SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

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INTRODUCTION

The separation of power, although by no means universal, is widely regarded as one of the pillars of a liberal constitutional democracy. Article 16 of the French declaration of rights of man 1789, states that a society where rights are not secured or the separation of powers established has no constitution**.**

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial and Locks categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power. "Continuous executive power" implies the executive and the judicial power, "discontinuous legislative power" implies the rule making power, and "federative power" signifies the power regulating the foreign affairs.[1] The French Jurist Montesquieu in his book L. Esprit Des Lois (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That's why he is known as modern exponent of this theory. Montesquieu [2]said;

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehension may arise, least the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if judicial power be not separated from the legislative and the executive power. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control,

[1]I.P. Massey: Administrative Law, Edn. 1970, p. 35.
[2] The Sprit of the laws (trans.nugent) `151-152

for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. Miserable indeed would be the case, where the same man or the 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 that of judging the crimes or difference of individuals."[3]

In 18th century, there was complete and full-fledged monarchy in France. Louis XIV was well-known for his absolute and autocratic powers. The king and his administrators were acting arbitrarily. The subjects had no right or liberty at all. On the other hand, Montesquieu was very much impressed by the liberal thoughts of Locke and he also based his doctrine on analysis of the British constitution during the first part of the 18th century, as he understood it. According to him, the secret of an Englishman's liberty was the separation and the functional independence of the three departments of the government from one another.in federalist 47, James Madison has explained the above statement and had stated thus; the accumulation of all powers-legislative, executive and judiciary-in the same hands, may justly be pronounced as the very definition of tyranny. montisque who is generally credited with this claim does not mean that ought to have no partial agency in, or no control over, the act of one department is exercised by the same hands which possess the whole power of another department, the fundamental Principe of free constitution are subverted.[4]

It is generally accepted that there are three main categories of governmental function, viz., the legislative, the executive and the judicial. Likewise there are three main organs of the government in a state i.e., the legislature, the executive and the judiciary. According to the theory of serration of powers, these three powers and functions of the government must, in a free democracy, always be kept separated to be exercised by the three different organs of the government. Thus the legislature cannot exercise judicial or administrative function; the executive cannot exercise judicial function nor can the judiciary exercise legislative or administrative function of the government.

According to Wade and Phillips[5]separation of powers may mean three different things;

1. That the same person should not form part of more than one of the three organs of government, e.g. the minster should not sit in parliament

[3] C.K.Takwani; Administrative law,Edn.2014,p.33
4. ibid at 34.
[4] Nuzhat parveen khan; comparative constitutional law,edn2015 p.p260
[5] AIR 1973 SC 1461

2. That one organ of the government should not control or interfere with the exercise of its functions by another organ ,e.g. the judiciary should not independent of the executive or that minsters should not be responsible to parliament
3. That one organ of the government should not exercise the functions of another, e.g., the minster should not have legislative power.

In the case of kesavananda bharati case[6] C.J Sikri observed that "separation of powers between the legislature, the executive and the judiciary" is the basic feature of Indian constitution which cannot be amended or altered. Shelat and Grover JJ, also observed that the "Demarcation of power between the legislature, the executive and the judiciary" is the basic feature of Indian constitution which cannot be amended.

The doctrine of separation of power as propounded by Montesquieu had tremendous impact on the functioning of government.it was appreciated by English and American jurists and accepted by politicans.in his book commentaries on the law of England, published in 1765, Blackstone observed that if legislative, executive and judicial functions were given to one man, there was an end of personal liberty. Madison also proclaimed;

The accumulation of all powers, legislative, executive and judicial, 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.[7]

IMPORTANCE OF THE DOCTRINE

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not strictly accepted by a large number of countries in the world. The main object, as per Montesquieu - Doctrine of separation of power is that there should be government of law rather than having willed and whims of the official. Also another most important feature of this doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power .Montisque great point was that if the total power of government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive. All the jurist accept one feature of this

[6] Supra note 3. p34

doctrine that the judiciary must be independent of and separate from the remaining two organs of the government viz., legislature and executive. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where the constituent Assembly of France in 1789 was of the view that ―there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted‖. The most important aspect of the doctrine of separation of power is judicial independence from administrative discretions" there is no liberty, if the judicial power be not separated from the legislative and executive.[8].In the case of Indira Nehru Gandhi v Raj Narain, [9]K.Ramaswamy J. made the following observation;

It is the basic postulate under the Indian constitution that the legal sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the constitution. The courts are intermediary between the people and the other organs of the state in order to keep the latter within the parameters delineated by the constitution. The can be no liberty if the power of judging be not separated from the legislative and executive power.

