
QUASI FEDERAL UNDERSTANDING OF THE DOCTRINE OF SEPERATION OF POWER IN THE INDIAN CONSTITUTION

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The concept of Doctrine of Separation of Power

The idea of the separation of powers has been at the center of attention since ancient times. The Greek philosophers Aristotle and John Locke detailed a utopian society that embodies power sharing in their report. The true spirit and meaning of the idea was expressed by Sir Montesquieu in *The Spirit of the Laws*. The doctrine of separation of powers essentially means that the three functions of government presented earlier in this article remain separate. A closer look at this concept leads to the conclusion that doctrine is accompanied by two important principles, without which it would be impossible to understand the nature of doctrine. First of all, departments responsible for functions must be fundamentally separate and independent. Second, the same person cannot belong to both departments.

The doctrine of separation of power between the three branches of the government (Judiciary, Executive and Legislature) has been a founding principle which was enshrined by the constituent assembly into the constitution¹.

While understanding the doctrine of Separation of Power there are 2 major types and understanding of this concept which are accepted globally they are – The American or the Presidential system of governance based separation of power and the English or the Parliamentary system of governance based separation of power.

The American Understanding of Doctrine of separation of power requires one to refer to the Article 1 section (1) , Article 2 section (1) and Article 3 (1) which vests all the legislative power to the Congress , all the executive power to the President and vests all the judicial power to the Supreme Court respectively ; a clear separation of power between the three organs of the government are inherently independent of each other being itself mandated by the constitution itself , these articles of the American constitution along with the key landmark judgements

¹ Constituent Assembly Debates On 27 May, 1949 Part II

given by the American Supreme Court in *Marbury v Madison*² propound on our understanding of the American understanding of the Doctrine of Separation of Power which is based on strict independence while maintaining a system of Checks and Balances .

The English understanding of the Doctrine of Separation of Power is based on the theory of integration of power which was emphasized upon by the Donoughmore Committee³ which was set up of creating a constitution in the erstwhile British Ceylon (today Sri Lanka) which clearly stated that the British Constitution is based on the implicit understanding of the separation of power and duties while there being no such thing as the absolute separation of power , to understand the English separation of Power we have to refer to the Black Stones theory of ‘Mixed Government’⁴ , this understanding helps us in explaining the complete mingling of all the three branches of the Government in England in which although the monarch is the leader of the executive branch, he/she is also a member of the legislative branch. Similarly, every minister is a member of one of the Houses of Representatives or the other. The Lord Chancellor is the Chief Justice of the United Kingdom, as well as the Speaker of the House of Representatives (legislative branch), a member of the executive branch, and frequently a member of the Cabinet. The House of Representatives is in charge of the legislative at the end of the day. Although the judiciary is independent, judges on the higher courts can be removed by a vote of both houses.⁵

The Constituent assembly debates on the of Power in India

The archived debates of the constituent assembly while forming our constitution provide us with a detailed insight into the understanding of the Doctrine of Separation of Power – from the get go on to the debates pertaining to the given doctrine was matter of large level of clash of opinions which happened between the ones who idealized the British Separation of Power which was already enacted in the pre independent India , while some idealized the American understanding of Separation of Power.

The idea of complete and strict separation of power is based on the American ideals and understanding based on the form of governance they have which is a presidential form of

² Madison, 5 U.S. 137 (1803)

³ The National Archives , Kew-FS 23/139

⁴ William Blackstone, Commentaries on the Laws of England_Vol 1, (Oxford: Clarendon Press, 1765, facsimile version Legal Classics Library, 1983)

⁵ HOUSE OF LORDS Select Committee on the Constitution 6th Report of Session 2006–07 Relations between the executive, the judiciary and Parliament

government , this understanding of the concept of Separation of Power between the three organs of the State was rejected by the constituent assembly ⁶ when K.T.Shah who was part of the constituent assembly sought to write this understanding into words by codifying the concept of separation of power in strictest words to prevent the centralization of power by any wing at the cost of undermining the other two wings of the government - his proposition was met with sharp criticism from certain benches of the constituent assembly.

The argument against the proposed article which will enshrine the strict separation of power were then put forth by Shri K.Hanumanthaiya in the most respectful manner as follows : Even in America, though theoretically there is complete separation of powers between these three departments, we all know the party system of Government softens its rigor to a very great extent , In America there are two well organised parties and these parties determine what is to be done in their respective party meetings ;At these meetings, conflicts which could have arisen between these three departments of Government, are softened, smoothed and ironed out so that the evils of this system are eliminated; Sometimes when one party has a majority in the Legislature and another in the executive, conflicts surely arise; In order to make the judiciary impartial it is unnecessary for us to exalt it to the position of the Government or the Legislature. It is wrong to argue that a few judges of the Supreme Court are better than four hundred Members of the Legislature, the duly chosen representatives of the people, or the accredited leaders of the nation. This is a topsy-turvy argument ; The sooner we give up this psychology which is born of political controversies, the better⁷. The argument was met with applause and nays of displeasure both were present post the delivery of the argument against the given proposition .

