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Separation of Powers: A Comparative Study under India, UK and USA Constitution

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ABSTRACT

India has its written Constitution, it is said to be lengthy. It is a Holy text to the Citizens of India. The Constitution entails Fundamental Rights and Fundamental Duties in Part III and Part IV respectively. The Constitution has recognized the separation of powers as part of it. 'Separation of Powers' is a basic principle where powers and responsibilities are divided among the executive, legislative and judicial branches. The author attempted to analyze the doctrine of Separation of Powers as envisaged under the Constitution of India and also the author would like to demonstrate the difficulties faced by the three wings of the government in practice while implementing the provisions of the Constitution. The author also draws a comparative analysis with the Indian, US(the United States of America), UK(United Kingdom) Constitutions regarding the scheme of Separation of Powers.

Keywords: Separation of powers; Executive; Legislative; Judiciary; Constitution of India

I. INTRODUCTION

Separation of powers refers to the demarcating of the powers, responsibilities to the existing three branches of the government and also includes checks and balances to avert the concentration of unchecked power. In this, the powers of one branch of government are limited.

There is no power or a right to overarch into another organ's powers and responsibilities. This doctrine contemplates the idea that the government functions must be based on the three-tire division of legislature, executive, and judiciary. The three organs should be distinct, separate, and sovereign in their sphere so that one does not trespass the territory of the other. The first allusion to the doctrine of separation of powers can be traced back to Aristotle who is the father of political science, he analyzed that the government should be divided into three different branches but he didn't specify their separation. The Roman republic also observed a similar form of political structure around the same time.

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A French philosopher, Baron-de-Montesquieu he was of the view that without any check, power must never be trusted, with this view he divided government responsibilities into three different categories of legislative, executive, and judiciary and he sketched out how liberty is affected if these powers are vested upon the same person which leads to tyranny.

This theory mainly signifies the division of different powers in between different organs of the state executive, legislature, and judiciary.

The theory of separation of powers signifies mainly three formulations of Governmental powers;

According to Wade and Phillips², Separation of power means three different things:

1. There should be independence of one organ of the government that it should not control or interfere with the exercise of its function by another organ.
2. The Same person should not form part of more than one organ, there should be separate and distinct individuals in all three branches.
3. The functions assigned to one organ should not be exercised by other organs of the government.

II. HISTORY

The Separation of powers concept first gave birth in ancient Greece and has become widespread in the Roman Republic as part of the initial Constitution of the Roman Republic. Aristotle (384-322 BC) in his book (4th century B.C.) "The Politics" he has stated that "There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it of these are well arranged, the constitution is bound to be well arranged and the differences in constitutions are bound to correspond to the difference between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the official; and third the judicial element. A French philosopher, Baron-de-Montesquieu divided the government responsibilities into three different categories of legislative, executive, and judiciary and he outlined how liberty is affected if these all powers are vested upon the same individual which leads to tyranny.

Locke described the three powers legislative, executive, and federative, but he didn't say about the independent distribution of the functions among them. Rather, he treated the legislative as the supreme branch, and the executive and federative branches were only

² Lectures on Administrative law – C.K. Takwani, Reprinted 2021, Eastern Book Company.

bothered with the internal and external affairs of the country and it operates under the control and authority of the King. There is an absence of the mention of the judiciary as a separate branch of the government in Locke's theory. Therefore, it has been pointed out that Locke's theory does not genuinely certify as an explication of the doctrine of separation of powers.

III. MONTESQUIEU THEORY

The Montesques separation of powers is a model that involves the separation of political power between the executive, the legislature, and the judiciary. In this separation of powers, each branch is limited from intervening in the area of responsibility of any other branch. So, the separation of powers refers to the division of government responsibilities into different branches to constraint any one branch from exercising the major functions of another branch. The main intention is to avert the concentration of power and to provide for the checks and balances.