Article 50 of the constitution of India, therefore enjoins the state, and in fact separated the judiciary from the executive in the public service of the state. It's the constitutional duty of the judiciary to adjudicate the dispute between the citizens and the citizens, citizens and the state, the state inter-se and the states and the centre in accordance with the constitution and the law. [10]

Putting emphasis on the independence of judiciary, international congress of jurist held in New Delhi in 1959, had resolved;

An independent judiciary is an indispensable requisite of a free society under the rule of law. Such independence implies freedom from interference by the executive or the legislature with the exercise of judicial function.[11]The separation of power has to be viewed through prison of constitutional ism and for upholding goals of justice in its full magnitude[12]

HISTORICAL EVOLUTION

[8] Friedmann , law in a changing society (1996) 383
[9] AIR 1975 SC 2299 para 320
[10] Kartar Singh v state of Punjab (1994) 3 SCC 569
[11] Reports of international congress of jurists, vol. IV (1960)
[12] University of Kerala v council principal's colleges, Kerala AIR 2010 SC 2532.

The doctrine of separation of power has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle.in the 16th and 17th centuries, French philosopher john Bodin and British politician Locke expressed their views about the theory of separation of powers. But it was montisque who for the first time formulated this doctrine systematically, scientifically and clearly in his book *ESPRIT DES LOIS* (the spirit of the laws) published in the year 1748.

The concept of separation of power can be traced back from 4th century B.C., when Aristotle, in his treaties entitled 'politics" described the three main agencies of government i.e. the general assembly, the public officials and the judiciary.[13]In Rome, there was also three organs of government viz., public assemblies, the senate and the public officials. After the fall of Roman Empire Europe become the centre of power.in the beginning of 18th century the birth of parliament took place in a present colour and the three organs of government Re-Appeared. According to Locke these organs are legislative, executive and federative. However it's to be kept in mind that Locke did not consider all of them independently. He consider the legislative branch to be the supreme, while the other two functions as internal and external affairs, and they were left within the control of monarch. During those times executive and judicial functions were simply known as "executive power". The king was considered as the supreme and he holds supreme power and all the organs are sub-ordinate to king. Chief justice coke in 1607 said that judicial matters were not to be decided by the natural reason but by the artificial reason and judgments of law, which law is an act which require long study and experience before that a man can attain cognizance of it[14].the judiciary were appointed by the king ,the judge shall serve amoung other things that he will do justice without fear, to all men pleading before him, friends and foe alike, that he will not delay to so even though the king should command him by his letters or by his words of mouth to the contrary.it was clear in the minds of people that the only part that the king played in the administration of justice was that of the appointment of judges.

PITFALLS OF SEPERATION OF POWER

Theoretically, the doctrine of separation of power was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine.

- Historically speaking, the theory was incorrect. There was no separation of power under the British constitution.at no point of time, this doctrine was adopted in England.Prof

[13] Generally Robinson; The division of governmental powers in ancient Greece's p. 614 (1903)
[14] Fairlee,;The separation of power 21 Mich law rev,393 (1992) at 6

Ullman says, "England was not the classic home of separation of power."[15] . Donoughmore committee also observed that there is no such thing as the absolute separation of power between legislature, executive and judiciary.

- This doctrine is based on presumption that the three organs of the government are independent to each other. In fact it's not so. There is no watertight compartments. It's not easy to draw a distinguishing line between these with a strict mathematical calculation.
- As Paton[16] observed "its extraordinarily difficult to define precisely each particular power' 'president Woodrow Wilson rightly said;

  "The trouble within the theory is that government is not a machine, but a living thing…no living thing can have its organ offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Their cooperation is indispensable, their welfare fatal"[17]
- Enforcement of rigid concept of separation of power will make modern government an impossible entity. Strict adherence to this theory is practically impossible. The modern state has to work as a pedestrian father. Gone are the days when it was police state.as the time passes the problems of the state grows. Today the state is supposed to solve the complex issues. Socio-economic problems and it's not possible to do a strict adherence of this theory. Justice Frankfurter says also observed that enforcement of rigid conception of separation of power would make modern government impossible.
- The fundamental object behind Montesquieu's doctrine was liberty and freedom of an individual, but it cannot be achieved by mechanical division of functions and powers.in England, theory of separation of power is not accepted and yet it's known for the protection of indiual liberty. For freedom and liberty, it's necessary that there should be rule of law and impartial ad independent judiciary and eternal vigilance on the part of subjects.
- In modern practice, the theory of separation of power means an organic separation and the distinction must be drawn between "essential and incidental power". And that one organ of government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function thereof.[18]

[15] Supra note 3
[16] ibid at 35
[17] Friedmann, Law in a changing society p.382
[18] J.J.R.Upadhyaya, Administrative law' central law agency 9th edition p.47.

