



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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# **SEPARATION OF POWER AND JUDICIAL ACCOUNTABILITY<sup>1</sup>**

AUTHORED BY - ASHISH NATH TIWARI & DR. SANDEEP KUMAR SINGH

## **INTRODUCTION**

The Separation of Powers doctrine has a long history. The doctrine's history can be traced back to Aristotle. The idea of separation of powers was developed in the 16th and 17th century by British politician Locke and French philosopher John Bodin, respectively. Locke distinguished between what he called-

Discontinuous legislative power,  
Continuous executive power, and  
Federative power.

He included within “discontinuous legislative power”, the general rule-making power called into action from time to time and not continuously. “Continuous executive power” included all those powers which we now call executive and judicial. By “federative power” he meant the power of conducting foreign affairs. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book '**Esprit des Lois**' (**The spirit of the laws**). Montesquieu's division of power included a general legislative power and two kinds of executive powers: an executive power in the nature of Locke's “federative power”, and a “civil law” executive power including executive and judicial power.

The changes in early eighteenth-century British constitutional history provided Locke and Montesquieu with the basis for this idea. Following a protracted conflict between Parliament and the King, Parliament won legislative authority in England in 1688, leading to the enactment of the Bill of Rights. As a result, the King eventually acknowledged the legislative and taxing authority of Parliament as well as the judicial authority of the courts. The King had administrative authority at the time, Parliament had legislative authority, and the courts had judicial authority. However, England later abandoned this fundamental division of powers and adopted a parliamentary system of government.

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<sup>1</sup> ASHISH NATH TIWARI, & Dr. SANDEEP KUMAR SINGH, Assistant professor, (B.A.LL.B.), Faculty of Law, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur.

According to **Montesquieu**- *“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 judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*

*There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions, and of trying the causes of individuals.”<sup>2</sup>*

According to **Wade and Phillips**<sup>3</sup> say that the doctrine means the following three things-

- (a) the same set of persons should not compose more than one department of the three departments;
- (b) one department should not exercise the functions of the other two departments, and
- (c) one department should not control, or interfere with the work of other two departments.

According to **Blackstone**, *“if legislative, executive and judicial function were to be vested in one man, that would be the end of personal liberty.”*

**Marshall J.** observed in case of **Marbury vs. Medison** that *“the accumulation of legislative, executive and judicial power in the same hands would be very defined of tyranny.”*

Thus, the doctrine lays emphasis on the separation both at the personnel as well as functional level. In an ideal set-up the separation in both these aspects should be clear and complete. However, the doctrine seems to be still unrealised. The nearest approximation is found under the State Constitution of Massachusetts in the United States of America. There it is said that *“...the legislative department shall never exercise the executive and judicial powers or either of them, the executive shall never exercise the legislative and judicial powers or either of them, the judicial shall never exercise the legislative and executive or either of them, to the end it may be "government of law and not of men.”*

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<sup>2</sup> Nugent, The Spirit of the Laws, 151-152 quoted in C.K. Thakker, Administrative Law (Eastern Book Company 1992) 31.

<sup>3</sup> Wade and Phillips, Constitutional law, Part II, Ch. 1.

The doctrine of separation of powers is based on four different principles

- (a) Exclusivity principle which suggests structural division in all the three organs of State, as it is in the US.
- (b) Functional principle which prohibits amalgamation and usurpation but not interaction of all the organs of State.
- (c) Check and balance principle, meaning, thereby, that each organ of State may check the other to keep it within constitutional bounds.
- (d) Mutuality principle which aims at creating concord not discord, cooperation not confrontation, engagement not estrangement amongst different organs of State to create a society of constitutional image which is a free, equalitarian, inclusive and rule of law society.

This doctrine can be applied in two different ways:

- 1) negatively, where it restricts the use of power by all branches of government; and
- 2) positively, where it not only establishes boundaries but also specifies the minimal scope of authority that a court may impose in order to uphold constitutional principles.<sup>4</sup>

Though the doctrine of separation of powers in its classical structural form is not followed in any country, not even in the US, yet logic behind it is still valid-logic of polarity because "threat to liberty arises not from blended powers but unchecked powers". Interaction of power facilitates liberty and freedom.

