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# UNDERSTANDING THE DOCTRINE OF SEPARATION OF POWER: A CLOSER LOOK INTO THEORY VERSUS PRACTICE IN INDIA

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Dibya Ranjan Swain, PG Department of Law, Utkal University

Jyotirmaya Pal, PG Department of Law, Utkal University

## ABSTRACT

We have evolved from the concept of “Might is always right” where all the powers and authority were vested in the King. In the current political and constitutional setup, the powers and functions are divided among the various categories or organs of the government i.e., a) the legislative, b) the executive, and c) the judiciary. According to the doctrine of separation of power in a free democracy, the three organs should be separated and independent of each other. The core principle of the doctrine of separation of powers is that the entities of the government do not converge or exchange the roles that they perform separately. Though there is no specific provision in the Indian Constitution but India's Constitution contains several implicit provisions for the separation of powers between the legislature, the executive, and the judiciary. Various judicial decisions have also recognized the concept of the doctrine of separation of power in India. One of the first cases was of *Golak Nath v. State of Punjab* and subsequently, it has been included as part of the basic structure in the case of *Indira Nehru Gandhi v. Raj Narain*.

This paper aims to interpret various theories of the doctrine of separation of power to understand the doctrine in different constitutional scenarios. Further, this paper aims to study the extent of the applicability of separation of power by studying various judicial decisions and through comparative studies of other constitutions.

**Keywords:** Separation of Powers, Indian Constitution, Judicial Decisions, Basic Structure Doctrine, Comparative Constitutional Analysis.

## INTRODUCTION

Very much so, separation of powers is an essential feature in almost all democratic societies of the world, including India-the other one-and must work adequately. The principle of separation of powers says that the legislature, said the executive, and the judiciary perform different functions, and no limb should have unchecked power for governance. In the Indian context however, although the constitution does not envisage the separation in absolute terms as is the case with the United States, it nevertheless accepts that those organs must perform distinct functions. As debates on the Indian Constitution were taking place there were concerns about the concentration powers within any institution, such concerns were also present in countries adopting the democratic system like the United Kingdom and Australia. Women and men who take these ancient sayings on the mischief of power, or more accurately, nay the absence of power, seriously make bull's eyes of prescience every single time governance attempts to tilt against the equilibrium principle. When it comes to implementation, the Judiciary system in India has taken an unusually confrontational and vigorous strategy towards upholding the law, protection of civil rights of the people and in particular public interest litigation. This complex example of the confrontation of Russian power institutions illustrates that radical separation cannot be achieved, however, the essence of this doctrine that serves the purpose of control over powers is important in India and countries far away from India to safeguard democracy. The focal points of my study will therefore include: Separation of Powers as observed in India, a look at Separation of Powers in other systems, the emerging importance of the judicial body, and effects on risks to democracy.

## BACKGROUND OF DISTRIBUTION OF POWER:

The concept originated in Greece and Rome, and it is believed that it originated in ancient Greece and later spread across the Roman Republic. As Aristotle in his book "The Politics" which dates back to (384-322 BC) mentioned that "*There are three elements in each constitution. One element discusses subjects of common importance and the second element is the official and is the Judicial element*".

French Philosopher Bodin and English Philosopher Locke likewise wrote on the subject of separation of powers. Here, Bodin did not speak directly regarding the doctrine. His works and thoughts on the balance between liberty and authority do imply something along the lines of the Doctrine of Separation of powers.

The doctrine thus received a further impetus after Montesquieu, a French Judge, expounded the theory of doctrine of separation of power or theory of division of power in his celebrated work *Esprit des Lois* (The Spirit of Laws in 1748). He is regarded as the prime modern proponent of the doctrine. The term "Trias Politica," coined by him, also explains what checks and balances exist between the organs of government. There is a beautiful description of "Trias Politica," which likens it to a three-legged stool, wherein each leg represents a particular organ of the government, namely, the legislature, the executive, and the judiciary. Thus, a three-legged stool functions well if all the three legs work together and are strong. This is the principle upon which the modern democracies are based.

