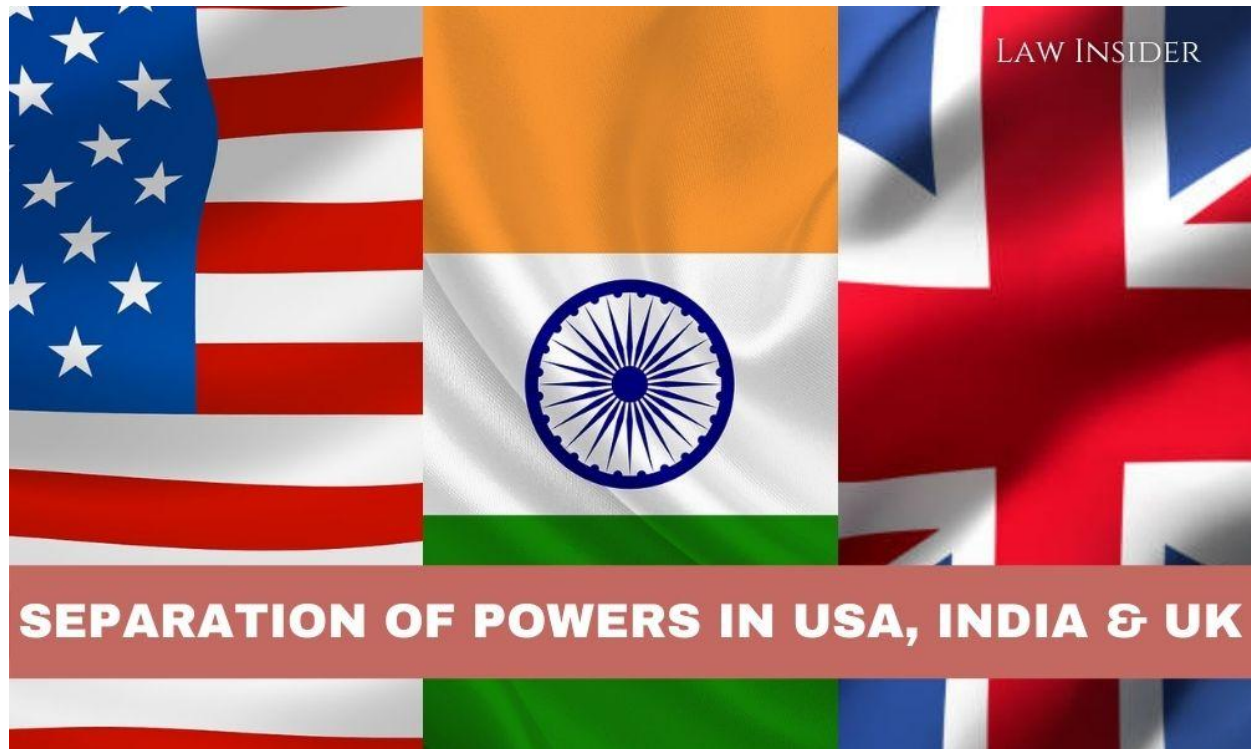


Analysis of Separation of Powers in India, USA & UK

16 min read

4 months ago



By Mohammed Asif

Published On: December 31, 2021 at 17:43 IST

Introduction

Under the doctrine of separation of powers, the state is divided into three different organs- legislative, executive, and judiciary each having individually independent power and responsibility on them so that no branch may obstruct the working of the other two organs. fundamentally, it is the rule that every state should follow in order to make law, execute the law, and also apply to each case expediently.

This doctrine focuses on the absolute division of power and tries to bring uniqueness to the operation of each organ.

History of Separation of Powers

There are three functions of a government. The lawmaking function is the legislative function. The executive function, which means the function to enforce the law or put the law into operation. And the judicial function, which means the function to interpret the law if it has been broken.

In the early times, all power would vest in one monarch or king. The same king would make the law enforce the law and decide the punishment for violation of the law. He was one in all and all in one. A lot of affairs would run on the whims and fancies of the king. In the 16th century, **Montesquieu** a French scholar came up with a theory that said that "**concentration of power in one person would result in tyranny**". If the monarch had all three powers in his hand, people's liberty would suffer. He said the solution would be the separation of governmental functions, which implies that three functions should not be concentrated in a single entity and should be separated into three different independent organs of the government. The theory of separation means that none of the three organs of the government can exercise any form which properly belongs to the other two.