OBJECT OF SEPERATION OF POWER.

It has been argued that the object of separation of power is to prevent the amalgamation of legislative, executive and judicial power into a common hand. Which will result into confusion and choais.no one will take care of other, everyone will think for the welfare of its own. The constitutional philosophers argued that the object of theory of separation of power is to check and balance. The constitution distributes powers into legislative, executive and judicial power. The checks and balance will keep the every one of them within their own domain. The check and balance system will be able to guard against arbitrarily use of power by anyone branch. The principle of checks and balance suggests overlapping functions in which each branch is able to check the powers of others.

The logic behind this doctrine is of polarity, rather than strict classification, meaning there by that the centre of authority must be dispersed to avoid absolutism.in the same manner Prof Wade writes that the object of montisque was against accumulation and monopoly rather than interaction.[19]Manistique himself never used the word 'separation'. The object of this doctrine was not create the berries but mutual restraint and respect between the three organs of the government.in this sense this doctrine can be called as doctrine of " check and balance"

The object and purpose of the doctrine is very well summarised by chandrachud, J. (as he then was) in the case of Indra Nehru Gandhi V Raj Narain[20].

'No constitution can survive without a conscious adherence to its fine checks and balance. Just as court ought not to enter into problems entwined in the 'political thicket' parliament must also respect the preserve of the courts. The principle of separation of power is a principle of restraint which has in it the precept, innate in the prudence of self-preservation. That discretion is the better part of valour"

SEPERATION OF POWER AND JUDICIAL INDEPENDANCE

Judicial independence is an aspect of rule of law.seperation of power concerns the independence of judicial system from other branches of government. Judicial independence require the independence of indiual judges from any pressure. As lord hope stated;

[19] Wade;Adminstrative Law, p.251
[20] 1975 SUPP SCC 1,260

Central to the rule of law, in a modern democratic society is the principle that the judiciary must be seen to be independent of the executive.[21]

Judicial independence require judges to be protected against external pressure but does not mean that they should not be accountable for their actions. Francis Bacon in his "Essay of Judicature" showing the importance of „Temple of Justice" has expressed thus: "Solomon's Throne was supported by lions on both sides; Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty." (Quoted in S.C. Advocates-on-Record Association v. Union of India, AIR 1994 SC 268 at p. 301). Here the expression "Solomon's Throne" symbolizes the majesty of our justice system and the word „Lions" represents the Legislature and the Executive. Briefly it may be stated as" „Majesty of Justice system" is supported by the Legislature and the Executive from both sides, nevertheless, these Legislature and Executive are under the control of Judiciary. Legislature and Executive must not go against any point of Sovereignty. As regards „Sovereignty" it is enough to state that in a democracy it vests in the will of people.[22] .

Today almost all the nations incorporated this principle that judiciary must be independent, free from the interference of other organs of the state. Article 10 of the UDHR, article 14(1) of ICCPR 1966, article 6 of ECHR also talks about independent tribunal.

SEPERATION OF POWER IN UNITED KINGDOM

Although Montesquieu based his doctrine of separation of powers talking into account the British constitution, as a matter of fact at no point of time this doctrine was accepted in water tight compartments in England. On the contrary the reality is that the doctrine of integration of power was a reality in England.Loard chancellor was the head of judiciary, and he was also the chairman of house of House of Lords (legislature).the constitutional reforms act 2005,is an attempt to strengthen the separation of powers in relation to judiciary. The constitutional reforms act 2005 attempts to strengthen the separation of power by creating a supreme court to replace the appellate committee of house of lords, injecting an independent element into judicial appointments and removing the lord chancellors roles as head of judiciary and speaker of the house of loards.it could

[21] Millar v Dickson (2002) 3 ALL ER 1041,(41)
[22] TEJ Bhadur Sing; Principles of separation of powers and concentration of authority, J.T.R.I-journal 2nd year 2 & 5 march 1966.

