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# The Principle of Separation of Powers: A Comparison between the British and the Indian Legal Systems

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## ABSTRACT

*The principle of separation of powers is integral to the constitution of any democratic country. The principle advocates for a distribution of powers amongst the legislature, judiciary and executive, ensuring that the power vested into one department of the government is not absolute and corrupt. However, the key to successfully safeguarding democracy lies in the partial separation of powers amongst the three organs of the government. The organs have an intertwined relationship and are not completely distinct, creating a system of checks and balances. This system guarantees that each department is placed in check by another, restraining an arbitrary exercise of power. In the UK, such a partial separation of powers is encouraged through the courts and executive placing limitations on the legislature. However, the same cannot be said for India since the executive seems to allow the legislature to flagrantly abuse its power. Therefore, through this research paper, I aim to compare the ways in which the two legal systems adopt this key constitutional principle of separation of powers.*

**Keywords:** *partial, separation of powers, India, UK, Constitution.*

## I. INTRODUCTION

Under the doctrine of Separation of Powers, the three branches of government i.e, executive, legislature, and judiciary, are separated. The origins of this principle, that is fundamental to many constitutions, dates to the works of Aristotle and John Locke. Aristotle first classified the powers of government into “deliberative, magisterial and judicial”, but did not explicitly suggest that the powers need to be exercised by individual branches, not commenting on the Separation of Powers. John Locke, an English philosopher further defined the doctrine in his book *Two Treatises of Government*. Locke argued that there should be a separation of power between the three organs of government, namely “*executive, legislative, and federative*”<sup>2</sup>. Federative power consisted of the right to act internationally, abiding the law of nature. This

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<sup>2</sup> Locke, J., 1689. *Two Treatises of Government*. England: Awnsham Churchill, Chapter 12

means that, since countries are in the state of nature with each other, they must abide by the laws of nature and so, can punish each other for violating the law to protect their own citizens. In his book, Locke argued that ***“being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions”***<sup>3</sup>, advocating liberty and separation of the three organs so that no one organ has all the powers, concentrated and absolute enough to be corrupted. However, Montesquieu, a French judge and political philosopher, criticised Locke’s understandings of the separation of powers, arguing for no pure separation of power and complete liberty amongst the organs of the government.

Montesquieu is the primary source of the doctrine of separation of power. He believed that if immense power is invested in one organ, it would result in exploitation of that power, abuse of position and tyranny. In his book *The Spirit of The Laws*, Montesquieu rightly stated that ***“to prevent this abuse, it is necessary from the nature of thing that one power should be a check on another”*** (Montesquieu, 1750), introducing the system of checks and balances. This system ensures that no branch of the government exceeds its jurisdiction and limits of powers, acting in a fair and just fashion. This system is created through a partial intertwined relationship between the three branches of government, where each branch places checks and places on other, keeping the latter within its realms. Through this interlinked relationship of organs, Montesquieu debunks Locke’s notion of complete separation and liberty between the different organs of the government. He further states in his book, that if all the three powers were concentrated in one branch, ***“there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will executive them tyrannically”*** and ***“the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator”***<sup>4</sup>. Thus, suggesting a partial separation of power where the executive, judiciary and legislative have their own jurisdiction and powers but are also somewhat entwined to ensure that each branch is acting within its limits, placing checks and balances.

Therefore, the objective and scope of this research topic is to emphasise on the importance Montesquieu’s idea of separation of powers and the checks and balances that the relationship between the three organs of the government creates in a democracy. I will further highlight the changing attitude of the society towards this system of checks and balances. Over the years the British legal system has become more willing to incorporate the partial separation of power to prevent abuse of power by the three organs of the government. This can be seen through the

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<sup>3</sup> Locke, J., 1689. Two Treatises of Government. England: Awnsham Churchill, Chapter 12.

<sup>4</sup> Hazo, R., 1968. Montesquieu and the Separation of Powers. American Bar Association Journal, [online] 54(7), pp.665-668. Available at: <<https://www.jstor.org/stable/25724465>> [Accessed 6 August 2021].

decreasing dominance of the legislature over the years, reducing its arbitrary exercise of power. I will compare this evolving attitude of the British legal system to that of India, highlighting the differences in the attitude. Indian legal system also incorporates a partial separation of powers. However, while it seems like the judiciary keeps the legislature in check, but the executive enables the legislature to flagrantly abuse power.

## II. SEPARATION OF POWER IN THE BRITISH LEGAL SYSTEM

The Government, also known as the Executive, runs the country and is responsible for drafting new laws and implementing and developing new policies. The Executive is formed by the party that gains the most seats in the House of Commons at a general election. The Executive cannot make new laws without the Parliament's agreement. The Parliament is made up of the House of Commons, which consists of ministers and other political parties' members, and the House of Lords, whose members are appointed because of their expertise.

