DOCTRINE OF SEPARATION OF POWER IN INDIA

AND USA: A COMPARATIVE STUDY

By: Sneha

LL.M., 2nd Semester, Chanakya National Law University, Patna

ABSTRACT
The doctrine of separation of power has been adopted by many countries worldwide. Some countries have adopted it completely and some have adopted it partially. Both India and USA have this doctrine mentioned in their respective constitutions. The doctrine plays an important role in the proper functioning of the administrative bodies, it gives power to the different organs of the state and also keeps a check on the power. This doctrine is provided under the Constitution of India which gives the idea that it is adopted in theory as well as in practice. Under the Indian Constitution, executive powers are with the President, legislative powers with Parliament and judicial powers with the Judiciary.

But the framers of the American Constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical government by making it impossible for a single group of persons to exercise too much power.\(^1\) Accordingly, they intended that the balance of power should be attained by checks and balances between separate organs of the government.\(^2\) This alternative system existing with the separation doctrine prevents any organ to become supreme.

This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore, the Constitution of USA gives a good mention of the doctrine in its provisions also but does not follow it in its rigidity and hence has opted for dilution of powers just like India.\(^3\)

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\(^2\) [https://www.lawctopus.com/academike/doctrine-of-separation-of-power/](https://www.lawctopus.com/academike/doctrine-of-separation-of-power/)

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CHAPTER 1: INTRODUCTION

The division of power deals with the division of power between the different organs of the government and their mutual cooperation. The power is divided into three different governmental authorities namely, the executive, the legislative and the judiciary. This concept was defined by Montesquieu in his book “Espirit des Louis” in the year 1747. His objective was to distribute the power among different branches of the government independently as well as interdependently, meaning thereby, that these branches of the government have different powers of their own and one doesn’t interfere or encroach upon the power and function of the other, but rather works in cooperation with each other. This concept of separation of power gives different power and responsibility to different organs as well as limits them from interfering in the functions of another branch.

**Montesquieu’s Doctrine of Separation of power**

The doctrine of Separation of Power can be traced back to Aristotle, but the writings of Locke and Montesquieu provided the idea based on which further attempts to distinguish between the legislative, executive and judiciary were made. John Locke in his theory distinguished between:

i. **Discontinuous legislative power**
   The general rule making power called into action as and when required but not continuously.

ii. **Continuous executive power**
   It included all the powers exercised by the executive and the judiciary.

iii. **Federative power**
   It was considered as the power to conduct foreign affairs.

Montesquieu, was a French scholar, who was of the view that concentration of power in one person or group leads to autocracy in the society. And therefore, to keep a check on arbitrariness, the need for decentralization of power was felt. Thus, the governmental power was thought of to be vested in three different organs i.e., the executive, the legislature and the judiciary. The principle implies
that each organ should be independent of the other and that no organ should perform functions that belong to the other.\textsuperscript{4}

Montesquieu in the following words stated the Doctrine of Separation of Powers “There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”\textsuperscript{5}

According to Montesquieu, the doctrine of separation of power suggests a complete separation of power and one organ should not interfere or encroach upon the power of the other organ. This doctrine has been adopted in many countries but it has not been absolutely adopted. It is widely accepted.

The idea that Montesquieu indicated was of complete separation of power and no interference or encroachment in the power of the other organ. Many countries have adopted this doctrine but no country has fully or absolutely adopted it. Even though it has been widely accepted, there are certain drawbacks in this theory.

The three organs are required function in coordination and cooperation for a better and smooth functioning of a government. This system is however important to keep a check on the functions of each other and to avoid any kind of arbitrariness.

\textsuperscript{4} http://www.legalservicesindia.com/article/483/Separation-of-Power-in-India-&-USA.html, (May 31st 2021, 3.15 p.m.)

\textsuperscript{5} Ibid.
CHAPTER 2: CONSTITUTIONAL STATUS OF SEPARATION OF POWER IN INDIA

DOCTRINE IN INDIA

By virtue of its Constitution, India has adopted the Doctrine of Separation of power not just in theory but in practice too. As enumerated in the Constitution of India, executive powers are safeguarded with the country’s President, legislative powers are in the hands of the Parliament and judicial powers with Judiciary (Supreme Court, High Courts and Subordinate Courts).