If there is a system of checks and balances where one organ keeps a check on the other two organs by making sure that they don't misuse their power, the government can run harmoniously and smoothly.

What is the Separation of powers?

The separation of powers is a fundamental characteristic of a democratic system of government. This doctrine differentiates the state into three organs. The legislative, executive, and judicial organ gives each other the power and duty to fulfill different tasks. Numerous tasks are allocated to the different organs and their institutions in such a way

that each of them can scrutinize the exercise of power by the other branches. Consequently, no branch can become very powerful as to manage the system completely.

The separation of powers is very significant due to its proviso a crucial system of checks and balances. It makes sure that the different branches control each other. This is done on purpose to make them liable to the other. It splits power between the different organs of government. This balance aims to ensure that no individual or group of people in government is all-powerful. Power is allocated and not centralized in one branch. The very purpose of the separation of powers is therefore to stop the abuse of power.

Separation of powers in India

The functioning of the constitutional bodies in India is based on the theory of separation of powers. In India, the Parliament is a legislative organ, and its function is to make laws. The Parliament cannot enforce laws, nor can it encroach upon the function of the judiciary and act as code. The executive organ is the president and the Council of Ministers, with Prime Minister at its head. The executive is responsible for enforcing the laws made by the legislature. It cannot venture into making laws and deciding cases. The judicial organ is the Supreme Court. Its function is to interpret the laws made by the legislature and decide upon the actions taken by the executive. The judiciary cannot usurp the function of the legislature and start making laws, nor can it take any administrative decisions like the executive.

India being a federal nation, a similar model of separation of powers exists at the state level. We have a state legislature, which is the Legislative Assembly and the Legislative Council. The state executive, which is the governor, and the Council of Ministers. And the state judiciary, which consists of the high courts and the lower judicial. The doctrine of separation of powers has been adopted in most democratic countries, including India. What the doctrine needs are that no organ should serve the functions and powers of the other organs. But precisely applying the doctrine is not ideal, as no organ of the government can work with absolute independence. The three organs of the government should work in coordination with each other. If the government should function smoothly.

Landmark cases

- [I.C. Golaknath Vs the State of Punjab\[i\]](#)

It was held that the Constitution brings into subsistence numerous constitutional institutions, specifically the Union, the States, and the Union territories. It frames three major mechanisms of power, namely the legislature executive, and judiciary.[ii] It separates their jurisdiction exhaustively and contemplates them to use their respective powers without infringing their limits. They should act within the fields given to them.

In India, not only there is utilitarian overlapping, but there are people's overlapping also. The Supreme Court has the power to express void the laws which are passed by the legislature and the steps taken by the executive if they infringe any clause of the law enacted by the legislature. In the case of executive acts. The executive can influence the operating of the judiciary by doing appointments to the office of Chief Justice and other judges.

- [Indira Gandhi Vs Raj Narain\[iii\]](#)

It was held that in the Indian Constitution there is a separation of powers in a comprehensive sense only. As a reserved separation of powers has under the US Constitution would not apply to India. Justice Chandrachud in this case also held that the political utility of the doctrine of separation of power is not extensively recognized. No Constitution can survive without a deliberate cohesion to its fine check and balance. The concept of separation of power is a principle of moderation which has in it the precept innates in the wisdom of self-preservation, that circumspection is the better part of audacity.

- [Ram Jawaya Kapur Vs State of Punjab\[iv\]](#)

In this case, the Supreme court of India has held that the Indian Constitution has not in fact acknowledged the doctrine of separation of powers in its absolutely but the duties and responsibilities of the different organs of the state have been sufficiently transformed and, in a consequence, it can be said that the Indian Constitution does not scrutinize presumption by one organ of the State of functions that fundamentally belong to another.

- [Kesavananda Bharati Vs State of Kerala\[v\]](#)

In this case, supreme court had held that any provision of the Indian constitution cannot be amended by the parliament under Article 368 due to its basic structure and if the parliament made any amendments in violation of the basic structure, then such amendment will be declared unconstitutional, by this judgment the strict applicability of the doctrine can be seen.

