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# Separation of Power according to the Indian Constitution and its Merits/Demerits

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## ABSTRACT

*The Constitution is a set of rules and that determines the composition and functions of the organs of central and local government in a state and regulates the relationship between the individual and state. The constitution of India guarantees power to the people, and it's the people who choose the government. The government of India, usually condensed as GoI, is created or made by the Constitution of India, as the three heads, the legislative, the executive, the judiciary. The constitution dedicates the separation more on the basis of functions rather than power. It divides and separates functions under three heads that collectively develops a system of check and balance, and governs the country. The legislature is the body that makes laws and policies according to which a country is governed. The executive is the branch that enforces the laws in the country. The judiciary is the part which protects the law, it resolves the disputes and ensures the correct law is followed and justice is served. This division of functions and powers is done because the power would not be vested or concentrated in a few hands, so the powers wouldn't be misused. This division is what we are going to discuss further in the paper. The merits of division and how it helps in the smooth running of the country also, the demerits of this separation is what we are going to note.*

**Keywords:** Separation of power, legislature, executive, judiciary.

## I. INTRODUCTION

Separation of power under the Indian Constitution is divided horizontally at the centre under three heads, that is, the legislative, the executive and the judiciary. The legislature is the body that makes laws by passing the bill from both the houses and by the president which collectively forms the parliament.<sup>2</sup> Apart from making laws the legislature also decides various policies and other decisions according to which a country is governed. The legislature is who decides the budgets, appointment of executives, apart from legislating.

The executive is the body that carries out or enforces the laws made by the legislature and

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<sup>2</sup> A.P. Bhardwaj, Legal Awareness and Legal Reasoning 3.61 (Nandini Basu and Vipin Kumar., 6th ed. 2019)

enforces it on the state. “All the ministers including the prime ministers form the part of the executive. The executives are the administrative head of the government of India.”<sup>3</sup>

The judiciary is the body that protects the laws and solves the disputes according to laws made by the legislature. This is the body responsible for serving justice and is also considered as the “guardian of the constitution”. It consists of the Supreme Court, the high courts and district as well as other subordinate courts.<sup>4</sup>

The division was done so that all the powers wouldn’t be concentrated to a few hands. It was done to ensure that the society remains free of arbitrary decisions and the systems work smoothly. The divisions also ensure a system of check and balance so no malpractice comes into play. This division also ensure the effective discharge of duties from their respective heads for the smooth running of the country.

The division of power was first coined by “Aristotle in the 4th century BCE, wherein he described the three agencies of the government as General Assembly, Public Officials and Judiciary.” In the 18th century, Montesquieu made this doctrine highly scientific and systematic one in his book **the spirit of laws**.

The constitution of India rather than clearly stating about the division it implies.<sup>5</sup> Although the division is the basic structure of the constitution and the legislature cannot overpass it. We could see the division of power in articles of the constitution such as Article 50, 121, 221, 123 and 361.

Although in an attempt of dividing the power, there have been various demerits noted, this separation could never be as a whole practised. As the three bodies are not limited to their functions only, but also looks over in various other problems. The legislature has power over the executive, while the judiciary also has the rules making powers.

This paper aims to discuss the history of the separation of power, how it came to date, what the merits of this system are, and what are the demerits in terms of practicality and functioning of the state, while we discuss this system in detail with the help of cases, and laws in existence.

### **Literature Review**

To add to the efficiency of the research, the researcher refers to numerous books, cases, laws and journal/article on the separation of power under the Indian Constitution as a part of the

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<sup>3</sup> BYJU’S, Separation of Powers in the Indian Constitution – Relationship between Executive, Legislature and Judiciary, <https://byjus.com/free-ias-prep/separation-power-indian-constitution/> (last visited Nov. 16, 2020 14:25 pm)

<sup>4</sup> Supra Nore 3

<sup>5</sup> Ram Jawaya Kapur V. State of Punjab, AIR 1955 SC 549, 1955 2 SCR 225

research and to identify the demerits and merits also to compare before and after the effects of this doctrine to fulfil the objectives of the research.

According to the case of *Ram Jawaya Kapur V State of Punjab*, it was held “ that the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another” which states that the Indian Constitution does not in fact state the division of power in its absolute form but implies it and is the part of the basic structure of the constitution.

The book on **Indian Polity** written by **M Laximkanth** comments on the parliamentary form of government which our country follows while the book written by A.P Bhardwaj named *Legal Aptitude and Legal Reasoning* mentions the functions of the three bodies. The legislature that makes the laws, the executive enforcer of the laws while the judiciary protects the laws.

The researcher confirms that no such paper that highlights the specific problem exist which will be covered in this paper.

### **Research Methodology and Research Question**

The current research topic demands a doctrinal research. The topic requires the analysis of the theory Separation of power with different definition given by different jurist. Analysing different provisions laid down in the Indian Constitution As well as analysing different case laws, and judgements. For effective research and to fulfil the objectives, the researcher has also referred to several websites, books, journal and article to reach to the conclusion. To answer the research questions:-

- (i) What is Separation of power and its history?
- (ii) What is Separation of power according to Indian Jurisdiction?
- (iii) What are the benefits and demerits of separation of power?
- (iv) What are the benefits of a society with separation of power?

