Principle of Separation of Power in India: An Overview

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"Power corrupts and absolute Power tends to corrupt absolutely".
Lord Acton

Abstract-
Montesquieu profoundly propounded the theory of separation of powers being impressed by the thoughts of Locke in the 18th century. He pointed out that the three organs of the Government-legislative, executive, and judicial must be independent and separate in the sphere of their limits. The legislature made the laws, the Executive exercises and executes the same laws and in a situation of conflict, the Court interprets the laws. Every democratic country must have adopted the principle of separation of power because if there is no such type of principle we can't imagine the rule of law. In the same article, the author has tried to explain the same principle and their consequences. Along with the same author has tried to apply the same principle in the UK, USA, France, and India. Dealing with the principle it has been attempted to describe the constitutional provisions of the country concerned and some specific judgments of court to explain the same principle in the ambit of time and place.

Keywords: Separation of Power, Trideva, Legislature, Judiciary and Executive, Checks and Balances, Constituent Assembly Debates.

INTRODUCTION

The principle of Separation of power is not a new concept. It has been placed under Hindu methodology from the Vaidik Age by the Sanatan Hindu Dharma. There is a concept of "Trideva" which means there are three gods namely Brahma, Vishnu, and Shiva or Mahesha. They had different tasks by their own nature. Lord Brahma represent the legislature who makes laws for the regulation of the universe, Lord Vishnu represents Judiciary who interprets the laws and Lord Shiva represents the Executive who executes the laws. In the modern era, every established democratic countries has the same concept of the Government that has all three organs namely legislature, judiciary, and executive. This article deals with the meaning of separation of power, the significance of principle, the historical perspective, and the position of the Principle in different countries like UK, USA, France, and India. In the Indian prospect, it have been dealt with the pros and cons of constitutional provisions about the principle of separation of power, judiciary towards the principle of separation of power, criticism of the same principle, and finally lacunas, conclusions and suggestion regarding the strengthening the same principle.

PURPOSE OF THE STUDY

The purpose of this study is to thoroughly examine India's domestic constitutional, legal, and judicial framework for separation of power in India. The analysis will examine the different constitutional provisions, laws, policies, and regulations in the context of the principle of separation of power and its application under the Constitution of India It will also investigate India's institutional framework for separation of power and the roles of various constitutional and government agencies in implementing the

same principle. The study's goal with this analysis is to provide insights into the effectiveness of India's legal and institutional framework for separation of power.

REVIEW OF LITERATURE

Here review of the literature investigates India's present constitutional and legislative framework for the principle of separation of power in India. The review examines the pertinent sources.

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HYPOTHESIS

India does not have any specific constitutional or statutory provision regarding the separation of power but has some specific articles and judicial pronouncements that contribute to establishing the principle of separation of power by applying all these articles but they are not sufficient to combat separation of power because they are only indirect provisions to interpret the same principle. There is a lack of a clear constitutional and legal framework and effective implementation mechanisms to establish the same principle.

OBJECTIVES OF STUDY

Here are objectives of the study that are relevant to the research-

1. To explore and analyze, extensively, the current constitutional and legal framework regarding separation of power;
2. To study the judicial response in the implementation of such constitutional and legal provisions;
3. To analyze and identify an international constitutional and legal framework to deal with the principle of separation of power;
4. Evaluate India's constitutional and legislative measures to combat the principle of separation of power with a special reference to some other countries.
5. To provide some recommendations to improve upon the present constitutional and legal framework that deals with the separation of power in India.

RESEARCH QUESTIONS

Here are some research questions that a researcher aims to address with their research-

1. Is there any constitutional and legal framework regarding the principle of separation of power in India?
2. Are the legal and institutional frameworks regarding principle of separation of power in India coherence or it is fragmented?

3. What is an international constitutional and legal framework to deal with the principle of separation of power in India?
4. What is the judicial response in the implementation of the principle of separation of power in India?
5. Are there any direct laws or policies made by the Indian Legislature to establish the principle of separation of power in India?