History of Separation of Powers in the USA

In the United States, the president does not act alone. When the American Revolution came to an end in 1783, the United States government was in a state of transformation. The founding fathers knew that they did not want to establish another country that was ruled by a king. So, the debates were disciplined on having a powerful and equitable national government that secures individuals' freedoms and did not misuse its power.

When the new constitution was adopted in 1787, the structure of the infant government of the United States called for three separate branches, each with its powers and a system of checks and balances. This would make sure that no single organ of the government would ever become too strong because the other organs would always be able to scrutinize the power of the other two. These branches work together to run the country insert guidelines for us all to live by.

Separation of powers in the USA

The legislative branch is described in **Article 1**[vi] of the US Constitution. The legislative branch is comprised of 100 US senators and 435 members in the US House of Representatives. Which is known as the US Congress. Making laws is the foremost purpose of the law-making organ, but it is also liable for accepting the federal judges and justices approving the national budget and declaring war. Each state gets two senators and some number of representatives depending on how many people live in that state.

The executive branch is explained in **Article 2**[vii] of the Constitution. The leaders of this branch of government are the president and vice president who are responsible for enforcing the laws of Congress and set forth. The President works intimately with a group of advisors and councilors known as the Cabinet. These appointed individuals help the President in making crucial findings within their area of skills and capabilities, such as defense and Homeland Security, etc.-. The executive branch also appoints government officials, commands armed forces, and meets with leaders of other nations. And the executive organ engages nearly 4 million people to get everything done.[viii]

The third organ of the American government is the judicial branch and as stated in **Article three**[ix]. This branch is comprised of all the courts in the land from the federal district courts to US Supreme Court. These courts interpret the US nation's laws and punish those who break them. The highest court the Supreme Court settles disputes among states and hears appeals from state and federal courts, and determines that federal laws or constitutional. There are nine justices on the Supreme Court who are nominated for life.

Their democracy depends on an informed citizenry, so they must know how it works and what authority each branch of government has over its citizens. Besides voting, chances are that sometime in life he will be called upon to participate in your government whether it is to serve on a jury, testify in court, or petition their Congressperson to pass or defeat an idea for a law by knowing the branches, who runs them and how they work together, and one can be involved, informed and intelligent.

Holding the Checks and Balances by one branch on others

The doctrine of separation of powers keeps these three branches of the government, namely the legislature, executive, and judiciary separate from one and another so that no other branch could pose threat to another. Whereas the system of checks and balances is a constitutional mechanism by which each of the three organs of the government can limit their powers so that no organ can become so powerful.

For example: Congress will keep its checks and balances on the executive by ratifying the treaty, impeaching the president, and sometimes by withholding the money and by impeaching the supreme court judges it keeps its checks on the supreme court too. Whereas the executive branch can have the checks and balances on the legislature by using its veto power on the laws that were made and by appointing the judges of the supreme court it endows its checks and balances.

Similarly, the supreme court also utilizes its checks and balances on the legislative by judicial review it can declare any law which is void that is passed by the legislature, and when the orders passed by the president or vice president is unconstitutional it can make them void by this the supreme court can hold the checks and balances.

The established representations of the powers of the organs of American government are:

- The law-making organ is liable for making the laws of the state and earmarking the money which is needed to run the government.
- The executive organ is liable for accomplishing and implementing the public policy which is made and aided by the legislative branch.
- The judicial organ is liable for elucidating the constitution and laws and applying their simplifications to arguments and cases brought before them.

In the case of **Marbury Vs Madison**[x], it was held and formed the basis for the implementation of judicial review under Article III of the US constitution. This landmark judgment had been made and the checks and balances between the branches.

Separation of powers in the United Kingdom

The UK Constitution is uncodified which means there is no specific rule, there is no official document that outlines the legality of separation of powers. The separation of powers in the UK however, in various forms it does exist. So, as per the original definition of a separation of powers, which is a legislative branch, executive branch, and judicial branch. and having all of these existing separate from one another, does this exist in the UK? Do they have a separate institution for each of these? Well, the answer is no, the UK does not have this.

The United Kingdom has an overlap between the two, for example, ministers in the executive branch can also sit and make decisions in the legislative branch. So, the UK has ministered. And this includes the Prime Minister. And they sit in parliament, whereas Parliament is closely defined to be the legislative branch and the Prime Minister and the Ministers are closely defined to be the executive branch.

