The Separation of Powers: Indian Constitution

“The Separation of Powers” is a doctrine that has exercised the minds of many peoples. Ancient philosophers, political theories and political scientists, framers of constitutions, judges and academic writers have all had cause to consider the doctrine through the centuries.

This mainly signifies the division of different powers in between various organs of the state; executive, legislature and judiciary.

The theory of separation of powers signifies mainly three formulations of Governmental powers;

i. The same person should not form part of more than one of the three organs of the state.

ii. One organ should not interfere with any other organ of the state.

iii. One organ should not exercise the functions assigned to any other organ.

In this project report I am doing the comparative study of this doctrine in various states like USA, UK and India and dealing with various aspects related to the doctrine of separation of powers and in this regard I am briefly describing the definitional crisis and then the various advantages and disadvantages in relation with this doctrine and for better understanding I am giving the present position in USA, UK and India. In Indian context I am dealing with various constitutional provisions and also judicial response in the cases related to this doctrine. At the end I am reaching the conclusion and giving a brief description that in which direction this doctrine is going on. At last I am framing some opinion and suggestion as per my understanding of this doctrine.

**Definitional Crisis:**

There is no exact definition of this doctrine because everybody is interpreting it according to his own views and it is also not possible to find the exact origin but we can see for the first time Aristotle[1] was saying about the doctrine of separation of powers in his book Politics as follows:

“There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. The three are, first the deliberative, which discuss everything of common importance; second the officials…and third the judicial element.”

In 1689 the English political theorist John Locke[2] also envisaged a three fold classification of powers in the book The Second Treatise of Government as:

“May be too great a temptation to human frailty…for the same person to have the power of making laws, to have also in there hands the power to execute them, where by they may exempt themselves from obedience to laws they make, and suit the law both in its making and execution, to make their own private advantage.”
Another one who said about this doctrine is Montesquieu[3] who described separation of powers in his book *The Spirit of Laws* in 1748 as:

“When legislative power is united with executive power in a single person or in a single body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannically laws will execute them tyrannically.

Nor there is liberty if the power of judging is not separate from legislative power. If it were joined to legislative power, the power over the life and liberty of citizen would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.

All would be lost if the same man or same body of principal men, either of nobles, or of the people, exercised these three powers: that the making of laws, that of executing public resolutions, and of judging the crimes or disputes of individuals.”

**Advantages:**

There are various advantages with the acceptance of this doctrine in the system;

1. The efficiency of the organs of state increased due to separation of works hence time consumption decreases.

2. Since the experts will handle the matters of their parts so the degree of purity and correctness increases.

3. There is the division of work and hence division of skill and labour occurs.

4. Due to division of work there is no overlapping remains in the system and hence nobody interfere with others working area.

5. Since the overlapping removed then there is no possibility of the competition in between different organs.

**Disadvantages:**

As there are advantages attached to this doctrine, there are some disadvantages can also occur due to this doctrine;

1. As I have said there will be increased efficiency but reverse effect can also be seen because of the overlapping between rights of the organs if we are not following the doctrine in its strict sense because organs may fight for the supremacy over each other.

2. There is also a possibility of competition between organs again for proving ones supremacy over the other organ.

3. There is also possibility of delay of process because there will not be any supervisor over other hence the actions of the organs can become arbitrary.
**Position In USA:**

The framers of constitution of USA believed that only by allocating the three basic functions of the government; legislative, executive and judicial, in to three separate, coordinate branches could power be appropriately dispersed. Thus the US Constitution allocates the three powers in separate branches. The first three article of their constitution, known as the distributive articles, define the structure and powers of the congress (legislative body), executive and the judiciary.

They were aware of the Montesquieu’s idea about separation of powers and the fact that the new constitution adopted was based on separation of powers. Yet they were equally aware that in most states the legislature dominated the executive and judiciary. The system of checks and balances created by the framers and ensures that Congress can not dominate the executive and judicial branches of the national government. Moreover, constitutional limitations are not to be defined entirely independently of majoritarian preferences.

The Supreme Court of US has not been given power to decide political questions, so that the Court may not interfere with the exercise of powers of the executive branch of the government.

The President of USA interferes with the exercise of the powers by the congress through the exercise of Veto power. He also exercises the law making with the use of his treaty making power. The President also interferes with the functioning of the Supreme Court through the exercise of his power to appoint judges.

In the same manner Congress interferes with the powers of the President through vote on budget, approval of appointments by the senate and the ratification of the treaty. Congress also interferes with the working of courts by passing procedural laws, creating special courts and by approving the appointment of judges.

In this turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It is correct to say the SC of USA made more amendments to US Constitution than the Congress itself.

In brief we can say that the condition in US by the words of CORWIN, “ separation of powers are more specifically seen in USA but absolute separation of powers does not exists in USA.”