be that aspect of these reforms, particularly in relation to the lord chancellor, strengthen the instuitional separation but weakens check and balances. The constitutional reforms act 2005 creates a new supreme court as the highest appellate court transferring to it the appeal functions of the House of Lords and in devolution cases of the Privy Council. This takes effect in October 2009.the main reason are to ensure a separation of power between the legislature and the judiciary and to enhance public understanding of and confidence in the judicial system. In England the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government. In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that doctrine of separation of powers is not an essential feature of British Constitution. It's to be noteworthy here that under English system the executive cannot impose taxes without the concurrence of legislature, as the imposition of taxes is purely a legislative function.[23] It has been also observed that there is no limitation on the legislature. The British system involves the following system;-

1. That the judicial power would be exercised by court, presided by judicial officer.
2. The legislature has a power to prescribe maximum or minimum punishment for an offence. However the selection between the minimum punishment and the maximum punishment is a judicial function, which cannot be excersice either by legislature or the executive. If the legislature seeks to excersice this power or to punish the indiual offender by legislation, that would be a bill of attainder, which is condemned by the bill of rights
3. Carrying out a punishment is an executive function of state and this function is to subject to any condition imposed by law.
4. The power to remit the sentence (mercy), in the case of particular offender, is an executive function.

Lord Diplock in the case of **hind's v queen**[24], Stated that the United Kingdom have no written constitution comparable that with the Australia and USA, yet in the sense that the legislature, the executive, the judicial powers are vested in three separate organs. The basic conception of separation of power is recognized even in unwritten constitution of that country. Again in the case

[23] Attorney general vs. will's united dairies, (1921) 91 LJKB 897.
[24] 1977 AC,

of **Duport steels ltd v sirs** [25] *lord diplock* observed it cannot be too strongly emphasized that the British constitution, though largely unwritten, is firmly based on separation of powers. Parliament makes the laws; the judiciary interprets them.in the case of **H.V Homes office**[26] House of Lords held that, parliament makes the law, executive carries the law into effect and judiciary enforces the law.in the case of **Reg v home secretary**, [27]it was observed; it is a feature of the peculiarity British conception of the separation of powers that the parliament, the executive and the courts have each their distinct and largely domain. Parliament has legally unchallengeable rights to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the power conferred on it by law. The courts interpret the law and see that they are obeyed.in **R V Secretary of state ex parte fire brigades union[28],** Lord Mustill said at 267, the feature of separation of power is that the parliament, executive and the courts have their distinct and exclusive domain. Parliament has right to make law, whatever law it thinks right, the executive carries on the administration of the country in accordance with the power conferred on it by law, and the courts interpret the law and sees that they are obeyed.in **Duport steels ltd v Sirs[29]** lord Scarman said**;-**

"The constitution separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk…confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for parliament to cut the powers of the judges."

Even though the doctrine of separation of powers has deep rooted in English, it's admitted fact by the academician and philosophers that the doctrine was never accepted in English. The doctrine finds no place in the English constitution. The UK constitution provides the supremacy of parliament. Parliament has unlimited legal power to enact any law without external restraint. Parliament supremacy is a legal principle meaning that a law formally made by parliament, in the sense of queen, House of Lords and House of Commons acting together, must conclusively be accepted as valid by the courts.[30]

SEPERATION OF POWER IN U.S.A

In 1787, the American constitution was drafted, and the doctrine of separation of power was adopted. In America, the doctrine of separation of power forms the foundation on which the

[25] 1980 1 ALL ER 529
[26] 1939 3 ALL ER 537
[27] (1995) 2 WLR 464
[28] (1995) 2 ALL ER 244
[29] (1980) 1 ALL ER 529 AT 551
[30] Pickin v British railway boards 1974

entire structure of the constitution is based. The doctrine of separation of power has been accepted and strictly adopted by the founding father of the U.S constitution and is considered to be the heart of the American constitution.[31] Art. I says:

"All legislative powers herein granted shall be vested in a congress."

Art. II says:

"The executive powers shall be vested in President"

Art. III similarly states:

"The judicial power….. Shall be vested in one supreme court……."

