

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

© 2021 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of any suggestion or complaint, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

A Deep Concern of Executive Aggrandizement: A Comparative Study of Separation of Powers in India and the USA

RAJESH BZAD¹

ABSTRACT

The research paper deals with a comparative study of the doctrine of separation of powers. The researcher wants to highlight the basic concept of separation of power and then gradually draws a comparative analysis of its application in two different systems, the USA and India. On the one hand, the USA follows the separation of power in an absolute sense, but on the other hand, India that just partly adopted it. Building on that, the paper then turns to discuss the contemporary practices of both nations regarding the doctrine. In doing that, the researcher shows that even though the implementation of the doctrine is different. Both the countries developed and implanted the doctrine according to the needs and practical application even though it required a strict implementation. Still, both the system made their way. But in practicality, they face the same issues; in the form of executive aggrandizement, the executive is cutting the role of other branches and becoming intense day by day and dismantling all the accountability.

Keywords- *Separation of Power, Executive Aggrandizement, Encroachment and Accountability.*

I. INTRODUCTION

Today in a democratic setup, many countries follow the division of powers between the three government organs: the legislature, executive, and judiciary. This division of power between the different organs called separation of power. In the words of Wade and Phillips, separation of power is that "the same person should not form more than one organ of the Government, One organ of the Government should not exercise the function of other organs of the Government, and One organ of the Government should not encroach with the function of the other two organs of the Government."²

The doctrine is against the accumulation of power in the hand of one organ so that every organ

¹ Author is a LLM student at NLSIU Bangalore, India.

² M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86, VLR, 1127, 1129, (2000)

can stay independent in its sphere and no organ can interfere in other work, as James Madison said, “the accumulation of all powers, 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.”³

Ideally, the purpose of this doctrine to completely divide the powers and function between the three organs so that there can be no interference or overlapping between the functions of organs; it ultimately aims to independent and free government organs. Though there is broad adoption of this doctrine, this doctrine's rigidity is one reason many countries do not adopt it, and if adopted, it is not adopted in its real sense.

The researcher in the paper draws a comparative analysis of the application of separation of power doctrine in two different systems USA and India; on the one hand, the USA follow separation of power in an absolute sense, but on the other hand, India that not follow it in the strict sense. Even though the doctrine is adopted in both countries but in a real position, it is not observed in either country in strict sense as developed by Montesquieu. Further, the paper explains the contemporary practices regarding the doctrine and explains how the countries make their way to apply this doctrine in modern democracies and even though USA and India are from the different system, they are facing the same problem with regarding the overlapping of the function of the three organs, as executive is becoming stronger day by day and encroaching on legislative and judiciary.

II. CORNERSTONE OF CONSTITUTIONAL FRAMEWORK: A CLEAR DISTINCTION

Montesquieu Separation of Power aimed at full separation so that the organs of government can function freely and independently; it aimed to distribute powers between the three organs of the government and non-interference of one organ into the other's work. Many countries adopted this doctrine but not in an absolute sense.⁴

In both India and the USA, constitution-makers adopted this doctrine in different ways; the USA adopted it in absolute terms; all three organs, judiciary, executive, and legislature, not interfere in another work and stay in their sphere. In contrast, in India, it is not adopted in a strict sense. Still, a restricted manner as the functions are adequately separated from different organs cannot interfere with the other.

³The Doctrine of Separation of Powers in India, USA and France, Constitutional Lawcontemporary Legal Issue, https://lexforti.com/legal-news/separation-of-powers-in-india/#_ftn64

⁴ Jyoti Sencha, Doctrine Of Separation Of Powers – Comparative Study Between USA & India, <http://thelegalvoiceofindiaiiil.org/volume-6/doctrine-of-separation-of-powers-comparative-study-between-usa-india/>

