



# Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820  
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

---

## Acknowledgment of Separation of Power through Indian Precedents

Dev Kumar Yadav<sup>a</sup>

<sup>a</sup>National Law University, Odisha, India

*Received* 07 February 2024; *Accepted* 08 March 2024; *Published* 11 March 2024

---

*The division of responsibilities and authority among the legislative, executive, and judicial divisions of government is known as the separation of powers. It primarily addresses how each state organ functions and how those functions affect other organs. India is a nation with a federated system. As a result, this article determines whether there is a clear separation of powers between these three organs or if there is ever an overlap. Adhering to this idea of separation of power will reduce the likelihood of oppressive laws being passed because they will know that a different branch will overtake them. It aims for a distinct division of authority and seeks to grant each organ exclusive functioning. Functions are distinct from powers in India, not the other way around. India does not follow the idea of the separation of powers, in contrast to the US. The court has the authority to reject any illegal legislation that the legislature authorizes because of the checks and balances that have been placed in place.*

**Keywords:** *separation of power, check, and balance, administrative law, power.*

---

### INTRODUCTION

The French philosopher Montesquieu developed the concept of separation of powers by establishing a clear and distinct distinction between the executive, the legislature, and the

judiciary.<sup>1</sup> The doctrine of separation of powers has changed over time. John Bodin, The French philosopher and the English statesman, whose origins date back to Plato and Aristotle, expressed their views on the separation of powers doctrine in the 16th and 17th centuries.

*Triaspoliticia* is a democratic understanding of the separation of power in the governance of a country. This idea was established in ancient Greece and widely circulated as part of the Roman Republic's unwritten constitution. The state is divided into subdivisions or regions, each of which has its powers and responsibilities. One class is divided into executive, legislative, and judicial.

Separation of powers is an old principle (traced back to the Vedas), but it was popularized globally by Montesquieu and Locke. Such a division can be seen in the Smritis, which are ancient sources of law, i.e. Dharma. The Naradsmriti have a very notion of separation of power which is classified as follows:

- (i) Diwan controlled the Executive organ;
- (ii) Responsibility for maintaining peace was of Senapati;
- (iii) Kazi handled the duty of the Judiciary.

At the same time, they all obey the decision of the king, and because the king is the most powerful person in making laws, he might be compared to today's legislature.

## **SEPARATION OF POWER**

However, all modern laws contain the concept of separation of powers. It is simply argued that all three organs of government should do the same: legislative, executive, and judicial & as they have their duties and authority separated so that no one branch may exercise the authority of another. This aspect is the opposite of the doctrine of centralization of power at the single level (i.e., at the Central level), as this may compromise the goal of a democratic government

---

<sup>1</sup> Charles De Secondat Baron Montesquieu, *The Spirit of Laws (Great Books in Philosophy)* (Prometheus Books 2002)

The Supreme Court stated<sup>2</sup>, 'Even though the Indian Constitution does not recognize the concept of separation of powers in its entirety and totality, the functioning of various institutions and the responsibilities of the government are entirely different, as are our laws.'

## **CHARACTERISTICS OF SEPARATION OF POWERS**

Separation of Power in its pure form has the following characteristics: -

- (1) The main responsibilities of the government are divided into legislative, administrative, and judicial.
- (2) The other institutions are given different responsibilities according to need.
- (3) Members of one organization cannot be members of another organization.
- (4) The role of one organization should not interfere with the role of another organization.

### **The separation of powers theory can be broken down into two categories:**

- (I) Positive Sense - It not only establishes boundaries but also specifies the minimal amount of authority that can be exercised within those boundaries for a court to uphold constitutional ideals.
- (II) In a negative sense - It restricts how each state organ can use its authority.<sup>3</sup>

## **SEPARATION OF POWER IN THE INDIAN CONTEXT**

In India, the will of the people is mediated through three departments within the government. The Legislature makes laws, the Executive enforces laws, and the Judiciary comes into play when there is a violation of laws. Thus, even when functioning within the scope of their authority, these organs' tasks tend to overlap. This raises the question of what the relationship

---

<sup>2</sup> *State of UP v Jeet S. Bisht* (2007) 6 SCC 586

<sup>3</sup> *Ibid*

between these three national bodies should be. Do we need a complete separation of powers, or do we need coordination between powers?

