

Also, in ***Indira Nehru Gandhi v. Raj Narain***[17]**,** the Chief Justice of India, Ray C.J., stated that the Indian Constitution only recognises the separation of powers in a wide sense. In India, there is no such rigorous division of powers as exists under the American Constitution or the Australian Constitution. It was ultimately determined by the Court that, even though the constituent power is distinct from the doctrine of separation of powers, attempting to enshrine the concept of basic structure developed in the case of ***Kesavananda Bharati***[18] into the ordinary legislative powers would constitute an infringement of the doctrine of separation of powers and thus constitute an encroachment on the doctrine of separation of powers. Beg, J., however, went on to say that the division of powers is a fundamental component of the Constitution's basic construction. None of the three different organs of the Republic has the authority to assume the responsibilities of the other two. Even if Article 368 of the Constitution is invoked, it will not be possible to amend the current constitutional framework.[19]

The overlap between functions and personnel exists in India, and this is true not only for functional but also for personnel overlap. In the event of legislative acts, the Supreme Court has the authority to declare void the laws enacted by the legislature and the measures taken by the executive if they contradict any article of the Constitution or a law passed by the legislature in the case of legislative activities. Even the power of Parliament to modify the Constitution is subject to the examination of the Court, which has the authority to declare any amendment unconstitutional if it alters the fundamental structure of the Constitution.[20] The President of India, in whose hands the Executive Authority of India is lodged, wields law making authority in the form of ordinance-making power, as well as judicial powers under Article 103(1) and Article 217(3), to name a few examples. The Council of Ministers is appointed by the Legislature and is ultimately accountable to the Legislature as a whole. In addition to exerting legislative authority, the Legislature has judicial authority in situations of violation of its privilege, impeachment of the President, and removal of judges. The Executive may also have an impact on the operation of the judiciary by appointing individuals to the position of Chief Justice and other positions within the judiciary.[21]

IV. Judiciary and Doctrine of Separation of Powers

With respect to the doctrine of separation of powers, there have been times when the judiciary has faced difficult challenges in upholding and preserving the doctrine of separation of powers, and it has delivered landmark judgments in the process of upholding and preserving the above-mentioned Doctrine, which speak

[17] Indira Nehru Gandhi v. Raj Narain 1975 SCC (2) 159

[18] Kesavananda Bharati v Union of India (1973) 4 SCC 225

[19] Baranwal, *supra* note 2.

[20] "Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" [2005] PER 5, , http://www.saflii.org/za/journals/PER/2005/5.html (last visited Mar 6, 2022).

[21] Doctrine of the Separation of Powers | Online Library of Liberty, , https://oll.libertyfund.org/page/doctrine-of-the-separation-of-powers (last visited Mar 6, 2022).

volumes about the independence of the judiciary as well as the success of the judiciary in India over the last six decades.

It was in the case of ***Ram Jawaya v. State of Punjab***[22] that the judiciary rendered its first significant decision in connection to the doctrine of separation of powers. As stated above, the court found that the doctrine of separation of powers was not completely acknowledged in India at the time of the decision. Furthermore, it lends credence to the idea that the philosophy referred to above is not universally recognised in India. It is claimed that, while the Indian constitution has not recognised the doctrine of separation of powers in its absolute rigidity, the functions of the various parts or branches of government have been sufficiently differentiated, and as a result, it can be safely asserted that our constitution does not contemplate the assumption, by one organ or part of the state of functions that essentially belong to another organ or part of the state.[23]

Subha Rao, C.J. stated in ***I.C. Golak Nath v State of Punjab***[24] that "***the constitution creates different constitutional entities, namely, the union, the state, and the union territories***," It establishes three primary instruments of authority, namely the Legislative branch, the Executive branch, and the Judiciary branch of government. It delineates their different jurisdictions to the smallest detail and expects them to use their individual authorities without exceeding their authority. They should carry out their responsibilities within the domains that have been assigned to them."[25]

The court's decision in the case of ***Ram Jawaya Kapur v State of Punjab***, which included the theory of separation of powers, has clearly stated in the above-mentioned judgement of the court, which clearly demonstrates the shift in the court's viewpoints. In one of the most important decisions ever handed by the Supreme Court, ***Keshvananda Bharti v Union of India***[26], the court held that the authority to modify the constitution was now subject to the fundamental provisions of the constitution. As a result, any modification that tampers with these fundamental provisions would be declared unlawful. Beg, J., went on to say that the division of powers is a fundamental component of the constitution's basic framework. There is no way for any of the three different organs of the republic to take over the tasks that have been given to the other seven. The court's position on the idea of separation of powers was thereby reinforced as a result of this decision.[27]

When the dispute over the Prime Minister's election was pending before the Supreme Court, the court ruled that adjudication of a specific dispute is a judicial function that Parliament cannot exercise, even if it exercises constitutional amending power. In other words, the Parliament does not have the authority to perform a function that another organ has the authority to perform, or else there will be chaos because the jurisdictions of the three

[22] Ram Jawaya Kapur v. State of Punjab AIR 1955 SC 549

[23] Baranwal, *supra* note 2.

