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SEPARATION OF POWERS: THE DOMINANCE OF THE HYPER-EXECUTIVE ORGAN IN INDIA

G. F. Surya
L.L.M. 2nd Sem, Dr. Babasaheb Ambedkar School of Law, Nagpur

Abstract

Another concept of Constitutional democracy is Separation of Powers (SOP) designed to keep an equilibrium between three arms of government: Ministerial (Executive), Judiciary and Legislative to avoid excess powers. However, it has been very severely criticized for its ineffectiveness in India as it brings together decision making, political and administrative powers in a wholesome combination in the hands of the Executive. The present study critically examines how hyper-executive organ has emerged and how it has taken over in India and its implications for democratic governance and constitutional duties and institution's independence. It delves into the evolution of the relationship between the three arms of government as a result of the growth of executive power, centralisation of decision-making, control over the law-making function, extensive use of delegated legislation and administrative control of governance. The study also analyzes the role of the constitutional institutions, judiciary scrutiny, control by the parliament and federalism in promoting institutional balance. Effect of the constitutional institutions, judiciary scrutiny, control of parliament and federalism on institutional balance is also examined. The breadth of Executive dominance of the Constitution, issues of constitutional morality, transparency, accountability and democratic participation are given special attention. The study emphasizes the importance of the executive's efficiency in administration, while also suggesting that holding it too much can have a negative effect on constitutional protections. It lays emphasis on the need to enhance institutional checks and balances that would help maintain the constitutional democracy of India.

Keywords: Separation of Powers, Hyper-Executive, Indian Constitution, Executive Dominance, Judicial Independence, Parliamentary Sovereignty, Constitutional Democracy

Introduction

The dichotomy of separation of powers is one of the basic principles of modern constitutional democracy. It was a supportive basis of separation of governmental powers with regard to governmental powers exercised by three main organs of the State, namely, the Legislature, the Executive and Judiciary. The main idea of this doctrine is that powers are shared among several institutions to place checks on the actions of any single institution for the sake of protecting individual liberty, constitutional principles and democracy. The Legislature – makes the laws, The Executive – executes and operates them, The Judiciary – checks the constitutionality of the laws and the action of the government with it. This idea was penned by French political philosopher of the 1700s, Montesquieu, whose famous work, The Spirit of Laws (1748), included the concept of the separation of governmental powers. According to Montesquieu, if there is no separation of power there is no liberty. His ideas influenced the modern systems of constitution, particularly that of the United States of America, and in forming the ideas they

became an important guide for other constitutional democracies of the world. The application of the doctrine, however, is different in individual countries, depending on the political and constitutional command of them. Parliamentary Constitution of India is one in which there is linkage between the Executive and the Legislative branches whereas they don't have linkage in Presidential System of America. But, the Indian Constitution does not ignore the principle of separation of duties by procedure, statute or judiciary. But the sharing of power between the three is not clearly set out in the Constitution but can be inferred from various provisions that give each of these institutions powers or interventions that are constitutionally required.

The Constitution of India provides for a tripartite multi-institutional structure of Legislature, Executive and Judiciary to operate in respective domains with checks and balances on one another. According to Articles 53, 154 of the Union government, it has executive powers while Article 79 and 168 involve the setting up of parliaments and state legislatures with executive powers in the respective State government. According to the article 124 Supreme Court and article 214, High Courts are provided. Further, the constitutional courts also have the power to protect fundamental rights via judicial means in Article 32 and 226 of the constitution. Constitutional framework, therefore, is not the IR per se, but it is functional differentiation with institutional interdependence. The Indian parliamentary system would, however, have an inherent connection between the Legislature and the Executive as the Council of Ministers would have a 'corporate responsibility' towards Lok Sabha under Article 75(3) and to the respective Legislative Assembly under Article 164(2). This is a try to provide democratic accountability, that Executive shall be responsible to elected people. The Parliamentary questions, Parliamentary debates, Parliamentary motions, Parliamentary committee hearings, Parliamentary budget hearings and Parliamentary no confidence motions ensure that executive power is regulated. In the same way, the power to conduct judicial review allows the Judiciary to challenge any laws and acts of government that are unconstitutional. These create a balance between power of the Government, its control by it and its examination in the institutions.