### UNDERSTANDING MONTESQUIEU'S DOCTRINE:

The 18-century France had complete monarchy and then King Louis XIV was a despotic ruler. His administration was likewise seen as arbitrary against the subject. The people's rights and liberty were questionable and scant. Montesquieu was imbued with the ideas of liberalism read from Locke. Moreover, Montesquieu was influenced by the British Constitution, i.e., the liberty of an Englishman as conceived by Montesquieu "rests on the separation and independence of the three organs of government from each other".

Montesquieu stated in his book:

*"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive powers.*

*Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined with the executive power, the judge might behave with violence and oppression.*

*Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or*

*differences of individuals*"<sup>1</sup>.

The separation of powers was Montesquieu's clear solution to the liberty dilemma. He warned that when a single body, such as a committee or a king, has complete authority over laws, enactments, and rulings, there is a guarantee of oppression and even tyranny. What would happen if the same person who enacts laws also performed enforcement tasks? What about a judge who serves the same authority that appointed him rather than the law? The law will be reduced to a forgotten history and a glimmer of hope in such a situation. Divide to rule was Montesquieu's simple and alluring solution.

He argued that the establishment of a system of checks and balances, in which the legislative, executive, and judicial branches all play a role, could accomplish this. Then, neither would allow the other to become overly dominant. This idea is fundamental to modern democracies and has influenced state formation worldwide. The fact that Montesquieu's theories are still applicable today rather than being outdated is heartening.

#### **DEFECTS IN MONTESQUIEU'S THEORY:**

Despite its strengths, the theory of separation of powers has several historical and practical drawbacks. For instance, the British Constitution, which lacks the complete separation of powers Montesquieu outlined, did not implement it. Additionally, the doctrine incorrectly prescribes the legislative, executive, and judicial branches' functional operations as distinct and separate, which is incorrect because the government is made up of systems, and these branches do have some overlap. Work becomes challenging when the strict separation is implemented in practice because it, for instance, forbids legislatures from punishing individuals who violate privileges, prohibits the delegation of certain tasks that call for specialised knowledge, or even forbids the courts from enforcing procedural rules.

Today's welfare states have governance structures that make it impossible to uphold a rigid separation of powers. By distinguishing between essential and incidental powers, modern explanations alter the situation somewhat and permit power overlap, allowing equilibrium without rigidity. The aforementioned doctrine is frequently thought to be intended to safeguard individual liberty. However, the law, independent courts, informed citizens, and the capacity

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<sup>1</sup> Montesquieu, C. de S. (1748/19XX). *The spirit of laws* (T. Nugent, Trans., Ed.). Publisher. (Original work published 1748, pp. 151–152).

of individuals to modify the government's structure to suit the needs of society and political processes at any given time can all better safeguard individual freedom.

## **PRACTICE OF SEPARATION OF POWERS:**

### **USA:**

The value of the separation of powers is ingrained in American democracy. It is a fundamental principle that shapes the nation's governance. By precisely outlining and restricting the authority of the three branches of government—legislature, executive branch, and judiciary—the US Constitution guarantees the smooth operation of the government. To keep one branch from usurping the authority of the other, these branches operate autonomously within their specified mandates.

### **Legislative Branch (Congress):**

Congress, which is composed of the Senate, the House of Representatives, and a bicameral legislature, among other organs, has the authority to enact laws.- According to Article I of the Constitution, Congress has the authority to enact laws, impose taxes, regulate commerce, wage war, and manage federal funds. Additionally, Congress has historically had the ability to override a presidential veto with a two-thirds majority in both houses, completing the check and balance against the president's powers.

### **Executive Branch (President):**

The President is in charge of the executive branch, as stated in Article II of the Constitution. - The President is in charge of enforcing the nation's laws, managing its foreign policy, and acting as the nation's top military leader. The other branches of government have authority over the President's ability to sign executive orders, appoint judges to the federal bench, and reject laws passed by Congress. Judicial Branch (Supreme Court and Lower Courts): The Supreme Court and any lower courts that Congress may occasionally designate and create hold the judicial authority of the United States. The Constitution's Article III goes on to explain that this authority's significance stems from its capacity to render legal decisions. Laws ought to be rigorously and impartially formulated, assessed, and implemented while taking into account all actions—political and otherwise—taken and suggested by the legislative or executive branches. This is a crucial role in preserving the other powers' power balance.

