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# Constitutional Provisions of Doctrine of Separation of Power in India: Comparative Analysis with that of United States of America and United Kingdom

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## ABSTRACT

*Constitution holds the foundational pillar of the entire legal system; a country stands upon. The various parliamentary tenets, both from individual states and the country as a whole need to follow the basic structure (essence) of its constitution. Constitutional law is thus can be referred to as the Mother of all laws in a particular country. In this article, the various relevant positions discussing separation of power within the constitution of India along with powers and functions shall be analysed. The comparative analysis on the doctrine of separation of power shall include India, United Kingdom and United states of America in their basic constitutional framework. Precisely, in India, there is no constitutional status of Separation of power. The Indian constitution portrays nothing in line with this doctrine, but envisions an overlapping nature of the three organs of the Government.*

**Keywords:** *Separation of Power, Constitution, division of powers, conflict between powers, Governance.*

## I. INTRODUCTION

The idea behind the doctrine of separation of powers is denial from excessive powers (legislative, judicial and executive) to be exercised by each bodies. This also includes denial of interference by each of these bodies in one and the other's governance or functions. Additionally, non-exchange of functionalities by these three bodies of Governance in a country has also been clearly stated by this doctrine. As per Adlar John<sup>2</sup>, *'There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the cause of individuals.* Thus, decentralization of power was articulated to avoid Justice becoming capricious. Montesquieu believed that if all the powers of governance (legislative, judicial and executive) are given under one single body, an anarchy would take place in the

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<sup>2</sup> Constitutional and Administrative Law, Palgrave Macmillan, New York, 6<sup>th</sup> Edition

country, filled with arbitration. Justice delivery system would thus become violent for the citizens and executive world would be flawed. However, this principle (though not followed in strict sense) but has been adopted by many nations today. It was first adopted by United states of America. India had adopted a part of it and started practising it post-Independence.

## II. RELEVANT ARTICLES OF INDIAN CONSTITUTION RELATING TO DOCTRINE OF SEPARATION OF POWER

As per Article 50<sup>3</sup> – the independence of the Judiciary has been laid down, Separation of adjudication shown. Under Article 121<sup>4</sup> and 211<sup>5</sup>, the state legislature and the Parliament have been imposed with certain restrictions. While moving on to the independence given to the executive, Article 53<sup>6</sup> and 154<sup>7</sup> has been laid down. As per these articles, highest executive power has been vested upon the President for the entire country and on the Governor in the individual states.

In certain cases, impeachment of the President or removal of Judges may include the legislature to exercise judicial powers for appointment of the judges and the Chief Justices of High Courts and Supreme Court. Even as per Article 123<sup>8</sup>, when both the Houses of the Parliament are in session, if the President (Highest office of Executive) is satisfied with the existing circumstances, requiring his immediate action, he is allowed to promulgate Ordinances as per the situation demands him. Across multiple articles in the Constitution, Separation of Powers have been portrayed quite distinctly in the Indian Constitution.

### (A) Executive Structure of India:

**Part V of the Indian Constitution- The Union.** Chapter I of this part is related to the Executive – discusses about the President and the Vice President. Other significant factors showing one of the important principle [ 3<sup>rd</sup>] of the Separation of the Powers- ‘*Check and Balance*’ are like – The process of Election of the President and Vice President of India, disputes over such election, discusses on Council of Ministers, the Attorney General for India, and various executive conduct of Government Business. Article 52 to 78 deals with the executive function of the Indian Governance at the Union level.

**Part VI of the Indian Constitution- The States.** Chapter I of this part is the General which deals

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<sup>3</sup> INDIA CONST, art. 50.

<sup>4</sup> INDIA CONST, art. 121.

<sup>5</sup> INDIA CONST, art. 211.

<sup>6</sup> INDIA CONST, art. 53.

<sup>7</sup> INDIA CONST, art. 154.

