

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

---

Volume 7 | Issue 3

---

2024

© 2024 *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 the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Doctrine of Separation of Power: A Comparative Study of The Constitution of U.S.A, U.K and India

---

VAIBHAV KUMAR SINGH<sup>1</sup> AND AMBAR SRIVASTAVA<sup>2</sup>

## ABSTRACT

*The doctrine of separation of power being considered as an important pillar of democracies, had to demarcate the governmental power, authority or function into distinct entities to avoid misuse of such power. The origination of doctrine can be traced back to Aristotle and Roman Republic. Subsequently, developed by John Locke and Montesquieu. Further founding fathers of U.S.A inserted the element of doctrine into their Constitution. Major democratic countries like the U.S.A, the U.K, India, etc. inserted more or less the elements of the doctrine either into their constitution or impliedly in use.*

## I. INTRODUCTION

The doctrine of separation of powers, which was systematically developed by Montesquieu, is always in debate because of transgression of one organ of the State in another organ's jurisdiction or area of assigned work. It is a very significant concept as it is based on the cardinal canon of preserving and protecting the liberty of individual by mutually confining the various organs of government in its sphere.

The concept of separation of powers may mean at least three different things:

- (i) that the same person should not form part of more than one of the three organs of the government, for example that ministers should not sit in Parliament;
- (ii) that one organ of government should not control or interfere with the work of another, for example that the judiciary should be independent of the Executive or that ministers should not be responsible to Parliament;
- (iii) that one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.

The modern interpretation of the doctrine of separation of powers, therefore, is that one organ or department of government should not usurp the functions which essentially belong to another

---

<sup>1</sup> Author is a student at Law College Dehradun, Uttarakhand University, Dehradun (Uttarakhand), India.

<sup>2</sup> Author is a Professor at Law College Dehradun, Uttarakhand University, Dehradun (Uttarakhand), India.

organ. The theory, that the legislative, judicial and executive functions should be performed by different bodies of persons– that department should be limited to its own sphere of action without encroaching upon the others and that it should be independent within that sphere, is called the theory of separation of power.

## **II. PURPOSE OF SEPARATION OF POWER**

The aim of the separation doctrine is to guard against tyrannical and arbitrary powers of the state. Though, in face of the complex socio-economic problems demanding solution in a modern state, it may no longer be possible to apply the separation theory strictly, nevertheless, it has not become redundant and its chief value lies in emphasizing that it is essential to develop adequate checks and balances to prevent administrative arbitrariness. Thus, Jaffe and Nathanson has stated that: “Its object is the preservation of political safeguards against the capricious exercise of power; and incidentally, it lays down the broad lines of an efficient division of functions. Its logic is the logic of polarity rather than strict classification ... the great end of the theory is, by dispersing in some measures the centres of authority, to prevent absolutism.”

### **(A) In U.S.A:**

This doctrine is embodied in the opening sentences of the first three Articles of the American Constitution, commonly called the distributive clause, mentioned below:

Section I of Article I: “All the legislative powers herein granted shall be vested in a Congress of the United States...”

Section I of Article II: “The executive power shall be vested in a President of the United States of America”.

Section I of Article III: “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish ...”.

Thus, the foundation of the threefold or tripartite plan – a government composed of three separate, independent and co-ordinate branches- was laid down. The same principles of organization eventually became universal in state government and spread extensively downward into city, country and other units of local government.

### **(B) In U.K:**

Britain has adopted parliamentary system of government. So, there rigid separation of powers is not possible although the organs of government are easily distinguishable as –

- (i) The legislature, which consists of the Queen, the House of Lords and the House of

Commons.

- (ii) The Executive, which consists of the cabinet, the Ministers of the Crown, the government departments and the civil service.
- (iii) The judiciary, which consists of the Courts of law and the judges, who sit in them.

In Britain, there is only evidence of a true separation of powers that is in the virtual independence of the judiciary. The legislature and the executive function more by co-operation than separation.

### **(C) In India:**

In Indian legal framework, the doctrine of Separation of Powers has found a partial acceptance. Although, the term separation of powers is nowhere used in the Constitution of India but the combined effect of the interpretation of different provisions of Constitution reveals the essence of the doctrine of separation of powers. On simply analysing the provisions of Indian Constitution we can say that doctrine of separation of powers is accepted in India. Under Indian Constitution at both level the Union and the States, the executive powers are with the President and the Governor, the legislative powers are with the Parliament and the State Legislatures and the judicial powers are with the Judiciary (the Supreme Court, the High Courts and Subordinate Courts).

But, when we study carefully the constitutional provisions of Indian Constitution, it is clear that the doctrine of separation of powers in India, in its strict sense, is not accepted. There is no provision in the Constitution itself regarding the separation of powers among the three organs of government. As Upendra Baxi has also said ‘in India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in **Article 50** which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.’”

The Indian Constitution merely states that “Executive power of the Union shall be vested in the President [Art. 53(1)] and “the executive power of the state shall be vested in Governor ... “[Art. 154(1)]. All executive action of the Government of India shall be expressed to be taken in the name of the President [Art. 77(1)]”. But there is no any express provision that legislative and judicial powers shall be vested in any person or organ. In India, there is not only a functional overlapping but there are personnel overlapping also.

### **III. CASES**

**Myers v. United States**, Justice Brandies (dissenting), observed that the doctrine of the

separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to void friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

**Kilbourn v. Thompson**, American Supreme Court observed that it is essential to the successful working of this system that the persons entrusted with power in any one 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.

**Golaknath v. State of Punjab**, Chief Justice Subba Rao stated that: “The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without over stepping their limits. They should function within the spheres allotted to them

**Kesavananda Bharati v. State of Kerala**, Hon’ble Supreme Court of India declared the separation of powers as a basic structure of Constitution which cannot be destroyed through amendment of the Constitution also. This unique change in attitude of Indian Judiciary took place, perhaps to strengthen its power and status or to establish judicial supremacy.

**Minerva Mills Ltd. v. U.O.I**, a five-judge Constitution Bench consisting Hon’ble Y.V. Chandrachud, C.J., P.N. Bhagwati, A.C. Gupta, N.L. Untwalia and P.S. Kailasam, JJ., pronounced judgment. Justice Bhagwati said that it is clear from the majority decision in Kesavananda Bharati case that our Constitution is a controlled Constitution which confers powers in the various authorities created and recognized by it and defines the limits of those powers.

**P. Kannadasan v. State of T.N**, a Division Bench consisting Hon’ble B.P. Jeevan Reddy and Suhas C. Sen, JJ. pronounced judgment. Justice Reddy said that our Constitution recognizes and incorporates the doctrine of separation of powers between three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line the legislature and executive becomes thin, the theory of separation of powers is still valid.

In **NJAC Case (Supreme Court Advocates-on-Record - Association and another v. Union of India)**, the Supreme Court said that it is open to the Parliament, while exercising its power

under Article 368, to provide for some other alternative procedure for the selection and appointment of Judges to the higher judiciary, so long as, the attributes of “separation of powers” and “independence of the judiciary”, which are “core” components of the “basic structure” of the Constitution, are maintained.

\*\*\*\*\*