The theory of separation of powers depends on the idea of check and balance. It familiarises people with how each branch of government limits the authority of the others. For instance, laws can be passed by Congress, but the President can also reject them, and the judiciary can declare them unconstitutional if needed. This kind of structure is purposefully in place to maintain government stability and prevent any abuse of power by making sure that no branch grows more powerful than the others.

## **UK:**

The United States and the United Kingdom have quite different constitutional provisions regarding the division of powers. This is mostly because the UK's constitution is uncoded and has mostly changed over time. Although it is acknowledged in theory, the systemic separation of powers is less strict in the UK than it is in the US. The House of Commons and the House of Lords make up the bicameral Parliament of the United Kingdom, which serves as the "legislature" of the three branches of government.

The most democratic institution in the nation is the House of Commons, which is populated by Members of Parliament (MPs) chosen by the general public. However, the presence of socially titled people in the House of Lords, such as bishops and hereditary peers, contributes a certain degree of tradition and quality.

Parliament is primarily responsible for enacting laws, closely monitoring government operations, holding it accountable, and approving or disapproving government motions. The Prime Minister and the Cabinet hold the authority in the executive branch and are in charge of day-to-day operations and actual law enforcement. The Prime Minister is typically appointed by the Sovereign to lead the party with the majority in the Commons.

These relationships foster a mutually beneficial relationship between the executive and legislative branches of government, often combining them. Central to the interpretation and application of the law is the judiciary, which is represented by the Supreme Court in the aristocratic judiciary organ. Judith Reeve, who has written extensively about issues pertaining to the Virgin Islands and Miami, explores how contentious the concept of the Constitution is—that is, how its normative framework clashes with the division of authority in Parliament. However, even when such policies appear to be in violation of fundamental human rights or principles, this is justified by Parliament's supreme legislative power. Ultimately, rather than

being an absolute theory of government, the principles of the separation of powers as they are applied in the UK are better understood as enabled history and practice.

### **India:**

Although the Indian Constitution has some aspects of the separation of powers idea, it does not adhere to it strictly. Since the legislative, executive, and judicial branches of government are independent, this theory is relevant in democracies. Some contend that although this principle is enshrined as one of the fundamental components of India's constitutional architecture, at least in its most basic form, its application is neither strict nor absolute.

### **Distribution of Powers Among the Three Organs:**

According to Articles 53(1) and 154(1) of the Indian Constitution, the President has all executive authority, while Parliament has been given legislative authority to enact laws that fall within the parameters of the Constitution. Nevertheless, there is no explicit clause that defines and assigns legislative or judicial authority to a certain entity. In actuality, the judiciary—which consists of the Supreme Court, the High Courts, and lower courts—has the majority of judicial authority. These courts operate independently. It has the responsibility of determining whether laws are constitutional and whether they are being followed.

In *Golak Nath vs State of Punjab*<sup>2</sup>, The Supreme Court held in *Golak Nath v. State of Punjab* that all three branches of government must function within the legally permitted boundaries of their respective domains of authority. Nonetheless, the Indian political system is inherently characterised by functional overlap.

### **Functional Overlap and Flexibility:**

The interconnectedness of all governmental branches is acknowledged by the Indian Constitution. For instance, the President carries out adjudicatory functions by deciding on matters like the retirement age of judges and disqualifying members of parliament, as well as legislative tasks like enacting ordinances. Parliament, which also has judicial functions like penalising individuals who violate the privilege and instituting an impeachment trial for the

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<sup>2</sup> *Golak Nath v. State of Punjab* (1967). AIR 1967 SC 1643.

president, gives the executive some legislative authority.

In addition to its court-related responsibilities, the judicial branch also carries out legislative and executive tasks, including establishing court rules of procedure and supervising subordinate courts. Because one organ may assess and influence the actions of the other organs, this cross-functioning promotes better cooperation and supports the ideas of "checks and balances," preventing situations in which one organ has excessive authority.

