

SEPARATION OF POWER IN INDIA

By

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INTRODUCTION

*“Rule of Law is the antithesis of Arbitrariness...it is an accepted norm of all civilised societies”*⁵¹⁴

- Khanna J.

There is an underlying connection between the principles of rule of law and separation of power. In a system governed by rule of law there should not be any absolute power being run at the whims of the ones having the repository of the same.⁵¹⁵ Therefore if there is no repository of power in the first place; then chances of the power being exercised whimsically by a body become even scantier and distant. Though theoretically different both seems to have historically advocated against the recognition and growth of administrative law.⁵¹⁶

Regulation of partition of forces prophesizes that administrative capacities must be divided in light of a tripartite division of governing body, official and legal. Among all philosophers Montesquieu was the one to prophesize about the *tripartite* system of separation of power against the *bipartite* system advocated by many philosophers prior to him like Calvin John or John Locke.⁵¹⁷ The three organs ought to be partitioned, unmistakable and sovereign in its own particular circle so one does not trespass the region of the other.⁵¹⁸ Aristotle who initially saw that there is a specialization of capacity in every Constitution built up this principle. Later different scholars like Montesquieu,

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⁵¹⁴ Khanna J. in *A.D.M. Jabalpur v. Shivkant Shukla*; AIR 1976 SC 1027

⁵¹⁵ *Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486, 495 (para 28)

⁵¹⁶ DAVIS, *I Administrative Law Treatise* 64 (1958)

⁵¹⁷ Charles-Louis de Secondat, Baron de Montesquieu, *De L'esprit de lois*, 1748, Vol I

⁵¹⁸ Schwartz, *Legislative Control of Administrative Rules & Regulation: The American Experience*, 30 NYULR (1955)

John Locke and James Harrington depicted these capacities as administrative, official and legal.⁵¹⁹ All the hypotheses that were sent by these political scholars in connection to the regulation of division of forces were on a fundamental assumption that the freedoms of the individuals ought to be shielded from the hard and oppressive rulers when every one of the forces are vested and practiced by the exceptionally same persons.

At this note it is vital to cite Cooley who underscores the significance of the tenet of partition of forces as “the course of action gives every division a certain autonomy, which works as a restriction upon such activity of others as strength infringe on the rights and freedoms of the individuals, and makes it conceivable to set up and authorize ensures against endeavors at cruelty.”⁵²⁰

The framers of the Indian Constitution did not perceive the belief of division of forces in an inflexible sense.⁵²¹ It can't be clearly seen however can be seen through the separation made in the release of capacities by the diverse branches of the legislature in the Constitution. This convention is not totally an outsider to our Constitution.⁵²² As we review, important ideal law like *Ram Jawaya v. Condition of Punjab*⁵²³ plainly illustrates this rule. **Justice Mukherjea** in the moment case said: "It can in all likelihood be said that our Constitution does not consider supposition, by one organ or a piece of the State, of capacities that basically fit in with another. The official for sure can practice the forces of departmental or subordinate enactment when such powers are designated to it by the governing body. It can likewise, when so enabled, exercise legal capacities in a restricted manner".

Meaning Of Separation Of Power

Wade and Philips further laid down three conditions for separation of power to be absolute and in the interest of rule of law⁵²⁴ although they are practically and theoretically not possible. However,

⁵¹⁹ Polybius translated by Evelyn S. Shuckburgh, *Histories*; 1889

⁵²⁰ T.M. Cooley, *Separation Of Powers Conflict: Legislative Versus Judicial Roles In Evidence Law Development*, L. Rev. 443

⁵²¹ *Ramkrishna Dalmia v. Justice Tendolkar*; AIR 1958 SC 538

⁵²² *State of M.P. v. Nerbudda Valley Refrigerated Products Pvt. Ltd.*; (2010) 7 SCC 751 -758

⁵²³ *Ram Jawaya v. Condition of Punjab*, A.I.R. 1955 S.C. 549

⁵²⁴ E. C. S. Wade, C. Godfrey Phillips, *Constitutional Law*, Vol 18 no. 8

it is constantly feasible to give a wide intending to this principle. The essential idea of the partition of forces would mean that the following rules shall apply.

Rule A - That the same persons should not form part of more than one of the three organs of government.

Rule B - That one organ of government should not control or interfere with the work of another.

Rule C - That one organ of government should not exercise the functions of another.

The Legislature

The Legislature has been agreed high-regard throughout and not just in the Indian Constitution.⁵²⁵

It is basically concerned with order of general guidelines of law that are apropos to all parts of the behavior of its natives and establishments. The Parliament is the Union Legislature of India involving two bodies to be specific Lok Sabha and the Rajya Sabha. It orders laws, force assessments, approves obtaining, and gets ready and actualizes the monetary allowance, has sole energy to announce war, can begin examinations, particularly against the official branch, names the leaders of the official branch and in some cases selects judges and in addition it has the ability to approve settlements. By making the official responsible to the common house, the Constitution guarantees a legitimate system of governing rules to the precept of detachment of forces. The whole framework has different features which can help accomplish the same. Therefore, this brings into inquiry the part of the other two columns: the legal and the Executive. There are several instances where power of legislative power has been transferred expressly or impliedly to executive like delegation of legislation.

