

The concept of separation of powers refers to a system of government in which the powers are divided among multiple branches of the government, each branch controlling different facet of government. In most of the democratic countries, it is accepted that the three branches are the legislature, the executive and the judiciary. According to this theory, the powers and the functions of these branches must be distinct and separated in a free democracy. These organs work and perform their functions independently without the interference of one into others in order to avoid any kind of conflict. It means that the executive cannot exercise legislative and judicial powers, the legislature cannot exercise executive and judicial powers and the judiciary cannot exercise legislative and executive powers.

Objectives of Separation of Powers

The following are the fundamental objectives of the doctrine of separation of powers:-

1. Firstly, it aims to eliminate arbitrariness, totalitarianism and tyranny and promote an accountable and democratic form of government.
2. Secondly, it prevents the misuse of powers within the different organs of the government. The Indian Constitution provides certain limits and boundaries for each domain of the government and they are supposed to perform their function within such limits. In India, the Constitution is the ultimate sovereign and if anything goes beyond the provisions of the constitution, it will automatically be considered as null, void and unconstitutional.
3. Thirdly, it keeps a check on all the branches of the government by making them accountable for themselves.
4. Fourthly, separation of powers maintains a balance among the three organs of government by dividing the powers among them so that powers do not concentrate on any one branch leading to arbitrariness.
5. Fifthly, this principle allows all the branches to specialize themselves in their respective field with an intention to enhance and improve the efficiency of the government.

Elements of Separation of Powers

Legislative

The legislative organ of the government is also known as the rule-making body. The primary function of the legislature is to make laws for good governance of a state. It has the authority of amending the existing rules and regulations as well. Generally, the parliament holds the power of making rules and laws.

Executive

This branch of government is responsible for governing the state. The executives mainly implement and enforce the laws made by the legislature. The President and the Bureaucrats form the Executive branch of government.

Judiciary

Judiciary plays a very crucial role in any state. It interprets and applies the laws made by the legislature and safeguards the rights of the individuals. It also resolves the disputes within the state or internationally.

Indian Constitution and Separation of Power

Like the United Kingdom, India also practices the parliamentary form of government in which executive and legislature are linked to each other. So, the doctrine of separation of powers is not implemented in its strict sense. However, the composition of our constitution creates no doubt that the Indian Constitution is bound by the separation of powers. There are various provisions under the Indian Constitution that clearly demonstrate the existence of the doctrine of separation of powers. This principle is followed both at the centre and the state level.

Provisions that Substantiate Separation of Power

- [Article 53\(1\)](#) and [Article 154 of the Indian Constitution](#) clearly say 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](#) of the Indian Constitution state that the courts cannot inquire in the proceedings of Parliament and the State

Legislature. This ensures that there will be no interference of the judiciary in the legislature.

- [Article 105](#) and [Article 194](#) of the Indian Constitution specify that the MPs and MLAs cannot be called by the court for whatever they speak in the session.
- [Article 50](#) of the Indian Constitution encourages the separation of judiciary from the executive in the states.
- [Article 245](#) of the Indian Constitution gives authority to Parliament and State Legislature for making laws for the whole country and the states respectively.
- [Article 121](#) and [Article 211](#) of the Indian Constitution 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 specifies that the President and the Governor are not accountable to any court for exercising their powers and performance of duties in his office.

Overlapping Provisions

- [Article 123](#) of the Indian Constitution allows the President to issue ordinance when both the houses are not in session.
- [Article 213](#) of the Indian Constitution gives power to the Governor to issue ordinance when state legislative assembly is not in session.
- [Article 356](#) of the Indian Constitution lays the provision of Presidential Rule in case of state emergency.
- [Article 73](#) of the Indian Constitution specifies that the powers of the executive shall be co-extensive with that of the legislature.
- [Article 74](#) of the Indian Constitution states that the council of ministers shall aid the President in the exercise of his executive functions.
- [Article 75\(3\)](#) of the Indian Constitution makes the Council of Ministers collectively responsible to the House of the People.
- [Article 61](#) of the Indian Constitution lays the provision of Impeachment of the President by passing a resolution from both the houses in order to remove the President.
- [Article 66](#) of the Indian Constitution states that the election of Vice-President is done by the electoral members of both the houses.

- [Article 145](#) of the Indian Constitution allows the Supreme Court to make laws with approval of the President for the court proceedings and the practices.
- [Article 146](#) of the Indian Constitution lays the provisions for the appointment of the servants and officers of the Supreme Court by the Chief Justice of India with consultation from President and the Union Public Service Commission.
- [Article 229](#) of the Indian Constitution lays the provision for the appointment of the servants and officers of the High Courts with the consultation of the Governor and the State Public Service Commission.
- [Article 124](#) of the Indian Constitution gives the President the power to appoint the judges of the Supreme Court.
- [Article 72](#) of the Indian Constitution empowers President to grant a pardon or suspend the sentence of any person who is convicted by the Supreme Court of India.
- [Article 32](#), [Article 226](#) and [Article 136](#) of the Indian Constitution provide the power of judicial review to the Supreme Court to strike down any law made by the Parliament or any administrative action which is found to be unconstitutional.

Judicial Approach towards Separation of Power in India

The court has interpreted the applicability of the doctrine of separation of power in India in many case laws.