According to Montesquieu's theory, it means that nobody should be vested with all the three powers in their hands, it means that every organ of the government should exercise its power alone. Those three organs of the government are:

1. Legislature (the Legislature should only make laws but should not enforce or administer them)
2. Executive (the executive should administer the laws which are made but should not influence the legislature in the law-making process or stand in judgment of the same)
3. Judiciary (judiciary should determine rights and uphold justice without involving in the functions of law-making or administration process)

Montesquieu expressed that "when the legislature and executive powers are united in the same persons or the same body of magistrates there can be no liberty, because apprehensions may arise lest the same monarch or separate should enact tyrannical laws".

Effects of Montesquieu's theory:

- Since powers are distributed among these different government departments these departments gained very deep knowledge of the matters with which they were concerned.
- These departments enjoy only limited powers because powers are distributed among different government departments which prevent the rise of dictatorship.
- Separation of powers is an effective check against the exploit of power and ignorance of power which is accompanied by checks and balances

Defects of Montesquieu's Theory:

- This Montesquieu theory is a mistake because what it means is the separation of function and not the separation of powers.
- Though this theory is adopted by most of the countries, it suffers from defects, separation of powers leads to jealousy, friction, and suspicion between these three organs
- This theory is not fully possible because the executor has some role in rulemaking and even the legislature also performs some judicial functions, so it is not possible to the extent fully.

Executive

The President is the head of the executive branch who commands the military and he makes political appointments under the checks and balances system. The checks and balances system instead of concentrating it in one person or branch it distributes power among these. It curtails one branch from gaining too much power;

The Executive can command the military, can veto laws, make decrees or declarations, promulgate lawful regulations and executive orders, can appoint judges, and has the power to grant pardons to convicted criminals, can refuse to spend money allocated for certain purposes. Though the Indian Constitution allocates executive powers to the President and Governors they are empowered with certain legislative powers and certain judicial powers. Similarly, the legislature exercises certain judicial functions and the judiciary exercises few legislative and executive functions.

Legislature

The Legislature is primarily concerned with enactment and change of general rules of law regarding the aspects of the conduct of its citizens and institutions. The Legislature of India is the Parliament which comprises two bodies namely Lok Sabha and the Rajya Sabha.

It enacts the laws, imposes taxes, authorizes borrowing, and it prepares the budget and it has the sole power to declare war, can also start investigations, mainly against the executive branch, it appoints the heads of the executive branch and sometimes even appoints judges as well and it has the power to ratify treaties. The powers and functions of these legislative organs also differ from country to country. In the case of the UK, the UK Parliament consists of the House of Common and the House of Lords

As in the case of the US, the legislative branch is the American Congress which is a

bicameral legislature and it also consists of the House of Representatives and also the Senate. Indian Parliament also consists of two houses, the house of people or the Lok Sabha which is the lower house, and the Rajya Sabha (House of states), the upper house. As in the case of the American Congress and that of the Indian Parliament here, the legislative power may be limited but it is kind of unlimited in the case of the British Parliament.

Judiciary

The constitutional framers drafted it so meticulously that to provide an independent and impartial Judiciary. The judiciary is mandated to interpret the laws but not to make them. Judiciary is not to lay down the general norms of behavior for the government. Judiciary is the third pillar of government. In a democratic state, the judiciary has a very important role that is to safeguards individual liberties and to enforces the laws made by the executive and the legislature. Judiciary can declare an act carried out by the executive or legislature as unconstitutional and invalid. keeping in mind certain constitutionally assigned encroachments the three organs have to exercise their functions

In *Golak Nath v. State of Punjab*³ said that “they should function within the spheres which were allotted to them to exercise their respective powers by not overstepping their limits and also said that no authority created under the constitution is supreme”.

Therefore if any of the three organs try to expand its jurisdiction it would affect the harmonious efficacy of the tripartite system of the government. No organ has to superintend the other organ over the exercise of the powers and functions of another unless the Constitution strictly mandates.

Advantages

1. Because of the division of work there is no overlapping in the system and hence nobody interferes with the other's working area.
2. There is no possibility of competition between different organs as the overlapping is removed.
3. Due to the separation of works the efficiency of the organs of the state increased hence the time consumption decreases.
4. The degree of purity and correctness increases because the experts will deal with the concerned matters of their parts.