### **POSITION IN ANGLO-AMERICAN**

Montesquieu deduced the concept of separation of powers from the British Constitution. In actuality, though, it is not a crucial component of the British Constitution. The theory was never used in England, not even during the English Constitution's transitional era, while Montesquieu lived in France under Bourbon dictatorship. Despite being somewhat less able to exercise his prerogative powers, the King was still involved in passing laws, and his ministers were seated in Parliament. The Act of Settlement only temporarily prohibited them from entering the Parliament.

In order to foster the growth of the cabinet system of government and the concepts of joint

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<sup>4</sup> State of U.P. vs. Jeet S. Bisht, (2007) 6 SCC, 586.

accountability to the Commons, the clause prohibiting Commons membership was quickly deleted. This disproved the doctrine's dogmatic application. Furthermore, the perfection of the English Government lies in the fact that "*all parts of it form a mutual check upon each other,*" rather than a rigorous implementation of the idea of separation powers. One of the features of the English Constitution is this Montesquieu interpretation. The position has been summed-up by the Donoughmore Committee<sup>5</sup> "*Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misunderstood what he saw.*"

The concept of separation of powers is highly recognized in the US Constitution. Article 1 of the Constitution grants the Congress legislative authority, Article II grants the President executive authority, and Article III states that the United States' judicial powers shall be vested in a single Supreme Court and in any subordinate courts that the Congress may from time to time ordain and establish. It can be inferred from these Constitutional clauses that the authority granted to one arm of government cannot be transferred to another branch.

**Sutherland's** observations are most pertinent in this connection. He says, "*It may be stated as a general rule inherent in American constitutional system, that unless otherwise expressly provided or incidental to the power conferred, the Legislature cannot exercise either executive or judicial powers, the judiciary cannot exercise either executive or legislative powers.*"

But the actual position is quite different in United States of America. **Jaffe** in his book<sup>6</sup> very rightly said: "*The principle of separation of powers is a fundamental and valid dogma of our Constitution. Its object is the preservation of political safeguards against the capricious exercise of powers, and incidentally it lays down the broad lines of an efficient division of functions. Its logic is the logic of polarity rather than strict classification. But in many crucial instances where there is pressure for the transfer of an old ones, the creation of new functions or for the better implementation of the old ones, the logical implications of the principle are conflicting we should in sum keep in mind that.....(i) it is internally to stratify our government arrangements in the particular mould of 1789, 1953 or any other date.*"

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<sup>5</sup> Committee on Ministers' Power, 193.

<sup>6</sup> Administrative Law.

## INDIAN POSITION-

The idea has no historical context in India. In India, the Legislature did not emerge as a distinct entity from the executive branch until the mid-1800s. A Constituent Assembly was only established to write the nation's constitution following independence. A proposal to include the idea in the Constitution itself was rejected by the Constituent Assembly. The Constitution's provisions do not imply the idea in its strictest form. However, Article 50 provides for the separation of the judiciary from the executive. Some sincere endeavours have been made to fulfil the above objective of the Constitution. But the above article cannot be said to have incorporated the whole doctrine. The Constitution has not made any absolute or rigid division of functions among the three agencies of the State. As a general practice, the executive has been entrusted with the legislative and judicial powers. Nevertheless, the functional separation of in the President of Indian Union under Article 53(1) and the Governors of the three different agencies has not been ignored. The executive power is vested exercises his power constitutionally on the aid and advice of his Council of State under Article 154(1), The President being the head of the Union Ministers. On the other hand, the President is given extensive legislative essentially legislative power which extends to all things which are within the powers. He can make Ordinances. The promulgation of Ordinances is legislative jurisdiction of Parliament subject only to the limitations of Article 123. The President has been further empowered to make laws for a State after emergency has been declared under Article 356 of the Constitution. He exercises purely legislative functions under Articles 372 and 372-A.