In the USA, the doctrine is highly recognized, and it is the cornerstone of America's constitutional structure. Still, there is no explicit adoption of separation of powers in the constitution as the specific and real meaning of separation of power involves restrictions and limitations and constraints boundaries of different organs' work. So it is partially adopted and back up by the checks and balance doctrine. The doctrine separates the functions and powers between the three government organs: executive, legislative, and judiciary, in the US constitution but not in its Federal constitution⁵. In US constitution Section 1 of Article 1 states, "All legislative powers herein granted shall be vested in a Congress of the United State". In Article II states, "The executive power shall be vested in a President of the United States of America". In Article III states, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish....."⁶

In India, like many other democracies, the ultimate power is vested in Constitution; under the Constitution, the three organs of government function. However, the explicit provisions are not available in the Indian Constitution that explicitly recognizes the Separation of powers.⁷ In *Bandhua Mukti Morcha v. UOI*,⁸ the Supreme Court said that, for all government branches, the Indian constitution does not explicitly provide separation of power; however, it can be inferred on the foundation on which the constitution is based. Also, in the case of *Kesavananda Bharati vs. State of Kerala*,⁹ it was added to the basic structure.¹⁰ Many times a question arises that India should move to presidential form from the parliamentary system of government, recently it was also raised in the Rajya Sabha that the Presidential system is more stable than parliamentary system and we should adopt that. But the system itself was criticized in constitutional debates.

Indian constitution explicitly provides that "Executive power of the Union shall be vested in the President"¹¹ and "the executive power of the State shall be vested in Governor..."¹² and the executive will be separate from the judiciary¹³ but nowhere separation of the legislature is mentioned. There are no explicit provisions to whom the legislative and judicial powers are

⁵Tej Bahadur Singh, PRINCIPLE OF SEPARATION OF POWERS AND CONCENTRATION OF AUTHORITY, IJTR, 1, 3, (1996)

⁶ ibid

⁷ Supra note at 3

⁸ (1997) 10 SCC 549

⁹ (1973) 4 SCC 225

¹⁰ Ayush Verma, Comparative study on separation of power in India and USA, 2, VLR, 14 (2020)

¹¹ India Const. art. 53, cl. 1

¹² India Const. art. 61

¹³ India Const. art. 50

vested.¹⁴

In the constituent assembly debate, Prof. K.T. Shah insisted on adding an Article 40A that talks about “There shall be a complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial.”¹⁵ But members of constituent assembly like Shri K. Hanumanthiya and Dr. B.R. Ambedkar disagreed with this and said drafting committee approved for parliamentary system rather than presidential form of government and is of opinion that rather than a conflicting system of its better to adopt harmonious system, because complete separation of these organs leads to conflicts, and it will hamper the peace and development of the country.¹⁶ Dr. B.R. Ambedkar argues the assumption that the executive should be divided from the judiciary is not contested at all. It is correct that a distinction remains in the US system with regards to the separation of executive and legislature, but the citizen themselves are not happy with the strict separation.¹⁷ He pointed out that “There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, 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.”¹⁸

III. IMPLEMENTATION OF SOP: A BLUR DISTINCTION

The real position of application of the doctrine raises the question: Is this doctrine adopted in its strict sense or just partly adopted. In practice, this doctrine's adoption is not absolute since there is an overlapping of powers and functions of different organs. To avoid arbitrariness of one organ and for the cooperation of all the organs, interference is necessary.

India and the USA both have written constitutions. Like the USA, India didn't provide separation powers doctrine in its absolute sense in the constitution; it follows only in a broad sense.¹⁹ In the USA, the apex powers are in the President's hand, as it follows the Presidential system. In contrast, in India, which follows the Parliamentary system, the President is just a nominal head; Prime Minister is a real head. The USA president is not a part of congress as it

¹⁴ Supra note at 8

¹⁵ Supra note at 5

¹⁶ *ibid*

¹⁷ Constitution Assembly Debate of Dec. 1946

¹⁸ Kenneth C. Cole, "Government," "Law," and the Separation of Powers, 33, TAPSR, 424, 429 (1939)

¹⁹ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299

follows the absolute separation of powers, whereas, in India, the President is a part of parliament.

