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SEPARATION OF POWER – STRESS AND STRAIN

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ABSTRACT

In India, functions of the Government are separated from the powers of three organs namely the Legislature, the Executive, and the Judiciary and this constitutes a theory called Separation of powers which warrants check and balance in the administration of a country. But the application of the theory of Separation of powers is not being duly followed by India since the administration system of India is in contradiction to the principle of the theory i.e., to restrict the power of each branch, when we see the power of Supreme Court over parliament and other branches, the Judiciary will have the sole power to interpret any law made by parliament. At the sametime, it can quash any law if the law is deemed unconstitutional by the court. Moreover, there is no branch or organ to monitor the functions of the Supreme Court. Hence, if the Supreme Court acts unconstitutional, then the remedy will be in question since the Supreme Court is head of the Judiciary and is Independent in its own affairs. If we trace back history, the three key verdicts rendered by the Supreme Court, the court will clearly manifest its supremacy over the other two organs. The subsequent chapters of this briefing paper will be divided into three parts namely The Evolution of the theory in India. The Impact of this theory in Administration, and its consequences, and Sovereignty of the Judiciary in regulating the principles and laws of the nation.

KEYWORDS: “Unconstitutional”, “Sovereignty”, “Interpret”, “Branch”, “Separation of Powers”, “Checks and balances”.

INTRODUCTION

“The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny”.

- James Madison

In India, the development of the administration system evolved from the theory of Separation of powers coined by Montesquieu¹. So, the governance of our country is largely taken care of by the three organs: The Legislative, Executive, and Judiciary. Now these organs perform divergent roles in the Administration of our country. In the later stages of the modern era, the concept called checks and balances was globally adopted by various countries, to limit the power of each organ and to have a check over the functions of another organs. As a result, the same concept was adopted in the Indian Administration System even though, the term separation of powers is nowhere used in the Constitution of India but the combined effect of the interpretation of different provisions of Constitution reveals the essence of the doctrine of Separation of Power². If we investigate the purpose of aforesaid concept is to avoid tyranny and to promote democracy in each branch. But in due course of time, we can see the shortcomings in the Indian system of check and balance because the Independence of the Judiciary plays a binding role in the administration of our country, which in the long run results in the supremacy of the Judiciary especially when comes to the Apex court decisions. So, the Independence of the Judiciary is required for fair justice but at the same time, there should be a limit and control over the ultra vires function of the Judiciary when the Apex exercises its power beyond the Constitution. For example, collegium system which is not statutory law i.e., it is not brought by any amendment in the parliament and instead, that is absolutely based on the interpretation of the Apex court in making common law. Thus, considering all these facts we can come to a conclusion like a review petition but again there are also some drawbacks such as the same bench re-appearing for the review of their own verdict. So, practically no person will reverse his opinion unless there is strong evidence or a clear-cut blunder in their

¹ Separation of Powers and Its Development with Special Reference to India (legalservicesindia.com) – Visited on 03.11.2023.

² (PDF) DOCTRINE OF SEPARATION OF POWERS IN INDIA (researchgate.net)- Visited on 03.11.2023.

judgment. Furthermore, this Article will hypothetically discuss about the challenges faced by the Indian model of Separation of Powers in context of Check and Balance.

Research Questions

- 1) How did the Separation of Power theory evolve in India and whether it is fully deployed?
- 2) What are the impacts and consequences of the theory of Separation of Power in Indian Administration?
- 3) How does the Indian model of Separation of Power shape the Sovereignty of the Judiciary in regulating the principles and laws of the nation?

1. How did the Separation of Power theory evolve in India and whether it is fully deployed?

“Our separation of each other is an optical illusion of consciousness”.