So, this tells us is that the executive is fused. And this is how the overlap between the powers of government will be seen.

Whereas between the legislative and the judicial branch it is within Parliament, So Parliament is responsible for its regulation. Significantly, Parliament acts almost like a judiciary on itself. And the judicial branch doesn't have as much power over Parliament as Parliament has over itself, which means there's a bit of an overlap here between the two branches.

- **Role of Lord Chancellor**

As of the Lord Chancellor who is the head of the judiciary of England and Wales, one of the members of the cabinet, and also the speaker of the House of Lords, it is a body that is of high regard within government, and it is a very significant position in the UK. He occupies power in all three branches. And we can say Lord Chancellor is the perfect example of a fusion of powers rather than separation power.

However, this has become a little bit rarer as they had changed because since 2003. There have been efforts to reform this. There was a reform in 2003 to abolish the office of Lord Chancellor. However, this took a bit of a backlash because their reforms took public opposition and, in the end, the abolishment of the Lord Chancellor's office never came to be. However, we do see reforms in the Constitutional Reform Act which was in 2005. And this Act held and reformed several pieces of policies. And it reformed the role of the Lord Chancellor.

- **What is Constitutional Reform Act 2005?**

Constitutional Reforms Act 2005 imparts new reforms to build up the checks and balances and also to cease the misuse and abuse of powers. It also assists in deciding better powers of separation in the United Kingdom. It is an Act to make preconditions for changing the office of Lord Chancellor and to make provisions in regard to the purpose of that office.

As per the **Section 2** of the **Constitutional Reform Act 2005[xi]**. It was the Prime Minister who was able to appoint a Lord Chancellor in which also took away Lord Chancellor's judicial power, so he was no longer part of the judiciary, which was a massive step forward in the separation of powers of the Lord Chancellor who once was a part of all three branches of government and now with the reform that is made, he is no part of the judicial branch.

The constitutional reform talks about a lot of other things as well. And one of such is the idea of a Supreme Court. Before the Constitutional Reform Act 2005, the highest court in the land was situated in the House of Lords and it is also one part of Parliament. The highest part of the judiciary was sitting in the legislative branch of government, which was again a symbol of a fusion of powers. And this existed as the Lords who were called as law Lords who would hear cases in the House of Lords and make decisions.

However, since 2005, the Constitutional Reform Act created a Supreme Court, so a separate building for which the lords would have abided and became official judges rather than members of the House of Lords. and the law Lords were no longer allowed to sit inside the House of Lords which was a huge step when it came to the separation of powers as it was a symbol of physical separation as the Law Lords would move across the road from Parliament to a newly formed Supreme Court, this was ratified in 2005. And then this was put into place in 2009. So, by this UK altogether saw a constitutional format by just applying more different policies that were to separate the three branches of government rather than to fuse them.

Comparison of the Separation of Powers

By contrasting the mechanism of distribution of powers in the U.S.A with that in India we can find that in America there is just one list while in India there are three lists namely Union, State, and Concurrent. Under the US constitution, exclusive powers of the center are only interpreted; there is no concurrent list and the excess stays with the states. In India, the exclusive powers of the union also of the states are defined, there is a large concurrent area and the excess stays in the union and not with the states.

Functions assigned to the union in India are very complex in scope than those given to the center in the U.S.A. Defense and external affairs are central (Union) subjects in both USA and India but the Centre's external powers seem to be broader in India than in the U.S.A. The Supreme Court in the U.S.A has helped in the thickening of the Centre as a powerful body; whereas in India, the Centre has been granted a powerful status by the constitution itself which is more extensive than that of the Centre in the U.S.A.

Similarly, the composition and concept of separation of power in India and the U.K are almost alike to each other as India being a British colony for over 200 years. The Indian separation of power which is guided by the Government of India Act, 1935 was enacted by British lawmakers. This is the reason that India and the U.K foresee almost the same concept of separation of power.

Recent issues in India

Independence of the Judiciary is an essential condition of Indian democracy, especially for the rule of law to persuade. The Judiciary is an active organ, ready to use the law to deliver social justice through a dynamic goal-oriented motion. In India, despite the fact that the Legislative and Executive are coupled, Judicial independence guarantees a fair Judicial order in the country.