Disadvantages

³Golak Nath v. State of Punjab, A.I.R. 1967 S.C. 1643

1. For proving one's supremacy over the other organ there might occur a possibility of competition between organs.
2. As there is no supervisor over other organs there is the possibility of delay of the process hence the actions of the organs can become arbitrary.

IV. SEPARATION OF POWERS IN USA

In 1787, the doctrine of separation of powers has been widely accepted and strictly adopted by the founding fathers of the US constitution and is also the heart of the constitution⁴. Separation of power is implicit in the American Constitution, it shows the mutual exclusiveness of three organs of the government. According to this, the legislature cannot exercise executive or judicial power and the executive can't exercise the other two powers similarly the judiciary cannot exercise the other two powers.

The US Constitution allocates the three powers in three separate branches. The first three articles of the US constitution⁵ called the distributive articles which define the structure and powers of the congress (legislative body), executive and the judiciary.

- Article 1; Section 1 of the US Constitution vests all the legislative power in the Congress,
- Article 2; Section 1 of the US Constitution vest all the executive power in the President and,
- Article 3; Section 1 of the US Constitution vest all the Judicial power in the Supreme Court.

All these branches have certain powers, and each of these powers is checked or limited by another branch this is the system of Checks and Balances. By the words of CORWIN⁶, the condition in the US “ separation of powers are more specifically seen in the USA but the absolute separation of powers does not exist in the USA.”

V. SEPARATION OF POWERS IN UK

The UK is one of the particular states in the world. It is one of those few states which doesn't have a written constitution. Since there is the absence of a formal written constitution it is possible to claim that there is no formal separation of powers in the UK. It can't be presumed that it does not exist. They do exist but in weak form because they overlap and work together.

⁴ *Bukley v R. Valeos*, 424 U.S. 1 (1976),

⁵ *Constitutional and Administrative Law*, by Alex Carroll

⁶ *Constitutional and Administrative Law*, by Alex Carroll

There are many examples of overlap between the three functions of the government for example:

1. Law Lords sit on the appellate committee of the House of Lords and in the House of Lords as a legislative body as well as in the judicial committee of the Privy Council ;
2. Magistrates exercise both the administrative and judicial functions in that they grant licenses.

There has been a debate in the UK as to whether or not there is a separation of powers in UK as Professor Munro has noted, two opposing camps had been established. The academic writers of constitutional law can be placed in the first of these camps, the debate that there is no separation of powers. In the opposing camp is the judiciary, senior judges have expressed that the UK's constitutional practices are based on separation of powers.

VI. SEPARATION OF POWERS IN INDIA

Indian Constitution is the world's largest Constitution. In the Indian Constitution, the theory of separation of powers was nowhere expressly mentioned. The doctrine of the separation of power in the Indian constitution does not confer in a water tight compartment. Separation of judiciary from the executive is enjoyed under Article 50 of the Indian constitution⁷. There is no provision in the Indian Constitution dealing with vesting the legislative and judicial powers in any particular organ. Under Arts. 53(1)⁸ and 154(1)⁹ of the Indian Constitution the executive power of the union and state is vested by our constitution in the President and the Governor, respectively.

In the case *Ram Jawya v/s State of Punjab*¹⁰, It has been held by the Supreme Court that there is no rigid separation of powers. In the popular case of *Kesavananda Bharati v/s State of Kerala*¹¹ Beg. J has added that the separation of power is also part of the basic structure of the constitution.

No one organ of the three organs of the Republic can take over the function which was assigned to the other. In the case *Indira Nehru Gandhi v/s Raj Narain*¹², Ray, C.J. observed that the separation of powers in the Indian constitution is in a broad sense. There is a rigid

⁷ Separation of judiciary from executive

⁸ The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

⁹ The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

¹⁰ *Ram Jawya v/s State of Punjab*, AIR 1955 S.C. 549.

¹¹ *Kesavananda Bharati v/s State of Kerala*, 1975 Supp SCC 1, 61, para 136.

¹² *Indira Nehru Gandhi v/s Raj Narain*, AIR 1975 SC 2299.

separation of powers as under the American constitution or under the Australian, Constitution does not apply to India.

