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Separation of Powers in India and USA: Analyzing its Role on Ensuring Good Governance

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This research paper analyses the effectiveness of the tripartite system of government i.e., Legislature, executive, and judiciary. For the smooth running of government there has to be separation of powers and function amongst the organs of government. Basically, it means to separate the powers and functions of one organ of government with that of another. Aristotle was the first person to categorize the governmental functions into deliberative, magisterial and judicial locks. But it was the French jurist Montesquieu who conceived this separation of powers in his famous book 'Spirit of laws'. According to him one organ should not abdicate the power of another organ. He further says that one cannot expect liberty and freedom when both legislative and executive powers are exercised by the same person. However, this theory had different implications in different countries. In the USA, 'Separation of powers' and 'Checks and balances' were adopted to ensure rights, liberty and equality and prevent the abuse of power in governmental machinery. Both separation of powers and checks and balances has to be applied in every country in order to secure constitutional, political and democratic development. In countries like India where we follow parliamentary form the application of separation of powers becomes difficult because the fusion between legislative and executive is very important for the harmonious working of parliamentary democracy. Hence, separation of powers is just relative and not absolute. However, In order to achieve good governance and rule of law, fair constitutional building is the symbol of quality, law and liberty. The researcher tries to find out the ideologies behind separating the powers and functions of government. The researcher also tries to throw light upon how it is separation of parties and not powers.

Keywords: *Separation of powers, checks and balances, Democracy, Interference, Ideologies.*

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I. INTRODUCTION

The concept of separation of powers in the American Constitution is considered as one of the most important features. The demarcation of three wings in the constitution of America is so clear when compared to other countries in the world. For example, in countries like India there is active participation of the executive body in the matters concerned with the legislature because the entire power of union is vested in the parliament and parliament consists of two houses and the President. However, in the USA the distinction of powers among the organs of government are separate and hence they act as an independent body. For example, the congress cannot be dissolved by an executive body i.e The President and in the same way the President has the fixed term and he cannot be held responsible to the congress in any way. However, let us park our thoughts here and move a step forward and look at how the American constitution has not yet served as proof of the independence of the three wings of the government. It is because the government of America was weakened by implementing the doctrine of checks and balances to secure the liberty of the people, where one organ will interfere and check the powers and functions of the other organ if they are working or not². India does not possess a rigid separation of powers. Hence the purpose of doctrine of checks and balances is to prevent capricious use of powers. For example, the appointment of judges is done by the President(executive) and the removal of judges is done on the basis of resolution passed by the parliament(legislature)³.

Research Methodology

The research is done with the help of doctrinal and empirical research. Data is collected mainly from books, statutes, constituent debate, article, journal, newspaper etc., empirical data is collected from law students

Research Questions

1. Whether the doctrine of separation of powers is in accordance with the principle of checks and balances?
2. How does the separation of power impact the democracy of a country?

Research Objectives

1. To understand that this doctrine of separation of powers ensures impartial working of the government

² Vishnoo Bhagwan et al, World Constitution a comparative study, 128(sterling publishers Pvt ltd. 11th ed. 2017)

³ A game of checks and balances, *The Hindu*, March 31 2021.

2. The aim of this research paper is to identify the ideologies behind the development of separation of powers
3. To know how separation of powers is consequently changing in the modern era.

Hypothesis

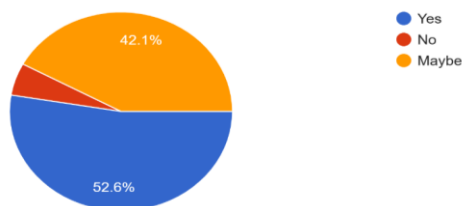
The researcher assumes that the separation of powers is relative and not absolute.

II. SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

Prof. K.T. Shah, a member of constituent assembly, proposed to insert Art 40-A by way of amendment to the Indian constitution. However, Shri Hanmanthiya gave dissenting opinion by saying “We already have Parliamentary Form of Government and let us not amend to bring Presidential executive” he further added that the conflicts between the organs of government would be suicidal to the peace and harmony of the country. It is always said that the executive should be separated from the legislature and the executive, such a separation exists in a broader sense in America. However, the Americans themselves are dissatisfied with the rigid separation. This was the main reason to turn down Art 40-A from being added to the Indian constitution.⁴

In *Bandhwa Mukti Morcha v. Union of India*⁵, it was held by the supreme court that though there is no express provision regarding separation of powers in India we can implicitly apply the doctrine from the constitutional structure. Hence in *Kesavananda Bharati v. State of Kerala*⁶, separation of powers was held as the Basic structure of Indian Constitution. In *Indira Nehru Gandhi v. Raj Narain*⁷ The doctrine of separation of powers as applied in America and Australia in a rigid and strict sense cannot be the same in India. J. Chandrachud says no constitution can survive without proper adherence to the principles of checks and balances. Hence, checks and balances furthers the aims and objectives of separation of powers.