The Judiciary

The designers of our Constitution drafted it so carefully that it accommodates a free and fair Judiciary as the mediator of the Constitution. The higher legal in India, particularly the Supreme Court, the most intense legal on the planet, has turned into an epicenter of debate over its part in fascinating and choosing open interest-petitions. In choosing these petitions, the legal issues numerous bearings to the Government which incorporates confining of enactment in numerous zones. What's more, if so is the situation, then what is the authenticity of activity of such powers? The part of the legal ought to just be restricted to investigating the dependability of the enactment

⁵²⁵ John Locke, *Two treatise of Government*, pp 2.149 & 2.150

and not guiding the legislature to establish enactment. The extent of legal audit does not expand past enquiring whether a denounced performance.

The three organs need to practice their capacities remembering certain constitutionally assigned encroachments. However as indicated by Subba Rao C.J. in *Golak Nath v. Condition of Punjab*⁵²⁶ : "the Constitution 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, no authority created under the Constitution is supreme; the Constitution is incomparable and every one of the powers capacity under the incomparable tradition that must be adhered to."

Subsequently if any of the three organs tries to grow its area it would take after an unavoidable clash and influence the symphonious viability of the tripartite arrangement of government. No organ needs to control over the activity of forces and elements of another, unless the Constitution entirely so orders. The Honorable Supreme Court has itself interpreted that the idea of Separation of forces is an "essential component" of the Constitution. So if one infringes the area of the other it would be an unmistakable infringement of the fundamental structure of the Constitution and legal is not an exemption to the same.

The whole level headed discussion of constraint of every organ's energy has experienced an exceptional change in the previous two decades. In *Pathak in Bandhua Mukti Morcha v. Union of India*⁵²⁷ said:

“It is a common place that while the Legislature enacts the law the Executive implements it and the Court interpret it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And *the Court, in its duty of interpreting the law, accomplishes in its perfect action in a secondary degree of legislative exercise. Nonetheless a fine and fragile balance is envisaged under our Constitution between these primary institutions of the State*”.

⁵²⁶ Subba Rao C.J. in *Golak Nath v. Condition of Punjab* , A.I.R. 1967 S.C. 1643

⁵²⁷ *Pathak in Bandhua Mukti Morcha v. Union of India* , 1984 3 S.C.C. 161

It can be clearly inferred from the above that one may exercise the other one's function up to a limited extent but the issue that predates the Indian picture is whether this system is working in a well-balanced manner.

The Executive

The Executive can veto laws, can summon of the military, makes decrees or declarations (for example, declaring a state of emergency) and declare legitimate regulations and official requests, can decline to burn through cash distributed for specific purposes, can chooses judges can appoints judges, and has the power to grant pardons to convicted criminals. Like the other two mainstays of majority rule government, the Executive is similarly expected that would be free of interruptions from the other two. It is always said that Executive is independent of the two but the clash persists It's not that the question of responsibility pops up only in the case of executive. The legal and governing body are just as responsible however in their cases, an inherent framework from inside would be accessible for releasing those capacities.

Though the Indian Constitution allocates executive powers to the President and Governors (Article 53 (1) and Article 154 (1), they are empowered with certain legislative powers (Articles 123, 213 and 356) and certain judicial powers (Articles 103 and 192). Similarly the legislature exercises certain judicial functions (Articles 105 and 194) and judiciary exercises few legislative and executive functions (Articles 145, 146, 227 and 229). However the judiciary is made separate from the executive in the public services of the State (Article 50). In some states, complete separation of judiciary from executive has been achieved through legislation. In seven states, complete separation of judiciary from executive has been effected through executive orders.

THE EXECUTIVE AND THE LEGISLATURE IN THE INDIAN CONSTITUTION

In the early years of the Republic, the Supreme Court had effectively perceived that the Indian Legislature had an unmatched position opposite alternate organs of the State. The perception made by **Justice S.R. Das** is an affirmation to this in the well known instance of *A.K.Gopalan v. Condition of Madras*⁵²⁸:

⁵²⁸ *A.K.Gopalan v. Condition of Madras* , 1950 SCR 88

"In spite of the fact that our Constitution has forced a few confinements it has left our Parliament and the State Legislature incomparable in their particular fields. In the principle, subject to obstruction our Constitution has favored the matchless quality of the Legislature to that of the Judiciary and the Court has no power to scrutinize the intelligence or strategy of the law properly made by the suitable Legislature.

Article 52 and 53 of Indian constitution says:

52. The President of India - There shall be a President of India.

53. Executive power of the Union. - (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(3) Nothing in this article shall-(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or (b) prevent Parliament from conferring by law functions on authorities other than the President.

Executive powers: All the official activities of the Union government are taken in his name. He delegates authorities of the Union Government, Prime Minister, and Council of ministers at the guidance of the Prime Minister, Chief Justice and judges of Supreme Court and High Court at the advise of the Chief Justice of India. He delegates the executive of UPSC, Comptroller and Auditor general of India, Attorney General of India, Chief Election Commissioner and other Election Commissioners, Governor of the states, individuals from Finance Commission and ministers.