In the leading case **of Field v Clark**[32] the US supreme court observed, that "*the congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution".*

In the case of **Youngstown sheet & tuber co. v sawyer,** J Jackson observed that the "*with all its defects, delay, and inconviance men have discovered no techniques for long preserving free government except that executive be under the law, and the law be made by parliamentary deliberations"*

The American Constitution further ensures that not only that there should be separation of the judiciary from the other two organs, it also ensures that there should be separation of the legislature from the executive. To achieve that end, they provided by Art. I, section 6(2) of the constitution that no Senator or Representative during the time for which he is elected, be appointed to any civil office under the authority of the United State.in the American constitution ,there is a system of check and balance, and the powers vested in one organ of the government cannot be exercised by any other organ.in theory, no one organ of the government can encroach upon the power of the other.Jaffe and Nathanson stated, the division of our government into three great establishment is an indisputable fact-writ large and clear in the basic documents. Jefferson said'

The concentration of legislative, executive and judicial power in the same hands is precisely the definition of despotic government.it would be no alleviation that these powers will be exercised by a plurality of hands and not by a single

[31] Bucklery v R.valeos, 46 LED 2d 659;424 US I (1976)
[32] 36 LED 294; 143 US 649 (1892)

person.one-hundred and seventy-three despots would surely be an oppressive as one'[33] in U.S.A the doctrine has following features, which is applied in modern practice.

- The doctrine has produced a presidential form of government which is based on dichotomy of the executive and the legislature. The president is the head of state and of government. He is neither a member of congress nor dependent for his tenure upon the confidence of the congress in him.
- With the advancement of time the rigorous doctrine has now been relaxed. The president now excersice legislative functions by sending messages to the congress and by the excersice of the right to veto. The congress has power to excersice judicial functions of impeachment to remove the president. Senate discharges the executive functions regarding treaties and in the making of certain appointments. The congress has delegated the legislative power to numerous administrative agencies and these bodies excersice all types of functions. The position in America is that despite the theory that the legislature cannot delegate its power to the executive a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognized as valid. The Supreme Court never held that the combination of all the powers in one agency is un-constitutional .
- So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that legislature enacts the Law, but it is also true that in dealing with the new problems, where Law is silent, the Courts have to create the Law. The Chief Justice Hughes's remarks are most pertinent in this connection, as he candidly said- „The Constitution is what the judges say it is.[34] The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers.

In the present era, the strict observance of the doctrine of separation of power is impossible because the functions had grown in a speedy manner. Each organ of the government is interdependent on each other.as Woodrow Wilson had observed that "the trouble with the theory is that government is not machine but a living thing…no living thing can have its organs offset against each other as checks and live. government is not body of blind forces, it is body men, with

[33] Citied in indra Gandhi v Raj Narian,1975 supp SCC 1, Para 319.Air 1975 SC 2299
[34] Handel, Charles Evants Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz in American Constitutional Law 1955 page 130

highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose, their cooperation is indispensable; their warfare fatal"[35].the modern view is that although the framers of American constitution had adopted the doctrine of separation of power to divide the three organs of the government so that they may not overlap within the functions of others but it was never conceded that the three organs will operate with full and absolute independence. The intention of framers was that each organ should work within its bound and should not overlap within the functions of other. These organs should work as a check and balance on each other.

SEPERATION OF POWER IN AUSTRALIA

The common wealth of Australia constitution act 1900 adopts the model of separation of power by distributing three branches of government into three different bodies.

Sec, 1 provides;-

The legislative power of the common wealth shall be vested in the parliament.

Section 61 provides;-

The executive power of common wealth is vested in the queen and is exercisable by the governor general the queen representative.

Section 71 provides;-

The judicial power of common wealth shall be vested in a federal supreme court, and in such other federal courts as the parliament creates.

From the above sections of the Australian constitution act it's clear that the legislature makes the law, the executive puts the law into operation and the judiciary interprets the law. A strict separation of power in not always evident in *Australia.in Victorian stevedoring and general contracting co Ltd v Dignan*[36] the high court of Australia held that it was impossible, consistent with the British tradition, to insist upon a strict separation between legislative and executive powers.in absence of the contrary the doctrine of separation of power is embodied in the constitution.it was intends to confine each of the three departments of the government the excersice of power with which it was

[35] Supra note 4. p.p264.
[36] (1931) HCA 34

invested by the constitution.it has accordingly been held that under the Australian constitution, judicial and non-judicial functions cannot be united in the same persons or body of persons and judicial persons can be vested only in a court.in various constitutional cases the high court has separated the judicial power from the other two powers but not separated the legislative and executive power due to the nature of the Westminster system of the responsible government[37].the high court decisions which affirms that the system of responsible government prevents the complete separation of legislative and executive powers was *Victorian stevedoring and general contracting co pvt ltd v Digman (Digmans case)* 1936.the Digmans case is also considered authority for the proposition that parliament may delegate its power without significant restrictions.

