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**SEPARATION OF POWER**

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**ABSTRACT**

The Indian constitution codified a significant collection of authorities that describe the three fundamental organs in a democratic country: the legislature, the executive, and the judiciary. The underlying concept of these principles was to safeguard individuals from the arbitrary and disproportionate authority of the State. After gaining independence, several significant legal cases were decided that established the principle of separation of power. Although the Constitution of India does not explicitly define the concept of separation of power, nor does it rigidly adhere to the doctrine, the roles and responsibilities of different branches of the government are clearly distinguished. Therefore, it can be concluded that our Constitution does not allow one branch or a part of the State to assume duties that rightfully belong to another. Therefore, this study will thoroughly examine the idea of separation with a clear and straightforward approach, focusing on its relevance in the Indian context.

**INTRODUCTION**

This principle originates from the era of Plato and Aristotle. Aristotle is credited with the earliest categorization of government duties into three separate groups: deliberative, magisterial, and judicial. The powers of the Government are classified into three distinct parts: the continuous executive authority, the intermittent legislative power, and the federative power, as characterized by Locks. Although the Constitution does not directly acknowledge the concept of dividing powers in a literal sense, the framers of the Constitution have meticulously delineated the functions and duties of the several parts of government. The legislative, executive, and judiciary must adhere to the limits set by the Constitution in their respective roles. Every organ has unique and specific duties that cannot be performed by any other organ. The Constitution relies on the judgment of these institutions to function and

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make decisions by properly following the established procedure. The efficacy of a democratic system hinges on the resilience and independence of its diverse constituents. When the legislative and executive authorities are merged into a single people or body, the preservation of freedom is unavoidably undermined. True freedom is only possible when there is a distinct division between the judicial, legislative, and executive departments of power. The consolidation of judicial power with legislative power would jeopardize the lives and liberty of individuals, as it would grant judges the ability to enact laws. The judge's behaviour has the potential to become hostile and repressive when mixed with executive power. If a single individual or collective entity were to acquire all three powers, the ultimate outcome would be the cessation of everything.

Wade and Phillips argue that the principle of separation of powers suggests:<sup>2</sup>

- (i). That no individual should hold multiple positions within the government.
- (ii) It is important that each branch of the Government carries out its own functions without encroaching on the responsibilities of other branches.
- (iii) It is important for each branch of the Government to respect the boundaries and responsibilities of the other branches.

As in the landmark case of *Kesavananda Bharati vs. State of Kerala*<sup>3</sup> the Honourable Chief Justice Sikri noted and confirmed the fact that the separation of powers between the legislative, executive, and judiciary is a fundamental structure of the Constitution that cannot be changed. *Indira Nehru Gandhi v. Raj Narain*<sup>4</sup> was another landmark Indian lawsuit. The Honourable Justice Chandrachud stated that the American Constitution divides government into three branches: executive, legislative, and judiciary. Each agency ought to limit its authority, according to the Constitution. Powers are distributed consistently in the Australian Constitution. Unlike other Constitutions, the Indian Constitution does not clearly divide authority among government branches. Separation of powers cannot ensure that the three branches of the state will always keep within their functions.

Recently, public interest litigation writs have forced the courts to advise the government on an extensive variety of topics, including street litter clearance and political corruption. A minority of people believe the court is overstepping its authority and performing government

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<sup>2</sup> Karan Tyagi. "THE DOCTRINE OF SEPARATION OF POWERS AND ITS RELEVANCE IN TIME OF COALITION POLITICS." *The Indian Journal of Political Science*, vol. 69, no. 3, 2008, pp. 619–25. *JSTOR*, <http://www.jstor.org/stable/41856450>. Accessed 24 June 2024.

<sup>3</sup> AIR 1973 SC 1461 at p. 1535,

<sup>4</sup> AIR 1975 SC 2299 at p. 2470,

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tasks. This idea is unjustified. The Supreme Court and High Courts are vital to legality and fairness in the Executive and Legislature.