[24] I.C. Golak Nath v State of Punjab 1967 SCR (2) 762

[25] Separation of Powers--An Overview, *supra* note 10.

[26] Kesavananda Bharati v Union of India (1973) 4 SCC 225

[27] Separation of powers | Wex | US Law | LII / Legal Information Institute, , https://www.law.cornell.edu/wex/separation_of_powers (last visited Mar 6, 2022).

bodies will overlap, and the government will be unable to function effectively. Another point of view expressed by the French Constituent Assembly, which was formed in 1789, was that "there would be no such thing as a Constitution in a society if the theory of separation of powers is not adopted." In other words, if there is a provision, there should be effective execution, and this ruling focuses only on that point.

The Supreme Court in the case ***of I.R. Coelho vs. State of Tamil Nadu***[28], which dealt with the doctrine of basic structure, adopted the opinion expressed by the Supreme Court in the Kesavananda Bharati case and held that the Ninth Schedule is in violation of the doctrine of basic structure, and as a result, the Ninth Schedule will now be subject to judicial review, which is also a component of the basic structure theory, going forward.

There has been a significant shift in opinion from the cases listed above, which range from ***Ram Jawaya Kapur v State of Punjab*** in 1955 to ***I.R. Coelho v State of Tamil Nadu*** in 1997. Initially, the Supreme Court of India held that the Constitution did not contain a Doctrine of Separation of Power, but as time has passed, the Supreme Court's position has shifted, and it now recognises the Doctrine as a fundamental feature of the Constitution of India.

As Das J. noted in the case of ***A. K. Gopalan v. State of Madras***[29], while the constitution imposes some constraints on the three branches of government, it places our parliament and state legislatures as the highest authorities in their respective spheres of jurisdiction. As a general rule, subject to certain exceptions, our constitution has given precedence to legislative rather than judicial supremacy; as a result, our courts have no authority to call into question the wisdom or policy of a law that has been duly passed by an appropriate legislature, and this is the fundamental fact that the court must not overlook."

Also, in the case of ***Asif Hameed v. State of Jammu and Kashmir***[30], the Supreme Court said the following: Though the theory of separation of powers has not been explicitly acknowledged in the constitution in its full rigour, the constitution's drafters have done an excellent job of defining the powers and duties of the various institutions." The legislature, the executive, and the judiciary are all required to operate within the boundaries of their respective constitutional domains. "No organ has the authority to assume the duties that have been assigned to another."

[28] I.R. Coelho vs. State of Tamil Nadu [(1999) 7 SCC 580]

[29] A. K. Gopalan v. State of Madras AIR 1950 SC 27

[30] Asif Hameed v. State of Jammu and Kashmir 1989 AIR 1899

V. Conclusion and Way Forward

Every theory has some positive and negative consequences. Although the division of powers has been proven to be faultless in theory, it has not been proven to be faultless in its application in real-world situations. There are certain disadvantages and restrictions associated with it. It is extremely difficult to discern between the powers of the legislative, executive, and the judiciary with any degree of precision. There can only be a smooth and stable government if there is collaboration among the three branches of government. Any attempt to compartmentalise these organs into watertight compartments would almost certainly result in failure and inefficiency in administration.

If this notion is implemented in its entirety, it will become impossible to carry out certain tasks. As a result, neither the legislature nor the executive, which has the expertise in the subject matter, will have the power to delegate the law-making authority to the legislature or the courts, who have the authority to make laws governing the operation of courts and the conduct of court proceedings. In the current situation, the state is concerned with the well-being and prosperity of its citizens. It is responsible for resolving the complicated difficulties facing society. In such conditions, it appears that the concept of separation of powers is difficult to uphold. Implementing this philosophy in its rigorous formulation will not result in the accomplishment of the goals of the contemporary state. As a result, the division of powers is both theoretically unlikely and practically unattainable. Montesquieu, in proposing this idea, hoped to defend and maintain the freedom and liberty of people, which he believed would be impossible under the rigid execution of the separation of powers doctrine.

Administrators are subject to administrative law, which is a part of public law that governs the organisation, functions, and responsibilities of administrative authorities. The idea of separation of powers establishes a clear line of demarcation between the three branches of government. However, in the current situation, administrative law is diametrically opposed to this notion. A pattern of globalised interdependence is emerging, and as a result of this pattern, administrative agencies are not only performing administrative functions but are also exercising quasi-legislative and quasi-judicial powers, thereby violating the constitutionally mandated principle of separation of powers.

In order to construct an efficient and adroit government to ensure appropriate enforcement of laws, it has become an unavoidable requirement to transfer further legislative and judicial responsibilities to administrative bodies in the modern era. The establishment of administrative tribunals and delegated legislation was undertaken with the goal of reducing the burden on the legislative and judicial branches of government and expediting the process of law-making and delivery of justice via the use of their expertise. This will not be possible if the idea of separation of powers is strictly followed in its application. Therefore, the separation of powers serves its role viably as a check on the scope of administrative law.