Judicial Powers: The President names the Chief Justice of the Supreme Court and different judges on the advice of the Chief Justice. The President enjoys legal immunity. He can allow acquittal, reprieve, and respite or remise punishment. The President can dismiss the judges by two-thirds majority of the members present in two houses. On the off chance that they consider an issue of law or a matter of open significance which has emerged, they can request the consultative feeling of the Supreme Court. In any case they might possibly acknowledge that feeling.

Legislative Powers: The President summons both places of the Parliament and prorogues the session of the two houses and can break up the Lok Sabha yet utilizes these forces as indicated by the advise of the Council of Ministers headed by the Minister. The opening discourse of the

Parliament toward the start of the in the first place session every year is conveyed by him where he traces the new arrangements of the legislature. A bill that the Parliament has passed can turn into a law strictly when the President gives their consent to it. He can give back a bill to the Parliament for re-examination yet this not so if there should arise an occurrence of cash bill. He can return a bill to the Parliament for reconsideration but this not so in case of money bill. But in case the Parliament sends it back for the second time, the President is obliged to sign it. The President can promulgate ordinances when the Parliament is not in session but must get it ratified within six weeks. Moreover this is so only in case of the Union and Concurrent list.

THE EXECUTIVE AND THE JUDICIARY IN THE INDIAN CONSTITUTION

The relationship between the judiciary and the executive has dependably been a fragile question. General public administered by Rule of law dependably requests for division of the legal from the official. It is in this setting that legitimate working of a vote based system obliges an unmistakable division of the two. The essential capacity of the legal is the organization of equity and equity can never be rightly managed without the apprehension or support unless there is a partition of the legal from the official. Article 50 of the Constitution gives that “The State shall take steps to separate the judiciary from the executive in the public services of the State.” The aim of the designers of the Constitution was to realize changes wherever conceivable and should be done promptly, as soon as possible, and where quick operation of this rule is impractical, it should all things considered be acknowledged as a basic commitment.

Now a-days, there are numerous occasions where legal has intervened in matters altogether inside of the space of official. In *People's Union for Civil Liberties v. Union of India* [1997 1 SCC 301]⁵²⁹ the Court watched that run making is the capacity of the official.

As the learned Verma C.J. has pointed out in his **Dr. K.L.Dubey Lecture**:

“Judiciary has intervened to question a ‘mysterious car’ racing down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the Judge’s pool, monkeys

⁵²⁹ *People's Union for Civil Liberties v. Union of India*, 1997 1 SCC 301

capering colonies to stray cattle on the streets, cleaning public conveniences, and levying congestion charges at peak hours at airports with heavy compliance of its orders.”

THE JUDICIARY AND THE LEGISLATURE UNDER THE INDIAN CONSTITUTION

The provisions of the Chapter IV of Part V of our Constitution dealing with Union Judiciary provides for a close relationship between the Judiciary and Legislature. Article 122 of the Indian Constitution gives that the Court should not call legitimacy of any procedures in Parliament being referred to on the ground of any claimed inconsistency of system and Article 212 gives that the Court should not enquire into the procedures of the Legislature. Be that as it may, certain legal inconsistency has been felt in the later past. The most prominent being the famous *Jagdambika Pal case* of 1998 involving the Uttar Pradesh Assembly and the Jharkhand Assembly case of 2005. The Interim Order of the Supreme Court in both the cases is a reasonable infringement of the rule of division of forces between the Judiciary and the Legislature. The judiciary blames Legislature for not doing anything worthwhile over the past three decades, whereas Legislature accuses Judiciary of doing the job of the legislature.

The 42nd Amendment Act of the Parliament brought a drastic change in the provisions of the Constitution. Under this amendment Article 368, which gives amending power to the Parliament, was so modified that any further amendment of the Constitution would be immune from being questioned in Court of law. The power tilted in favor of the legislature. Ultimately in *Minerva Mills v. Union of India*⁵³⁰ Supreme Court ruled that the ‘judicial review’, being a basic feature of constitution, cannot be taken away by the Parliament by amendment of the Constitution. Apart from this, there are has been several instances where the judiciary has assumed the role of legislature without taking into account the practical difficulties and financial constraints.

CONCLUSION

Constitutionally the state mechanism is such that the wall of separation between the legislature and the executive has always been bleak and easily pierceable. But judiciary has always been separate. This has been not only been held to be a basic structure⁵³¹ but also realized to be an

⁵³⁰ *Minerva Mills v. Union of India*, A.I.R. 1980 SC 1798

⁵³¹ *Keshavananda Bharti v. Union of India*, AIR 1973 SC 1461

important element of a tripartite form of government.⁵³² But in the light of recent events the above rule is in jeopardy and so is the concept of having a free and fair and unbridled power of judiciary. NJAC Act has definitely put the independence of judiciary in jeopardy because the parliament will now not only have indirect control over the appointment and remuneration of the judges of Supreme Court but also can interfere in to the rule making power of the Commission thus formed under the Act.

⁵³² Charles-Louis de Secondat, Baron de Montesquieu, *De L'esprit de lois*, 1748, Vol I