

# SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

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## SEPERATION OF POWER IN U.S.A

In 1787, the American constitution was drafted, and the doctrine of separation of power was adopted. In America, the doctrine of separation of power forms the foundation on which the entire structure of the constitution is based. The doctrine of separation of power has been accepted and strictly adopted by the founding father of the U.S constitution and is considered to be the heart of the American constitution. Art. I says:

“All legislative powers herein granted shall be vested in a congress.” Art.

II says:

“The executive powers shall be vested in President” Art.

III similarly states:

“The judicial power..... Shall be vested in one supreme court.....”

In the leading case of **Field v Clark** the US supreme court observed, that “*the congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution*”.

In the case of **Youngstown sheet & tuber co. v sawyer**, J Jackson observed that the “*with all its defects, delay, and inconvenience men have discovered no techniques for long preserving free government except that executive be under the law, and the law be made by parliamentary deliberations*”

The American Constitution further ensures that not only that there should be separation of the judiciary from the other two organs, it also ensures that there should be separation of the legislature from the executive. To achieve that end, they provided by Art. I, section 6(2) of the constitution that no Senator or Representative during the time for which he is elected, be appointed to any civil office under the authority of the United State.in the American constitution ,there is a system of check and balance, and the powers vested in one organ of the government cannot be exercised by any other organ.in theory, no one organ of the government can encroach upon the power of the other. Jaffe and Nathanson stated, the division of our government into three great establishment is an indisputable fact-writ large and clear in the basic documents. Jefferson said’

*The concentration of legislative, executive and judicial power in the same hands is precisely the definition of despotic government. it would be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. one-hundred and seventy-three despots would surely be an oppressive as one*<sup>1</sup> in U.S.A the doctrine has following features, which is applied in modern practice.

- The doctrine has produced a presidential form of government which is based on dichotomy of the executive and the legislature. The president is the head of state and of government. He is neither a member of congress nor dependent for his tenure upon the confidence of the congress in him.
- With the advancement of time the rigorous doctrine has now been relaxed. The president now exercise legislative functions by sending messages to the congress and by the exercise of the right to veto. The congress has power to exercise judicial functions of impeachment to remove the president. Senate discharges the executive functions regarding treaties and in the making of certain appointments. The congress has delegated the legislative power to numerous administrative agencies and these bodies exercise all types of functions. The position in America is that despite the theory that the legislature cannot delegate its power to the executive a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognized as valid. The Supreme Court never held that the combination of all the powers in one agency is unconstitutional.
- So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that legislature enacts the Law, but it is also true that in dealing with the new problems, where Law is silent, the Courts have to create the Law. The Chief Justice Hughes's remarks are most pertinent in this connection, as he candidly said- „The Constitution is what the judges say it is.<sup>2</sup> The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers.

In the present era, the strict observance of the doctrine of separation of power is impossible because the functions had grown in a speedy manner. Each organ of the government is interdependent on each other. as Woodrow Wilson had observed that “the trouble with the theory is that government is not machine but a living thing...no living thing can have its organs offset

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<sup>1</sup> Cited in *Indira Gandhi v Raj Narain*, 1975 supp SCC 1, Para 319. Air 1975 SC 2299

<sup>2</sup> *Handel, Charles Evans Hughes and the Supreme Court* (1951), II quoted by Bernard Schwartz in *American Constitutional Law* 1955 page 130

against each other as checks and live. government is not body of blind forces, it is body men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose, their cooperation is indispensable; their warfare fatal”<sup>3</sup>.the modern view is that although the framers of American constitution had adopted the doctrine of separation of power to divide the three organs of the government so that they may not overlap within the functions of others but it was never conceded that the three organs will operate with full and absolute independence. The intention of framers was that each organ should work within its bound and should not overlap within the functions of other. These organs should work as a check and balance on each other.

## **SEPERATION OF POWER IN AUSTRALIA**

The common wealth of Australia constitution act 1900 adopts the model of separation of power by distributing three branches of government into three different bodies.

Sec, 1 provides;-

The legislative power of the common wealth shall be vested in the parliament.

Section 61 provides;-

The executive power of common wealth is vested in the queen and is exercisable by the governor general the queen representative.

Section 71 provides;-

The judicial power of common wealth shall be vested in a federal supreme court, and in such other federal courts as the parliament creates.

From the above sections of the Australian constitution act it's clear that the legislature makes the law, the executive puts the law into operation and the judiciary interprets the law. A strict separation of power is not always evident in *Australia.in Victorian stevedoring and general contracting co Ltd v Dignan* the high court of Australia held that it was impossible, consistent with the British tradition, to insist upon a strict separation between legislative and executive powers.in absence of the contrary the doctrine of separation of power is embodied in the constitution.it was intends to confine each of the three departments of the government the exercise of power with which it was

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<sup>3</sup> Supra note 4. p.p264. <sup>36</sup>  
(1931) HCA 34

invested by the constitution. it has accordingly been held that under the Australian constitution, judicial and non-judicial functions cannot be united in the same persons or body of persons and judicial persons can be vested only in a court. in various constitutional cases the high court has separated the judicial power from the other two powers but not separated the legislative and executive power due to the nature of the Westminster system of the responsible government<sup>4</sup>. the high court decisions which affirms that the system of responsible government prevents the complete separation of legislative and executive powers was *Victorian stevedoring and general contracting co pvt ltd v Digmans (Digmans case)* 1936. the Digmans case is also considered authority for the proposition that parliament may delegate its power without significant restrictions.

In practice there is only partial separation of powers, that is the judiciary is independent and separated from the other two branches i.e. The legislature and the executive. The executive (cabinet ministers) is formed from within the legislature (parliament). according to Hughes Australia has a political system that is suggested to be one that follows the Westminster parliamentary system and responsible government. The Australian system of government combines and uses aspects of both the UK model and the US model of government and separation of powers. The Australian model is therefore a mixture of English and American model. These models have important philosophical and theoretical origins based in significant historical events. The English separation of powers model based in the English revolution of 1688 and the American separation of powers model based on American revolution of 1775 and the declaration of independence of 1776. there was not a similar revolution in Australia, instead it has been gradual peaceful social, political and constitutional reforms. Thomson (1980) coined the term "*Westminster mutation*" to describe the mixed parentage of Australia. The Australian political system is a hybrid of the Westminster system of government and the American federal and constitutional aspects of government. There is a significant difference between the theory and practice of separation of powers in countries like the UK, US and the Australia.

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<sup>4</sup> *Waterside workers federation of Australia v j.w.alexandra ltd (Alexandra case)* 1918 25 CLR 434