However, the challenging political and administrative landscape of modern-day Indian has witnessed the emergence of Executive in the functioning of the State. Over the long haul, the impact of executive authorities on the legislative order and agenda, policy process, administrative processes, financial budgets, and national governance processes has resulted in broad coverage of the emerging concept of ‘restructured separation of powers. Hyper-Executive is a situation that gradually over time, the Executive becomes a more powerful player in the constitutional system, influencing over other institutions and reducing the accountability power of the existing channels in the constitutional system. It is not necessarily a constitutional institution abolition or the drastic removal of their independence. Rather, what it suggests is that executive authority is being exercised on an ever-larger scale outside of its relatively mundane day-to-day bureaucratic operations and that there might be a system imbalance. In a parliamentary democracy, the Executive has already a certain amount of political influence, the Executive normally has the upper hand in determining the agenda of the legislature in such a semi-democratic system and there is no separation of powers. Party discipline, effective leadership, lack of parliamentary oversight and central decision-making procedures can severely compromise the ability of the Legislature to exercise good control over the Executive.

This means that Parliament is less likely to scrutinise and critically evaluate public policies as it is increasingly sanctioning the executive ones. This is especially prompted by the increasing use of ordinances under articles 123 and 213 as well as the non-stop passage of vital laws by Parliament for hasty execution despite their high volume.

Review of Literature

The separation of powers has long been discussed in constitutional law and in administrative jurisprudence, with regard to the distribution of the powers among the three branches of government (legislature, executive and judiciary). There are a number of relevant topics in the literature on the constitutional foundations of institutional independence, judicial review, executive accountability, as well as the evolving nature of the relationship between the three governmental powers. In this paper some of the selected works which are based on 'Separation of powers' the dominance of the hyper-executive organ in India' are reviewed.

The Constitution of India by P. M. Bakshi (2005)[1] aims to give an extensive elucidation of the constitutional provisions pertaining the structure and working of the Indian government. The author describes the powers sharing between Legislature, Executive and Judiciary in the constitution and the role of various Institutions under the constitution. Fundamental rights, Parliamentary procedures, judicial review and constitutional remedies are a special focus of attention. The exercise aids in understanding issues of non-ideal distribution of powers in India, functional distribution of powers and institutional checks and balances. This contribution aims to give some basic understanding of the constitutional structure in which the executive power works. Specially significant when considering the rise of the influence of the executive in light of the principles of constitution that the framers hoped the constitution would serve.

Administrative Law Principles discussed in the book, "Administrative law" by D. D. Basu (2004)[2] applies to administrative agencies as well as to the administrative organization of Government. The role of administrative discretion, delegated legislation, delegated accountability and judicial controls over executive decisions are explained. It emphasises the need to keep legal constraints on administrative power, such that decisions are not arbitrary, and that governmental powers are not misused. It also covers the judicial role concerning the respect for the institutions of administration in order to (re) remediate the operation of administrative institutions in the framework of legal principles. It is impossible to overestimate the contribution in fostering an understanding of the development of executive authority is the administration and the delegation of executive power. It provides a framework to analyse the implications of excessive administrative discretion and the interaction between different arms of government as set out in the constitution to hold government to account.

Seperation of Powers and Judical Activism in India' by Somnath Chatterjee (2006-2007)[3] provides an insight of how two concepts 'separation of powers' and 'judicial activism' have

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collated in the Indian History. The importance of institutional boundaries and recall of the constitutional accountability of authorities are emphasized. Judicial activism is seen as important in the defense of basic rights and responding to the failure of other constitutional powers (legislative, executive) to perform their functions. Other issues include institutional limitations in combination with interventions by judicial authorities and the possibility of overlapping authority. The contribution that is relevant to the present study is that it gives an insight into whether judicial activism is an effective balancer to the dominance of the Executive or it leads to further tension within the constitutional system in India.

Akhtar Majeed (2008)[4] discusses the connection between separation of powers, judicial activism and crisis of governance under the title Separation of Powers Vs Judicial Activism: Crisis of Governance. The author analyzes whether there could be incoordination of institutions, where Judiciary is expected to uphold the legality of both executive and legislative interference, in the expanded function of the Judiciary, especially related to executive and legislative interference. The discussion also draws attention to the need for due balance between the independence of the courts and constitutional restrictions. Judicial activism can be seen as challenging crises of government, a failure of governmental responsiveness and the defense of the democratic character of the constitutional institutions as the guardians of democratic values. It would be quite beneficial in understanding the institutional issues that may present themselves when one organ in the institution is able to compensate for the failures of the other organ. It should be read alongside and in the context of the existing study which depicts a narrower scale of the constitutional issues that are being tackled because of the increase in executive power and judicial activism.

