

SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

SEPERATION OF POWER IN UNITED KINGDOM

Although Montesquieu based his doctrine of separation of powers taking into account the British constitution, as a matter of fact at no point of time this doctrine was accepted in water tight compartments in England. On the contrary the reality is that the doctrine of integration of power was a reality in England. Lord chancellor was the head of judiciary, and he was also the chairman of house of House of Lords (legislature). the constitutional reforms act 2005, is an attempt to strengthen the separation of powers in relation to judiciary. The constitutional reforms act 2005 attempts to strengthen the separation of power by creating a supreme court to replace the appellate committee of house of lords, injecting an independent element into judicial appointments and removing the lord chancellors' roles as head of judiciary and speaker of the house of loards.it could be that aspect of these reforms, particularly in relation to the lord chancellor, strengthen the institutional separation but weakens check and balances. The constitutional reforms act 2005 creates a new supreme court as the highest appellate court transferring to it the appeal functions of the House of Lords and in devolution cases of the Privy Council. This takes effect in October 2009. The main reason is to ensure a separation of power between the legislature and the judiciary and to enhance public understanding of and confidence in the judicial system. In England the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government. In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus, we can say that doctrine of separation of powers is not an essential feature of British Constitution. It's to be noteworthy here that under English system the executive cannot impose taxes without the concurrence of legislature, as the imposition of taxes is purely a legislative function.²³ It has been also observed that there is no limitation on the legislature. The British system involves the following system; -

1. That the judicial power would be exercised by court, presided by judicial officer.

2. The legislature has a power to prescribe maximum or minimum punishment for an offence. However, the selection between the minimum punishment and the maximum punishment is a judicial function, which cannot be exercised either by legislature or the executive. If the legislature seeks to exercise this power or to punish the individual offender by legislation, that would be a bill of attainder, which is condemned by the bill of rights.
3. Carrying out a punishment is an executive function of state and this function is to be subject to any condition imposed by law.
4. The power to remit the sentence (mercy), in the case of a particular offender, is an executive function.

Lord Diplock in the case of **hinds v queen**, stated that the United Kingdom has no written constitution comparable to that of Australia and USA, yet in the sense that the legislature, the executive, the judicial powers are vested in three separate organs. The basic conception of separation of power is recognized even in the unwritten constitution of that country. Again, in the case of **Duport steels ltd v sirs** *lord diplock* observed it cannot be too strongly emphasized that the British constitution, though largely unwritten, is firmly based on separation of powers. Parliament makes the laws; the judiciary interprets them. In the case of **H.V Homes office** House of Lords held that, parliament makes the law, executive carries the law into effect and judiciary enforces the law. In the case of **Reg v home secretary**,¹ it was observed that it is a feature of the peculiarity of the British conception of the separation of powers that the parliament, the executive and the courts have each their distinct and largely separate domain. Parliament has legally unchallengeable rights to make whatever laws it thinks fit. The executive carries on the administration of the country in accordance with the power conferred on it by law. The courts interpret the law and see that they are obeyed. In **R V Secretary of state ex parte fire brigades union**², Lord Mustill said at 267, the feature of separation of power is that the parliament, executive and the courts have their distinct and exclusive domain. Parliament has right to make law, whatever law it thinks right, the executive carries on the administration of the country in accordance with the power conferred on it by law, and the courts interpret the law and see that they are obeyed. In **Duport steels ltd v Sirs**³ Lord Scarman said;-

¹ (1995) 2 WLR 464

² (1995) 2 ALL ER 244

³ (1980) 1 ALL ER 529 AT 551

“The constitution separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk...confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for parliament to cut the powers of the judges.”

Even though the doctrine of separation of powers has deep roots in English, it's admitted fact by the academician and philosophers that the doctrine was never accepted in English. The doctrine finds no place in the English constitution. The UK constitution provides the supremacy of parliament. Parliament has unlimited legal power to enact any law without external restraint. Parliament supremacy is a legal principle meaning that a law formally made by parliament, in the sense of queen, House of Lords and House of Commons acting together, must conclusively be accepted as valid by the courts.⁴

⁴ Pickin v British railway boards 1974