RESEARCH METHODOLOGY

This section outlines the research methodology, emphasizing the use of primary and secondary sources. It employs analytical, descriptive, critical, and comparative approaches. Primary data comes from legislative documents and judicial decisions, while secondary sources include textbooks, research articles, and online resources. Legal experts' insights support the research's doctrinal approach. Data collection encompasses primary and secondary sources, with legal cases and expert opinions when needed. Data analysis employs inductive, deductive, analogical, and dialectical methods, validated by legal precedents. The procedure involves libraries, online databases, research journals, websites, and expert discussions. The chapter scheme explores the principle of separation of power in India.

MEANING, DEFINITION AND CONCEPT

The principle of Separation of power means that the power of the state is not a single entity but rather than a composition of different governmental functions which is carried out by the bodies of the state separately and independent and they should work autonomously with minimum interference to others. The main object of this principle is to it reduces over- centralization of power and abuse of power in the ambit of another branch of the government.

Emlyn Capel Stewart Wade and **G. Godfrey Phillips** in their book "Administrative Law" explained the doctrine of separation of powers that implies:

i. The same person should not form more than one organ of the Government.
ii. One organ of the Government should not exercise the function of other organs of the Government.
iii. One organ of the Government should not encroach on the function of the other two organs of the Government.

SIGNIFICANCE OF PRINCIPLE

It is a general observation that the concentration of power in one authority or organ makes it arbitrary and corrupt and that can abuse the power. It may promote the nepotism and dictatorship. The principle of Separation of power is an attempt to protect the citizens from arbitrary laws and policies. Hence, there is much more importance on the principle of Separation of power these are under-

1. It promotes autocracy;
2. It promotes individual liberties;
3. It helps in efficient administration;
4. It controls the arbitrariness of the government's organs;
5. It makes autonomy of the government's organs;
6. It promotes minimum interference between the ambit of other organs of the government; and
7. It prevents to legislature from enacting the arbitrary or unconstitutional laws and policies.

HISTORICAL PERSPECTIVE

The modern jurist, philosophers, and social thinkers says that the origin of this principle goes back to the period of **Plato** and **Aristotle**. The principle of Separation of power was coined by Aristotle and further established by Montesquieu. It deals with the constitutional relations between the three branches or organs of the government namely legislature, executive, and judiciary. Montesquieu is called the father of the doctrine of Separation of Power. The **French Jurist Baron De Montesquieu** wrote a book **De L 'Espirit' des Lois (The Spirit of Laws)** that was published in 1748 and for the first time enunciated the principle of separation of powers. That's why he is known as a modern exponent of this theory. Montesquieu's doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive, and judiciary. In other words, each organ should restrict itself to its sphere and restrain from transgressing the province of the other.

According to Montesquieu, "when the legislative and executive powers are united in the same person, or the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. When it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. When it joined with the executive power, the judge might behave with violence and oppression. There would be an end to everything were the same man or the same body to exercise these three powers.
Montesquieu's "Separation" took the form of mutual restraints to be known as "**checks and balances**". The three organs must act in concert, not that their respective functions should not ever touch one another. If this limitation is respected and preserved, "it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty- the monopoly, or disproportionate accumulation of power in one sphere".3 The famous English Jurist **Blackstone** supported the doctrine of Montesquieu. According to him, "wherever the right of making and enforcing the Law is vested in the same man or in the same body of men there can be no liberty".

POSITION OF THE PRINCIPLE IN DIFFERENT COUNTRIES

In the era of the modern legal system, it has been found that the concept of separation of power has found place in the legal and constitutional systems of the various countries. It is not possible to discuss here the same principle in all countries' legal and constitutional systems but a few important countries are part of our discussion. They are as under-

POSITION IN ENGLAND

In U.K The "House of Commons", the "House of Lords", and the "Crown" make up the Legislature. The primary task of law-making is entrusted to the legislature. The Crown and the Government, which includes the Prime Minister and Cabinet members, make up the executive branch in the United Kingdom. The executive creates and carries out policies. The judges in the courts of law, the judicial officers serving in tribunals, and the lay magistrates working in the magistrates' courts make up the judiciary. Appointments to senior courts are made by the Crown.