Albert Einstein

In 1748, the first time, the principle of Separation of Power was enunciated by the French Jurist Montesquieu in his book L. Esprit Des Lois (Spirit of Laws) where he opined about the importance of liberty, also he defined that the composition of the Government be so constituted as one man need not be afraid of another³, but originally this concept was seen in the works of Aristotle in 4th century BCE wherein he described about the three agencies of the Government as General assembly, Public officials and Judiciary⁴. Now if we trace back the History of Separation of Power in India, During the pre-independence period, the Judiciary was under the direct control of the British which resulted in biased verdicts in favor of the British Government⁵. As time progressed and after Indian Independence and a structured system was formulated by the Drafting Committee and was enforced on 26 January 1950. In India, for the first time, the Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert a new Article 40-A concerned with doctrine of separation of powers in the Constituent Assembly Debates by stating “There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial”⁶ but amendment was rejected and thereafter Dr. B.R. Ambedkar on his suggestion in Constituent Assembly Debates on 24th and 25th November 1948, emphasized about the importance of the executive to be separated from the Judiciary and he further discussed

³ De l'esprit des lois (The Spirit of Law), January 1, 1748, Montesquieu.

⁴ Separation of Powers – (Legal PaathShala) - Visited on 05.11.2023.

⁵ [Judicial System Before 1947 \(legalservicesindia.com\)](http://legalservicesindia.com) – Visited on 05.11.2023.

⁶ Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.

the evil effects of Colonial rule in independence of judiciary and finally the Assemble adopted the draft article 39-A(Article 50) on 25th November 1948⁷. In view of post-independence, for the first in the case of Rai Sahib Ram Jawaya v. State of Punjab, Supreme Court that -“The Indian Constitution have not recognized doctrine of separation of powers in the absolute rigidity but the functions of the different branches or parts of Government have sufficiently been differentiated and consequently it can very well be said that our Constitution does not contemplate the assumption by one of the organ or part of the State of the functions that essentially belong to another”⁸ and later in the landmark judgment in Kesavananda Bharti v. State of Kerala, Hon’ble Chief Justice Sikri categorically observed that “Separation of powers between the legislature, the executive and the judiciary is a part of the **basic structure of the Constitution**; this structure cannot be destroyed by any form of amendment”⁹ and the application of Separation of Power was vividly discussed in the earlier Judgment in the year 1968 by the Supreme Court in the case of Udai Ram Sharma v. Union of India held that “The American doctrine of well-defined separation of legislative and judicial powers has no application to India.”¹⁰ Also, if we take into consideration the case Indira Nehru Gandhi V Raj Narain, the Supreme Court held that in the Indian Constitution, there is a separation of powers in a broad sense only. A rigid separation of powers similar to the American Constitution or the Australian Constitution does not apply to India¹¹. So, all this depicts how India adopted its doctrine of separation of power in its Constitution. The main aim of the separation of powers is to maintain the checks and balances system among all three organs of the government. History demonstrates how a monarchy can be established by central power while the rulers or leaders control the people. Therefore, it is preferable to divide the powers among the authorities by their areas of responsibility rather than centralizing the power. The doctrine of separation of powers eliminates monarchy, and tyranny and holds the government accountable to the people for its action. It guarantees justice and protects Human Rights. The operations of each government entity are monitored by the one while staying separate from each other.

2. What are the impacts and consequences of the theory of Separation of Power in Indian Administration?

In India, since that the doctrine of Separation of Power was not fully accepted as stated in the

⁷ 25 Nov 1948 Archives - Constitution of India (www.constitutionofindia.net) -Visited on 03.11.2023.

⁸ AIR 1955 S.C. 549.

⁹ AIR 1973 SC 1461.

¹⁰ AIR 1968 S.C. 1138.

¹¹ 1975 AIR 865.

cases of *Ram Jawaya v State of Punjab*¹². But over the period of time, the doctrine of Separation of Power has got the status of Basic Structure of Constitution in a famous Kesavananda Bharti case¹³. **The Provisions that substantiate the Separation of Power in Indian Constitution are listed below as an impact of this theory in our constitution,**

Article 53(1) and Article 154 state that the Executive powers of the Union and the States are vest in the President and Governor respectively and shall only be exercised directly by him or through his subordinate officers.