<sup>8</sup> INDIA CONST, art. 123.

with definition of state, the states of India as mentioned in Part A of 1<sup>st</sup> Schedule. Chapter II discusses about the Executive and discusses about the Governor, Council of Ministers, the Advocate-General for the State, conduct of Government Business. Article 153 to 167 deals with the executive function of the Indian Governance at the state level.

### **(B) Legislative Structure of India:**

**Part V of the Indian Constitution - The Union.** Chapter II deals with the Parliament discussing the Constitution of Parliament, officers of the Parliament, conduct of Business, Powers, Privileges and Immunities of Parliament and its members, various Legislative Procedure, Procedure in Financial matters, and other procedures generally used in both the Houses of the Parliament. However, to apply the fourth principle of the Separation of Powers- '*Mutuality Principle*'- the same aimed at creating more concord and less of discord, has been included in the Constitution. As found in Chapter III of Part V- Legislative Powers of President discussing the power to promulgate Ordinance during the recess of Parliament, stated in Article 123.

**Part VI of the Indian Constitution-The States.** Chapter III discusses about the State Legislature- as in Constitution of Legislative Assembly in the states, officers of the state Legislature conduct of Business, Disqualification of members, Powers, Privileges and Immunities of State Legislatures and their members, Legislative Procedure, Procedure in Financial Matters and Procedures generally. Also, in the Chapter III of Part VI, Power of Governor to promulgate Ordinances during recess of Legislature has been given. The relevant articles in Part V pertaining to Legislative Structure are Article 79 to Article 123, at Union Level and in Part VI at state level from Article 168 to Article 213.

To promote the second principle of the Separation of Powers i.e. '*Functional Principle*' in Article 122<sup>9</sup> and Article 212<sup>10</sup> of the Indian Constitution, boundaries-exclusivity has been granted between the organs as in vis-à-vis:

### **(C) Judicial Structure of India:**

**Part V of the Indian Constitution- The Union.** Chapter IV deals with the Union Judiciary- discusses about the establishment and constitution of Supreme Court of India. This includes appointment and salaries of Judges, Chief Justices of India- acting and ad-hoc Judges. Also includes attendance of retired Judges at the sittings of the Supreme Court. The chapter detail about the Supreme Court. The chapter detail about the Supreme Court to be a court of record,

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<sup>9</sup> INDIA CONST, art. 122.

<sup>10</sup> INDIA CONST, art. 212.

to be the Original Jurisdiction under Article 131<sup>11</sup>, and enlists the disputes which are not at par Article 131.

This chapter entails the exclusive jurisdiction of the Supreme Court with regards to question as to Constitutional validity of central laws. Various functions of the Judiciary at the Union level like having appellate Jurisdiction from High Courts on Constitutional, Civil, Criminal and other proceedings are shared. Article 124 to 147 deals with the Judicial function of the Indian Governance at the Union level empanelled with the Supreme Court of India.

**Part VI of the Indian Constitution- The States.** Chapter VI discussing the sub-ordinate courts and chapter V discussing about the High Courts in the states. Article 214 to 232 discusses about the High courts and that of subordinate courts are stated from Article 233 to 237. Under Article 226- the power of High Courts to issue writs- writs of certiorari, writ of Prohibition, Writ of Mandamus, Writ of Quo-warranto and Writ of Habeas Corpus are discussed.

In the *re, Delhi Laws Act*<sup>12</sup>, it has been stated that the Constitution<sup>13</sup>, the powers and functions of each body or organs must be found in the Constitution itself and also noted that the functions except that of the executive were not vested in any particular body. Apart from the exceptional provisions like Article 123, 213<sup>14</sup> and Article 357(1)<sup>15</sup>, it is a fact that the legislative powers shall be exercised only by the legislature created by the Constitution, which is the Parliament in case of the Union and the respective legislative body<sup>16</sup> in the State.