Does the checks and balances system furthers the objective of separation of powers?
19 responses



⁴ Amlan Chakraborty, *Principles of separation of powers and concentration of authority*, JTRI Journal, 3-5, 1996

⁵ *Bandhwa Mukti Morcha v. union of India* AIR 1984, SCC 549

⁶ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461

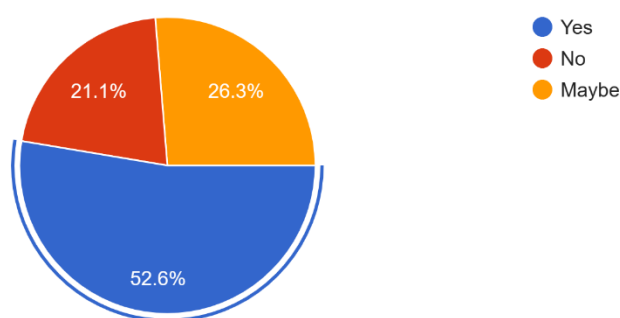
⁷ *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SCC(2) 159

In India, the President is the executive head. He in his legislative capacity propagates the ordinance⁸. He also has the power to declare the emergency during the failure of constitutional machinery⁹. Art 103(1) gives the president the judicial functions wherein he decides whether a person from either house of parliament be disqualified¹⁰.

The courts have asked the three organs of government to function in their own spheres without overstepping their limits and to act as an independent body.¹¹ Art 50 of the Indian constitution separates the judiciary from the executive. But in reality, executive body is said to be functioning as judicial body in appointment of judges¹². Therefore, the empirical research also proves that in India there is not only overlapping of functions of organs but also overlapping.¹³

Does the Separation of Power contemplate independence of organs of government ?

19 responses



In America, President is the executive head and he also possess the power to vote bills¹⁴ which is passed by the congress, the bill is then sent to the houses wherein 2/3rd majority is required without which it cannot become law¹⁵. The president is also said to make treaties regarding foreign affairs thereby he is also said to have legislative power. In *United states v. Curtiss Wright Export Corp*, John Marshall in his arguments points out that the president is the sole organ of Nation and sole representative in foreign affairs¹⁶. The president of US gives information of the union/state to the congress in his legislative capacity¹⁷. The congress also interferes with the powers of the president by casting a vote on the budget. Congress is

⁸ Indian constitution, art. 123(1)

⁹ Indian constitution, art. 357

¹⁰ Indian constitution, art. 102(1)

¹¹ *Golak Nath v. State of Punjab*, (1967) AIR (2) SCR,

¹² Indian constitution, art 124, 126, 127.

¹³ *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

¹⁴ American Constitution, art. 1 sec 7(2)

¹⁵ *INS v. Chadha*, 462 U.S. 919 (1983)

¹⁶ *United states v. curtiss wright export corp*, 229 U.S. 304(1936)

¹⁷ American constitution, art II, Sec 2

vested with great powers since it has got the sole power to remove the judges only on impeachment proceedings.¹⁸

Judiciary acts as supervisor for other two organs by way of judicial review. Though legislature has got power to enact law, the judiciary enacts laws in certain issues where legislature is silent about it¹⁹. Art 61 of the American constitution gives the house of parliament the authority to remove the president. Thereby, legislature is exercising judicial function.²⁰

III. SEPARATION OF POWERS IN MODERN ERA

In modern times separation of powers should be understood in the view of institutional efficiency. The framers of the constitution from the start of the American republic have understood this concept as a contemporary constitutional law and this understanding has ceased to exist. The experiences of institutional form of political competition have turned off political competition has turned out not to be branches but political parties. If inter branch checks and balances remain as a hope, then the understanding of Framers of constitution would put the constitutional structure and constitutional aims into dangerous risk. It is on us as to how we understand and recognize the actual procedure of political competition works in bringing new approaches to constitutional law and the institution. This would in fact help us achieve aims of separation of powers. This is why in the modern era it is said that there is separation of parties and not powers.²¹

Home minister Amit Shah addressed the MP's by saying how dangerous consequences would a democratic country face, if the legislature is encroached by the executive and judiciary. He said the organs of government are pillars of democracy and there has been a complaint that the legislature has gone weak when compared to the other two organs of the government. It is so sometimes that the judiciary and executive body are blamed for encroachment but however it is not their fault, it is the legislature and all of us responsible for it. Our duty is to strengthen the legislative body. If we fail in our duties then the country has to face dangerous consequences for the existence of democracy.²² In 2020, a conference was conducted in Gujarat by All India Presiding Officers, where many issues were discussed relating to harmonious co-ordination between legislative, executive and judiciary. The Prime

¹⁸ Amlan Chakraborty, *supra note 3*, at 3.

¹⁹ Dr. Veena Madhav Tonapi, A Seminal approach to constitutional philosophy, 484(KILPAR), 2008

²⁰ Amlan Chakraborty, *supra note 3*, at 6.