Article 122 and Article 212 state that the courts cannot inquire in the proceedings of Parliament and the State Legislature. This ensures there will be no interference of the judiciary in the works legislature.

Article 105 and Article 194 state that the MPs and MLAs cannot be called by the court for whatever they speak in the session.

Article 50 state that the separation of judiciary from the executive in the states.

Article 245 state that Parliament and State Legislature can make laws for the whole country and the states respectively.

Article 121 and Article 211 state that the judicial conduct of any judge of the Supreme Court or High Court shall not be discussed in Parliament or State Legislature.

Article 361 of the Indian Constitution state that the President and the Governor are not accountable to any court for exercising their powers and performance of duties in his office.

So, all these Article ensure Prevention of abuse of Power in one hand, Check and Balances, to keep away autocracy, for effective Administration, Accountability, and Protection of individual liberty¹⁴.

¹² AIR 1955 SC 549.

¹³ 4 SCC 225; AIR 1973 SC 1461.

¹⁴ Separation of Powers and its Relevance (iPleaders) – Visited on 7.11.2023.

Consequences of the Indian of Model of Separation of Power

It is evident from the several verdicts stated above that the India does not adopted the doctrine of Separation of Power fully and which have several overlapping provisions, in particular, the Independence of Judiciary, Judicial Review and Appointments of Judges being the most debatable topic since it resulted in Judicial overreach and few important cases are discussed below as examples,

Shyam Narayan Chouksey v. Union of India: The Supreme Court, in this case, made it mandatory that all the cinema halls in India shall play before the feature film starts. It was argued that this direction goes beyond Preventions of Insults to National Honour Act 1971, which says that no film, show or drama of any sort can have the National Anthem as part in the show¹⁵.

Liquor ban: The Supreme Court, ruling on a Public Interest Litigation (PIL) which was about road safety in 2017 had banned the sale of liquor at retail outlets, as also in hotels, bars and restaurants, that are within 500m of any of the national or thestate highway. These orders were felt to be against the spirit of the separation of powers given by the constitution. It was argued it was an administrative matter where the decision is rested with state governments¹⁶.

Arun Gopal v. Union of India: The Supreme Court had fixed timings for setting off fireworks during Diwali and had banned the use of fireworks that are not environmentally friendly, despite there being no legal basis for these restrictions¹⁷.

M.C. Mehta v. Union of India: The court declared invalid Rule 115(21) of the Central Motor Vehicle Rules, 1989, by mandating that no BS-4 vehicles can be sold after March 30, 2020, and only BS-6 vehicles can be sold only after that date¹⁸.

3. How does the Indian model of Separation of Power shape the Sovereignty of the Judiciary in regulating the principles and laws of the nation?

Due to prolonged British Raj and the newly formed democracy of the republic country, there was a question of “How a government should operate”, For the prosperity of a nation operation of the county’s legislation, executive and judiciary is very important, thus evolved the concept of

¹⁵ AIR 2018 SC 357.