To answer all these questions the researcher depends on the doctrinal method for the research.

## **II. SEPARATION OF POWER**

The concept of separation of power has been delving in the minds of many philosophers, politicians, constitution framers and has been interpreted by several over time.

The theory mainly signifies the separation or the division of different functions or powers under different organ of the country. The three head being, the executive, legislature and judiciary. The theory was formulated on the basis of three necessities for the smooth running of the state:

- “One person should not be a part of more than one of the organ.”
- The three organs should not interfere into each other matter.
- The three organs should work according to the assigned functions and not exercise any other organ’s function.<sup>6</sup>

*Legislature:* The legislature is the organ that deals with making of the laws. The enactment of any law gets through the organ of the Legislature. This is the main platform or the structure of the other two organs to function. The enactment of these laws reflects the will of the state and if there are no laws, there is no enactment and protection of the laws.

*Executive:* The executive is the part of the state which is responsible for implementing the laws made by the legislature. This body carries out and enforces the laws on the state. As the executive is the “administrative head” of the state. It mainly comprises of all the ministers, advisors and others.

*Judiciary:* This body is the protector of the law. The public officials under judiciary apply such laws to the citizens and vouches for justice and fair treatment of all according to the laws.

### **(A) History of separation of power:**

The concept of the separation of power has its root deep down in history as we fathom it to be. “The separation of power was also known as *trias politica*.” This theory was first developed by the ancient Greece and could be seen widely followed by the Roman Republic. The concept was the result of centuries of discussion.

The Aristotle (384-322 BC) in the book “The Politics” mentions “*There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; of these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the official; and third the judicial element.*”<sup>7</sup>

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<sup>6</sup> The Separation of Power: Indian Constitution, [https://www.cusb.ac.in/images/cusb-files/2020/el/law/w2/The\\_Separation\\_of\\_Powers2\\_iv\\_sem.pdf](https://www.cusb.ac.in/images/cusb-files/2020/el/law/w2/The_Separation_of_Powers2_iv_sem.pdf).

<sup>7</sup> Historical Development of Separation of Powers, Law Teacher, <https://www.lawteacher.net/free-law-essays/constitutional-law/historical-development-of-separation-of-powers-constitutional-law-essay.php> (last visited Jan 18, 2021).

In England during the reign of Edward I between the years of 1272-1307 the separation of power for the first time emerged in England with the emergence of Parliament. Baron Montesquieu promoted the concept of his separation of power. He called his theory “*Montesquieu’s tripartite system.*” Montesquieu based his hypothesis primarily on the English method. He placed greater focus on a citizen's political and natural rights. He elaborated that the unification of executive and legislative authority will drive the executive to despotism. He also clarified, equally, that the union of legislative authority and the judiciary does not defend people against the administration. Therefore, he clarified that human liberty can be preserved only if it is practicable to prevent the accumulation of forces in an individual or a group of people.

*Separation of power in Ancient India:* The origins of power division are present in the Vedas as well. It is the very idea of division of authority that Narad Smiriti has. Deewan was the head of the Executive wing in those days. Senapati regulated law and order and the judicial head was Kaji. Their positions, however, were all below to the king who was the highest authority. King was the one who made rules that can be compared to the new legislative form. Therefore, one will see a division between forces and duties in ancient times as well.<sup>8</sup>

### **(B) Separation of Power in India**

The Indian Constitution does not define the separation of power. It does not state anywhere clearly of the distinction of powers but it implies. Even though there are no clear provisions stating the distinction between the three organs, there are many provisions under the Indian Constitution that states the reasonable separation of the function of different organs.

“The Constitution of India lays down a functional separation of the organs of the State as”:-

- **Article 50:** “State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary.”<sup>9</sup>
- **Article 122 and 212:** “-validity of proceedings in Parliament and the Legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity.”<sup>10</sup>

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<sup>8</sup> GKToday, Doctrine of Separation of Powers: Meaning and History GKToday (2016), <https://www.gktoday.in/gk/doctrine-of-separation-of-powers-meaning-and-history> (last visited Jan 18, 2021). y

<sup>9</sup> INDIA CONST. ART. 50

<sup>10</sup> INDIA CONST. ART. 122 , INDIA CONST. ART 212.

- “Judicial conduct of a judge of the Supreme Court and the High Courts’ cannot be discussed in the Parliament and the State Legislature, according to Article **121 and 211 of the Constitution.**”
- **Articles 53 and 154:** “respectively, provide that the executive power of the Union and the State shall be vested with the President and the Governor and they enjoy immunity from civil and criminal liability.”<sup>11</sup>
- **Article 361:** “the President or the Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office.”<sup>12</sup>

After the analysis of the different provision under the “Indian Constitution it is clear that the Constitution intends that the powers of the statute be exercised only by the legislature.”

Likewise, it may be assumed that judicial rights vest with the courts. “The judiciary is independent in its area and there should be absolute exercise and no intervention by either the Executive or the Legislative with its judicial duties. The executive powers of the Nation and the State are both vested in the President and, respectively, the Governor.”