The executive has a dominance over the legislature due its majority in the House of Commons and the Supremacy of the Commons. This supremacy is affirmed by the *Salisbury- Addison convention* and *Parliament Acts 1911-1949*. The Salisbury Convention ensures that Government Bills can get through the Lords when the executive has no majority in the Lords. In practice, it means that the Lords eliminate a Government Bill mentioned in an election manifesto through their votes. *Moreover, the 1911 Act* repealed the power of the Lords to veto or delay money Bills, and abolished their veto, substituting it with power to delay legislation for two years for public Bills (other than those prolong the Parliament's life). Under the *Parliament Acts 1911– 49*, in certain circumstances, Bill may receive the royal assent after only being approved by the Commons. With this sense of supremacy and majority of its MPs gaining seats in the Commons, the executive would have a dominance over the Parliament, the legislature, and so, could pass laws deciding whatever it wants to be constitutional. The executive's dominance over the Parliament, the legislature, is established further due to this lack of system of checks and balances manifested through a partial separation of power.

### (A) Executive's dominance on the legislature

The executive's dominance on the legislature runs to contrary to the principle of separation of power, where the executive and legislature are arguably fused together. This would create a democratic dictatorship, where the elected politicians appointed for furthering people's voices, are the ones slitting their throats and chaining them up with arbitrary laws. This is because, awarding such unconstrained power would lead to legislating draconian laws that would endanger the rule of law, threatening justice and fairness. Rule of law is a key constitutional

principle whereby every individual must obey and submit to the law, and not arbitrary action by other people or groups. In essence, no one is above the law. Additionally, *Lord Acton* correctly states that **“Power corrupts, and absolute power corrupts absolutely”**<sup>5</sup> Applying this to the dominance of the executive in the Parliament and in regards to separation of powers, the statement reflects the immense exploitation that would occur when such tremendous amount of power is concentrated upon one institution, the executive. An example of such exploitation can be seen in the establishment of the *War Crimes Act 1991*. The Act was fallacious due its retrospective element, which is contrary to the rule of law, thus being unconstitutional. Yet, the Act was enacted because of court’s unwillingness to infringe Parliamentary sovereignty, the reduced power of the Lords to veto the bill and the executive’s majority in the Commons allowing it to pass laws in their discretion. This reflects the power abuse of the executive through Parliamentary sovereignty, violating key constitutional principle of rule of law. Another infamous case was the *Burmah Oil v Lord Advocate*<sup>6</sup>, where the *War Damage Act 1965* overruled the House of Lords’ decision for awarding compensation to the loss of property, highlighting executive’s abuse of power for its own convenience. The court’s reluctance to declare an Act of Parliament invalid and so enhancing the executive’s dominance on the legislature can be seen in *R (Jackson) v Attorney-General*<sup>7</sup>. In this case, the *Hunting Act 2004* was argued to be invalid after being passed by the *Parliament Acts 1911– 49*, the grounds being that the 1949 Act was invalid. The House of Lords refused to give a declaration and ruled that the 1949 Act had been validly sanctioned using the 1911 Act and so, the Hunting Act was valid. However, in the obiter dicta the discussions dwelled deeper to Parliamentary sovereignty, where the three judges agreed that this constitutional principle is ultimately in the jurisdiction of the courts. This suggests that Dicey’s notions that **“Parliament can make/unmake any law whatsoever”** and **“nobody is competent to set aside an Act of Parliament”**<sup>8</sup> does not reflect the current, true constitutional position. Albeit such comments were directed to the Parliament’s power, it could also be interpreted as reducing the power of Common and so, the executive’s power to pass laws in their discretion through its majority seats in the Common. This is because, courts will set aside Acts that are considered unconstitutional. Therefore, executive cannot determine anything to be constitutional in its own discretion since courts will intervene to keep their powers in check, upholding separation of powers which is key to UK’s

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<sup>5</sup> Acton, L., 1887. How historians should judge the past. (letter)

<sup>6</sup> [1965] AC 75

<sup>7</sup> [2005] UKHL 56

<sup>8</sup> Dicey, A., 1961. Introduction to the Study of the Law of the Constitution. 10th ed. [place of publication not identified]: Macmillan & Co Ltd.

constitution.