The President performs judicial functions also. He has the power to decide cases of disqualification of membership of the Houses of Parliament of the Houses of under Article 103. The judicial function of the House of Parliament is also substantial in certain respects. They can consider the questions of breach of any known parliamentary privileges and where the breach is established, they have power to punish for contempt. In the event of impeachment of the President one of the Houses acts as the prosecutor and the other House investigates the charges and declares whether the charges have been sustained or not under Article 61. The High Courts in certain marginal spheres perform a function which are administrative rather than judicial. Their power of supervision over other subordinate courts under Article 227 is more of administrative nature rather than judicial. Under Article 228 they have power to effect transfer of cases. The legislative powers of the High Courts and the Supreme Court consist in

their powers to frame rules. This power is fairly wide.

Besides functional overlapping the personnel separation is also absent in this country. This is invariably unavoidable in a parliamentary system of government. No individual can be a member of the Council of Ministers for more than six months unless he is also member of either House of Parliament under Article 75(5). He sits in either House, and votes in the House of which he is a member. The principle of collective responsibility of the popular House is a direct negation of the doctrine of separation of powers. It creates an interministerial responsibility on the one hand and accountability of the Legislature on the other.

### JUDICIAL ACCOUNTABILITY

A survey of the constitutional provisions establishes that this doctrine under the Constitution of India is an approximation of the British position rather than American. There is no direct declaration on this point which is also not possible today when the doctrine is being surrendered in the face of an unprecedented growth of delegated legislation and judicial powers of the Administration. Justice Mahajan took note of this point and stated in the famous case of ***in Re Delhi Laws Act***<sup>7</sup>, that *"it does not admit of serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the System of government that India has, at present under our Constitution. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in different organs of the State our Constitution though federal in form is modelled on the British Parliamentary system, the essential feature of which is the responsibility of the executive to the Legislature....."*

But in ***Ram Jawaya v. State of Punjab***<sup>8</sup>, the Supreme Court stated that the doctrine of separation of powers has been essentially contained in the Constitution. It was stated that *"the Indian Constitution has not indeed recognized the doctrine of the separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."*

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<sup>7</sup> AIR 1951 SC 747.

<sup>8</sup> AIR 1955 SC 549 at 556.

To the same effect is the observation of Justice Das in **Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendulkar & Others**<sup>9</sup> when he said "*The Constitution does not express the existence of separation of powers, and it is true that division of powers of the government into legislative, executive and judicial is implicit in the Constitution, but the doctrine does not form an essential basis of foundation-stone of the constitutional framework as it does in USA.*"

In **Chandra Mohan v State of U.P**<sup>10</sup>, it was held that though our Constitution does not accept the strict doctrine of separation of powers but provides for an independent judiciary in the State, it constitutes a High Court for each State, prescribes the institutional conditions of service of the justices thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Government which is bound and given to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction.

Again, in **Udai Ram Sharma v. Union of India**<sup>11</sup> the Court categorically stated that the doctrine has not been accepted by our Constitution. The Court expressed its opinion that the American doctrine of separation of powers has no application in India.

In **Indira Nehru Gandhi Shri Raj Narain and Anr**<sup>12</sup>, Beg. J., has observed that "*separation of powers is a feature of the basic structure of the Indian Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This constitutional scheme cannot be changed even by resorting to amending process under Article 368 of The Indian Constitution.*"

Again in **State of Punjab v. Deepak Mattu**<sup>13</sup>, the Court has held that there is broad separation of powers under the Constitution and ordinarily one organ of the State should not encroach into the domain of another Judiciary should exercise restraint and should not ordinarily encroach into the legislative or executive domain because Montesquieu's theory of Separation of Powers broadly applies in India too. Court also observed that separation of powers has to be viewed through prism of constitutionalism and for upholding goals of justice in its full magnitude and rationale is to uphold individual liberty and rule of law.

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<sup>9</sup> AIR 1959 SCR 279.

<sup>10</sup> AIR 1966 SC 1987.

<sup>11</sup> AIR 1968 SC 1138.

<sup>12</sup> AIR 1975 SC 2299.

<sup>13</sup> AIR 2008 SC 35, University of Kerala vs. Council, Principals Colleges Kerala, AIR 2010 SC 2535.