“The case of *I.C. Golakhnath vs. the State of Punjab*<sup>13</sup>, the Indian Constitution puts the separate political bodies, including the regions of the Union, the Union and the State, into existence. There are also three primary tools: the judiciary, the executive and the legislature. It limits their authority and expects them to practice their responsibility without intervening with other positions. Inside their reach, they can work.”

The case of *Indira Gandhi vs Raj Narain*<sup>14</sup>, the court ruled that the concept of division of power was recognized in a wider context in our Constitution. In India, much as in the Constitution of the United States and Australia, where a strict sense of division of authority is not valid.

**Justice Chandrachud** also expressed his views by stating: “*The political purpose of the doctrine of separation of power is not widely recognized. No provision can be properly implemented without a check and balance system. This is the principle of restraining which has in its precept, innate in the prudence of self- preservation that discretion is better than its valour.*”

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<sup>11</sup> INDIA CONST. ART 53.

<sup>12</sup> INDIA CONST. ART. 361.

<sup>13</sup> I.C. GOLAKHNATH VS. THE STATE OF PUNJAB (1967) SCR (2) 762 (INDIA).

<sup>14</sup> INDIRA GANDHI VS RAJ NARAIN (1975) SCR (3) 333 (INDIA).

*Judiciary: Article 142 and Article 145 of the Indian Constitution states or talks about the power vested in the Judiciary that makes it an independent body. The Supreme Court has the power to declare the laws enacted by the legislature void if it harms the Indian Constitution as well as take appropriate actions against the executive. The amendment of the laws is also subject to the scrutiny of the Court. As seen in **Kesawananda Bharati v. State of Kerela**<sup>15</sup> it was held that the Parliament couldn't amend the provision in such a way that violates the basic structure.*

*Executive: The Indian President, the top executive authority of the state is the authority who gives clearance when making any law. He can reject if he finds any law not just, and refuse to sign it. Also "Article-123, also the Judicial powers under Article-103(1) and Article-217(3), he has the consulting power to the SC of India under Article-143 and also the pardoning power in Article-72 of the Constitution. The executive also affecting functioning of the judiciary by making appointments to the office of Chief Justice of India and other judges." It should also be noted that the executive appoints the Chief Justice of India, affecting the Judiciary.*

*Legislature: Responsible for making laws and amendment in the made laws The Council of Ministers shall be chosen from among the members of the Legislature and this Council shall be responsible for the Legislative Council. Article 61: Impeaching the president and removal of judges.*

### **(C) Merits of Separation of Power**

Since the functions are divided, the work is hence divided to the three groups. This increases the efficiency with the work, when every group is working on different aspects simultaneously, hence increases the amount of work done in less time. It is necessary for the smooth running of the state.

The three organs appoint the experts of the field. The experts work under their respective organs and are capable in handling the work assigned under different organs hence; with efficiency it ensures the work done to be correct and accurate.

Since the functions and the work is divided, it clears and creates the distinction of skills and labour required.

Since there is a clear distinction and a system of check and balance, there is no arbitrary ruling and no autonomy. The division creates as systematic procedure to run the country.

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<sup>15</sup> KESAVANANDA BHARATI V. STATE OF KERALA, (1973) 5 SCC 225 (INDIA).

The clear distinction helps eradicating the overlapping of work, and hence there is no interference with others work, and since the overlapping is removed with the organs having its individual work, it helps in removing competition.

#### **(D) De-Merits of Separation of Power:**

The theory behind doctrine of the separation of power states that the functions between the legislature, the executive and the judiciary are separate which cannot be seen in reality. The three functions do overlap each other as the system of check and balance. But this provision may result in the efficiency and increase in competition.

The separation may lead to deadlocks and may get engaged in some conflict between two organs. As well as in practice it is not possible to dedicate one kind of power under one body.

And hence, the doctrine is impractical in its absolute sense as well as not favourable.

### **III. SOCIETY WITH AND WITHOUT SEPARATION OF POWER**

Since time immemorial, history has been the evidence of what happens when a set of people or a single person is given unlimited power. The power in on hand often results in suppression of normal people voice. And it can often result into misuse of power vested in their hand.

Hence democracy was introduced to represent the voice of every citizen. The division helped in representing different aspects for governing the state while it also ensured that the power distribution prevented power concentration to few hands and hence preventing abuse of power, safeguarding freedom.

Even Montesquieu mentions that in order to prevent the abuse of powers, the power of the government should not be left in a particular set of hands. This separation creates a web of functions, interrelated but separated. This would make sure there is a system of check and balance.

A society without always have a sense of danger of misuse of power. While a society with separation of power ensure good efficiency and a sense of security also with equal representation of the citizens of the society.

### **IV. CONCLUSION**

After the analysis of the concept of separation of power and looking at the case laws, the doctrine states on how the power is divided under the three heads: The legislative, the executive and the judiciary. It originated in Greece and could be seen widely followed in Rome. The clear distinction is not laid down in the Indian Constitution, but several provisions under the

constitution talks about the division and lays down different functions. It ensures fair balance of power, creates a system of check and balance and increases efficiency.

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