In his Article “Separation of Powers: the function of Judicial Review: Juristic or Forensic?”, Justice J. N. Bhatt (1999)[5], has defined the role of judicial review as follows: How to keep the supreme power of the law in place, and how to make sure government powers are exercised, is the question addressed in 'Evolving or Elusive?', which discusses the role of judicial review. Judicial review and its constitutional nature, scope and development are discussed. Judicial review is considered so important to checks and balances and to the rule of law, that it is the only mechanism courts can engage to determine whether laws and the executive branch are constitutional or illegal. The contribution highlights the importance of judicial independence for the protection of judicial decision making and also the constitutional principles against arbitrary action taken by the government. This is particularly important for the current research since one of the key institutional tools that serve to limit the power of the executive is judicial review. The book gives a legal analysis of how effective judicial action is in the performance of the balance of constitutional powers.

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Administrative law is dealt with elaborately in book Administrative Law, 2005 by I P Massey[6]. The concept of administrative discretion, delegated legislation, natural justice and rules on it, administrative tribunals and judicial review of administrative action is overviewed by the author. The work points to the expansion of the modern administrative State, and focuses on the responsibilities and powers of the executive authorities. However, there is a need for expansion with necessary legal protections, to prevent arbitrariness and the protection of individual rights. The author emphasises the importance of the judicial review and the powers of administrative accountability, as tools designed to limit the exercise of discretionary powers in the Executive. The contribution is of special significance to the idea of the hyper-executive organ since it outlines the possible occurrence of increased concentration of authority and a demand for increased institutional supervisory powers due to the expansion of executive functions.

Indian Constitutional Law by M.P Jain, (2005)[7] has a lucid and easy discussion on the constitutional framework, institutional relations and principles of Indian political system. The author discusses the powers allocated to constitution, importance of judicial review, fundamental rights, federalism and such constitutional limitations. The work provides a glimpse into the relationship of parliamentary government with separation of powers in India particularly in the context of India. It also helps in understanding the role of the Judiciary in limiting the exercise of legislative and executive powers as laid out in the Constitution. The contribution is important for the interpretation of state protection of individuals against excessive state power as guaranteed by the Constitution. It offers a theoretical and legal basis for assessing the scope of executive dominance as it may impact the independence of institutions, democratic accountability and the fundamental structure of the Constitution Law.

In The Meaning of the Separation of Powers (1965), W. B. Gwyn[8] explores the history, theory and doctrine of the separation of powers, with the emphasis on its meaning. The author explores the significance of decentralizing government, having multiple institutions and how this can help to disperse power. An indispensable theoretical explanation of the interdependence of institutional independence, political freedom and constitutional government. Also, it introduces another definition of separation of power: it does not imply total separation of the institutions, but rather the intent to not give the government unlimited powers. This knowledge and understanding of this theoretical approach serve to conceptualize the present study relating to hyper-executive organ in India. The paper advances the understanding of the role of institutional imbalance and how well the system of checks and balances has to work to ensure a democratic government.

Literature Gap

The literature that was consulted for this paper confirmed that Separate Powers is one of the key principles of constitutional arrangement for a good democratic governance, institutional

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independence and accountability. Basu-Massey examine the means by which administrative powers have been expanded and the laws that are in existence to ensure the accountability of the executive, while Bakshi-Jain provide a constitutional perspective of the power dynamics involved in democracy in India. Because of this, Chatterjee and Majeed speaks on 'Institutional-cum-judicial evaluation of judicial activism and separation of powers' and Justice J. N. Bhatt puts emphasis on the importance of judicial review. Gwyn presents more general philosophical arguments of the teaching. Together, they highlight the key of the balance of the three powers of the State, which are essential for the effective functioning of constitutional democracy.

