

SEPARATION OF POWERS: A COMPREHENSIVE REVIEW OF THE CONSTITUTIONS OF INDIA, THE UNITED KINGDOM, AND THE UNITED STATES

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ABSTRACT

“Power tends to corrupt and absolute power corrupts absolutely.”

-Sir John Dalbery- Acton

The doctrine of separation of power existence can be traced back in Magna Carta. It basically means that there shall be separation of power between executive, legislature and judiciary. So the executive shall be liable for enforcing laws, legislature shall be liable of making those laws and judiciary in case of breach of such law, shall decide the specific dispute. Each organ has a separate function to perform in its demarcation.ⁱ

Also check and balance could mean no independence of judiciary. Judiciary purpose is to provide justice and it is important to for judiciary to be free from any internal or external influence so that it can function without being bias.

What one need to analysis is that, is it practically possible to have such strict separation and is its implementation possible? Different countries have adopted the concept of separation of power accordance with their constitution. But does pure separation of power has been adopted or not? This will be dealt in later part of this essay. First we need to understand the concept of separation of power and how check and balance has become important part for implementation of good governance in exercising separation of power.ⁱⁱ

EVOLUTION OF CONCEPT OF ‘SEPARATION OF POWER’ AND ‘CHECKS AND BALANCES’

Aristotle was the first one to classify functions of government in three different head i.e. magisterial, deliberative and judicial. John Locke also categorised power of Government in three parts i.e. federative power (power to regulate foreign affair), continuous executive power (executive and judicial power) and discontinuous legislative power (power to make rules).

Montesquieu is consider as modern exponent of theory of separation of power. He was first one to pronounce this doctrine in his book “*spirit of law* (Esprit Des Lois)”. Although Montesquieu gave the doctrine yet he thought that this would be panacea on good governance, as it is subject to drawbacks. It does not ensure good governance unless there are adequate “*check and balances*” over it. John Calvin was in support of democracy and also supported system where power of government is divided into aristocracy i.e, mixed government and democracy. But in order to reduce misuse of absolute power, Calvin suggested that there should be such a set up that all the institution shall have control over each other through check and balances.ⁱⁱⁱ

Despite of all Montesquieu said on separation of power he was opinion that “*the independence of the judiciary has to be real, and not apparent merely*”.

Check and balance is system by which one branch limits power of another in order to prevent it from becoming supreme. Madison had same view that if power is accumulated in same hand then it may result into tyranny. Therefore, the purpose of these doctrine is to form such a system which provides clarity of separation of power, without creating tyrannical power or an arbitrary structure. Despite of all the protection this system can provide, it has its own drawback as well. Following check and balances over separation of power had led to dilution of power, also in some case one organ has been given more power over the other.^{iv}

DIFFERENT CONSTITUTION AND DOCTRINE OF SEPARATION OF POWER

U.S.A

American constitution is consider as the origin of separation of power. Various provisions under constitution form part of its structure. The power of legislature has been given in hands of congress under Art. 1. The executive power is in hand of the President, as provided by Art. 2. Lastly Art. 3 talks about power of Judiciary, it shall vest in Supreme Court's hand.

Despite of mentioning division of power in its article there are few exception to these rules which prevent from making its government tyrannical. Likewise, if a bill is passed by Congress then it can be rule out by veto power of President. Also if President ratify a treaty while exercising his power, it need approval of senate as well.

To declare a statue passed by congress as unconstitutional, that can be done by Supreme Court. Therefore, function of one is checked by other in order to avoid misuse of power. ^v

United States the courts can not interfere with the political matters but supreme court of United States state that the judicial review is one of the basis their constitution in *Marbury v Madison* in this case supreme court for the first time declared something unconstitutional and through this case only the concept of Judicial Review was established in the United States constitution. ^{vi} This landmark decision helped in defining the check and balances of the American form of government. Also while dealing with new problems where the law is silent, the courts have to create the law. The chief justice Hughes remarks are most important in this particular scenario that he said "the constitution is what the judges say it is".

U. K.

United Kingdom follows parliamentary form of government also it has titular monarchical system in which the king/queen is the titular or nominal head and real powers and real legislative functions are performed by the parliament.