In practice there is only partial separation of powers, that is the judiciary is independent and separated from the other two branches i.e. The legislature and the excecative.the executive (cabinet ministers) is formed from within the legislature (parliament).according to Hughes Australia has a political system that is suggested to be on that follows the Westminster parliamentary system and responsible government. The Australian system of government combines and uses aspects of both the UK model and the US model of government and separation of powers. The Australian model is therefore a mixture of English and American model. These models have important philosophical and theoretical organs based in significant historical events. The English separation of model based in the English revolution of s1688 and the American separation of power model based on American revolution of 1775 and the declaration of independence of 1776.there was not a similar revolution in Australia, instead it has been gradual peaceful social, political and constitutional reforms. Thomson (1980) coined the term *"washminster mutation*" to describe the mixed parentage of Australia. The Australian political system is a hybrid of the Westminster system of government and the American federal and constitutional aspects of government. There is a significant difference between the theory and practice of separation of powers in countries like the UK, US and the Australia.

SEPERATION OF POWER IN CANADA

Canada's system of government is based on a parliamentary model quite distinct from the presidential system operating in U.S.A.The leading constitutional writers observed that the Canada's retention of the British system o responsible government is utterly inconsistent with any

[37] Waterside workers federation of Australia v j.w.alexandra ltd (Alexandra case) 1918 25 CLR 434

separation of the executive and legislative.[38]While this is one important view it has never been approved by the supreme court of Canada.in the case of **dismantle v the queen**, [39]the supreme court refer the doctrine a '*essential feature of the constitution"*.the separation of power in Canada exists only between the judiciary and the parliament, not between the executive and the legislature within the parliament has become constitutional orthodoxy. The supreme court of Canada in the case of **peter Hogg claims** that, there is no general separation of power in the constitution act 1867.the act doesn't separate the legislative, executive and judicial functions and insist that each branch of government excersice only its own functions.as between the legislative and executive branches, any separation of power would make little sense in a system of responsible government ; and its clearly established that the act doesn't call for any such separation. According to Hogg *Canada have little separation of powers doctrine*. The constitutional act 1867, establishes executive power by ss.9-16.these provisions vests the executive power in the queen, and calls for its excersice by the governor general and Privy Council. The constitutional act 1867, establishes significant power in the executive branch, including by s.15, the command of armed force. The constitutional act 1867 identifies and organises separate constitutional status as well for the legislature (section 17-52) and judiciary (section 96-101) and specifies their respective powers and limits. It's worth remembering that within the text of constitutional act 1867 the three branches of government are connected functionally as to give each a constitutional control over the other. Parliament is invested with the constitutional powers to enact all federal laws and to establish federal courts. Parliament is checked by the powers of the executive to call the houses of commons into session. [Sec 38].and by the power of the judiciary to declare laws unconstitutional .parliament is also checked by the powers in the executive to reserve bills passed by the house of parliament and to disallows laws enacted [sec55-7].the veto-like powers, designed for British control of Canadian law making, have long since fallen into disuse, but they still exist in the text and the structure of the constitution. The judicial branch has a constitutional power to try all cases, to interpret the laws in those cases and to declare any law or executive act UN constitutional . The judiciary is checked by the powers in the executive to appoint its members by power in the legislature to enact amendments that overturn judicial decision, including many constitutional decisions and also by the combined power of the executive and legislative branches to remove the judges.

[38] Hogg, constitutional law of Canada ,1999 student ed.,p.321
[39] (1985),1 SCR 441,491

SEPERATION OF POWER IN INDIA

The doctrine of separation of power in India has not accorded a constitutional status. However the framers of the constitution doesn't support accumulation of power.in the constituent assembly there was a proposal to incorporate this doctrine but the same was not accepted and was dropped. In Constituent Assembly Debates Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads: "There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."

Kazi Syed Karimuddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof. K.T. Shah. Shri K. Hanumanthiya, a member of Constituent Assembly dissented with the proposal of Prof. K.T. Shah. He stated that Drafting Committee has given approval to Parliamentary system of Government suitable to this country and Prof. Shah sponsors in his amendment the Presidential Executive. He further commented: "Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of Government. In any country or in any government, conflicts are suicidal to the peace and progress of the country. Therefore in a governmental structure it is necessary to have what is called "harmony" and not this three-fold conflict."[40]

Prof. Shibban Lal Saksena also agreed with the view of Shri K. Hanumanthiya. Dr. B.R. Ambedkar, one of the important architect of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus: "There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature. 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

[40] TEJ Bhadur Sing; Principles of separation of powers and concentration of authority, J.T.R.I-journal 2nd year 2 & 5 march 1966.

the Executive from the Legislature.[41]" With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negatived i.e. turned down.