### III. ANALYSIS ON SEPARATION OF POWER IN INDIA

Separation of Power was first envisioned through the various contributions of Aristotle, Plato, Locke and Montesquieu. Many centuries ago, a segregation between the various functional bodies of government was offered by Greek Philosopher, Aristotle. He propounded three distinct realms of Governance in a country- the lawmaking (legislature), the administration (executive) and the dispute resolution (judiciary). Based upon the same, John Locke contributed three-fold classification of any country's functional bodies or Governance in 16<sup>th</sup> and 17<sup>th</sup> century. However, in 1785, in the book- "*Esprit des Lois*" [*The spirit of Laws*] by Montesquieu, for the first time, the doctrine of separation of power was scientifically, systematically articulated.

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<sup>11</sup> INDIA CONST, art. 131.

<sup>12</sup> 1912, (1951) SCR, 747

<sup>13</sup> India has a written constitution unlike United Kingdom

<sup>14</sup> Power of Governor to promulgate Ordinances during recess of Legislature

<sup>15</sup> Exercise of legislative powers by the President in the case of breakdown of Constitutional machinery in the states

<sup>16</sup> Legislative Assembly or the Vidhan Sabha

The four principles on which this doctrine relies upon are as follows:-

- a) *Exclusivity Principle* – which states division of the government into three structural organs.
- b) *Functional Principle*- which states putting boundaries on the organs, where one organ is prohibited from performing the functions of the order.
- c) *Check and Balance Principle*- which suggests a check to be made on each organ by the others in order to look that functions and duties so performed are within the constitutional bounds.
- d) *Mutuality Principle* – which aims to create concord over discord, cooperation rather confrontation and engagement over estrangement between the three organs.

Thus, this doctrine holds a logic of polarity because *'threat to liberty arises not from blended powers but rather from unchecked powers'* and it is also founded in this doctrine, that when there is an interaction of power, liberty and freedom are facilitated. In the case of *Ram Jawaya Kapur v. State of Punjab*<sup>17</sup> - it has been held that – *the doctrine of Separation of Power not recognized in absolute rigidity but functions of the different parts or branches of the government have been differentiated from each other sufficiently*. This shares the idea of non-contemplation of assumption by one organ or a part of the state about the functions belonging to other organs.

In India, there is a functional overlapping as found from the various constitutional provision as found from the various constitutional provision. However, as personal overlapping also exists, in this Indian Constitutional provisions. As in it is found that how the Supreme Court<sup>18</sup> () has the power to declare laws existing or newly made by the legislature void. The same exits with the actions taken by the executive where any misalignment from the Constitutional provisions can make such actions void.

As per Constitutional provisions, the court has the power even to nullify the amendments if the same is found to be not aligned with the basic structure of the Constitution. This court can lay down laws in the nature of precedents as given under Article 142<sup>19</sup>. Here, it is stated the order or defence made by the Supreme court shall be enforceable throughout the territory of India. This should however, be made in such a manner as may be prescribed by or under any law made by the Parliament. The process of involving the Doctrine of Separation of Power has been imported in India in a twofold manner, *vis-à-vis* –

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<sup>17</sup> AIR 1955 SC 549

<sup>18</sup> Highest Judicial Organ of India

<sup>19</sup> Enforcement of decree and orders of Supreme Court

- Firstly, as the Indian Constitution is a written one, any power vested upon any of the three organs have been clearly written or mentioned in the Constitution.
- Secondly, once ascertained that a particular function to be performed by a particular organ, it would be a violation of the Constitution if any other organ attempts to assume that function or power.

#### IV. COMPARATIVE ANALYSIS ON SEPARATION OF POWER IN INDIA WITH UNITED KINGDOM & UNITED STATES OF AMERICA

As per Madison<sup>20</sup>- '*Accumulation of the three powers legislative, executive and judiciary in the same hand, either through hereditary, self-appointed or elected, whether one or few or many, may be justly pronounced as the definition of tyranny.*' Even Jefferson<sup>21</sup> also emphasized about the formation of despotic government with concentration of all the three powers under one umbrella or organ. However, as scientifically explained by Brandies J<sup>22</sup>- '*the purpose of this doctrine is not to promote efficiency in the administration but to preclude the exercise of arbitrary power.*' He furthered his view that the purpose herewith is to protect the citizens from autocracy.