The Constitution of India provides for the distribution of duties of state bodies as follows: Article 50 requires governments to make efforts to remove decision-making from the executive branch. This is the guarantee of judicial independence. Articles 122 and 212 stipulate that the legality of proceedings in the Parliament and the Legislative Assembly cannot be interfered with by any court. This ensures that the judiciary is independent and protected from the influence of decisions based on allegations of procedural incompetence.

Administrative law in India has evolved gratuitously over the years, particularly in terms of adopting this theory via various precedents. The separation of powers idea is essential in constitutional law because it seeks to provide a system of checks and balances between the executive, legislative, and judicial branches of government. The Indian Constitution does not specifically address this concept, although it is inferred by its various passages.

Key Indian court judgments and their influence on administrative law may be used to properly understand the evolution of administrative law in terms of the recognition of the theory of separation of powers: -

**In the Re Delhi Laws Act:**<sup>4</sup> For the very first time hon'ble Supreme Court adheres to the notion that, unless the constitution authorizes a body, a body should not engage in activities owned by others. In a seven-judge court, the majority concluded that while the principle of separation of powers is not embodied in our constitution, it is exceptionally articulated in a clause of the constitution itself.

**Rai Sahab Ram Jawaya Kapur & others v State of Punjab:**<sup>5</sup> One of the famous instances relating to the duties and responsibilities of the executive is Ram Jawaya Kapur and others. The court ruled that the executive branch's operations do not necessarily require legislative approval because its powers and responsibilities change over time. The Court agreed to a flexible meaning

---

<sup>4</sup> *In Re The Delhi Laws Act, 1912, The Ajmer-Merwara (Extension) v The Part C States (Laws) Act, 1950* 1951 SCR 747

<sup>5</sup> *Rai Sahab Ram Jawaya Kapur & Ors v State of Punjab* AIR 1955 SC 549

of separation of powers because it believed that if this theory were to be defined rigidly, it would become unworkable.

The simple facts of this case are that six people, through a petition under Article 32 of the Constitution, alleged to have the right to issue textbooks for different grades in schools of Punjab as, 'Uttar Chand Kapoor and his sons'. The Ministry of Education of the Punjab Government has issued a series of notices regarding the printing, publishing, and marketing of textbooks since the 1950s as part of its nationalization strategy. The petition alleged that the sale of these books imposed unreasonable restrictions and forced other employees out of business.

Petitioners insisted that they had the fundamental right to conduct business, i.e., Article 19(1)(g). The petitioners requested a writ of mandamus ordering the Government of Punjab to remove notices infringing its rights under section 19(1)(g), as this violation occurred without statutory legislation or executive order.

**Mukherjee, J.** ruled that the Constitution of India recognizes the 'doctrine of separation of powers,' recognizing a clear distinction between legislative, judicial, and executive functions, with the executive's function being to execute or supervise the execution of laws passed by the legislature. In this judgment, the Supreme Court emphasized the issue of responsible governance and encouraged and strengthened the parliamentary form of government. **Mukherjee, C.J.**, speaking on behalf of the apex court, stated that while the Indian Constitution demarcates the functions of the Legislature and the Executive by stating that no organ should assume the functions essentially belonging to the other organ, there is no separation between them in its absolute rigidity. The idea of Separation of powers refers to a parallelism of authority between the three organs in a particular field, with hierarchies that each organ must maintain for the other two to check it. As a result, the administration may continue to issue administrative orders until the legislature passes legislation to the contrary.

In **Chandra Mohan v State of UP**:<sup>6</sup> According to the Hon'ble apex court, 'the Indian Constitution, although differ in recognizing the rigorous and stringent concept of separation of

---

<sup>6</sup> *Chandra Mohan v State of UP* AIR 1976 SC 1482

powers, also allows for an independent judiciary in the States... Indeed, it is common knowledge that in pre-independence India, there was a strong agitation for the separation of the judiciary and the executive, under the belief that unless they were separated, the independence of the judiciary at the highest levels would be a mere wash of an eye.'

**I.C. Golak Nath v State of Punjab:**<sup>7</sup> According to the apex court, the Constitution establishes three constitutional entities: the Union Executive, the States, and the UTs. It established the three main branches of government: the Judiciary, the Executive, and the Legislature. It outlines their specific authority boundaries and requires them to apply their special talents within them. They ought to limit their efforts to what has been delegated to them.

Then, in **Keshvananda Bharti v Union of India**<sup>8</sup>, the Supreme Court handed down one of its most important rulings, ruling that modifying authority was now subject to the fundamental provisions of the constitution. Any modification that has an impact on these essential structures would therefore be considered void. **Beg, J.** asserts that the division of powers is an essential element of the constitution. 'None of the republic's three distinct organs may assume the functions of the others.' The court's position on the idea of the separation of powers was thereby reinforced.