(A) Legislative powers- In the USA, the legislative powers are only given to congress, but in India, it is given to Parliament as well as State legislatures, even the executive also exercise legislative powers as Indian President enjoys legislative powers in the promulgation of the ordinance, in case of failure of machinery in the state, President proclaim emergency and power to adopt any Law adaptations and modifications.²⁰

In both the USA and India, the executive head is President, besides they enjoy some legislative powers; in the USA, after congress passed bills it sent to the President for his approval which he has three options to approve, to take no action and not agree, in this case, the bill has to pass again by the congress with two-third majority.²¹ This power is purely legislative. Same in India, a bill passed by parliament become an act after the assent of the President. In the USA, the President involve in making treaties on foreign affairs.²²

Judiciary also interfered and exercised legislative powers as many times as the Supreme Court and High Court makes laws on the area on which law is silent or if it found any law in infringement of the constitution or opposed to public policy, it nullifies them.²³

(B) Executive powers - In the USA, the President is the executive head, and all the executive powers are vested in him. Still, in India, executive powers are vested in both the President²⁴ and The Governor²⁵ and some legislature and executive situations. But in a real situation in the USA, Congress has an executive power to vote on the budget.

(C) Judicial Powers- Judicial Powers are granted to courts in the USA; no other organ can exercise judicial powers; on the contrary, in India, judicial powers are not only vested in courts but also to Tribunals; executive exercise judicial functions as the President have the power to decide disqualification of a member of parliament²⁶, in appointment of judges²⁷. Legislative exercise judicial functions as it took part in the removal of President.²⁸

²⁰ India Const., art. 372 and 372A.

²¹ U.S.A. Const., art. 1, sec. 7, cl. 2.

²² Supra note at 5

²³ Tarunabh Khaitan, Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism, Vol. 17, ICON, 342, 347 (2019)

²⁴ India Const., art. 53, cl.1

²⁵ India Const., art.154, cl.1

²⁶ India Const., art. 103, cl. 1, "If any question arises as to whether a member or either of House of Parliament has become subject to disqualification mentioned in clause (1) of Article 102, the questions shall be referred for the decision of the President and his decision shall be final".

²⁷ India Const., art. 124, 126 & Article 127

²⁸ India Const., art. 56

In the USA, courts by the judicial review have control over congress and the president, and when the laws are silent on some issues court makes laws. The amendments in the US constitution are not only done by congress but also by the Supreme Court; this is also one reason that the separation of power that the USA follows is not rigid. Congress also enjoys judicial powers as it can expel its member or punish them for misbehavior, even the impeachment of judges proceedings instituted in it.²⁹

Both the USA and India developed and implanted the doctrine according to the need and practical application even though it required a strict implementation. Still, both the system made their way.

It can be observed that both India and the USA do not follow a rigid separation of power. However, it is stricter in the USA than in India; the legislature and executive's overlapping in the USA, and their control is comparatively less than in India. The USA follows the presidential system; the president is the real executive head of the state. Unless he is working within the constitutional limits, he is not responsible or accountable for the legislature's actions. Even the Supreme Court don't have power for judicial review.³⁰

Similarly, the legislature is autonomous in its functioning, and the president cannot dissolve a sitting congress. Whereas in India, President is a nominal head; in taking decisions, he has to bring aid and advice and decide under the Council of Minister's assistance and recommendation, who are part of the legislature. Even Parliament can be dissolved by the Prime Minister, who is considered as the real head³¹.