### **(B) Judiciary limiting the executive's power**

It can be argued that the **Constitutional Reforms Act, 2005**, was the steppingstone for the British Legal System to adopt the theory of Separation of Powers. The Act abolished the office of Lord Chancellor and established the Supreme Court by taking the Law of Lords out of the legislature and into the judiciary. This resulted in the significant boundary between the legislature and the judiciary, since the Supreme Court's powers have now been separated from the Parliament's, establishing the path of separation of powers. Moreover, section 61 of the Act provides for Constitution of Judicial Appointments Commission, which appointments Judges in the Supreme Court and Court of Appeal. Therefore, the independence of the judiciary, and its allocation of power separate from the legislature was warranted by the Constitutional Reforms Act, 2005

Moreover, the Courts are willing to break up this unmatched power of the executive in two branches of the government, upholding the system of checks and balances. In *UNISON*<sup>9</sup>, the Supreme Court held a secondary legislation drafted by the Lord Chancellor to be unlawful. This case reflected the court's efforts to limit the executive's power and ensuring that it remains accountable (at least to the Parliament). Also, in *Cherry/ Miller II*<sup>10</sup> case, the courts said that they have exercised a supervisory jurisdiction over the lawfulness of acts of the Government for a while now. It went on to rule that the power to prorogue the Parliament is limited by the constitutional principles with which it would otherwise conflict. The limitation is that such power will be unlawful if the prorogation frustrates or prevents the Parliament to carry out its constitutional functions, without a valid reason. Albeit, in this case, the Court is not restricting executive's dominance on the legislature as to passing laws, it still restricts the executive's unlawful actions, keeping it in check. Such a restriction on unlawful actions was also seen in *Miller I*<sup>11</sup>, where the Supreme Court ruled that the executive may not initiate withdrawal from the European Union by formal notification to the Council of the European Union without the Parliament's permission to do so. Therefore, through these examples one can witness the willingness of courts to curtail the power of the executive so that it does not act arbitrarily, abusing its power.

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<sup>9</sup> [2017] UKSC 51

<sup>10</sup> R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland UKSC

<sup>11</sup> R (Miller) v Secretary of State UKSC 5

### **(C) Legislature limiting executive's power**

Finally, the legislature also places limits on the executive's dominance in the Parliament through the principle of Parliamentary accountability. The principle states that if governments and their agencies fail to fulfil their responsibilities, mechanisms are available to hold them politically responsible to Parliament. Some of these mechanisms are oral questions, written questions and select committees. Mechanism of Oral questions such as Prime Ministers Questions (PMQs), aims to highlight the failures of the ruling political party and whether the opposition would form a better government. The public can view this on television, creating a sense of transparency of the executive's actions and so, holding them accountable. Secondly, MPs can also write their questions down to get information from the current government. The Hansard is a record of these debates and answers to such questions. Lastly, A select committee is selected through a secret ballot, that examines the policy and administration of each governmental department through inquiries and collecting written and overall evidence. At the end of the inquiry, a report is produced with suggestions to the government. Therefore, through such mechanisms, the legislature further limits the executive's ability to arbitrarily determine anything to be constitutional, holding it accountable for its actions.

In conclusion, there is partial separation of powers in the UK. To keep the executive's power in check, the courts have placed limitations on it through the development of common law. Likewise, legislature curtails executive's power through mechanisms such as PMQs, written questions and select committee, ensuring parliamentary accountability. Therefore, ensuring that separation of power is upheld, which is key to UK's constitution, rather than allowing arbitrariness and abuse of power to perpetuate.

### **III. SEPARATION OF POWERS IN INDIA**

The principle of Separation of Powers is not awarded a constitutional status in India but is established through different articles of the Constitution. Firstly, Article 50 ascertains the separation of the judiciary from the executive. Secondly, Articles 122 and 212 declare that the acts and proceedings of the Parliament and the Legislature cannot be questioned in Courts. Likewise, according to Articles 121 and 211, the judicial conduct of a Supreme Court or High Court's judge cannot be examined in Parliament or State Legislature. Articles 53 and 154 state that the executive power of the Union and the State is vested with the President and the Governor, who are protected from civil and criminal liability. Lastly, Article 361 states that the President or the Governor's conduct is not answerable in any court.

Because of these Articles the powers of the three organs of the government, executive, legislature,

and judiciary, do not overstep each other in terms of power and duties. However, case law suggests that India welcomes a partial separation of power where the scope of powers of the organs are intertwined, creating a system of checks and balances. For instance, in *Indira Nehru Gandhi v. Raj Narain, Justice Chandruachund*, it was stated that “No constitution can survive without a conscious adherence to its fine check and balance”<sup>12</sup>, indicating that a rigid separation of power is not accepted in India. This is emphasised in *Ram Jawaya v. State of Punjab, Justice Mukherjee* stated that the “Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another”<sup>13</sup>. This suggests that there is a notion of an impure separation of powers in India where the executive, legislature and judiciary are distinct in terms of their power and don’t usurp another organ’s power. But the organs are still intertwined due to some functions of one organ overlapping with another; creating an essential system of checks and balances to keep each organ in check. This prevents power abuse and concentrated power in one branches of the government, evidenced in the landmark case of *Kesavananda Bharti. v. State of Kerala*<sup>14</sup>. Article 368 of the Constitution confers a limitless power on the Parliament to amend any part of the Constitution, could even abridge a fundamental right. However, the Supreme Court in *Kesavananda (supra)* ruled that the Parliament’s amending power was limited to basic features of the constitution and so, any amendment of fundamental rights or other essential parts would be unconstitutional. This case highlights the existence of the principle of ‘checks and balances’ in India where the Parliament cannot act arbitrarily and amend the Constitution to suit itself, Parliament’s arbitrary exercise of power is curtailed and so its power is limited by the judiciary.