The independence of the judiciary has been made controversial numerous times in recent past years, and the judiciary has always amazed the people. The Judiciary acts as a check on the Executive's embezzlement of power by monitoring as a bar between citizens and the state. As a result, the judiciary must be independent of executive coercion. The Executive and its compulsions obstruct the independence of the Judiciary.

Executive control has always been seen as an ultimatum to the freedom of the Judiciary. It is scary that the Executive would misuse its role to influence the end results of the case, which erodes the division of Governmental powers that may go unobserved. even, the interference of political parties in power, upon critical areas of state decision-making may also go unnoticed.

In today's world, the state has become the foremost litigant, and the superior courts, notably the Supreme Court, have become a nest of controversial conflicts, some of which have political voices. Recently the Chief Justice of India while delivering a lecture has highlighted the challenges before the judiciary in which it was stated that there is a growing tendency and even disrespect the court orders by the executive branch which is supposed to help and collaborate with the rule of law to prevail in the nation. He even stated that unless the executive and legislation make profound attempts to fill the judicial positions, appoint prosecutors, strengthen infrastructure, and make laws with an absolute prescience and stakeholder evaluation, the judiciary cannot be held accountable alone^[xii]

Few instances where Judicial appointments were called into question

Here the question that arises is whether the retired judges are proposed and appointed because of their integrity or because of help they may have done to the state, in which some of the few instances are:

- During Nehru's government, when **Justice Hidayatullah** has nominated as the vice president of India or when Justice Baharul Islam, who after becoming a Judge of Supreme Court, again became a member of the parliament.
- Nomination of **Justice Ranjan Gogoi** in Rajya Sabha, after making a Controversial Statement on the confrontations to the law which controls the quasi-Judicial tribunals. And after less than six months of retirement, he was nominated to the Rajya Sabha. In the final year of his term, he was involved in several famous judgments, that includes the Rafale Deal, the Ayodhya case, and the Assam NRC case, all of which were directly related to the BJP-led-NDA Government, all of which were decided in the Government's favor.
- In 1991 **Justice Ranganath Mishra** was chosen as chairman of the National Human Rights Commission and thereafter became a member of Parliament (MP) from the Indian National Congresses ticket.
- **P. Sathasivam** was chosen as Governor of Kerala within six months of his retirement from the position of Chief Justice. He led the bench that dissolved Amit Shah's First Information Report in the Sohrabuddin Sheikh fake encounter case.

Conclusion

Days of yore manifests the reality that if there is an absolute separation of powers the state cannot run functionally and productively. The smooth functioning of a state is attainable only by collaboration and common adjustment of all the three organs of the state. It is not possible to categorize the duties and responsibilities of the three organs of state in a numerical sense and each organ of the state should employ its power on the essential principle of **Checks and Balances** adding up to the fact that none of the organs of state should disturb the significant and important functions of the other organs.

ABOUT THE AUTHOR

Mohammed Asif is a Third year Law student pursuing B. A. LLB(Hons) from ICFAI law school, Hyderabad. He is a future lawyer and Lifelong humanitarian who believes in consistency and hard work rather than talent.

Edited by: **Aashima Kakkar, Associate Editor, Law Insider**

References:

- [US Constitution](#)
- [Golaknath Vs State of Punjab](#)

- [Separation of Power in India and USA](#)
 - [Separation of Power – An Overview](#)
 - [Comparative Study of Separation of Power in India, USA and UK](#)
 - [Interference in Judicial Independence](#)
-

I.I.C. *Golaknath Vs the State of Punjab* 1967 AIR 1643, 1967 SCR (2) 762.

[ii] Prachishah "[Separation of power in India and USA](#)" (last visited on 26 December 2021)

[iii] *Indira Gandhi Vs Raj Narain* 1975 AIR 2299

[iv] *Ram Jawaya Kapur Vs State of Punjab* AIR 1955 SC 549

[v] *Kesavananda Bharati Vs State of Kerala* AIR 1973 SC 1461

[vi] The US Constitution; Art.1

[vii] The US Constitution; Art.2

[viii] [Reviewed by Biderhan Cinar](#) (last visited on 27 December 2021)

[ix] The US Constitution; Art.3

[x] *Marbury Vs Madison* [5 U.S. 1](#) Cranch 137 137 (1803)

[xi] Constitutional Reform Act, 2005; Section.2