

## DOCTRINE OF SEPARATION OF POWERS IN INDIA

**\*Sourav Reddy Dodda**

<sup>1</sup>Separation of powers is a doctrine which designates discretionary powers to the three units of a state that are considered quintessential for the efficient functioning of the state; and that these branches of the state cannot converge with the powers bestowed on one another i.e. division of government responsibilities to various branches to carry out specific functions to interject any branch from performing the functions of one another. The Executive, Legislative and Judiciary powers which comprise the doctrine are however, not explicitly stated in the Indian Constitution. <sup>2</sup>One of the articles that deal with legislative power is Article 246(1) of the Indian Constitution wherein the term “Exclusive power” implies that the Parliament can exercise sufficient power for the creation of new laws laid down under List 1 and does not aim to include the state legislatures in matters of the state. <sup>3</sup>Else ways, one of the first political scientists to discuss this concept was Aristotle through his book, *Politics* (1297). <sup>4</sup>John Locke analyses the doctrine further in his book, *Second Treatise of Civil Government* (1690) but Locke felt that the legislative function was the most important with the other institutions acting as external and internal affairs just the way the British monarch was functioning at the time, with a Parliament and a King. <sup>5</sup>It was French jurist, Baron Montesquieu’s formulated version of the doctrine in *Espirit des Lois* (1748) that caught the eye of the American Constitution makers who then, incorporated the concept into their Constitution thereby catapulting the concept into mainstream recognition in the 18<sup>th</sup> century. Montesquieu outlined the concept whilst closely observing the British system, but he instead chose to prescribe an ideal framework of the Constitution for an ideal state rather than elucidate on the British system. The circumstances under which the doctrine saw light is

---

\*Jindal Global Law School

<sup>1</sup> Bakshi, P. M. "Comparative Law: Separation of Powers in India." *American Bar Association Journal* 42, no. 6 (1956): 553-95. <http://www.jstor.org/stable/25719656>.

<sup>2</sup> Article 246 (1) of the Indian Constitution

<sup>3</sup> Krishna, Shashank. "Separation of Powers in the Indian Constitution & Why the Supreme Court Was Right in Intervening in the "Jharkhand" Imbroglio." *Student Bar Review* 18, no. 2 (2006): 13-37. <http://www.jstor.org/stable/44306653>.

<sup>4</sup> Locke, John, and Andrew Bailey. n.d. *The Second Treatise Of Civil Government*.

<sup>5</sup> Levin, Lawrence Meyer. 1936. *The Political Doctrine Of Montesquieu's Esprit Des Lois*. Westport, Conn.: Greensood Press.

particularly noteworthy, around the time when all the sovereign powers were vested in monarchs across Europe.

After the doctrine's widespread ubiquity, a critical analysis as to what the doctrine implicitly states were quite evident. The functions of the state were to be divided into three distinct divisions and various functions were to be entrusted with the aforesaid divisions. This whole dynamic facilitates the division of power across different entities rather than the concentration of power with one institution. Each sect of the government will then have designated duties to fulfill whilst also keeping a check on the powers of one another thus ensuring no hassle in the process. This will also ensure that there is no saturation of power with one particular section.

It is however, not possible for these three institutions to function without a slight overlap sometimes. A perfect mixture of the three would ensure smooth functioning of the state.<sup>6</sup> One example of an executive duty of the legislature is elucidated in Article 55 of the Indian Constitution that talks about the process of voting in the election of the President. This essentially is an executive function which is carried out by the legislature. There are several such examples to show that the Constitution is not always bound by the doctrine. Ergo, a liberal mixture of the three institutions can help bring about efficiency in the whole process.

<sup>7</sup>This institutional division ensures that there is system of checks and balances on one another. When one institution digresses from performing its prescribed functions the other sects can interject and try and restore stability in this entire equation.<sup>8</sup> This system ensures that there is proper supervision over the state of affairs and that there is no err in the functioning of the institutions. This system of checks and balances is of paramount importance to make sure that there is no impediment over the course of events and that no particular sect becomes omnipotent. The doctrine as such is very rigid, which is why several countries have not adapted to it completely.

---

<sup>6</sup> Article 55 of the Indian Constitution

<sup>7</sup> Rao, P. Parameshwar. "SEPARATION OF POWERS IN A DEMOCRACY: THE INDIAN EXPERIENCE." *Peace Research* 37, no. 1 (2005): 113-22. <http://www.jstor.org/stable/24469690>.

<sup>8</sup> Krishna, Shashank. "Separation of Powers in the Indian Constitution & Why the Supreme Court Was Right in Intervening in the "Jharkhand" Imbroglio." *Student Bar Review* 18, no. 2 (2006): 13-37. <http://www.jstor.org/stable/44306653>.