The function and powers of the President are explained in the Constitution itself. At the same time by virtue of Constitution the Parliament is empowered to enact any law subject to the provisions of the Constitution and there is no limitation whatsoever on its legislative power. The Judiciary is entirely independent and autonomous in its field and there can be no interference with its judicial functions and duties either by the Executive or by the Legislature. The Supreme Court i.e., the apex court of India and every High Courts is granted with the power of judicial review and they have the power to declare any law enacted by the Parliament unconstitutional if the same is by any way in contravention to the provisions of the Constitution of India. By considering the factors, some jurists were of the view that the Indian Constitution recognizes the Doctrine of Separation of Power in its text.

The power and functions of the President are provided under Article 62 to Article 72 of Indian Constitution. India’s judiciary is independent and the Legislature and the executive cannot interfere in the matters of judiciary. Owing to the provisions of Article 226 and 227, and under Article 32 and 136 of the Constitution, both the High Courts and Supreme Court of India are given the power of judicial review. If such a situation arises that a law enacted by the Parliament

6 Part V of the Constitution of India.
7 Power of High Courts to issue certain writs
8 Power of superintendence over all courts by the High Court.
9 Remedies for enforcement of rights conferred in Part III
10 Special leave to appeal by the Supreme Court
is inconsistent with the Fundamental rights as provided under Part III of Indian Constitution, then
the judiciary i.e., the High Courts and Supreme Court has the power to declare any law void.\textsuperscript{11}

As explained in the case of \textit{I.C. Golakhnath vs State of Punjab}\textsuperscript{12}, the Constitution brings in
actuality the distinct constitutional entities i.e. the Union territories, Union and State. It is also
stated that the power is divided between the three major instruments namely, judiciary, executive
and legislature. It demarcates their jurisdiction minutely and further expects and demands them to
exercise their function without interfering with others functions. They should function within their
own ambit.

If we examine the constitutional provisions, we would see that the doctrine of separation of power
has not been accepted in a very rigid sense in India. Personnel overlapping along with the
functional overlapping exists within the system. The Supreme Court is vested with the power to
declare void the laws passed by the legislature and the actions taken by the executive if they violate
any provision of the Constitution or the law passed by the legislature in case of executive actions,
which in essence further elaborates the fact that the judiciary has the power to judicial review on
the actions of legislature and judiciary both. The executive has the power to make appointments
to the office of Chief Justice and other judges as well, and in this way, it has the power to look into
or affect the functions of the judiciary. One can go on listing such examples yet the list would not
be exhaustive, as to how all three major instruments of the state complement each other.

In \textit{Indira Nehru Gandhi v. Raj Narain}\textsuperscript{13}, it was duly observed by the Hon’ble Court that: “In the
Indian Constitution there is separation of powers in a broad sense only. A strict separation of
powers provided under the American Constitution or as per the Australian Constitution does not
apply to India. Justice Chandrachud also observed that the political usefulness of doctrine of
Separation of Power is not widely recognized. No constitution can survive without a conscious
adherence to its fine check and balance. The theory of Separation of Power is a principle of restraint

\textsuperscript{11} Article 13- Laws inconsistent with or in derogation of the fundamental rights.
\textsuperscript{12} 1967 AIR 1643
\textsuperscript{13} AIR 1975 SC 2299
which has in it the ambit, innate in the prudence of self-preservation, that discretion is the better part of valour.”

Thus, in essence, the doctrine of separation of powers is not fully accepted in India’s Constitution. Justice Mukherjee, in Ram Jawaya v. State of Punjab\(^4\) duly observed 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.”

A thorough perusal of the above enumerated case laws says that the India doesn’t practice Separation of power very rigidly. Though it is not provided in the Constitution, but it is practised as the three organs of government exceed their power and interfere in the other’s functions as and when required, thereby maintaining checks and balances on one another.

Although, there is an explicit provision in India’s Constitution just like American Constitution that executive power is vested in President under Article 53(1) and in Governor under Article 154(1) but there is no provision which talks about the vesting of legislative and judiciary power in any organ. Thereby by a comparison between the two similar yet distinct systems we can conclude that there is no rigid separation of power.\(^5\)

In light of Article 53 the executive powers of the union are vested with the President and by virtue of Article 154 the Governor is also vested with execution powers but the only way that they do exercise their powers is on the basis of the aid and advice of the council of ministers at the Centre (Article 74) and at the State, as the case varies. Both President and Governor exercise the power of ordinance making under the constitution thus performing legislative functions. President makes laws for a State, after the dissolution of the State Legislature, following the imposition of the President’s Rule (Article 356). President has the power to disqualify any member of the house in light of Article 103. The judges of the Supreme Court are appointed by the President, and at the same time the parliament has the power to impeach the judges. The President has the power to

\(^4\) AIR 1955 SC 549
\(^5\) https://blog.ipleaders.in/separation-of-powers/, (May 31st 2021, 6.03 p.m.)
decide a disputed when a question arises as to the age of a sitting judge of Supreme Court or any High Court for purpose of setting restrain from the judicial service.