### **APPLICABILITY OF THE DOCTRINE OF SEPARATION**

Modern governments—UK, US, France, India, and Australia—cannot strictly apply the separation of powers premise. This does not imply that the principle is obsolete. Government is organic. It has no compartments that are watertight. History shows that a strict division of powers hinders government efficiency. Only interaction and shared adjustment of all three government departments can ensure smooth government. Prof. Garner is right— “The doctrine is impracticable as a working principle of Government.” Mathematically categorizing the three government branches is impossible. Frankfurter's observation is noteworthy. He said “Enforcement of a rigid conception of separation of powers would make Government impossible”. I believe Montesquieu's "myth" is a truth since it emphasizes "Checks and Balances" to ensure that no government organ overshadows others' crucial functions. Professor Laski properly stated: "Separation of functions need not mean personnel separation."<sup>5</sup>

### **INCOMPATIBILITY OF DOCTRINE WITH ADMINISTRATIVE LAW**

Administrative law is a subset of public law that regulates the basic structure, powers, and obligations of institutions that are responsible for administrative matters. When it comes to the three departments of government, the concept of separation of powers serves to establish a barrier between them. On the other hand, administrative law is now incompatible with this essential premise. The administrative agencies are not only carrying out administrative responsibilities, but they are also carrying out quasi-judicial and quasi-legislative functions, which may violate the principle of separation of powers. To build a government that is both efficient and adept, as well as to ensure that law enforcement is competent, it is now an absolute requirement to delegate additional legislative and judicial functions to administrative bodies. The purpose of these tribunals was to alleviate some of the pressure that is placed on the legislative and judicial branches of government. It would also hasten the process of drafting laws and will ensure that justice is delivered promptly. On the other hand, this is not feasible if the principle of separation of powers is adhered to stringently because it restricts

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<sup>5</sup>John A. Fairlie, JSTOR, “The Separation of Power”, Michigan Law Review, Vol. 21, No.4, pp. 393-436, <https://www.jstor.org/stable/1277683> last accessed June 24, 2024

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the administrative law. The same way that every doctrine has two sides to its effects, every pointy end has a blunt side, so does every doctrine. Even though the idea of dividing power into three distinct heads could appear to be an incredible concept, it is not appealing when it is used in the actual world. This is because the time has come when the sharp edge of the dull side is brought to light. The difficulty emerges when we attempt to differentiate between these three branches of government, which are the legislative, executive, and judicial branches separately. When these powers are cohesive and work together, the only way for a government to function in a manner that is both accurate and timely is for them to coordinate their efforts. If we attempt to cause these sections to operate independently, this may fail the system and even inefficient operation of the government. Let's say for the sake of argument that we decide to utilize this concept in its complete form. On account of this, it will be extremely difficult, if not impossible, to move forward with certain particular matters and to take action. One way to think about it is that the legislative, which can transfer powers, will not be able to do so for the executive branch, which may have the origins and expertise of any issue that is being discussed. In addition, the courts that are responsible for dictating and making laws for all matters will not be able to also do so for the procedures and the courts themselves. In the current systemic world picture, it is the responsibility of the state to put its foot forward and strive for the prosperity and welfare of its people. This is the obligation that the state has. It must be able to resolve all of the problems that are present within the community, regardless of how simple or complicated they may be. Therefore, when all of these factors are considered, it is clear that the separation of powers appears to be unachievable and is portrayed as such. Therefore, as long as the notions of this doctrine continue to be imposed harshly and stringently, it will not be able to accomplish the goals that the contemporary state has set for itself. Therefore, it is easy to conclude that the separation of powers is not only theoretically unlikely but also almost impossible in practice. Montesquieu, whose goal was to preserve the freedom and liberty of an individual while defending and safeguarding the same of them, was a supporter of this notion<sup>6</sup>. If, on the other hand, the severe principles of separation of power are in play, then this is not at all practicable.

## **THE CONSTITUTION OF INDIA AND THE DIMINUTION OF THE DOCTRINE OF SEPARATION OF POWER**

The President of India, who is also the head of the executive branch of the government, is given the authority to exercise some legislative powers. The President of India is allowed the right to make ordinances in cases where immediate action is required, provided that both Houses of Parliament are not operational at the time. This authority is conferred in accordance with the requirements of Article 123(1) of the Indian Constitution. In situations where the President is certain that such action is required, he or she has the ability to adopt ordinances.

As an additional point of interest, Article 357 of the Constitution grants the President the right to exercise legislative power if a state of emergency is declared as a result of the failure of constitutional machinery. Because of this, the President is allowed to pass laws that are designed to remedy the situation.

Additionally, Article 372 and Article 372-A of the Indian Constitution allow the President the authority to adapt and alter existing laws, including repealing or amending them, as required to bring them into conformity with the requirements of the Constitution. This authority is granted according to the provisions of the Constitution.

### **Administrative and judicial functions include:**

According to Article 103(1) of the Constitution of India, the President of India is also responsible for performing some judicial functions. According to the provisions of this article, if any questions emerge concerning the disqualification of a member of either House of Parliament following clause (1) of Article 102, those questions are to be presented to the President for a final judgement.