Post the arguments presented against the proposed article by Shri. K. Hanumanthaiya the amendment presented by Shri.K.T.Shah was vehemently supported Kazi Syed Karimuddin⁸ who sought to criticize the British concept of Separation of Power which was based on the parliamentary system of governance on the grounds of the effects the implementation of same was having across India where the Ministers who were appointed of delivering justice and administration failed in stopping the arsons and violence in the 2 Punjabs and Noakhali district of Bihar , the honourable member of the constituent assembly argued that if the given doctrine is already failing the nation pre independence – the same doctrine would bear the same fruits

⁶ Constituent Assembly Debates On 10 December, 1948

⁷ Constituent Assembly Debates On 10 December, 1948

⁸ Constituent Assembly Debates On 10 December, 1948

or even worse if applied again once the nation becomes independent hence putting forward the arguments for the to be born republic to have the doctrine separation of power enshrined in the constitution as was done in the American context.

Even though the amendment proposed by Shri.K.T.Shah wasn't passed the Constituent assembly with the lead of Dr.B.R.Ambedkar⁹ added the Article 50 under the Directive Principles of State Policy , article 50 states that : The State shall take steps to separate the judiciary from the executive in the public services of the State. This made it one of the recommendations for future legislations to be based on post the enactment of the constitution hence implicitly stating that the state is liable for ensuring that there must be separation of power between the three wings of the governments and there to be a system of checks and balances for the same , but just digressing from mentioning there to be legal explicit mention of the strict application of the doctrine of separation of power.

Post the addition of this given article , the then to the first Prime Minister of the nation and erstwhile working in the provisional government – Pt.Nehru¹⁰ while speaking in favour of Dr.B.R.Ambedkar's amendment of addition of the doctrine as a Directive Principle of State Policy he commented on its addition that the provision government is in complete support of there being a strict separation of power between the legislative and the judicial organs of the government , but then he stated that a free India would inherently be a politically , judicially and economically of a mixed nature if we were to infer its future characteristics from the constitution that was being laid down , he stated hence , it would be very disadvantageous inherently for the republic to have a fixed rule of thumb when it comes to even the separation of power - hence while stating that the doctrine of separation of power is required he propounded that there was a requirement for there to be a flexibility in this doctrine to a certain level that it becomes an important feature of future state but not a hindrance to the good governance in future and this would be ensured by the presence of the doctrine of separation of power being part of the DPSP of the constitution rather than being an independent operational article in itself . ; after the end of the speech given by Pt.Nehru in favour of the amendment clause being presented in the committee Dr.Bakshi Tek¹¹ Chand who represented East Punjab rose up and spoke in favour of the amendment as well he presented the argument of historicity and legal history pertaining to the governance of the Bengal province post the

⁹ Constituent Assembly Debates On 10 December, 1948

¹⁰Constituent Assembly Debates On 10th September 1949

¹¹ Constituent Assembly Debates On 10th September 1949

Mutiny and how keeping the historic context in mind the amendment clause holds it ground and is justified.

Doctrine of Separation of Power in the Constitution

The President is vested with executive powers under Article 53, and the Governor is vested with execution powers under Article 154, but they exercise their functions with the help and advice of the council of ministers at the Centre (Article 74) and at the State, as the case may be. Under the constitution, both the President and the Governor have the right to make ordinances, and so conduct legislative powers. After the dissolution of the State Legislature and the imposition of the President's Rule, the President establishes legislation for the state (Article 356). Under Article 103, the President has the authority to disqualify any member of the House. The President appoints Supreme Court judges, while parliament has the right to dismiss them.

The President has the authority to resolve a dispute over a judge's age on the Supreme Court or any High Court for the purpose of removing him or her from judicial service.

The Lok Sabha holds the Union Council of Ministers accountable (Article 75). This chamber has the authority to initiate impeachment proceedings against the President (Article 61) and Supreme Court judges. Article 75(5) states that members of the Council of Ministers must be members of either house of Parliament, implying that there will be overlap in people.