Today, a new interpretation of the doctrine has been evolved. It seeks to emphasize upon the functional division of powers. The principle of delegation of legislative functions is not regarded inconsistent with the doctrine. Emphasis is laid on the balance of power and a system of checks. No single agency of the State should emerge as dominant one by assuming greater power in its hands and each of them should exercise a check upon the other so that none of them exceeds the authority vested in it by the Constitution. The very purpose of the doctrine is to prevent concentration of powers in any one of these three agencies and also to prevent them from making encroachments upon the other's activities so that autocracy may not replace rule of law. All the three organs must act in complete coordination with each other without interfering the functioning of the other organ. Considering the present meaning of the doctrine in this perspective the Indian Constitution can rightly claim to represent it.

**Chandrachud, J**, took the same view when he observed that the political usefulness of the doctrine is now widely recognised. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems, enshrined in the 'political thicket' Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept innate in the prudence of self-preservation, that discretion is the better part of valour.<sup>14</sup>

Perhaps, in view of the above meaning of the doctrine evolved in modern times, the Supreme Court in the **Keshvanand Bharti's case**<sup>15</sup> changed its opinion and pointed out that both the supremacy of the Constitution and separation of powers are constituents of the basic structure of the Indian Constitution. The view has been reaffirmed by the Court in **Indira Nehru Gandhi v. Shri Raj Narain Singh and Anr**<sup>16</sup>, Beg, J., observed "*this Constitution has a basic structure comprising the three organs of the Republic the Executive, the Legislature and the Judiciary It is through each of these organs that the sovereign will of the people has to operate and manifest itself and not through only one of them. Neither of these separate organs of the Republic can take over the functions assigned to the other. This is the basic structure of scheme of the Government of the Republic laid down in this Constitution.*"

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<sup>14</sup> AIR 1975 SC 2294.

<sup>15</sup> AIR 1973 SC 1461.

<sup>16</sup> AIR 1975 SC 2299.

The Supreme Court in the case of **Asif Hamid v. State of J. and K**<sup>17</sup>., has observed that *"Judicial review is a powerful weapon to restrain, unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint."*

But, in **Krishan Kumar v. Union of India**<sup>18</sup>, the Constitution Bench of the Supreme Court observed *"In the matter of expenditure includible in the Annual Financial Statement this Court has to be loath to pass any order or give any directions because of the division of functions between the three co-equal organs of the Government under the Constitution not, any court can issue a direction to a Legislature to enact a particular law. Similarly, a court cannot direct an executive authority to enact a law which it has been empowered to do under the delegated legislative authority."*

But in **I.R. Coelho (dead) by L. Rs v. State of Tamil Nadu**<sup>19</sup>, the Supreme Court observed that *"the Constitution is living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of law. The principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles including the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers. It requires a diffusion of powers, necessitating different independent centres of decisions-making. The principle of constitutionalism under-pin the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for law protecting fundamental right to be impliedly repealed by future statutes. The protection of fundamental constitutional right through the common law is main feature of common law constitutionalism."*

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<sup>17</sup> AIR 1989 SC 1899.

<sup>18</sup> 1990 (4) SCC 207.

<sup>19</sup> AIR 2007 SC 861.

According to Dr. Amartya Sen, the justification for protecting fundamental right is not on the assumption that they are higher rights but that protection is the best way to promote a just and tolerant society.

According to Lord Steyn, Judiciary is the best institution to protect fundamental right, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law Under the controlled Constitution, the principles of checks and balances have an important role to play Even in England, where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, courts may be forced to modify the principle of parliamentary sovereignty. For example, in cases where judicial review is sought to be abolished. By this, the Judiciary is protecting a limited form of contortionism, ensuring that their institutional role in the government is maintained.

As President Woodrow Wilson said: "*The trouble with this theory is that government is not a machine but a living thing. No living thing can survive by separating its organs from one another for purposes of control. On the contrary, its life depends upon their prompt cooperation, their ready obedience to the dictates of instinct or intelligence, and their mutual friendliness. Their cooperation is indispensable, and their conflict is fatal.*"<sup>20</sup>

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<sup>20</sup> Friedmann: Law in a Changing Society, 1996, p. 382.