The separation of powers in United Kingdom there is no absolute presence of the doctrine of separation of power is presently. Though United Kingdom follow monarchical system but real lies with the cabinet only, the cabinet is the real head of the executive not the crown. It is the cabinet only who begins the legislation and also control them and also cabinet has conferred

with the power to dissolve the assembly. Even there is overlapping of power in United Kingdom in both sense i.e. “Personnel overlapping and the functions of the state. The system which is followed by the United Kingdom is the system of check and balances so that the abuse of power can be controlled. Hence we can say that since different powers are confined to one body i.e. cabinet therefore we can say that the concept of separation of power is not there in United Kingdom.

India

The governance of democratic state is based on the model of separation of powers. In a welfare state the state tries to function in such a way so that diverse needs can be satisfied without any friction and also the prime aim of the state is to ensure smooth functioning of the state which should be fair, just and free from arbitrariness, and in order to achieve all this it is necessary to restrict the power of government in one organ so that arbitrary application or exercise could not take place.

In India the doctrine of separation of power is not explicitly mentioned in the constitution but different organs and their functions are differentiated in such a way so that one organ of the government should play the role of other organ.

The constituent assembly debates, Prof K.T. Shah a member of constituent assembly emphasised on the insertion of the new article i.e. article 40-A which laid emphasis on doctrine separation of powers.^{vii} This article read as follows:

“There shall be complete separation of powers as between the principal organs of the state, viz; the legislative, the executive, and the judicial.” This idea of Prof K.T. Shah was supported by the Kazi Syed Karimuddin but this idea was dissented by Shri K. Hanumanthiah and he stated that the drafting committee has already given approval parliamentary system of government which is best suited for this country.

Although in India the doctrine of separation of powers has not been expressly mentioned as constitutional status but there is presence of article 50 in the directive principle which states that “separation of judiciary from executive. The state shall take steps to separate judiciary from the executive in the public services of the states.” In case of *Ram Jawaya Kapur*^{viii} held “although the Indian constitution has not expressly adopted the doctrine of separation of powers 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 does not contemplate assumption by one organ or part of the state of functions that essentially belong to another.”

A more refined view of the abovementioned judgement is taken in ‘*Karat Singh V State of Punjab*’ in this court held that it is the basic postulate under the Indian constitution that the powers are divided between the legislature and executive and the legislature has been conferred with the power to make the law and the judiciary to implement the law within the set limits laid down by the constitution.^{ix}

In *Indira Gandhi V Raj Narain*, it was observed by the court that in India we do not follow the doctrine separation of powers in strict sense and in broad sense only we follow the doctrine, and Indian view of separation of powers are not rigid in nature like that of American or Australian constitution.^x

In famous case of ‘*Keshvananda Bharti v state of Kerala*’, Hon’ble chief justice Sikri observed that” separation of power between the legislature, the executive and the judiciary is a part of the basic structure of the constitution; and this structure cannot be destroyed by any form of amendment.”^{xi}

In ‘*Asif Hameed AI V State of Jammu and Kashmir*’, in this Supreme Court observed that “although India does not follow the doctrine of separation of powers in absolute rigid sense but the framers of constitution have meticulously defined the functions of various organs of the state.”^{xii}

In *I. R. Coelho V state of Tamil Nadu* the Supreme Court took the help of basic structure doctrine which was propounded in *Keshvanandan Bharti Case* and said the “Ninth Schedule is Violative of this doctrine and hence from now onwards ninth schedule is amenable to Judicial Review and the Golden triangle comprising Of Art 14, 19 and 21 will be criterion in scrutinising the ninth schedule.”^{xiii}

In ‘*State of U.P. V Jeet Ram*’ in this question arise in front of court that whether court can direct executive how to exercise the executive power or is it violates of separation of powers?^{xiv}

In this judge said that this will amount to violation of separation of power but one judge

Justice Sinha was of opinion that there is no violation of separation of power since the power of judiciary does not end where power of executive begins but judiciary can also check power

of executive and this is positive sense of doctrine which means the duty of the various organs is not to keep the other organ in limit but also to compel the other organ to exercise its power honestly.

INDEPENDENCE OF JUDICIARY AND CHECK AND BALANCE IN INDIA

Recently India witnessed huge debate between the executive and judiciary on issue of appointment of judges through collegium system and introduction to new system of appointment.