The significance of preserving a wall of separation between the executive branch and the lower branches of government is emphasized in Article 50. On the other hand, there are situations in which the executive branch exercises judicial authority, most notably when it comes to the nomination of judges.

There is a structure for the appointment of judges to the Supreme Court and High Courts that is provided by Articles 124, 126, and 127. This framework involves both the government branch and the judiciary in the process.

**Judiciary's Legislative Functions:**

Additionally, the judicial branch is responsible for carrying out legislative duties in specific areas. Both the High Courts and the Supreme Court have the jurisdiction to make regulations that have the characteristics of legislation, which allows them to regulate many parts of the legal system. In addition, the judiciary has the authority to declare a particular section of the law null and void if it determines that the provision in question violates the Constitution or goes against the general public policy. Amendments can be necessary in these kinds of situations in order to bring the legal system in line with the Constitution. The idea of the division of powers in India is one that is both complicated and ever-changing. On paper, there is a distinct separation of responsibilities among the legislative, executive, and judicial departments of government; but, in practice, there are frequently instances of overlaps and interdependencies between these branch tasks.

The President of India is granted certain duties in the legislative and judicial spheres by the Constitution of India. Additionally, there are situations in which the executive and judiciary conduct functions that are generally associated with other parts of government on a regular basis. The complexity of this system highlights the adaptability of the constitutional framework of India, while at the same time raising doubts about the extent to which separation of powers is actually implemented in practice.

**OUTLOOK OF JUDICIARY ON SEPERATION OF POWER**

- 1. Cooper v. Union of India<sup>7</sup> (1970):** The 1970 Supreme Court of India ruling in "Cooper v. Union of India" is a landmark. The case stressed the need for judicial independence. Financial restrictions cannot prevent the executive from complying with a legal order, the Court concluded. Executive power and judicial orders were the subject of the case. A judgment implementation dispute between the judiciary and executive branch led to the case. The Supreme Court ordered preventive detainees released. The executive-controlled state government disobeyed the court. The Supreme Court considered whether the administration might refuse a judicial order due to financial concerns. The court ruled that the executive cannot refuse a judicial

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<sup>7</sup>*Cooper v. Union of India*, 1970 AIR 564

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order due to financial concerns. The court stressed that the executive must follow court instructions, regardless of finances. The Cooper case upheld the rule of law and the judiciary's authority in constitutional rights. Executive accountability and court decisions were stressed. The case is important for India's constitutional balance of power between the executive and judiciary.

2. **Kesavananda Bharati V. State of Kerala<sup>8</sup> (1973):** This significant case established the “basic structure” doctrine, which limits Indian Parliament's Constitutional amendment power. The Court ruled that important Constitutional provisions cannot be amended. The 1973 Supreme Court of India decision is one of the most crucial in Indian constitutional history. It concerned the Indian Parliament's modifying power under Article 368 of the Constitution. The case challenged the Kerala Land Reforms Act, which restricted religious institutions' property management and disposal. A Hindu religious mutt (monastery) leader, Swami Kesavananda Bharati, claimed the Act breached his property rights. However, the case became a constitutional issue of whether Parliament's power to modify the Constitution was limited and whether certain “basic features” may be immune from amendment. The Supreme Court established the “basic structure” theory in a major ruling. The doctrine states that Parliament can revise the Constitution, but not its fundamental structure or features. The Court did not define the essential framework, but it listed supremacy of the Constitution, rule of law, democracy, separation of powers, federalism, and protection of fundamental rights. The Court upheld the Kerala Land Reforms Act but determined that some Constitutional provisions are inviolable. This approach has underpinned future constitutional amendment and government action rulings.

3. **Indira Nehru Gandhi V. Raj Narain<sup>9</sup> (1975):** Indira Gandhi was elected Prime Minister and disqualified for electoral misconduct. The Supreme Court's ruling reinforced the separation of powers by stating that no one is above the law. This case is a landmark in Indian constitutional law. The 1971 Lok Sabha election of Indira Gandhi, India's Prime Minister, was controversial. Indira Gandhi's opponent, Raj Narain, challenged her election on the grounds of electoral malpractices, corruption,

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<sup>8</sup>*Kesavananda Bharati v. State of Kerala*, 1973 4 SCC 225

<sup>9</sup>*Indira Nehru Gandhi v. Raj Narain*, 1975 AIR 1590

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and illegal use of government machinery. Her Allahabad High Court conviction for electoral malpractices nullified her election. The judge prohibited her from public service for six years. The Supreme Court of India heard Indira Gandhi's appeal. She controversially imposed a state of emergency in 1975, suspending fundamental liberties and centralizing power in the executive with the case pending. This halted legal procedures. After the emergency was removed in 1977, Indira Gandhi's party lost new elections. A new administration took office, and the ruling Janata Party sued her. The Supreme Court upheld the Allahabad High Court's verdict in 1977. This landmark ruling in Indian legal history emphasized that no one is above the law. The lawsuit emphasized rule of law and fair and transparent elections in a democracy. It showed the Indian judiciary's check on executive power and dedication to constitutional norms. This case and the elections changed India's politics.