In England, the crown, as the head of the executive, is also a key member of the legislature. Members of one or more Houses of Parliament are also among his ministers. The notion that an individual should not serve in more than one government organ conflicts with this philosophy. The executive branch is administered by the House of Commons in England.
In terms of the judiciary, the House of Lords is thought to be the highest court in the nation, but in reality, individuals designated specifically for this role—known as Law Lords and other judicial position holders—assume judicial powers. So, we might conclude that the British Constitution does not necessarily include the notion of separation of powers. **Donoughmore Committee** has aptly remarked:3 "In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers..." However, things have changed, and the Constitutional Reforms Act of 2005 makes provisions to reinforce the idea of checks and balance and to stop the abuse of authority. This idea also influences the UK's improved powers of separation.

POSITION IN USA

Although the Federal Constitution of the United States of America does not specifically address the concept of separation of powers, it is generally accepted that it makes a decent mention of it. Madison, the Federalist, who relied on Montesquieu's philosophy, noted; "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." In 1788, Hamilton articulated similar thoughts. The American Constitution establishes the division of powers among the legislative, executive, and judicial branches.

Section 1 of Article 1 declares: "All legislative powers herein granted shall be vested in a Congress of the United State of America".

Section 1 of Article II says: "The executive power shall be vested in a President of the United States of America."
Section 1 of Article III reads: "The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts...."

Through judicial review, the courts, as the body that interprets the law, have supervisory authority over the President and Congress. Legislators do indeed establish laws, but courts must also create laws to address novel issues in cases when the law is silent. This suggests that there is no chance for a strict personal division of powers to exist in the United States of America.

POSITION IN FRANCE

During the autocratic reign of Louis XIV (1643–1715), France held a dominant position in European politics. James I had made fruitless attempts to persuade the people of England to recognize the monarchy that Louis XIV held. Louis XIV believed that the subjects ought to submit to the King in every way, without question or complaint. He gained the reputation of an authoritarian ruler as a result of his arbitrary actions.
The French "Declaration of Rights of Man" also included theory of the separation of powers. Although this declaration's Article 16 states that a democratic or constitutional government cannot exist without a separation of powers, in actuality, this assertion has shown to be unworkable.

POSITION IN INDIA

The Indian Constitution does not explicitly contain the notion of separation of powers, but it does provide enough distinction between the roles played by the various government agencies to prevent one from usurping the role of another. Professor K.T. Shah, a member of the Constituent Assembly, emphasized in the debates that took place in the assembly that a new Article 40-A about the doctrine of separation of powers should be inserted by amendment. This Article reads: "There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."10
Prof. K.T. Shah's amendment was fully supported by Constituent Assembly member Kazi Syed Karimuddin. The suggestion put up by Prof. K.T. Shah was not approved by Constituent Assembly member Shri K. Hanumanthiya. Prof. Shibban Lal Saksena concurred with Shri K. Hanumanthaiya's viewpoint as well. Dr. B.R. Ambedkar, a significant contributor to the Indian Constitution, disagreed with Prof. K.T. Shah's position and stated that "I personally do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature."12

CONSTITUTIONAL PROVISIONS

The Constitution of India provides various provisions in the pros and cons of the principle of separation of power in India. Firstly, we will deal with the provisions that are in favor of the principle then after we will deal with the contrary provisions about the same principle or the real position in India regarding the separation of powers.
Many articles under the Constitution of India provide provisions to establish the principle of separation of power in India such as-
Article 50 of the Constitution of India provides a provision that, "The State shall take steps to separate the judiciary from the executive in the public services of the State."
Article 122 of the Constitution of India provides a provision that, "the Court should not call legitimacy of any procedures in Parliament being referred to on the ground of any claimed inconsistency of system".
Article 212 of the Constitution of India provides a provision that, "the Court should not enquire into the procedures of the Legislature".
The motion to add a new Article 40-A, which deals with the separation of powers, was negatived, or rejected, in light of the aforementioned points.

REAL POSITION IN INDIA REGARDING THE SEPARATION OF POWERS

Now we have to see what is the real position in India regarding the separation of powers? In Indian Constitution there is express provision that-
Article 52- "There shall be a President of India"

