

## Separation of Powers

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### Abstract

*The present Article is an attempt to analyze the scheme of Separation of Powers as envisaged under the Indian Constitution and the difficulties faced by the three wings of the government in practice while implementing the provisions of the Constitution in letter and spirit. The author also draws a comparative analysis with the American Constitution scheme of Separation of Powers. Throughout the course of the paper various foreign and Indian cases have been discussed wherein the Courts have recognized that there is no clear straitjacket formula to determine separation of powers. Given the complexity of the democracies all over the world, overlap in jurisdiction is bound to arise. However, each wing of the government must keep an internal check to ensure they do not end up violating the rights of the people. The Hon'ble Supreme Court of India has recognized that Separation of Powers is a part of the basic structure of the Indian Constitution. It is in this context, that the author felt the need to examine the „Constitutional Plan and Practice with respect to Separation of Powers in India“.*

**Keywords** - Executive, Indian Constitution, Judiciary, Legislature, Separation of Powers.

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### INTRODUCTION

In India separation of function is followed and not of power and hence the principle is not abided in its rigidity. In India strict separation of power is not followed in the manner in which followed in the U.S. But a system of check and balance has been embedded so much so that the courts are competent to Strike down the unconstitutional amendments made by the legislature. The constitution makers have also meticulously defined the function of various organs of the state. Legislative and executive which act as the two facets ensure that the people will have all the power including that of finance. There exists Clear division between the head of the state and the head of the government. The executive is head the Legislature is represented by parliament and the judiciary comprises Supreme Court, high court and various lower court. similarly, at the level of states, the governor acts as Executive and there exists legislative body in each state.

### DOCTRINE OF SEPARATION OF POWERS

Montesquieu explained the doctrine in its own word they are:

“When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separating from the legislative and executive powers. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers”

### Importance of The Doctrine of Separation of Powers

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having whims of the official. Also, another most important feature of the above said doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the

state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary.

### Doctrine of Separation of Power in India

The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the function of another.

In Indian Constitution there is express provision that “Executive power of the Union shall be vested in the President and the executive power of the State shall be vested in Governor” (Article 154(1) of Indian Constitution). But there is no express provision that legislative and judicial powers shall be vested in any person or organ.

President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate Ordinances in order to meet the situation as Article 123(1) says “If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require”.

When Proclamation of emergency has been declared by the President due to failure of Constitutional machinery the President has been given legislative power under Article 357 of our Constitution to make any Law in order to meet the situations. A power has also been conferred on the President of India under Article 372 and 372-A to adapt any Law in country by making such adaptations and

modifications, whether by way of repeal or amendment as may be necessary or expedient for the purpose or bringing the provisions of such Law into accord with the provisions of the Constitution.

The first major judgment by the judiciary in relation to Doctrine of separation of power was in *Ram Jawaya v. State of Punjab* [1] The court in the above case was of the opinion that the Doctrine of separation of power was not fully accepted in India.

Later in *I.C. Golak Nath v. State of Punjab*, [2] Subha Rao, C.J opined that

“The constitution brings into existence different constitutional entities, namely the union, the state and the union territories. It creates three major instruments of power, namely the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.” [3]

In *Keshvananda Bharti v Union of India* [4] the court was of the view that amending power was now subject to the basic features of the constitution. And hence, any amendment tampering these essential features will be struck down as unconstitutional.

### JUDICIAL REVIEW AND THE DOCTRINE OF SEPARATION OF POWERS

As clearly mentioned about the separation of power there were times where the judiciary has faced tough challenges in maintaining and preserving the Doctrine of separation of power and it has in the process of preservation of the above said Doctrine has delivered landmark judgments which clearly talks about the independence of judiciary as well as the success of judiciary in India for the last six decades.

Henceforth, it can be said that the rule of separation of power in today’s scenario cannot be worked out in a proper way. There is a need for a new and better doctrine which serves the purpose of the present democratic need,

whether it is a parliamentary or presidential type of government. If we take the background of the major countries like U.S.A, U.K, India, Russia, France, Germany, Spain and U.A.E, it can be seen it there is no complete separation of power that Montesquieu had advocated. All the organs of the Government are subject to each other's scrutiny by way of checks and balance. The Constitution must in all circumstances be considered supreme, and the laws made by the legislature should pass the test of reasonableness and the objectives of the Constitution.[5]

Separation of power is the essential feature of the Democratic Republic established under our Constitution by division of powers between the three important wings of the State: The Parliament and State Legislatures, the Executive and the Judiciary. However there is absence of specific provisions in the Constitution exclusively vesting legislative powers in the legislature and judicial powers in the judiciary was noticed in Delhi Laws in 1951, but the essence of doctrine of separation of powers and of constitutional limitation was accepted as a feature of basic structure of the Constitution in *Indira Gandhi vs. Raj Narain*. [6] Judicial review and activism functions of the judiciary is an important element of our system of justice to keep a check on the legislature who are the law makers of the land, so that they do not exceed their powers and work within the allowances that the constitution has made for them. The separation of the judiciary from the other organs though is taken very seriously so that the common man's liberty can in no circumstances be compromised and a fair remedy is available to any individual citizen of the state. Thus, the Indian Constitution, which is an extremely carefully planned document designed to uphold the integrity and liberty of every citizen, has not in its entirety embraced the doctrine of separation of powers but has indeed drawn a lot from the concept and kept it as a guiding principle. But the doctrine of Separation of Powers has been included in our basic structure doctrine as has been ruled and upheld by the Supreme Court in a number of cases. Thus, it holds a position of utmost

importance, albeit has been modified to suit the needs of a modern all-pervasive state.[7]

## JUDICIAL ACTIVISM

### Judicial Activism in India

Judicial activism in India means the power of the Supreme Court and the high courts but not the sub-ordinate courts to declare the laws as unconstitutional and void if it infringes or if the law is inconsistent with one or more provisions of the constitution. To the extent of such inconsistency while declaring a law as constitutional and void the courts do not suggest any alternative measures. According to SP Sathe "a court giving a new meaning to the provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an **activist court**." [8-9]

## CONCLUSION

Judicial activism connotes the assertive role played by the judiciary to force the other organs of government to discharge their assigned constitutional functions towards the people. It has held reinforcing the strength of democracy and reaffirms the faith of people in rule of law. Judicial activism may have been force upon the judiciary by an insensitive and unresponsive administration that disregards the interest of the people and that the nation does not suffer because of the negligence on the part of the executive and legislature.

Former Justice S. H. Kapadia said Parliament and executive had well-defined powers under the Constitution and these needed to be respected by the judiciary. "Legality and legitimacy are important concepts and go hand in hand. If there is excess of judicial overreach, then the legitimacy of judgments will be obliterated," he warned.

However judicial activism may be a welcome measure on in a short run where it helps in maintaining the rule of law and allows one organ to sustain the administration of the country when other organs are not performing. If it is practiced for a long time it may dilute the theory of separation of power and the doctrine of checks and balances.

However at the end I would conclude by stating that judicial activism may be good for protecting the fundamental rights of the citizens and protecting their interest from the vicious bureaucrats and politicians but extreme activism will lead to overreach of judicial powers that may lead to a misuse of power by the judges leading to arbitrary decision making as well tyranny which may be against the rule of a democratic country and so to ensure that no arbitrariness takes place judicial review should be practices by the respected Judiciary within the purview of doctrine of separation of powers and checks and balances.

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