Discussion

Doctrine of Separation of Powers is of great prominence in the Indian Constitution as it aims to strike a balance between the three organs of government—Legislature, Executive and Judiciary. The discussion is based on the existing literature which shows that though there is no rigid dichotomy in the Indian Constitution there is a functional division of powers, independence of institutions and controlling each other by holding the other party accountable. P. M. Bakshi[9] and M. P. Jain[10] give an account of the constitutional framework which enables the government to be distributed amongst different institutions. One of the things they have contributed is a fact that has to be recognized as the supremacy of the constitution because every organ has to act according with the scope provided in the constitution. Their operationality, however, has been through a number of changes, particularly in the extent to which the Executive is involved in the policy making process, both in making policies and in implementation.

The research work of D. D. Basu[11] and I. P. Massey[12] both accent on administrative extension in a modern welfare State. The governments' executive power has been extended in scope as they increasingly have been assigned responsibility over the economy and its administration, as well as responsibility in national security, social welfare and in regulating society. Delegated legislation is one of the means of government, as is the ability of the administration and the executive notifications. They may assist administrators to fast-track implementation within the policy framework, but while it may be essential to keep progressing towards implementation, it may be difficult to have oversight being provided over implementation by the Parliament, and may eventually lead to excessive delegations of power to the Executive. The decision lends itself to an important constitutional discussion about the compromise between administrative convenience and accountability and the individual rights to be protected by legislation.

Judicial activism and separation of powers are enlightenment areas highlighted by Somnath Chatterjee[13] and Akhtar Majeed's[14] respective essay. Other powers of the Constitution are deeply inadequate or fail to work if there is no judicial power, and this is reflected in their

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discussion. The importance of judicial power is reflected in their discussion because other powers of the Constitution fail to work effectively or are deeply inadequate. However, when judicial action goes too far there can be institutional disagreement and an exploration of what judges can and cannot do! In this regard it is the duty of the Judiciary to ensure review of action of the Executive and Legislative limbs in tandem with respecting the other constitutional responsibilities of the other arms. As a method of upholding the supremacy of the constitution and of protecting itself against arbitrary powers of the executive also it is felt in the discussion on judicial review by Justice J. N. Bhatt[15]. Provision of judicial review, then, is an important check on excessive executive power.

W. B. Gwyn's[16] article is a theoretical one describing the philosophic foundations of the separation of powers. He provides a description of devolved government as key to safeguarding political freedom and avoiding centralisation of power. The principle is of great importance in Indian context since Parliament provides an institutional linkage between the Legislature and the Executive. In a strong Government, where the legislature is predominantly opposition representation, the interaction between Government and the legislature can be very close, and the Executive can also exert a great deal of influence on the lives, agenda and policy of the Houses. In such situations, the performance of parliamentary committees, involvement of opposition parties, parliamentary debates and other accountability processes come in as significantly.

The emergence of the hyper-executive organ comes from the changes in institutional relationship. It is a phenomenon that has nurtured an influential impact upon the constitutional and administrative machinery of the government with decision making tendencies going progressively executive. This dominance might manifest itself in centralisation of power, extensive legislative deferral, comprehensive administrative discretion, extension of power into institutional action and marginalizing or exclusion of critics. India's issue of a federal democratic system is that the State governments are not independent in enforcement of laws and the working of co-operative federalism. Also, it's critical to take a democratic accountability, transparency, constitutional morality/independence, and administrative efficiency perspective of concentration of authority.

The conclusion the emphasis throughout the discussion is on the unchecked power of the Executive, when in fact the problem lies with the inadequacy of the Executive in the context of constitutional democracy in India. The coordination should not consist of ‘subordination' of an institution to another, rather it should be between the Constitutional institutions. To ensure the constitutional balance, there is a need to strengthen legislative control, judicial independence, an institutional autonomy, federal cooperation and transparency in administrative decisions. It indicates, therefore, that the principle of separation of powers has

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to be analysed dynamically to resolve contemporary issues of governance and to fulfil its original goal of preventing an excessive centralisation of government.