The 99th amendment was proposed and brought in parliament with the motive of improving system of appointments of judges for High court and Supreme Court. This was considered important as to gain public confidence and thereafter making system accountable in case there is wrong selection.

Separation of power is part of basic structure of constitution and it is important to safeguard it from political excesses. But 99th amendment was a question working of separation of power as well as independency of judiciary.

The Indian judiciary is one of the most powerful in the world. One of the reasons being, that our constitution has been constituted in a way that it keeps a check and balance on each organ of the government. Hence, if there is a question of misuse of power by any of the organ, it can be checked by the other organ. Also our constitution provides various provisions such as Article 50, where separation of power gives each organ individuality and independency. Since the Constitution does not provide the power to appoint judges to itself, surely the Judiciary has 'assumed' this power on its own, when it started following the older collegium system. Such an assumption of a vital democratic function, without any legal source of authority is a trait of autocracy, not democracy.

Involvement of the President under Art.217 (3) in determination of age of High Court judges with consultation of Chief justice was considered as a quasi-judicial function as was held in case of 'Union Of India v. Jyoti Prakash'.^{xv} Though the president's decision was considered as final, but this too (ouster clause) did not ordinarily oust the power of the court to review

decision. Decision of the Executive was never immune from judicial review. Even before collegium system decisions were under control of judiciary, as judicial review of President's decision could be done. So, if any problem involving President's Role in the appointment of a judge was raised, it could be covered under judicial review for recheck. In the book 'The Supreme court by Lawrence Baum' the author mentions that the president has helped to shape the government litigation policy and thus affected the Court's decisions through appointment of the Solicitor General (law officer) through such occasional intervention in specific cases. Thus, this view of involvement by President in appointment of judges is supported and was followed before the collegium system was introduced. The view has been supported by the standing committee and has been made part of pristine JAC amendment bill.

A close look at the current issue of 'corruption' raises a question whether is it really a system that failed or is the system (collegium) to be blamed for corrupt Judges? The learned Lord Alfred Thompson Denning states '*Be you ever so high, the law is above you*'. Here it applies to the Judges as well as to the officers holding high public office. Therefore, corrupt judges should be removed from the judiciary.^{xvi}

This is important point of concern, whether is there any fault in farming of system or people working on behalf of government should be blamed. System can change the way of working but can it can it change other problems such as corruption. But the 99th amendment was removed by 101 amendment.

CONCLUSION

It has been argued by exponents of Realism that judges just don't merely declare the law but one basis of fairness decides how law shall be applicable. So judiciary is liable for interfering in working of legislature.

It is not practically possible for any organ of government to exist on its own without possibility of it being corrupt. Also it is essential for government to provide a transparent system of governance. Democracy is where government is under a duty to look after the betterment of its people. It is a government elected by the people themselves; therefore keeping the system transparent is the duty of the Government. The Judiciary is under a duty to support such acts of executive government which safeguard our constitutional structure.

Justice Krishna Iyer once stated that “Whatever touches us all should be decided by all”. Having a lot of power concentrated in one area is what makes something "absolute." Even if its responsibilities are divided, public authority has the ability to abuse its power. This can occur when a public entity wields public power and is given complete and entire authority over things falling under its purview. As a result, the concept of separation of powers is a theoretical ideal that is exceedingly difficult to bring into practise. The current condition is vastly different from what existed earlier. It has progressed from a simple, non-interfering state to a welfare state with a variety of tasks, including protector, adjudicator, controller, and provider. Because the government is everywhere, its responsibilities have grown increasingly complex and intertwined, rendering any attempt to identify and separate them futile. As a result, it's evident which organ components are crucial and which aren't. The division of powers would be shattered if one individual or group claimed skills that were legitimately owned by another person or organisation. This would be in violation of the classification requirements. It could be able to argue that it is helping another organ in some way. Because of the separation, one organ cannot penetrate the area where another organ performs its function. Only via the use of minor authorities has the government been able to spread over this social welfare state. It has assumed a critical role that none of the other wings have.