Article 50 of the constitution which enjoins the separation of judiciary from the executive, the constitutional scheme doesn't embody any formalistic and dogmatic division of power[42]. The Indian constitution doesn't speak of the functions of the three organs of the state. Under the entire constitution article 53 provides only the executive power is vested within the president and it shall be exercised by him in accordance with the constitution either directly or through sub-ordinate officers appointed by him. The supreme court in the case of *Ram jawaya kapur v state of Punjab*[43]observed that the *"Indian constitution hasn't indeed recognized the doctrine of separation of power in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our constitution doesn't contemplate assumption by one organ or part of the state of function that essentially belong to another".*

Just like article 53(1) and 154 (1),where the executive power of the union and of the states vested with the president and of the governors respectively , there is no corresponding provisions in our constitution which provides legislative power and the judicial power to a particular organ. Accordingly *in Indira Nehru Gandhi v Raj Narain*[44]the court observed the Indian constitution adopts separation of power in broad sense only. A rigid separation of power as under the American constitution or under Australian constitution doesn't apply in India.in the result, there is no bar against vesting the judicial powers of states in tribunal other than the courts strictly-so called. The very fact that the article 136 (1) and 227(1) of the constitution mentions both courts and tribunals shows that the judicial power of the state may vested in courts and tribunals, even though the two class of judicial authorities may differ as to the nature as the question referred to them, the procedure to be followed by them and the like.

if we study the provisions of constitution carefully on can find that the doctrine of separation of power had not been accepted in India in strict sence.but one can inclined that the doctrine of separation of power has been accepted in india.in the case of *Golakhnath v state of Punjab*[45],Subba Rao, C.J. observed;

[41] Constuent assembly debates book no 2, vol no VIII second print 1989 p,967-968
[42] Upendra baxi; development in Indian administrative law, in public law in India, 1982(A.G.Noorani, ED) p.136.
[43] Air 1955 SC 549
[44] 1975 SUPP SCC 1;AIR 1975 SC 2299
[45] AIR 1967 SC 1643

"*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 overstepping their limits. They should function within the spheres allotted to them"*

In Bandhuva mukti morcha v union of India, [46]Pathak J. (as he then was) observed;

"The constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the power is not precisely demarcated, there is generally acknowledgment of its limits. The limit can be gathered from the written of the constitution, from conventions and constitutional practices, and from an entire array of judicial decisions'

In India, not only there is functional overlapping but there is personal overlapping also. The Supreme Court has power to declare the laws void passed by the legislature and the actions of executive if they violate any provision of the constitution or of any law passed by the parliament. The power to amend the constitution of parliament is subject to judicial Secrutunity of the court. Every law passed by legislature is void if they violate the basic structure of the constitution as propounded by the supreme court of India in the kesavananda bharati case. The president of India who is the executive head also enjoys law making power in the form of ordinance-making power, making laws for a state after the state legislature is dissolved. And also judicial power under article 103(1) and article 217(3), to mention only a few. He decides disputes regarding the age of judge of a high court or the Supreme Court for the purpose of retiring him[47].the president also enjoys the power regarding dis-qualification of any members of any house of parliament.[48]The executive furthered affect the judiciary by making appointment to the office of chief justice and other judges.

Likewise the parliament excersice legislative function and is competent to make any law not inconsistent with the provisions of constitution, but many legislative functions are delegated to the executive.in certain situations the parliament perform judicial functions as well. Article 105 of the constitution of India gives power to parliament to decide the question of breech of its privilege and if proved can punish a person concerned.in case of impeachment of president, one house acts as prosecutor and the other house investigates the charge and decides whether they were proved or not. The latter is purely judicial function.[49]

[46] AIR 1984 SC 802
[47] Article 217(3) inserted by the constution 15th amendment act 1963
[48] Article 103,of the constution
[49] Article 66, of the constution.

On the other hand the judiciary is supposed to perform judicial functions but they perform executive and sometimes legislative functions as well. Under article 227 of the constitution, the high courts has supervisory powers over all sub-ordinate courts and tribunals, and also the power to transfer cases. The high court and the Supreme Court frames rules, regulations, regulating their own procedure for conduct and disposal of cases.[50]High court rules, Supreme Court rules are few examples of it. Judiciary under Indian Constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and function within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the Constitution, had observed that[51]-

"The doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned"

JUDICIAL PRONUNCEMENTS

The following cases explain the real position of doctrine of separation of powers prevailing in India...