**Indira Nehru Gandhi v Raj Narain:**<sup>9</sup> The case that created history & was one of the major reasons for the imposition of Emergency in India (1975-1977). After the Allahabad High Court ruled that Indira Gandhi's election was illegitimate, Indira Gandhi filed an appeal. A conditional stay was granted as the Supreme Court was not in session. As a result of democratic unrest, an emergency was promulgated. In the meantime, Indira Gandhi proposed the 39th constitutional amendment, inserting Article 329A into the Indian Constitution. Article 329A states that a committee chosen by Parliament shall be consulted before the election of the Prime Minister and the Speaker may be contested in court. The honorable highest court was unable to decide Indira Gandhi's case. Consequently, the validity of the 39th Amendment was questioned.

---

<sup>7</sup> *I.C. Golak Nath v State of Punjab* AIR 1967 1643

<sup>8</sup> *Keshvananda Bharti v Union of India* AIR 1973 SC 1461

<sup>9</sup> *Indira Nehru Gandhi v Raj Narain* AIR 1975 865

It was noted: 'That the separation of powers in the Indian Constitution only applies in a limited sense. India's constitution does not follow the same strict division of powers as the American or Australian does.' **Chandrachud J.** further highlighted that the idea of Separation of Powers is not commonly understood in terms of its political utility. Without a conscientious devotion to its precise checks and balances, no constitution can endure. The principle of Separation of Powers is a restraint principle based on the intrinsic prudence of self-preservation dictum that discretion is the better part of valor.

**Khanna J** believed the court of law's order is void and is generally a judicial role, not a legislative function.

It was also determined that the decision of a particular subject is a judicial function that cannot be exercised by a parliament even by bringing a change in the constitution. So, the fundamental reason the amendment was ruled ultraviolet was that when the constituent body signaled that the Prime Minister's election would not be invalidated, it performed a judicial role that it should not have performed under the separation principle. As a result of this decision, the concept of division of powers became apparent in the Indian legal system.

**Asif Hamid v State of Jammu and Kashmir:**<sup>10</sup> The Court held that all three arms of government – legislative, executive, and judicial – had to operate within the bounds set by the Constitution. An organ cannot carry out the functions of another. The robustness and autonomy of each of democracy's organs serve as its foundation. Limiting the legislature's and the executive branch's unconstitutional misuse of authority can be accomplished effectively through judicial scrutiny. However, the self-imposed discipline of judicial restraint is the only thing that limits the authority of judges. This idea therefore cannot be applied freely to any modern government since neither the powers nor any government can be contained in an airtight container.

---

<sup>10</sup> *Asif Hamid v State of Jammu and Kashmir* AIR1989 SC 1899

**Dr Ashwini Kumar v Union of India Ministry of Home Affairs:**<sup>11</sup> In its strict sense, the examples of judicial excessive contradict the theory of separation of powers. According to the theory, the legislative makes legislation, the executive executes it, and the court settles disputes in conformity with existing law. However such watertight isolation does not exist and is impractical. In broad terms, it indicates that one organ of the state should not execute a function that is the responsibility of another organ. While interpreting and expanding the meanings of terms like 'due process of law,' 'equal protection of the law,' or 'freedom of speech and expression' is a permissible judicial role, establishing a whole new law... by directives... is not a legitimate judicial function.

## CONCLUSION

The theory of Separation of power has been used as a guiding torch in Indian governance to divide powers as far as feasible but not in totality so that the functions of organs of government are differentiated from one another. Because our parliamentary system of government requires a great deal of cooperation, each organ must relate to the other on some level to work properly. Because placing too much power in any one organ might be highly harmful, as a result, a system of checks and balances has emerged through time, which is consistent with various Supreme Court judgments as previously explained.

Thus, the Indian Constitution, which is an exceptionally well-crafted instrument meant to protect every citizen's dignity and liberty, has not entirely adopted the notion of separation of powers, but has drawn heavily from it and preserved it as a guiding principle. However, as the Supreme Court has determined and affirmed in several instances, the theory of Separation of Powers has been included in our fundamental structural doctrine. As a result, it occupies a position of paramount significance but is adjusted to meet the demands of a modern all-encompassing state.

---

<sup>11</sup> *Dr Ashwini Kumar v Union of India Ministry of Home Affairs* WP (Civ) No 738/2016