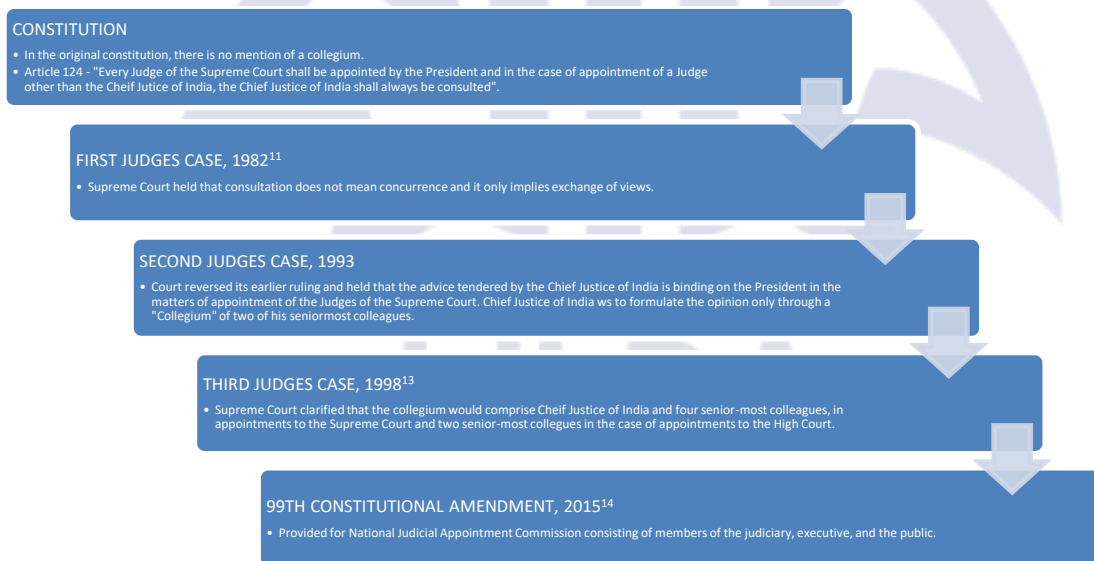
¹⁶ The State Of Tamil Nadu Rep. By ... vs K. Balu & Anr CIVIL APPEAL Nos .12164-12166.

¹⁷ 16 SCC 310.

¹⁸ 1987 SCR (1) 819; AIR 1987 965.

separation of power in India and its constitution. The term separation power does not mean there is no intervention between the organs, they all work together towards achieving a similar goal but doing different functions. The work of the legislature is to create laws for the effective governing of a nation and its citizens the legislature of the country is divided into two body carried lok Shaba (House of people), and Rajya Shaba (council of state) they are together called as parliament, they are headed by president who is a main member of the executive. When a bill is passed in the legislature, the bill passes through both the houses of the parliament and should be signed by the president to be passed as a law. The judiciary passes the power to make a review on those bills and strike down them if it is found to be unconstitutional. And the president has power to intervein in some cases and pardon the criminals The judges are appointed to supreme court through collegium system. From all the above-mentioned context we can conclude the one organ can intervein in the functions of other organs, but in the matters of legal subject the judiciary has sovereignty compared to other organs.

Appointment of Supreme Court judges:



So the above picture depicts that before 1993, the President has power to appoint the Judges of the Supreme Court and even the first Judge case affirmed that, but subsequently the same Supreme Court reversed his earlier ruling and introduced a collegium system in order to ensure independence of Judiciary from political influence by referring Article 50.

Judicial review:

The judicial review can also be called “constitutional review” as it helps judicial body maintain order overseeing that laws do not violating the constitution and its basic structure. The supreme

court in the landmark judgment of *Kesavananda Bharati vs State Of Kerala*, (1973)¹⁹ case says about the “doctrine of basic structure”. The term doctrine of basic structure means there should be no law’s or amendments made that violate the basic structure of the constitution. Judicial review, power of the courts in a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the basic structure of the Constitution. Action was judged inconsistent by court are declared unconstitutional and, was therefore deemed, null and void. The institution of judicial review in this situation depends upon the existence of the written constitution.²⁰

Review petition

In India, a binding decision of the Supreme Court/High Court can only be reviewed in Review Petition. The parties aggrieved in any order of the Supreme Court on any seemingly visible error can file a review petition.²¹ So in this, the Review Petition will be reviewed by the same bench and if we practically, no one will reverse his opinion unless there is strong evidence or a clear-cut blunder in their Judgment.