<sup>9</sup>The main objective of the doctrine as per Montesquieu is the establishment of a government of law rather than a government crawling with men (officials). Judicial independence was another factor which was of pivotal importance to Montesquieu. The doctrine plays an important role in creating a fair and just government ensuring that proper justice is delivered and that there is independence of judiciary. <sup>10</sup>In India, Dr. Ambedkar rejected the inclusion of this doctrine into the Constitution because he felt that the assessment of responsibility periodically will not do a country like India any good as opposed to a country like the USA whereby it takes place once in two years. <sup>11</sup>He felt the need for continual assessment of responsibility in a vast country like ours which was precisely stated and reiterated in the case *Ram Jawaya Kapur v. State of Punjab*. <sup>12</sup>A more polished version of the aforesaid case was taken in *Kartar Singh v. State of Punjab* whereby the judge stated that it is the basic postulate under the Constitution that the legislature makes the law, the executive implements it and the judiciary to uphold and interpret it. <sup>13</sup> The question as to where the amending power of the Parliament lies and whether Article 368 of the Indian Constitution confers unlimited amending powers to the legislature was acknowledged by the apex court in the *Keshavanand Bharti* case wherein it was held that the authority to amend was conditional on the primary features of the Constitution of India. Hence, any amendment found to be inconsistent with these essential features would be constitutionally invalid. <sup>14</sup>The Judge further noted that separation of powers is indeed a vital part of the Constitution and also added that Article 368 could not come to the rescue of such unconstitutional discrepancies.

<sup>15</sup> The Supreme Court has over the years struck down many such amendments by the Parliament as inconsistent with the basic structure of the Indian Constitution. <sup>16</sup>Section 4 of the Constitution (42<sup>nd</sup> Amendment) Act, was held to be unconstitutional on the ground that a

---

<sup>9</sup> "Separation Of Powers | Legislative, Executive, Judicial". 2019. *Ncsl.Org*. <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers.aspx>.

<sup>10</sup> *CAD* vol. 7 at 956 cited in H.R. Khanna, *Making of the Indian Constitution* 69 (1957)

<sup>11</sup> AIR 1955 SC 549

<sup>12</sup> AIR 1967 SC 1643: (1967) 2 SCR 762

<sup>13</sup> AIR 1973 SC 1461

<sup>14</sup> Article 368 of the Indian Constitution

<sup>15</sup> Bakshi, P. M. "Comparative Law: Separation of Powers in India." *American Bar Association Journal* 42, no. 6 (1956): 553-95. <http://www.jstor.org/stable/25719656>.

<sup>16</sup> "THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976 [Legislative Department | Ministry Of Law And Justice | Goi". 2019. *Legislative.Gov.In*. <http://legislative.gov.in/constitution-forty-second-amendment-act-1976>.

complete exclusion of challenges to a law for conflicting with Articles 14 and 19 (right to equality and property respectively) which are fundamental rights endowed upon the citizens by the Indian Constitution, if the law was to give effect to the Directive Principles of State Policy, were it to damage the fundamental structure.

After the *Keshavanand Bharti* judgement, in 1975 this view was challenged in front of a Supreme court bench by the Government of India. It was held that as such if the Parliament decided to amend or ratify a law, the judiciary has no right to question the intentions of the Parliament.<sup>17</sup> The then Chief Justice however, held that basic structure doctrine was inalienable in nature.

Due to the rigidity of the demarcation of the separation of powers among different branches, the feasibility of this doctrine may come under scrutiny, but I think an overlap in some circumstances can help bring about a just and fair outcome which outweighs its negative conundrums since the basic essence of the Constitution, judiciary comes into question. These efforts made by the Judiciary for the smooth functioning of proceedings are in the best interests of the public and to uphold the fundamental rights of the citizens. The constitutional provisions enumerated in the Constitution were formulated so as to accommodate a parliamentary form of government in a democracy like ours. The existing system of checks and balances facilitate a healthy supervision of the various institutions over one another thus ensuring a systematic approach to pragmatic and just outcomes. This discussion has furthermore, helped us reach a conclusion that the Indian Constitution isn't a firm supporter of the impugned doctrine. In today's world certain administrative entities have to be delegated with few judicial powers to ensure adroit governance of the state. This doctrine however, has its own defects. A pragmatic solution to issues might be difficult if the doctrine is followed in its rigidity thus hindering the very objective for which it was created. The freedom and liberty of the public might face jeopardy might not be possible by a strict enforcement of the doctrine. No legal doctrine comes without its cons. The most efficient way to deal with such issues would be to deal with them in a wider perspective in the best interests of the parties involved.

---

<sup>17</sup> Tyagi, Karan. "THE DOCTRINE OF SEPARATION OF POWERS AND ITS RELEVANCE IN TIME OF COALITION POLITICS." *The Indian Journal of Political Science* 69, no. 3 (2008): 619-25. <http://www.jstor.org/stable/41856450>.