In some ways, Parliament's judicial function is far too important. It has the authority to investigate any known infringement of parliamentary privilege and, if the charge is proven, to punish those who disobey the law. In some peripheral domains, the High Courts perform administrative rather than judicial tasks. Their supervisory authority over other subordinate courts under Article 227 is more administrative than judicial in nature. They exercise administrative control over the State district courts when they have the competence to transfer cases under Article 228. The High Courts and the Supreme Court have broad legislative powers, including the ability to write rules¹².

Supreme Court on the doctrine of Separation of Power

There have been a great number of judgements given by the honourable Supreme court and

¹² Commentary: Jain M.P & S.N Jain, "Principles of Administrative Law", Wadhwa & Company Nagpur, 2007

honorable High courts in their academic understanding of the doctrine of Separation of Power which have over the years presented their understanding of the principle of the article 50 of the constitution along with the principle of the understanding of the doctrine being a fundamental basic principle our constitution.

The Supreme Court has held in *Ram Jawaya Kapur v State of Punjab*¹³ that –

“...Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

The Supreme Court in the *re Delhi Laws Act* case¹⁴, the Honorable Kania CJ held that :

“Although in the Constitution of India. . . . there is no express separation of power, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?”

The honorable Supreme Court in the *Bhim Singh v. Union of India*¹⁵ case held that - “The Constitution does not prohibit overlap of functions, but in fact provides for some overlap as a parliamentary democracy. But what it prohibits is such exercise of function of the other branch which results in wresting away of the regime of constitutional accountability. Thus, the test for the violation of separation of powers must be as “a law would be in violation of separation of powers not if it results in some overlap of functions of different branches of the State, but if it takes over an essential function of the other branch leading to lapse in constitutional accountability.”

¹³ *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549

¹⁴ *Re Delhi Laws Act* case AIR 1951 SC 332

¹⁵ 2014 (4) RCR (CRIMINAL) 234 , (2015) 13 SCC 605

This understanding of the concept of separation of power was further propounded and emphasized by the judgment given by the honorable High Court of Allahabad in *Indira Nehru Gandhi vs Raj Narain* case – in which adding to the observations made by the supreme court in the case of *Kesavnanda Bharti* case which established the Doctrine of separation of power and the independence of judiciary to be the basic structure of the constitution.

In *State of U.P. v. Jeet S. Bisht*¹⁶, wherein this Court held: “ Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.”

Even though the doctrine of separation of Power has not be explicitly stated in the Indian Constitution the Supreme Court has clearly states that – ‘ there is the separation of powers in a broad sense only ;A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India’¹⁷ while the doctrine of separation of power¹⁸ and the Independence of Judiciary¹⁹ have been recognized under the basic structure doctrine of the constitution which was introduced in the judgement of *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.*²⁰. Therefore , the concept of Separation of Power in the Indian context isn’t strictly either the English model nor the American model; the Indian model is the middle path between both of them , which seeks for three branches of the government to be independent of each other while at the same time their being harmonious cooperation and interdependence on each other.

Conclusion

The doctrine of separation of power as has have been mentioned in the assembly debates has been given a position in our constitution which neither follows the American/ Presidential

¹⁶ (2007) 6 SCC 586

¹⁷ *Indira Nehru Gandhi v. Raj Narain* AIR 2299 = 1976 (2) SCR 347

¹⁸ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (1973) 4 SCC 225; AIR 1973 SC 1461

¹⁹ *Kumar Padma Prasad vs Union of India and Ors* (1992) AIR 1213, 1992 SCR (2) 109

²⁰ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (1973) 4 SCC 225; AIR 1973 SC 1461

understanding of Separation of power and neither follows the English understanding of the doctrine which is based on the theory of integration power structure, the strategic presence of the Doctrine in Directive Principle of the State Policy makes the legislature be bound to make such legislations which adhere to the given doctrine and even enshrine it in the constitution while, at the same time the constituent assembly have added clauses to the constitution which mandate for their to be integration and cooperation between the all the three organs of the state at the same time.

The understanding of the doctrine being unlike the two classification of understanding present globally has been propounded by the Honorable Supreme Court of India in multitude of its wise judgements across the decade which while ensuring that doctrine of separation of power is part of the basic structure of the constitution it also has stated that the understanding isn't strict and allows for flexibility but not as much as the English theory of 'mixed government' as was presented by Blackstone.

Hence, it has been presented for the Indian understanding and functionality of the doctrine of separation of power similar to its system of governance can be termed as – '*Quasi Federal doctrine of separation of power*' - as at the same time of the separation of power between the three organ being strict there is also flexibility and a greater level of flexibility which can considered to be the middle path between the American understanding which is based on strict separation of power and the English which is based on Mixed government