²¹ Dary J. Levinson and Richard H. Pildes, *Separation of powers, not parties*, Hein online, 22 Nov, 21:00 IST <https://heinonline.org/HOL/License>

²² Business standard, *legislature responsible for encroachment by executive, judiciary; can have dangerous consequences: Shah*, July 04 2019, 23:37 IST.

Minister emphasized more on the separation of powers and checks and balances that is built into our constitutional design. However, there are many instances where separation of powers is undermined which in turn weakens the functioning of checks and balances thereby deficiencies in integrity can erode the people's trust in the smooth functioning of government.²³

It was the first time in *Marbury v. Madison* that the judiciary declared something to be “unconstitutional” and established the concept of Judicial review in the American constitution. This later helped the American form of government to decide on the concept of “checks and balances” under separation of power.²⁴

In *Seila law v. consumer financial protection Bureau*²⁵ The court held that the President can remove any director of the consumer financial bureau and it is his absolute authority to do so. (As a result of mortgage lending abuses during the financial crisis, Congress created the CFPB)

Seila law struck down the limits on removal as a violation of article II of the constitution, which says the president has got the power to remove a person from the executive branch and it cannot be held as unconstitutional. Court moves a step forward and says this would not allow any checks on the President's power and he will start acting according to his whims and fancies, there can also be no statutory limits on the president's ability to fire those officials who are conducting an investigation on him. It would be a grave mistake to repeat the pattern here. However, checks on presidential power are not inherently good. In order for democratic accountability to work, the president must be able to exercise a considerable amount of control over most executive branch operations. The law must be applied equally, free of political favoritism and self-dealing, and respectful of professionals and experts who do not belong to either party. A requirement that Congress must justify its own investigative efforts based on an explicit legislative purpose, as established in *Trump v. Mazars*²⁶, highlights how critical it is to have trustworthy independent regulators within the executive branch who can hold everyone accountable for misconduct that violates the law, including the president.²⁷

IV. IDEOLOGIES BEHIND THE DOCTRINE

Now, is it safe to ask on what ideologies the separation of powers is based? Democracy can

²³ The red lines, *The Indian Express*, Nov 28, 2021

²⁴ *Madison*, 5 U.S. 137 (1803)

²⁵ *Seila law v. cfpb*, US 591, S.Ct. 2183

²⁶ *Trump v. Mazars*, US 591, S.Ct. 2019

²⁷ Daniel I. Weiner and Martha Kinsella, *Checks and Balances in Trump-era Supreme court*, Brennan Center For Justice, 20 Nov 2021, <https://www.brennancenter.org/our-work/analysis-opinion>

be the first idea behind this doctrine of separation of powers. However, this separation of powers may or may not serve the purpose of self-government. The second idea would be the competence and enforcement of professionals. Democracy would remain as an idea until the professionals' bureaucracies implement it in a fair way. Lastly, if there is no protection of people's fundamental rights then there would be clear despotism in the working of democracy and professional administration of the country.²⁸

V. CONCLUSION AND SUGGESTIONS

The repeated interference of one organ into the functioning of another may diminish the confidence of the people in the integrity and efficiency of the other organs. Too much concentration of power in the hands of one organ of government may also undermine the spirit of democracy. If the doctrine of separation of powers is applied in its strict and rigid sense one cannot expect for the smooth running of government. That is why there is no strict application of this doctrine in India and the USA.

Rather than having watertight compartments between the powers and functions of the organs of state, it is better to have the concept of checks and balances wherein the system imposes certain duties and rights that are crossed over. However, we can say that the doctrine of checks and balances aims at achieving the goals set in separation of powers.

But the modern era on separation of powers has its own interpretation which says there is separation of parties and not powers. To conclude, I would like to say that the doctrine of separation of powers is very important for the functioning of democracy. However, the American government purports to have a very unique and a better system in regards to the doctrine but consequently has failed to establish the same. Thus, many countries have adopted this doctrine in their constitution either expressly or impliedly modifying it to the situation that exists in their particular countries.

- In my opinion the doctrine of Montesquieu should not be considered as a myth because it carries truth, in the sense the doctrine of separation of powers has to be exercised by the organs keeping in mind the concept of 'checks and balances'.
- Having Legislative Impact Assessment to increase public awareness on legislative issues, a framework for pre- and post-legislative impact assessments is required, in which legislative proposals are evaluated on the basis of their social, economic, environmental, and administrative impact. Legislation Committees should be

²⁸ Abhishek Bajaj, *separation of powers- in its diluted form*, Vol.no.5 (AGUIJRSSH)22 2017,

established in parliament to oversee and coordinate legislative planning.

- To ensure a fair and democratic situation, there shouldn't be concentration of power with one person that would lead to arbitrary exercise of power.
- The Supreme Court can take steps to ensure more transparency and accountability in order to make it more democratic. According to the researcher, one cannot expect liberty to prevail if the judging power is combined with either legislature or executive body, because the judge would then act as a legislator and an oppressor which would lead to despotic rule in the country.

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