In **Re Delhi Law Act case**[52] Honble Chief Justice Kania observed: "Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?

In **Golakhnath vs. state of Punjab**[53], the constitution brings into existence different constitutional entities.it creates three major instruments of power, namely legislature, executive, and the judiciary.it demarcates their jurisdiction minutely and without overstepping their limits. It's clear that the doctrine of separation of power has not been accepted in India in strict sense.

[50] Article 145,225 of the constution
[51] Citied in Glanville Austin, the Indian constution; corner stone of a nation-174 (1966)
[52] 1951 SCR 747 AIR 1951 SC 332
[53] AIR 1967 SC 1643

The Supreme Court has power to declare void the laws passed by the legislature and the actions taken by executive if they violate any provision of the constitution. The executive can affect the functioning of judiciary by making appointment to the office of chief justice and other judges.

In **Asif Hameed v. State of J & K**[54], it has been held that

Although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislative, Executive and Judiciary have to function within their respective spheres demarcated under the constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people's will, have all the powers including that of finance. Judiciary has no power over sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits. It is the sentinel of democracy.

In **Jayantilal Amritalal Shodhan V F.N.Rana**,[55] it was observed by the court that it cannot be assumed that the legislative functions are exclusively performed by the legislature, executive functions by the executive and the judicial functions by the judiciary alone. Our constitution has not made an absolute or rigid division of functions between three agencies of the state.

In **Ram Krishna Dalmia v. Justice Tendulkar**[56], Honble Chief Justice S.R. Das opined that in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial- is nevertheless implicit in our Constitution

In **Udai Ram Sharma v. Union of India**[57], Supreme Court held that "The American doctrine of well-defined separation of legislative and judicial powers has no application to India."

In **Kesavananda Bharti v. State of Kerala**[58], Honble Chief Justice Sikri observed: "Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution; this structure cannot be destroyed by any form of amendment."

[54] AIR 1989 SC 1899
[55] AIR 1964 SC 648; (1964) 5 SCR 294
[56] AIR 1958 S.C. 538 at p. 546
[57] AIR 1968 S.C. 1138
[58] AIR 1973 SC 1461

In **Chandra Mohan v. State of U.P**[59]. Supreme Court held: "The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States. But at the time the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the power levels would be a mockery." (See also S.C. Advocates-on-Record Case, AIR 1994 S.C. 268 at p. 272).

The Supreme Court in the case of **Ram Jethmalani vs. Union of India**[60] Sudershan Reddy and surrender Singh Nijjar JJ, constuting the SIT'S is the apparent violation of separation of powers.

In **Minerva Mills Case** [61] "under our constitution we have no rigid separation of powers as in united states of America, but there is a broad demarcation though, having regard to complex nature of the governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of power is that the concentration of power in any one organ may, to quote the words of j chandrachud (as he then was) in smt.indira Gandhi's case, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which are pledged.

CONCLUSION

The constitution of U.S.A and Australia expressly incorporated the doctrine of separation of power. While on the other side the countries like England, India and Canada the doctrine of separation of power is not expressly provided but is impliedly incorporated. Whether the doctrine is expressly provided or impliedly provided the strict adherence to the applicability of the doctrine is impossible because it's humanely impossible to restrict the functioning of state into three organs precisely. The organs of the state needs to be in such a manner so as to overlap between one another. The doctrines of separation of power is a theoretical concept and leads to the collapse of the system. . Prof. Garner has rightly said the doctrine is impracticable as a working principle of Government. It is not possible to categorize the functions of all three branches of Government on mathematical basis. The observation of Frankfurter is notable in this connection. According to

[59] AIR 1966 SC 1987
[60] W.P.(C) NO.176 OF 2009,Decided on 04 july-2010
[61] AIR 1980,SC,1789

him Enforcement of a rigid conception of separation of powers would make Government impossible. It is my opinion that the doctrine of Montesquieu is not merely a myth but also carries a truth, but in the sense that each organ of the Government should exercise its power on the principle of Checks and Balances signifying the fact that none of the organs of Government should usurp the essential functions of the other organs. Professor Laski has aptly remarked. It is necessary to have a separation of functions which need not imply a separation of personnel.