The Union Council of Ministers are accountable to the Lok Sabha (Article 75). This house by virtue of Article 61 of the Indian Constitution has the powers to start impeachment proceedings against the President and the any judge of the Supreme Court. The members of Council of Ministers will be members of either house of Parliament under Article 75(5) which thereby results in overlapping of personnel.

The judicial function of the Parliament is very substantial in certain aspects. It could consider the question of breach of any known parliamentary privilege; and in a case where the charge of breach is established, they are empowered to punish for contempt.

It is also germane state that the High Courts in certain marginal spheres performs such functions which are administrative in nature, rather than judicial. Their power of supervision over other subordinate courts under Article 227 is more administrative in nature than judicial. While under Article 228, they are empowered to transfer cases. They also exercise administrative control over the district courts in state’s as well. The legislative power bestowed upon the High Courts and the Supreme Court includes the power to frame rules which are extensively wide in ambit.

The Executive in India is authorized to legislate in the name of delegated legislation. In the name of administrative adjudication of the right of individual citizens, the administrative agencies, which are statutory tribunals and domestic tribunals have been constituted and perform judicial function.  

CHAPTER 3: CONSTITUTIONAL STATUS OF SEPARATION OF POWER IN USA

DOCTRINE IN USA

The United States of America has adopted the doctrine of separation and it is the very basis of American constitutional structure.

Article I, section 1 grants all legislative power with the Congress.

Article II, Section 1 grants all executive power with the President of the United States, and

Article III, Section 1 grants all judicial power with the Supreme Court.

The framers of the American Constitution believed that using principle of separation of powers in practicality would help to prevent formation of a tyrannical government by making it impossible for a single group or association of individuals from exercising too much power. Thereby, they envisaged that the balance of power should be attained by checks and balances between separate organs of the government. Thus, this alternative system, arising from the separation doctrine prevents any organ to become supreme in terms of powers.

This means that functioning of one organ is checked by the other to the extent that no organ may misuse the power. Therefore, the constitution of United States of America which enumerates the Doctrine of Separation of Power in its provisions also does not follow it in its rigidity similar to India, and hence has opted for dilution of powers just like India.17

THE LEGISLATIVE

Article 1 of Constitution of USA speaks of the provisions related to legislature. It provides legislative authorities, their powers, duties, functions and even the procedure is laid down in Article 1. In United States of America, legislative body is Congress and it is solely responsible as well as authorized to exercise all the legislative powers.

17 http://www.legalserviceindia.com/article/l16-Separation-Of-Powers.html, (June 1st 2021, 2.17 p.m.)
Section 1 of Article 1 of the Constitution of the United States of Americas states: All the powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives. Hence, all the legislative powers are vested in the congress.

Section 2 and 3 provides in it with the qualification to become the member of the house of representative and process of doing so. Section 5 deals with sole power of impeachment.

**THE EXECUTIVE**

Article 2 of the Constitution provides the provisions in relation to the executive body of the state. It asserts that, all executive powers are vested with the President and includes tenure of office, powers, duties, roles and responsibilities along with due procedure of exercising the powers, i.e., procedure lay down in the provisions of the Constitution.

Further, Section 1 of this Article states that the executive powers shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term be elected through different process.

**THE JUDICIARY**

Article 3 of the Constitution of United States of America deals with the provisions related to the Judiciary. It envisages that Supreme Court is vested with all judicial powers. Article 3 within itself includes, various sections, which provides with the powers, duties, tenure & removal of judges, judicial authorities and all the functions and roles of judiciary. Judicial powers are extensively given to Supreme Court of the United States of America and such other court as Congress may provide for.

**LIMITATIONS TO SEPARATION OF POWER IN USA**

The principle of Separation of Powers is adopted and used by United States of America by virtue its Constitution, but their Constitution nowhere mentions about the same. The actual, exact and
precise implementation of the Separation of Powers requires limitation, restrictions, imposed boundaries and a system accountability among different organs of Government. Thus, in the modern system of governance, Separation of Powers is partially adopted and hence the system of checks and balances is introduced.