This is to point out that in England there is no concept of Separation of Powers. However, it follows the Westminster System of Government, United Kingdom unlike India, though both follows the Westminster system of Governance, the executive and the legislature are not separate and distinct. The King, though, an Executive Head is also an integral part of the legislature and all his Ministers are members of one or the other Houses of Parliament. This form of *Parliamentary Executive* in United Kingdom is a clear negation of the Separation of Legislature and Executive in India.

And the House of Commons (a legislative body) ultimately controls the executive. The Judiciary is however kept independent, but the Judges of the Superior courts can be removed on an address from both the Houses of Parliament. With the establishment of United Kingdom Supreme Court, unlike India, legislative and adjudicatory powers are being delegated increasingly on the executive organs of the Parliament of United Kingdom.

The Constitution of United Kingdom is unwritten, giving no constitutional limitations upon the plenary powers of the Legislature, as they go by the name of '*sovereignty of parliament*'. Therefore, in United Kingdom, it thus makes the Legislature competent enough to exercise both

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<sup>20</sup> James Madison, Federalist 47

<sup>21</sup> Thomas Jefferson, Notes on the State of Virginia, Query 13, 120--21

<sup>22</sup> dissenting in *Meyers v. United States*, 1926

the executive or judicial functions of particular kinds. In any adverse case scenarios, the Legislature usurps or encroaches over other functions of the organs, there is no authority (including the judiciary), to declare such an act of the Legislature as violative of the doctrine of separation of powers (functions) and hence void.

Following the observation of Lord Pearce in *Liyanage v. R*<sup>23</sup>, the principle of independence of Judiciary dates back from the Act of settlement, 1701- which also guarantees security of tenure to the Judges of the superior courts. However, no court unlike India, in United Kingdom can strike down any Act (if enacted by Parliament) on any grounds. Summarily, the limitations or restraints upon the powers of the British Parliament are political not legal.

In the United States of America, the constitution is written rather than expressed. ‘*Separation of Power*’ is clearly vested in three separate organs of Government, in three separate functions, as in- Article I(1) of the US Constitution discusses about the Legislative powers in Congress, Article II, S(1)(1) discusses about the executive power in the President and the Judicial power is vested in the Supreme Court in Article III, S(1).

In the case of *Kilbourn v. Thompson*<sup>24</sup>, it has been opined by the US Supreme Court- ‘*it is essential to the successful working of this system that the persons entrusted with power in any of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other...*’

## V. CONCLUSION

Thus, from the above discussion, it can be clearly iterated that no modern democratic government can adopt the doctrine of separation of power completely. It hence becomes clear that the doctrine in its classical sense is structural rather than functional. This cannot be literally applied as a water-tight compartment in governance nor can any government run on strict separation of powers. Also, in the United States, the public administrative laws are heavily criticised on the ground of de-alignment from the principles of this doctrine.

Doctrine of Separation of Powers in today’s context of *liberalisation, privatisation and globalisation* cannot be interpreted to mean either *separation of powers* or *checks and balance* or *principle of restraint* but *community of powers* exercised in the spirit of cooperation by various organs of the state in the best interest of the people. Prof Wade<sup>25</sup> had stated, that the

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<sup>23</sup> Pp. 188, 212, ante

<sup>24</sup> 1881, 103 US 168 (190)

<sup>25</sup> Sir Henry William Rawson Wade QC FBA (16 January 1918 – 12 March 2004)



objection of Montesquieu himself was against accumulation and monopoly rather than interaction. He even stated that Montesquieu himself had never used the term *separation*.

Therefore, through this Doctrine of separation, modern democratic countries like India are not following rigidly but holds an essence in the basic structure if the constitution. Therefore, administrative process is not an anti-thesis of the doctrine of separation of powers but appreciated as a doctrine of *checks and balance*.

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