Overall Conclusion

The topic "Separation of Powers: The Dominance of the Hyper-Executive Organ in India" sheds light on how the inter-institutional relations in the Indian constitutional structure are transforming, and the growing relevance of the role of maintaining the balance between the Legislature, Executive and Judiciary. The principle of separation of powers is an essential one in the constitution that aims to avoid the centralization of governmental power and preserve democratic principles, freedom of individuals and the supremacy of the constitution. The Constitution of India does not have a doctrine of `separation of powers' but it has a doctrine of `functional distribution' with institutions keeping a balance by way of mutual accountability and cooperation. The powers of each of the three arms of government have been constitutionally limited and the responsibility has been assigned to each arm of government.

The analysis in the present context indicates that the role of the Executive in the working of the Indian democracy has been strengthened, stage by stage as the scope and intensity of executive fatigue has gradually increased, the process of decision making has become more centralised, the motives behind the governance mechanism has become more complex and the complexity of political leadership has been increased. Parliamentary system is conceptually linked with these two organs due to their inherent relationship, the Executive is coming from the Power of the people, i.e. Parliament; its accountability is to the Legislature. So, the government party could have a large parliamentary majority, and this could mean that the government party is able to dominate the agenda of the legislative power, and hence its effectiveness to check the government party is reduced. It would therefore be hard for Parliament to keep an eye on government policies, challenge government plans for new laws and hold Government accountable. In tandem with this growing power of the executive are the growing use of delegated legislation, ordinance and administrative discretion.

The study also formulates that executive dominance also has significant bearings for Indian federalism. The Union makes the point that it is designed for regional autonomy; for national integration. There may also be a danger of divisions and conflicts between Governments, however, after too much centralisation in the policy, to the financial control of and administrative control of policies and goods. However, cooperative federalism is dependent upon consultation and coordination, mutual respect rather than authority exercised from on high. In this context it is necessary to strike a balance between the Union and the States Governments for ensuring proper level of democratic decentralisation and constitutional governance.

Judicial review is very important in the protection of the supremacy of the Constitution and in the interpretation of constitutional provisions as tackled by the Judiciary. The rights of the Government have been restricted by various benchmarks brought about in the last few years in

various important cases like Kesavananda Bharati v State of Kerala (1973)[17], Indira Nehru Gandhi vs Raj Narain (1975)[18] and the Minerva Mills Ltd v Union of India (1980)[19] case. In the decisions, Parliament and the Executive are not allowed to make decisions that result in the breakdown of the basic framework of the Constitution. Judicial independence, however, needs to be built on some institutional corrective measures that guard against unwarranted trespasses on the operation of the other two components of government, the Legislature and Executive. The principle to be pursued should be the supremacy of the constitution, not that of any organ of the Constitution.

When the accountability mechanism is not in line with the power of the executive, then the hyper-executive organ is a great danger for an effective constitutional democracy. There is a need of a strong Executive for smooth administration of the country, economic development and ensuring and ensuring timely implementation of the public policies as well as for national security. However, the shortcomings in execution should not be taken as an excuse to weaken the independence and authority of the parliaments, lack of transparency in operation, and lack of transparency in the powers of citizens. The Executive's capacity to make decisions works well, but its willingness to be held accountable to the constitutional institutions and to its people too is essential.

The report draws attention to the need of the consolidation of parliamentary committees in order to achieve substantive debate in the parliamentary chambers, to include the participation of opposition parties, to ensure transparency for administration, to prevent the judicial from being influenced by administration, and to improve the judicial independence as well as the independence of constitutional and regulatory bodies. In addition, there should be more consultation between the Union government and governments of the federating units, effective implementation of the principle of the constitution and the accountability for the use of the federal government's delegated law making powers should be strengthened. The democratic diffusion of governmental power, via independent institutions, through freedom of the press, civil society organizations and an informed citizenry, likewise ensures that too much governmental power is not too near at hand.

In brief, it is not the supremacy of either of the three but their working together in an orderly way which is the key to Indian democracy. The Legislature should remain a powerful body of lawmakers and a check and balance mechanism and the Executive should be held accountable for running the Country efficiently, and the Judiciary should have served as the watchdogs of the law and constitutional rights. Consequently, more institutional independence and constitutional morality, transparency and good checks and balances to enhance doctrine of separation of powers. A nimble and efficient Executive is required but not which is unchecked or hemmed in by institutions in India. Maintenance of this constitutional balance is vital to

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preserve democratic freedoms, to foster federalism, to avoid arbitrary governance and to keep the Constitution and the citizens as the ultimate source of constitutional power.

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