By trying a practical approach and by thoroughly examining the functions of the system it can be alleged that the separation of power is not adopted absolutely, in lieu of interference by one organ of government into another. Also, in order to maintain proper control and coordination within the country it is important to have interference of different organs so that there cannot be misuse of powers and arbitrariness in any manner whatsoever.

a) A bill passed by the congress may be vetoed by President in exercise of his legislative powers.
b) President has power to make treaty but it is not applied unless approved by the Senate.
c) The Supreme Court has power to declare the laws made by Congress as Unconstitutional.

There are judgments given by the court in certain cases which substantially and conclusively proves that there is absolute Separation of powers, but with checks and balances, there is encroachment of one organ of Government in other.

It was for the first time, in Marbury v. Madison\textsuperscript{18} when Supreme Court of the United States of America interfered with the functioning of the Legislative organ of the state and declared a law unconstitutional, thereby establishing the principle of judicial review in U.S.A. This was an initiation of a system of checks and balances in USA.\textsuperscript{19}

\textsuperscript{18} 5 U.S. 137 (1803)
\textsuperscript{19} http://thelegalvoiceofindiaii.org/volume-6/doctrine-of-separation-of-powers-comparative-study-between-usa-india/, (June 1st 2021, 4.23 p.m.)
CHAPTER 4: COMPARISON BETWEEN USA AND INDIA

The Constitution of both the countries i.e., India and United States of America have adopted the Doctrine of Separation of power. The Constitution of United States of America, adopted this doctrine in its entirety meaning thereby that the three organs of the government i.e., the executive, the legislative and the judiciary work well within their scope and authority without encroaching upon or interfering with another organ’s work and functions.

Whereas as per the provisions in India, though the powers are separated but not absolutely or in an absolute manner. If ever there arises a situation of misuse or power by any organ of the state or if one organ doesn’t function well or within its ambit, then the other organs would be well within their constitutional powers to interfere in it functions.

There are major differences in the functioning and procedure of works of the organs of system in both the countries.

- Judicial powers in USA are given to courts and none other than Courts can exercise such powers but in India, judicial powers are given to the courts and also to the tribunals (essentially quasi-judicial authority), in some matters to the executive (pardon power of the President and the governor) and also to the legislature (to decide on matters of removal of executive and judicial officers by law).

- The legislative powers in Unites States of America are exclusively given to the Congress i.e., the Senate and the House of Representatives, and in India, legislative power is given to Parliament and the State Legislature but in India, legislative powers are also exercised by executive (ordinance making power of the President and the Governor) and in some matters even by the Judiciary.\(^\text{20}\)

CONCLUSION

The doctrine of separation of power is adopted but just not as strictly as the philosophers like Montesquieu have talked about and extensively explained in his theory. This doctrine has a far more practical interpretation and approach, in today’s age and time. The division of power is also not as rigid as indicated earlier. It is said that the doctrine should be considered to include a system of checks and balances between the three distinct government departments instead of implementing the doctrine in the strict sense of the government's functional machinery and procedures, thus rejecting the consolidation of governmental powers in each of the three departments.

Keeping in view certain provisions of the Constitution of India, or the concepts like Delegated Legislation, it can be said that the Constitution of India has partially adopted the Doctrine of Separation of power, under which it allows all the three governmental organs i.e., The Executive, The Legislature and the Executive to interfere or perform the functions of the others. With the intent to avoid the arbitrary use or misuse of power, the checks and balances are applied by the government and judiciary alike. In India these three bodies of system are related and complimentary to each other. In United States of America, it can be observed that this doctrine is adopted completely and there is complete separation of power among the three governmental organs, but there is also a system of checks and balances to keep a check on the functions performed by these bodies so that there is no misuse of power. So, the system of checks and balances gives the idea that although there is complete separation of power in USA but to avoid any kind of arbitrariness or misuse of power, one organ encroaches upon the functioning of the other.

Thus, we can safely come to the conclusion that the doctrine of separation of power has not been fully accepted and adopted in many countries, like India and USA till now. On comparing the Indian Constitution with that of United States of India, we can conclusively summarise that though both the countries have the division of power in discharging their governmental actions, but the doctrine has not been strictly adopted in practicality. In cases where there is any misuse of power or a need is felt by the state, then in that case the three organs of the state are empowered to encroach upon or interfere in the functioning and working of the other organ.
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