The other two arms of government, the judiciary and the legislature, were insufficient to carry out the objective of the welfare state. As a result, the executive's role has grown in importance. The judicial proceedings were drawn out, and the legislature, as both a controller and a supplier, had a lot of work to do. Administrators in the modern state were able to take on a variety of tasks, including those of legislators and, to a lesser extent, judges. Since its inception, adjudicators have been regarded as an essential component of fundamental structure theory. They have control over the behaviour of the other two people. If you live in a democratic society, the courts can defend you from administrators and politicians who use the public to their advantage and turn your country into a totalitarian tyranny. The courts have occasionally given implementers instructions on what they may and may not do, as well as how they should proceed. Even those who work for the government are subject to the norms of the court. The Supreme Court's decisions on cash-for-questions and the Ninth Schedule have placed a greater focus on the legislative and judicial duties than previously. However, it was unclear whether the court agreed with the Lok Sabha's decision to dismiss MPs caught on camera accepting bribes. It did, however, reject the notion that it lacked the jurisdiction to determine the

legislature's authority. Instead, it asserted the authority to be the last arbiter of legislative decisions. Parliament no longer has the ability to prevent courts from ruling on specific progressive legislation as a result of the Supreme Court's decision on the Ninth Schedule. The United States Supreme Court: The Supreme Court determined that the Ninth Schedule violated the "fundamental structure" doctrine from the Kesavananda Bharati case in *I.R. Coelho v. State of Tamil Nadu*, and thus it is open to judicial review, as part of the basic feature theory, which states that a statute can be changed. A fundamental structural theory and a Golden triangle formed by the numbers A.14, 19, and 21 will be used to explore the Ninth Schedule. The constitution of a democratic country states its aims, and the government is then formed to pursue those goals. Furthermore, even if the idea cannot be rigorously applied, it may be demonstrated that constitutional provisions are organised in this manner in order to support a parliamentary system of government. Furthermore, the Supreme Court's decisions promote the notion of employing a new system of checks and balances rather than the rigid doctrine. Furthermore, as a philosophical notion, constitutionalism emphasises the significance of restricting government power in order to defend an individual's fundamental rights. Despite the lack of total separation of powers, the study discovered that the functions of each branch of government are sufficiently separated to prevent them from interfering with one another.

ENDNOTES

ⁱ Claus, Laurence. "Montesquieu's Mistakes and the True Meaning of Separation." *Oxford Journal of Legal Studies*, vol. 25, no. 3, Oxford University Press, 2005, pp. 419–51, <http://www.jstor.org/stable/3600677>.

ⁱⁱ Barber, N. W. "Prelude to the Separation of Powers." *The Cambridge Law Journal*, vol. 60, no. 1, Cambridge University Press, 2001, pp. 59–88, <http://www.jstor.org/stable/4508751>.

ⁱⁱⁱ Montesquieu, De L' "Espirit des lois, 1748 quoted in Justice D.D. Basu: *Administrative Law*, Edn. 199, p. 23.

^{iv} Nazir, Mudassir and Ahmad, Tauseef and Khan Afghani, Mohammad Aman, *Separation of Power: A Comparative Analysis*. *Commonwealth Law Review Journal*, Volume 3, September 2017, Available at SSRN: <https://ssrn.com/abstract=3193479>

^v Boudon, Julien. "The Separation of Powers in the United States", *Pouvoirs*, vol. 143, no. 4, 2012, pp. 113-122.

^{vi} *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137 (1803)

^{vii} *CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII* Friday, the 10th December 1948, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C10121948.pdf>

^{viii} *Ram Jawaya Kapur v. State of Punjab* AIR 1955 SC 549.

^{ix} *Kartar Singh vs State Of Punjab*, 1994 SCC (3) 569, JT 1994 (2) 423

^x *Indira Gandhi vs. Raj Narain* AIR 1975 SC 2299

^{xi} *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

^{xii} *Asif Hameed v. State of J. & K.* AIR 1989 SC 1899

^{xiii} *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

^{xiv} AIR(2007)6 SCC 586.

^{xv} Union Of India V. Jyoti Prakash Mitter Air 1971 Sc 1093

^{xvi}Extract from the Book “*The Road to Justice*” which prints collection of addresses given by Lord Denning while visiting Canada and United States of America as the guest of the Canadian Bar Associations and the American Bar Associations with the approval and consent of Lord Denning of it being published in the Volume <http://www.allahabadhighcourt.in/postcentenary/RoadOfJustice.html>