- The very first judgment with relation to the separation of powers was given by Mukherjee J. in the case of [Ram Jawaya Kapur v. State of Punjab](#)[3]. He concluded that-

" The Constitution of India has not acknowledged the doctrine of separation of power emphatically but the functions and powers of all the organs have been adequately distinguished. Thus it would not be wrong to say that Indian constitution does not behold assumptions rather it works in a flexible manner considering the needs of the country. So, the executive can exercise the law-making power only when delegated by the legislature and it is also empowered to exercise judicial powers within the limits. But on an all, no organ should exercise its power beyond the provision of the constitution."

- In the case of [Indira Nehru Gandhi v. Raj Narain](#)[4], Ray C. J. said:-
" A rigid sense of separation of powers which has been given under the American and Australian constitution does not apply to India."

Beg J. further added that:-

" The separation of power is a part of the basic structure of the constitution. So, the schemes of the constitution cannot be changed even after restoring [Article 368](#) of the Indian Constitution."

- In [Golak Nath v. State of Punjab\[5\]](#), it was observed by Subba Rao C.J. that:-

" The three organs of the government have to exercise their functions keeping in mind certain encroachments assigned by the constitution. The constitution demarcates the jurisdiction of the three organs minutely and expects them to be exercised within their respective powers without overstepping their limits. All the organs must function within the spheres allotted to them by the constitution. No authority which is created by the constitution is supreme. The constitution of India is sovereign and all the authorities must function under the supreme law of the land i.e. the Constitution."

- Das J. talked about separation of powers in the case of [A. K. Gopalan v. State of Madras\[6\]](#):-

" Although the constitution has imposed some limitations on the three organs of the government, it has left our parliament and state legislature supreme in their respective fields. In the main, subject to the limitations, our constitution has preferred the supremacy of legislature to that of the judiciary and the court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature and this is the basic fact which the court must not overlook."

- In [Asif Hameed v. State of Jammu and Kashmir\[7\]](#), the Supreme Court observed that:-

" Though the constitution has not recognized the doctrine of separation of powers in its absolute rigidity, the drafters of the constitution have diligently defined the powers and functions of various organs. The legislature, executive and judiciary have to function within their own domain prescribed by the constitution. No organ may arrogate the functions allotted to another."

Separation of Powers: A Barrier to Administrative Law

Administrative law is a branch of public law that determines the organisation, powers and duties of administrative authorities. The principle of separation of power creates a demarcation among the three organs of the government. But in the present scenario, administrative law is antithetical to this principle. With the

emerging pattern of globalized interdependence, the administrative agencies are not just exercising the administrative functions but also practises quasi-legislative and quasi-judicial powers, thus, violating the principle of separation of powers.

Contemporarily, it is a compulsive necessity to delegate the additional legislative and judicial powers to the administrative agencies to establish efficient and adroit governance and to ensure proper enforcement of the laws. The creation of administrative tribunals and delegation legislation took place with the aim to reduce the load of the legislation and judiciary and to expedite the lawmaking and justice giving process with expertise. This cannot be achieved with strict implementation of the doctrine of separation of powers. Therefore, the separation of powers acts as a limitation on administrative law.

The relevance of separation of powers in the Modern Era

Although, the doctrine of separation of powers does not have the rigid applicability that does not imply that it has no relevance in the current scenario. The core objective of the doctrine of separation of powers is to keep checks and balances among the three organs of the government which is an essential factor to run a government dynamically. The logic behind this doctrine is not the strict classification rather it is the avoidance of concentration of powers to a specific person or a body. This theory is not operative in its absolute sense but yes, it is very advantageous if applied correlatively. Thus, not impenetrable barriers and unalterable frontiers but mutual curtailment in the exercise of powers by the three organs of the state is the spirit of the doctrine of separation of powers.

Criticism

Every doctrine has some effects and defects. The separation of powers might have proved to be flawless theoretically but it cannot be applied comprehensively in real life situations. There are certain drawbacks and limitations to it.

1. It is extraordinarily difficult to distinguish the powers of the legislature, executive and judiciary precisely. A smooth and stable government can exist only if there is cooperation among the three organs. Any attempt made to separate these organs into watertight compartments may lead to failure and inefficiency in the government.

2. If this concept is adopted in its totality, then it will become impossible to take certain actions. Consequently, neither the legislature can delegate the law making power to the executive which may have expertise in the subject matter, nor the courts can make laws related to the functioning of courts and proceedings.
3. In the present scenario, a state works for the welfare and prosperity of the people. It has to resolve the complex issues of society. In such circumstances, the principle of separation of power seems to be impossible. The imposition of this doctrine in its rigid conception will not lead to the effectuation of the objectives of the modern state. Thus, separation of power is theoretically improbable and practically impossible.
4. Montesquieu, by propounding this theory aimed to protect and safeguard the freedom and liberty of the individuals which is impossible by the strict enforcement of separation of powers.

Conclusion

The doctrine of separation of powers must be interpreted in a relative form. In the era of liberalisation, privatisation and globalisation, separation of power has to be expounded in a wider perspective. It should not be curb to the principle of restraint or strict classification only but a group power exercised in the spirit of cooperation, coordination and in the interest of the welfare of the state. Though this doctrine is unfeasible in its rigid perception nevertheless its effectiveness lies in the prominence on those checks and balances which are necessary in order to avert maladroit government and to prevent abuse of powers by the different organs of the government.