Article 53(1) "Executive power of the Union shall be vested in the President",13 and
Article 153- "There shall be a Governor for each States".
Article 154(1) "Executive power of the State shall be vested in Governor.."
However, there is no clear clause granting legislative and judicial powers to any individual or organ. They are empowered with certain legislative powers under **Article 123**: Ordinance making power of the President of India).
Article 123(1) says "If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require".
Article 213 "Power of the Governor to promulgate Ordinance"; and
Article 356: Power of the President of India in emergency as the machinery of the State failure- When the President declares an emergency owing to the collapse of the Constitutional machinery, he is granted legislative authority under Article 357 of our Constitution to enact whatever law necessary to address the issue.
Certain judicial powers like-
Articles 103 "Power of the president to take decisions on questions as to disqualifications of the members of the Parliament"; and
Article 192 "Power of the Governors to take decisions on questions as to disqualifications of the members of the state legislature".
Similarly, the legislature exercises certain judicial functions like-
Articles 105 "Powers, privileges, etc of the Houses of the Parliament and of the members and committees"
Article 194 "Powers, privileges, etc of the States Legislatures and of the members and committees";
The judiciary exercises few legislative and executive functions like-
Articles 145 The Supreme Court has the power to make rules and regulation regarding the practice and procedure of the court shows the legislative work done by the SC.
Article 146 Appointment of the officers and servants and their expenses in the Supreme Court made by the President of India
Article 227 Power of the High Court regarding the superintendence and tribunals throughout the territorial jurisdiction of the same high court; and
Article 229 Appointment of the officers and servants and their expenses in the respective High Court by the Governor of the respective state.
Articles 372 and 372-A, give the President of India authority to amend or repeal any law that is in effect to bring its provisions into compliance with the Constitution or to make other necessary or practical modifications.
Article 72: Pardoning power of the President of India- The President is empowered to pardon, suspend, remit, or commute sentences under specific circumstances.
Article 161: Pardoning power of the Governor of the State- - The Governor have the authority to issue pardons, reprieves, respites, or remissions of punishment, as well as to suspend, remit, or commute sentences in certain cases.

OTHER EXECUTIVE POWERS

All official operations of the Union government are undertaken in the name of the President of India. He appoints Union Government authorities, the Prime Minister, and the Council of Ministers under the Prime Minister's advice, as well as Supreme Court and High Court justices on the advice of the Chief Justice of India. He appoints the UPSC executive, the Comptroller and Auditor General of India, the Attorney General of India, the Chief Election Commissioner and other Election Commissioners, the Governor of each state, members of the Finance Commission, and ministries.

JUDICIAL POWERS

The President appoints the Chief Justice of the Supreme Court and other judges based on the Chief Justice's recommendations. The President is legally immune. He has the authority to grant acquittal, reprieve, and respite, as well as reduce sentence. The President can dismiss the judges with a two-thirds vote of the

members present in both houses. If they consider a legal issue or a matter of public importance that has arisen, they may seek the advice of the Supreme Court. In any event, they might acknowledge that feeling.

LEGISLATIVE POWERS

The President has the authority to call a meeting of both houses of Parliament, prorogues the session of the two houses, and dissolve the Lok Sabha. Every year at the start of the first session of the Lok Sabha following a general election, as well as at the start of the first session of the legislature, the president addresses the entire assembly of both houses of parliament. Only when the President signs a bill that the Parliament has approved into law does it become official. He is allowed to return a bill to the Parliament for further review, but not if a money bill comes up. He can send a bill back to the parliament for review, but not a money bill. However, if the Parliament returns it a second time, the President must sign it. During a recess of the Parliament, the President may promulgate ordinances, but they must be ratified within six weeks. Furthermore, this only applies to the Union and Concurrent list.

SEPARATION OF POWERS VERSUS JUDICIARY

The following cases explain the real position of the doctrine of separation of powers prevailing in our country.

In "**In re Delhi Law Act case"15** Hon'ble **Chief Justice Kania** said that, there is no express provision regarding the separation of powers under the Constitution of India and Justice Mahajan said that there is no dispute that the principle of separation of power not apply in the rigid sense under the Indian Constitution in present scenario.

In "**Ram Krishna Dalmia v. Justice Tendolkar"18**, Hon'ble **Chief Justice S. R. Das** expressed their opinion that 'in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial- is nevertheless implicit in our Constitution'. Same view was expressed in "**Jayanti Lal Amrit Lal v. S.M. Ram".19**

But in "**Rai Sahib Ram Jawaya v. State of Punjab"16** Hon'ble Chief Justice B.K. Mukherjee said that, although there is no express provision regarding the separation of powers under the Constitution of India but it is not aligned to our constitution. The principle of separation of powers does not apply in the absolute rigidity under the Indian Constitution but the functions of the different organs or branches of the Government have been sufficiently differentiated and consequently.

