

SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

JUDICIAL PRONOUNCEMENTS

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

In **Re Delhi Law Act case**⁵² Hon'ble 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 **Golaknath vs. state of Punjab**¹, 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.

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**²,

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.

¹ AIR 1967 SC 1643

² AIR 1989 SC 1899

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 need 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 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.