### **Judicial Recognition of Separation of Powers:**

In the case of *Supreme Court Advocates-on-Record Association v. Union of India*<sup>3</sup>, The Supreme Court ruled that one of the fundamental elements of the Constitution is the division of powers. It further clarified that as long as one executive branch does not assume an intrinsic function of another, the concept is not broken when one executive branch encroaches on the duties of another. The Court ruled that neither the legislative nor executive branches should meddle in issues relating to the separation of powers in those domains, including but not restricted to the selection of judges.

Likewise, in *Ram Jawaya Kapur v. State of Punjab*<sup>4</sup> according to the Supreme Court, the Indian Constitution maintains a sufficient amount of separation between the three departments for practical reasons rather than applying the theory in a strict way. The distribution of powers in the Indian constitution has been viewed differently since its elements are adaptable enough to permit some functional overlaps for convenience and flexibility in government. This balance is maintained by the judiciary, which makes sure that no organ interferes with the primary functions of another. This idea, along with the concept of checks and balances, aids in maintaining democracy and the rule of law in India's governing structure, even though it is not strictly enforced doctrinally.

### **VARIOUS JUDICIAL DECISIONS ON THE SEPARATION OF POWER:**

#### **Dr. Ashwani Kumar v. Union of India and Another**<sup>5</sup>:

The issue in this case was whether the court may mandate that Parliament enact legislation

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<sup>3</sup> *Advocates-on-Record Association v. Union of India* (2016). 5 SCC I.

<sup>4</sup> *Ram Jawaya Kapur v. State of Punjab* (1955). AIR 1955 SC 549.

<sup>5</sup> *Dr. Ashwani Kumar v. Union of India* (2019, Misc. Application 2560 of 2018)



addressing torture in detention. It brought up the following issues: The principle of separation of powers is a fundamental component of the Indian Constitution, despite its limitations. Although they do not create laws, courts uphold constitutionalism and interpret the law. Unless there is an obvious constitutional void that needs to be filled, this would be against the separation of powers theory. It emphasised the necessity for courts to utilise their authority with caution, stating that they should stay inside the bounds of the constitution and refrain from interfering with the legislative or executive branches of government until there are flagrant violations of fundamental rights.

**D.K. Basu v. State of West Bengal<sup>6</sup>:**

In this instance, the degradation of human dignity was emphasised, and custodial abuse was denounced as a flagrant breach of Article 21. It was decided that torture was unconstitutional. The judiciary was not allowed to enact laws; it was only allowed to protect people's fundamental rights.

**Vishaka v. State of Rajasthan<sup>7</sup>:**

Cases where judicial orders were given without legislative action were shown here, however these actions were thought to be short-term. This reaffirmed the idea that courts merely act to temporarily fill in the legal loopholes; they do not create new laws.

**Kesavananda Bharati v. State of Kerala<sup>8</sup>:**

The supreme court ruled that the division of powers is a fundamental component of the organic organisation and that no branch of government may override the authority of the others.

**Kalpana Mehta v. Union of India<sup>9</sup>:**

The case looked at how much overlap between the branches was tolerated under the functional separation of powers. However, it made it abundantly evident that man's role is to create and interpret laws, not to enact laws based on any particular constitution.

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<sup>6</sup> D.K. Basu v. State of West Bengal (1997). (1 SCC 416)

<sup>7</sup> Vishaka v. State of Rajasthan (1997). (6 SCC 241)

<sup>8</sup> Kesavananda Bharati v. State of Kerala (1973). (4 SCC 225)

<sup>9</sup> Kalpana Mehta v. Union of India (2018). (7 SCC 1).

**P. Ramachandra Rao v. State of Karnataka<sup>10</sup>:**

The court arrived at the conclusion that criminal trial timetables went beyond the appropriate parameters of the judicial role. Although courts could not syntactically establish laws as the legislature would, they were free to interpret and enforce families of laws.

**State of Himachal Pradesh v. Satpal Saini<sup>11</sup>:**

The ruling overturned the High Court's decision to revise the legislation of state agencies, stating that courts have no authority to direct the legislature to make any changes.

**In Employees' Welfare Association v. Union of India and Another<sup>12</sup>:**

The Supreme Court made it clear that no court has the authority to order the legislature to enact legislation or to interfere with government choices. The Constitution's system of government makes it clear that state legislatures and Parliament have the last say on legislation. Because of the separation of powers principles, judicial involvement in legislative policy-making procedures is therefore illegal.