The application of the doctrine in India and the USA has some similarities and differences; however, the structure adopted is frequently criticized; both countries follow the practice that suits both countries' socio-cultural conditions

IV. CONTEMPORARY PRACTICES: A NEW FACE OF ENCROACHMENT AND AGGRANDIZEMENT

Separation of power, in theory, is the threefold division of powers and functions. Still, this doctrine's implementation in the strict sense is very complicated because of the states' diversity.³² The mechanism of law-making, its execution, and adjudication cannot be easily restricted and delegated. The absolute adoption of this doctrine ends up in inefficient

²⁹ Karan Tyagi, The Doctrine Of Separation Of Powers And Its Relevance In Time Of Coalition Politics, 69, IJPS, 619, 623 (2008)

³⁰ Supra note at 8

³¹ Supra note at 8

³² Matthew C. Stephenson, Does Separation of Powers Promote Stability and Moderation?, 42, 331, 336 (2013)

functioning as government needs cooperation among its organs. Prof. Garner, "the doctrine is impracticable as a working principle of a successful government."³³

Many contemporary practices show that countries are not following the strict path of Separation of Power. In India recently, in *Sampurna Behrua v. Union of India*,³⁴ the Supreme Court ordered that the government should provide shelters to homeless people and order to form committees for its enforcement. Still, the government didn't set up the committee. In which the clash between the organs came into the limelight, "the Law Minister said that governance must be left to those elected to govern, and there should be no interference from the Court."³⁵ In response to it, "the SC Judge, Madan B Lokur, publicly stated that the Executive is making efforts to dispossess the Judiciary of its power to govern and used the phrase 'the whip is broken.' J. Lokur remarked that the Judiciary was 'helpless' after such comments from the Law Minister."³⁶

In the USA, during the Trump administration, a ban on Islamic immigration and refugees was put; the Federal Court initially ruled this ban unconstitutional. Even though the executive didn't regard this order and claimed the powers to itself on drafting, executing, and adjudicating its action, it nullifies the doctrine's objective.³⁷

From the above instances, we can observe that a new situation that is arising in the countries is the very powerful executive, in the countries like India and USA who have different circumstances even though they are facing the same problems that executive is becoming powerful then legislative and judiciary, as they don't have authority to bring their decision to action. In the USA military powers, social welfare and law enforcement all come under the executive i.e. President and its power are uncontrollable and are breaching the limits of constitution.³⁸ Even in India, executive is becoming very powerful, in recent practices our Prime minister is compared to USA on his autocratic behavior, because of that India is becoming more centralized. The accountability is systematically dismantling, as many bills are now passed in guillotine without debate in parliament, no question hour, and no leader of opposition. Recently in the USA, the accountability is compromising in a way that many

³³ *Yashmita*, Separation of Powers: A Comparative Analysis of the Doctrine India, United States of America and England, <https://www.lawctopus.com/academike/separation-of-powers-a-comparative-analysis-of-the-doctrine-india-united-states-of-america-and-england/>

³⁴ (2018) 4 SCC 433

³⁵ Torsten Persson, Separation of Powers and Political Accountability, 112, TQJE, 1163, 1178 (1997)

³⁶ Live Law, We Were Told Governance Is For Govt, Not For Court, SC Justice Lokur's Dig At Centre, 2018, <https://www.livelaw.in/we-were-told-governance-is-for-govt-not-for-courts-sc-justice-lokurs-dig-at-centre/>

³⁷ Supra note at 4

³⁸ Tom Head, History of the Imperial Presidency, (Dec. 29, 2020, 11:34 PM) <https://www.thoughtco.com/history-of-the-imperial-presidency-721446>

appointments are not in the conformity with the Senate, recently in Trump administration, he appointed judges, and many labeled it as judicial takeover.³⁹

Both the countries moving toward an executive crisis, in the words of Bermeo executive aggrandizement, which happened “when elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences.”⁴⁰

V. CONCLUSION

Power in the hands of one organ or person leads to arbitrariness. Still, if this power divides into different organs even though the organ can misuse the power in its sphere, the concept of Separation of power is practically impossible. In India and the USA, both adopted this doctrine in their ways, because for a smooth and cooperation in the working of these three organs need minimal interference in each other works. Today, when the executive in both the countries is becoming so powerful that it is encroaching the powers and function of other organs, the absolute Separation of power that Montesquieu laid down may help, but a robust checking mechanism is needed.

³⁹ Supra note at 3

⁴⁰ Tarunabh Khaitan, Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism, Vol. 17, ICON, 342, 347 (2019)