Doctrine of casus omissus:

Casus omissus finds its origin in the Latin Maxim “casus omissus pro omisso habendus Est” that means that a case that is omitted is to be held as intentionally omitted. the age-old tussle of the courts and the legislature are reflected by Casus omissus . Generally, the Courts are not inclined to interfere when a casus omissus is found. Therefore, in those situations, the legislature may add such words to the statute that are appropriate to cover the casus omissus.²² And according to article 142(3) of the constitution supreme court has the power to grant relief to the victim outside of the legislation with proper reasoning and ethics.

The Supreme Court of India has become through its own making, the most powerful among the three branches of state. The amount of control that Supreme Court has asserted and continues to assert makes India the potential candidate for ‘kritarchy’ – rule of the judges²⁴.

¹⁹ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (Writ Petition (Civil) 135 of 1970).

²⁰ <https://www.britannica.com/topic/judicial-review>.

²¹ https://en.wikipedia.org/wiki/Kesavananda_Bharati_v._State_of_Kerala#:~:text=Kesavananda%20Bharati%20Sripadagalvaru%20%26%20Ors.,doctrine%20of%20the%20Indian%20Constitution.

²² <https://www.desikanoon.co.in/2021/10/the-curious-case-of-casus-omissus.html>.

²³ Article 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

²⁴ Meaning: <https://en.wikipedia.org/wiki/Kritarchy#:~:text=Kritarchy%2C%20also%20called%20kritocracy%2C%20was,a%20united%20monarchy%20under%20Saul>.

Constitutional scholars of every hue and color would rank this as a ‘constitutional development’ and an assertion of ‘judicial independence’. Judges of the Supreme Court would characterize the development of judicial activism in this country as the “obligatory duty against injustice(s)”. But in truth, the actions of the court have been self-aggrandizing, positive consequences notwithstanding. One of the most egregious example is case of judicial appointments. The Constitution of India lays out the appointment of the judges to the highest court under Article 124 (2)²⁵. Hereby, the Supreme Court has the sovereignty over the legal system of government, no one can interfere in their matters and every judge has freedom over their judgment, and yes, judiciary need a level of freedom to give a fair judgment but a level supervision over their activity must be maintained to avoid Judicial overreach and Judicial activism²⁶.

SUGGESTIONS

- 1) Supreme Court Judges should be appointed based on a voting system among AOR (Advocates on Records) after nominations of shortlisted candidates by president in consultation with Chief Justice of India who act as binding authority in finalizing the candidates in the nomination list.
- 2) High Courts Judges should be appointed based on the Article 217 with giving binding authority to Chief Justice of India, even after consultation with the President and the respective Governor of the State.
- 3) Review Petition should be reviewed by a different bench if the either party makes recommendation.

CONCLUSION

The Indian Constitution has not fully employed the concept of “doctrine of separation of powers”. Its existence is in the very general aspect. Before the concept of the collegium was given by the Supreme Court, Article 124²⁷ of the Indian Constitution stated unequivocally that the President of India, in concert with the Chief Justice of India, would appoint any judges to the Supreme Court. This indicates that the constitutional writers themselves thought the appointment of judges

²⁵ Article (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal 2 [on the recommendation of the National Judicial Appointments Commission referred to in article 124A] and shall hold office until he attains the age of sixty-five years: 3 [* * * *] 4 [Provided that]— (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in clause (4).

²⁶ <https://vajiramandravi.com/quest-upsc-notes/judicial-activism-and-overreach/>.

²⁷ Supra 8.

required the intervention of the executive. It has been made very obvious that all the components of the democratic government require the establishment of a certain safeguards. As per article 142²⁸ of the Indian constitution the supreme court has unique power to provide justice outside the law if necessary all this give supreme court power to act outside checks and balances.

The Constitution's framers made a conscious decision to keep the executive involved in selection of the judiciary in order to prevent any abuse of the power by a single branch of the government, despite the fact that entire concept of the separation of powers was created to keep each of the branch independent of the other. So, we can say that the independence of the judiciary is necessary while not forcing itself on the other wings of the government.



²⁸Article 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.