**V.K. Naswa v. Home Secretary, Union of India and Others<sup>13</sup>:**

The Court did hold, however, that judicial review does not give the court the authority to dictate to the legislature how and when it should enact laws. Courts do not make policy within the other two branches of government; they merely supervise the Constitution and make sure that its directives are followed. Only very seldom, when there is no existing law and there is an urgent need to protect the people's inalienable rights, do courts order legislation to be enacted.

**COMPARATIVE ANALYSIS BETWEEN USA, UK AND INDIA<sup>14</sup>:**

Due to the lack of a codified constitution in the UK and the development of constitutional norms over many years, the division of powers in the UK constitution differs significantly from that in the US constitution. Though it is interpreted more loosely than in America, the idea of

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<sup>10</sup> P. Ramachandra Rao v. State of Karnataka (2002). (4 SCC 578).

<sup>11</sup> State of Himachal Pradesh v. Satpal Saini (2017). (11 SCC 42).

<sup>12</sup> Employees' Welfare Association v. Union of India (1989). (4 SCC 187).

<sup>13</sup> V.K. Naswa v. Home Secretary, Union of India (2012). (2 SCC 542).

<sup>14</sup> Gadhave, A. S. (n.d.). International Scientific Journal of Engineering and Management. ISSN 2583-6129. SPPU University, Pune. find year of publication.

separation of powers is acknowledged in England as well. The UK Parliament, which is made up of the House of Commons and the House of Lords, is the highest body with legislative authority. However, the House of Commons, which is the centre of democracy since it emphasises the ultimate sovereignty of the people, is made up of many democratically elected Members of Parliament. On the other hand, the House of Lords' appointed members, bishops, and hereditary peers bring a distinct blend of historical and professional viewpoints. As a monitor over the government's operations, the Parliament, which is tasked with the crucial task of formulating and carrying out policies, is prepared to amend or veto government measures.

The Prime Minister and the Cabinet, who are principally in charge of carrying out the law and overseeing the day-to-day operations of the State, are granted executive authority by the constitution. The Prime Minister is usually the head of the majority party in the Commons, and the Queen's desire to select her is only a formality. It becomes challenging to establish a distinct boundary between the legislative and executive branches as a result of this. Clarifying and enforcing the law are important functions of the judicial branch of government, which is represented by an independent court system headed by the Supreme Court. However, she lacks the authority to declare primary legislation passed by the Parliament invalid, which limits her ability to do judicial review. This relationship upholds the idea of parliamentary sovereignty, which holds that the Parliament has the final say over legislation, even when doing so would violate fundamental human rights. In conclusion, the British system of government views the theory of separation of powers as one that is balanced in terms of the accountability and collaboration of every branch of government, all of which have been influenced by past events and current conditions.

## **CONCLUSION:**

The principle of separation of powers, which supports the preservation of the balance of power and accountability between the legislative, executive, and judicial branches, is fundamental to democratic governance. Montesquieu's thesis placed a strong focus on each branch's independence from the others' meddling. In actuality, though, there are clear variations in how this idea is applied. With its clearly defined boundaries and emphasis on checks and balances, the United States provides the most uncompromising application of this idea in its doctrine and practices. The lack of a written constitution, which is based on development and includes history and politics, allows the United Kingdom, on the other hand, to function in a more

flexible and harmonious manner.

According to the Constitution and court rulings, the idea is understood to be acceptable in India and is neither rigid nor extreme. A system of interdependence and checks and balances, which are essential to the complex democratic system's governance, are made possible by functional overlaps between the realms. However, more than any other branch, the judiciary is charged with maintaining the constitution's primacy and reining in any institution's abuses.

Notwithstanding its drawbacks, which include the challenge of achieving complete separation and occasionally inter-branch conflicts, the idea is crucial to upholding the rule of law, protecting people's liberties, and preventing dictatorship. Although there is room for functional adaptation to fundamental principles, contemporary democracies might alter the theory to accommodate shifting social needs, which accounts for the doctrine's ongoing importance in constitutionalism.