4. **State of Rajasthan V. Union of India<sup>10</sup> (1977):** The Supreme Court of India outlined two basic reasons for opposing the President's satisfaction under Article 356 of the Indian Constitution in *State of Rajasthan v. Union of India* (1977). The reasons include whether the President's satisfaction violates the constitution or is mala fide and based on extraneous grounds.
5. **L. Chandra Kumar V. Union of India<sup>11</sup> (1997):** Justices, not administrative entities, should hear fundamental rights cases, the Court ruled. This case highlighted the judiciary's Constitution-upholding independence. *L. Chandra Kumar v. Union of India* is a major Supreme Court of India case regarding administrative tribunal jurisdiction and judicial review. This case was determined in 1997. This case concerned whether Parliament can exclude the High Courts' jurisdiction under Article 226 (which grants the power to issue writs for fundamental rights enforcement) and the Supreme Court's jurisdiction under Article 32 (which allows the right to move the Supreme Court for fundamental rights enforcement) from administrative tribunals. The case concerns administrative tribunals under Indian Constitution Articles 323A and 323B. These articles let Parliament establish tribunals for specific matters. Parliament established administrative tribunals for public servant service problems

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<sup>10</sup>*State of Rajasthan v. Union of India*, 1977 AIR 1361

<sup>11</sup>*L. Chandra Kumar v. Union of India*, 1997 (3) SCC 261

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with the Administrative Tribunals Act, 1985. Judicial review, a fundamental right of the Constitution and the rule of law, cannot be prohibited from the High Courts and Supreme Court, the Supreme Court said. Parliament can create specialized tribunals, but it cannot preclude constitutional courts from hearing basic rights cases. This ruling confirmed the judiciary's power to oversee administrative bodies to preserve citizens' rights. The case clarified the relationship between administrative tribunals and constitutional courts in India and affected their operations. It stressed the need to reconcile specialist adjudication with constitutional rights.

### **CRITICISM OF THE DOCTRINE**

Every doctrine has two sides, like a pointy end with a dull side. The concept of dividing authority into three heads may seem appealing, but its practical implementation in the actual world reveals its drawbacks. Distinguishing between the legislative, executive, and judiciary presents a challenge. A government can only function efficiently and effectively when its powers work together. Attempting to perform these portions alone may result in system failure and ineffective government operations.

In the current global context, states must prioritize the wealth and welfare of their citizens. Whether the challenges are common or complicated, they must be addressed within society. Considering this, power separation appears to be impossible. As long as this philosophy is enforced rigidly, it will not achieve modern state aims. Thus, power separation is theoretically unlikely and practically impossible. Montesquieu supported this philosophy, aiming to protect and preserve individual independence and liberty. This is impossible if strict separation of power notions is in place.

### **CONCLUSION**

It is necessary to evaluate the theory that is currently being discussed, which is the separation of powers doctrine, not only in an absolute manner but also with regard to its actual aim. Especially in this day and age of privatization, anarchy, and globalization, the only way to properly extract its meaning is to have a larger vision and interpret it within a wide context. This is the only way to fully extract its meaning. On the other hand, it should be used in a spirit of unity, collective enhancement, and for the greater welfare of the people. Limiting it to the idea of being used as a medium of categorizing that too rigorously is not something that should be done. It is possible to argue that this concept or idea is not compatible with

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working in its literal sense; however, it can work and be successful by emphasizing the checks and balances that are placed in order to make it a good government in its true form and to make it possible to eliminate power manipulation and misuse by the various sections and domains of the government. It is clear that states do not adhere to this idea in a strict sense, and it is extremely difficult to put the doctrine of separation of powers into practice under these circumstances. With the assistance of this philosophy, India is able to monitor and oversee the functioning of the three organs that make up the government. Even though the theory of separation of powers must be a fundamental component of the Constitution for democracy to function properly, it should not be applied in a literal sense.



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