**Position In UK:**

A separation of powers in the purest form is not and never has been a feature in functioning of the organs of government in UK and since UK has no written constitution so there is no written document regarding this matter. An examination of the three powers reveals that in practice, they are exercised by persons or bodies which exercise more than one such power.
There are too many examples of overlap between three functions of the government. We can see the several examples as follows[9];

· Law Lords sit on the appellate committee of the House of Lords and the judicial committee of the Privy Council as well as in the House of Lords as a legislative body;

· Parliament exercises a legislative function and to lesser extent a judicial function is that it is responsible for the regulation of its own internal affairs;

· Government ministers are member of the executive who exercise a legislative function not only in Parliament but also in delegate legislation;

· In addition to exercise the judicial function, courts legislate in the sense that they develop principles of the common law;

· Magistrates exercise administrative as well as judicial functions in that they grant licenses.

Of all instances of overlap, however, it is the position of Lord Chancellor which is most commonly sited in support of the argument that there is no separation of powers in UK as the office of Lord Chancellor has existed for many centuries and occupies the unique position as the incumbent is a member of all three branches of the government with dominating powers in hand. The judiciary is the weakest among all organs in UK.

The debate as to whether or not there is separation of powers in UK as Professor Munro has noted, led to the establishment of two opposing camps. In the first of these camps the academic writers of constitutional law can be placed. The general consensus among them is that there is no separation of powers. In opposing camp is the judiciary and on numerous occasions the senior judges have expressed the opinion that the UK’s constitutional practices are based on notion of separation of powers.

In this sense, therefore it can be said that there is partial separation of powers in UK. But, O. Hood Phillips and Jackson have said,[10] “there is not and ever has been a strict separation of powers in the UK constitution.”

**Position In India:**

**Constitutional Provisions:**

There are no separate provisions regarding the Doctrine of Separation of Powers has been given in our Constitution. But there are some directive principles are given in the constitution as in Part-IV and Part-V and Article-50 of our constitution is separating the judiciary from executive as, “the state shall take steps to separate judiciary from the executive in the public services of the state,”[11] and except this there is no formal and dogmatic division of powers.

In India, not only functional overlapping is there but also the personal overlapping is prevailing.
**Judiciary:**

Under Article-142 and Article-145 of our constitution, the SC has the power to declare void the laws passed by legislature and actions taken by the executive if they violate any provision of the constitution or the law passed by the legislature in case of executive actions. Even the power to amend the constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the constitution.[12] In many cases courts have issued directions for the Parliament to make policies.

**Executive:**

The President of India who is the supreme executive authority in India exercise law making power in the form of ordinance making power under Article-123, also the Judicial powers under Article-103(1) and Article-217(3), he has the consulting power to the SC of India under Article-143 and also the pardoning power in Article-72 of the Constitution. The executive also affecting functioning of the judiciary by making appointments to the office of Chief Justice of India and other judges.

**Legislature:**

The Council of Minister is selected from the legislature and this Council is responsible for the legislature. The legislature exercising judicial powers in cases of breach of its privileges, impeachment of the President under Article-61 and removal of judges. The legislative body has the punitive powers under Article-105(3).

In words of Gledhill, “constitution of India has not ceremoniously wedded with Doctrine of Separation of Powers, however, it is whenever possible followed the doctrine of separation of powers.”

**Judicial Response:**

There are many cases in which SC has given judgements on basis of the facts related to those cases but we can understand the position of this doctrine in India by seeing some landmark opinions given by the Supreme Court in following cases;

**In Ram Jawaya v. State of Punjab[13]**

C.J. Mukerjee, said and held:

“Indian Constitution has not indeed recognized the doctrine of 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 be very well said that our constitution does not contemplate assumption by one organ or part of the State of Functions that essentially belong to another.”
In Indira Nehru Gandhi v. Raj Narain[14]

C.J. Ray said and held:

“In the Indian constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the US constitution or as under Australian constitution does not apply to India.”

J. Beg added:

“Separation of powers is the part of the basic structure of constitution. None of the three separate organs of the republic can take over the functions assigned to the other. This scheme of the constitution cannot be changed even by restoring to Article-368 of the constitution.”

Conclusion

From the above discussion we can conclude that though there is a definitional crisis for this doctrine but every state interpreted the doctrine of separation of powers according to their understanding and need of the state. There are various advantages the disadvantages present with the doctrine but it is alive from the time of Aristotle no matter the basic structure is been changed according to the modern governments. USA is following it in a spirit and known as the champions of the doctrine of separation of powers along with France. There is never ever this doctrine been followed in UK in its purest form. In India there is not any clear-cut description of the doctrine in the constitution but we have followed it whenever is needed and it is been clear on seeing various judgements given by the Supreme Court.

In brief we can say that the Doctrine of Separation Powers; is followed in US with a spirit, never followed in UK purely, and India has followed it with large exceptions.

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