However, the same cannot be for the relationship between the executive and the legislature. Lately, there has been much controversy around the new Parliament that the current Prime Minister is creating through the delamination exercise. This exercise will reduce the proportion of Ministers of the Parliament from non- Hindi states and concentrate much political power and influence on Hindi-speaking region, diminishing representation of other identities in India and so, reducing its secularism. Moreover, latest, very integral pieces of legislation such as the Bill revoking Article 370 that declared Jammu and Kashmir as Union Territories, were not

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<sup>12</sup> The State of Uttar Pradesh v. Raj Narain (1975 AIR 865, 1975 SCR (3) 333)

<sup>13</sup> Rai Sahib Ram Jawaya Kapur And Ors. vs The State Of Punjab AIR 1955 SC 549, 1955 2 SCR 225

<sup>14</sup> Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. (1973) 4 SCC



processed by a House committee. As such, the Lok Sabha and Rajya Sabha are no longer being the houses of heated debates where bills can be scrutinised and profoundly discussed before granting it the authority to drastically effect lives through their fine print. The bills are not extensively discussed, and debates are reduced to mere formality. This is because either the bills' texts are handed over to Ministers of the Parliament very last minute and so, leaving little to no time to discussion, or the opposition's comments are rejected. This is apparent by the fact that in 2019, 4 out of 40 bills were passed on the same day they were introduced, and in 2020, 3 out of 22 bills were passed on the same day they were introduced (Bhatnagar, 2021). Furthermore, several key pieces of legislation, not fitting the category are passed as Money Bills. Money Bill is a bill that specifically includes taxation and government spending. By doing so, the government formed by the current ruling party prevents the Upper House, where ruling party is a minority, from amending the bills, for e.g., Aadhaar Bill. Nonetheless, in 2020, Lok Sabha and Rajya Sabha announced that they will ***“do away temporarily with Question Hour due to extraordinary situation caused by Covid, and to avoid assembling of large number officials to be present in galleries of the House during the Question Hour in view of the need for social distancing”***<sup>15</sup>. It is doubtful whether covid was the sole reason. The virus is here to stay and there could be alternatives to physical presence in the House such as the access to the virtual world. Ministers asked questions for the public, giving way to India's democratic voices. Thus, as former Lok Sabha secretary general P.D.T. Achary stated that ***“Question Hour is when direct democracy is in operation”***<sup>16</sup>. It was an opportunity to ministers to hold the Parliament accountable for its action by seeking a direct reply to their questions. With silencing voices of minority representations and so, diminishing secularism, and with little to almost no scrutiny of the bills in the Parliament, before being passed, the executive fails to keep the legislature in check. Instead, one could say it enables it to abuse power; giving it a free rein to act according to its discretion.

In conclusion, India arguably incorporates less than a partial separation of powers where the only judiciary seems to hold the legislature accountable for its actions, placing its powers in check. The executive does not create a similar system of checks and balances and instead empowers the legislature to arbitrarily exercise its power, abusing its position.

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<sup>15</sup> Bhatnagar, G., 2021. 'Direct 'Democracy in Operation': Experts Decry Suspension of Question Hour. The Wire, [online] Available at: <<https://thewire.in/government/question-hour-suspended-democracy-parliament-experts>> [Accessed 6 August 2021].

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#### **IV. CONCLUSION: COMPARISONS BETWEEN THE UK AND INDIAN LEGAL SYSTEMS**

Arguably, the principle of separation of powers is differently welcomed in India and UK. In the UK and India there is a partial separation of powers between the executive, legislature and executive. This creates a system of checks and balances in between the three departments of the government, ensuring that power is not concentrated in one department. For instance, the judiciary in the UK and India keep the legislature in check by limiting its power, preventing much arbitrariness, notwithstanding the principle of parliamentary sovereignty. Parliamentary Sovereignty suggests that the Parliament can make or unmake any law it wants. However, while in the UK the executive holds the legislature accountable through debates in the House of Lords and House of Commons and questionnaires, in India the executive seems to allow the legislature to blatantly abuse power by legislating any piece of legislation without proper scrutiny or discussion. Thus, India seemingly enjoys a 'less than partial separation of power' than UK, making room for a democratic dictatorship where vast power is concentrated in one organ of the government.

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