In "**Udai Ram Sharma v. Union of India"24**, Supreme Court held that "the American doctrine of well-defined separation of legislative and judicial powers has no application to India."

In "**Kesavananda Bharti v. State of Kerala"25**, Hon'ble **Chief Justice Sikri** and Justice Beg clearly said 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."

In "**Smt. Indira Nehru Gandhi v. Raj Narain26**, Hon'ble **Justice Chandrachud** observed: "The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, legislative and judicial. It is an essential principle of the Constitution that powers entrusted to one department should not be exercised by any other department. The Constitution of India does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions."

In "**Asif Hameed v. State of Jammu and Kashmir32** the Supreme Court recognized once again that, "the doctrine of separation of powers under the Constitution of India in its absolute rigidity but the Constitution framers has meticulously defined the functions of various organs of the Government. All organs i.e., legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another."

The **Law Commission of India** in its **14th report** highlighted the reform of judicial administration and suggested that the judiciary must be separated from the executive.

EVALUATION OF THE DOCTRINE

In a strict sense the principle of separation of powers cannot be applied in any modern Government whether may be U.K., U.S.A., France, India, or Australia. But it does not mean that the principle has no relevance

nowadays. Government is an organic unity. It cannot be divided into water-tight compartments or state jacket formula. While dealing with the principle of separation of power we have to follow the liberal approach and harmoniously interpret the things.

LACUNAS

1. The concept of separation of power is not new for India. We have the concept and ideology of 'Trideva' from the Vedic period where 'Lord Brahma' makes the laws, Lord Shiva' executes the laws, and 'Lord Vishnu' interprets the laws and protects all creatures in the universe.
2. The government is a combined form of the legislative, executive, and judiciary having a single entity. It is not possible to separate the all organs of the government in the rigid sense in both manners theoretical as well as practical without the mutual coordination and cooperation organs of the government cannot carry out their functions effectively and efficiently. So, the strict interpretation and application of separation of powers is not possible.
3. Delegated legislation is a need and demand of time now in these days. So that law-making power cannot be embodied only in the legislature. The executive organ or administrative authorities under the exercise of delegated legislation are performing the function of legislature and even judiciary in no exception of the same proceedings. There are many guidelines have been issued by the judiciary and after that legislature became active.
4. We can use the term 'Separation of Functions' in place of 'Separation of Powers' because this principle marks the Separation of Functions' between the organs of the government not separate the power. There are provisions about the division of powers between the center and state government under the constitution.
5. The principle of Separation of Powers has been never seen in the British Constitution before the Constitutional Law Amendment Act, 2005 as Montesquieu advocated and formulated.
6. The principle of Separation of Powers is only a hypothesis. All three organs of the government are neither equal nor can be separated and only structural and not functional.
7. The principle of Separation of Powers cannot be applied universally because there are different situations and workings of the governments in the different countries.

CONCLUSION

In the light of above discussion it is very clear here that the application of the separation of powers is not possible in the same manner as formulated and advocated by the Montesquie. Rigidity is the main drawback of the principle of the separation of powers. Sometimes we saw that the legislature delegates their power to executives or subordinate authorities due to the lack of time or technicality of the subject matter or any other reasons. It is also found that whenever the legislature becomes inactive judiciary becomes active and issues guidelines the after legislature comes at front and makes laws. It is a need and demand of time that all three organs of the government must be separate, independent, and autonomous and don't interfere in other jurisdictions but it is also required that they work without the interference of each other with the coordination to each other. The working of all the organs of the government i. e., legislature, executive and judiciary cannot be categorize in the mathematical manner. It is only by mutual cooperation, coordination, and adjustment amongst the three government organs that the government can operate efficiently and effectively. As Professor Garner correctly pointed out, "the principle of separation of power is impracticable as a working principle of Government." In the opinion of Frankfurter, "Enforcement of a rigid conception of separation of powers would make Government impossible."[1].

So, the principle of separation of powers as defined by Montesquieu is neither a "myth nor universal truth". It can be applied on the basis of the principle of "Checks and Balances". Professor H. J. Laski rightly said that "It is necessary to have a separation of functions which need not imply a separation of personnel."

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