In the case of *AK Roy v/s India*¹³, it has been said that the legislative power and an ordinance have the same status as that of the law of legislature. In *AK Gopalan v/s Madras*¹⁴ it is held by the Supreme Court that over the legislative as well as the executive, the court has powers to make a judicial review. the cabinet minister exercises both the executive and administrative functions also. Article 74(1) states that it is compulsory for the executive head to comply with the advice of cabinet ministers. In the case of *Ram Jawya v/s State of Punjab*¹⁵, it was held that the executive is a part of the legislature and it is also accountable.

In India, strict separation of power is not followed like the American Constitution but the system of check and balance is followed. However, no organs can take over the essential functions of other organs which is part of the basic structure of the Indian Constitution. No organ can take over essential functions of other organs not even by amending and if it is amended then such amendment will be declared as unconstitutional.

VII. DIFFERENCE BETWEEN SEPARATION OF POWERS IN US AND UK:

The American model has separation of powers as a part of the American constitution, wherein the Britain model they have integration. In the U.S all three branches were systematically split between the executive, the legislative, and the judiciary whereas in Britain this is not so clearly done. The constitution in us is codified which gives power to all the three organs of government but in Britain, it's no the same the constitution is not codified and thus ultimately queen has the power.

VIII. DIFFERENCE BETWEEN SEPARATION OF POWERS IN INDIA AND US:

In American democracy, Congress can have a check on the power and actions of the president but in Indian democracy, the Prime Minister can control the legislature in the parliament by the virtue of his party's dominance. In the U.S judge can hold office if he can perform his duties but in India, a judge can hold office only till the age of retirement. In the U.S each and individual states have their constitutions to regulate their governance but then in India, Indian Constitution is followed by all individual states except Jammu & Kashmir.

IX. SIMILARITIES BETWEEN INDIA AND US:

The Indian legislature is known as a parliament and the U.S. legislature is known as congress.

¹³ *AK Roy v/s India*, AIR 1982, SC 710.

¹⁴ *AK Gopalan v/s Madras*, AIR 1950 SC 27

¹⁵ *Ram Jawya v/s State of Punjab*, AIR 1955 S.C. 549.

Both India and America have a bicameral legislature. There is a well-organized judiciary in both U.S. and India having the Supreme Court as the apex court.

System of checks and balances

The framers of the Indian constitution have ingeniously developed a system of checks and balances and they had included checks and balances in the constitution. The system of checks and balances is very important for the proper functioning of the three organs of the government. All the three organs of the state impose checks and balances on the other for decentralization of powers. Every judge of the Supreme Court shall be appointed by the president as said in Article 124(2) of the Indian Constitution. We might think that there is the possibility that the president can be manipulative and appoint judges who will favor his view but Article 124(2) of the Indian Constitution says that the chief justice of India mandatorily is consulted while appointing judges in the Supreme Court. The president has the power to remove any judge from the office but he can exercise this power only if at least 100 members of Loksabha or 50 members of Rajyasabha give written notice to the speaker. So numerous provisions in our constitution puts a bar on the power of the president, after getting written notice an investigation is also conducted and that if the judge is found guilty then a motion for removal is issued and it has to be adopted by each house of parliament by a majority of the total members of the house and a majority of at least two-thirds of members of that house present and voting once this motion is adopted in both houses only then the president can issue an order for the removal of a judge. Checks and balances act in a way that no organ of the state becomes too powerful. By looking above it is very crystal clear that the Indian Constitution has a system for checks and balances

X. CONCLUSION

The Constitution is the supreme law of the land and no organ should go beyond the role assigned to that particular organ by the Constitution. Judiciary, Executive, and Legislature are obliged to strictly adhere to one of the most fundamental features of the Constitution 'Separation of Powers'. There must be the separation of power but there must be some reserved power with all organs which enable them to control the arbitrary use of power. There are various advantages as well as disadvantages present with the doctrine.

In conclusion, we can say this very clearly that the Indian constitution did not adopt the separation of powers very rigidly, but it is crystal clear that the Indian constitution has adopted the division of powers. This doctrine signifies the fact that one organ or body of organs should not exercise all the three powers of the government. The centralization of

authority degenerates into tyranny and abuse of power.
