

“A Comparative Study on separation of power in India, UK and USA Constitution”

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ABSTRACT

India has its written Constitution, it is said to be lengthy. It is a Holy text to the Citizens of India. The Constitution entails Fundamental Rights and Fundamental Duties in Part III and Part IV respectively. The Constitution has recognized the separation of powers as part of it. 'Separation of Powers' is a basic principle where powers and responsibilities are divided among the executive, legislative and judicial branches. The study takes a multidimensional approach, taking into account institutional, political, historical, and legal aspects. The author attempted to analyze the doctrine of Separation of Powers as envisaged under the Constitution of India and also the author would like to demonstrate the difficulties faced by the three wings of the government in practice while implementing the provisions of the Constitution. The author also draws a comparative analysis with the Indian, US (the United States of America), UK (United Kingdom) Constitutions regarding the scheme of Separation of Powers

Key words: Separation of power, Executive; Legislative; Judiciary; Constitution of India

INTRODUCTION:

An essential component of any federal framework, the division of powers forms the cornerstone of democratic governance. It serves as the foundation upon which the systems of checks and balances, accountability, and authority are created. In this study, the separation of powers is compared in three well-known federal systems: India and UK & the United States of America. Understanding the nuances and variations in how the separation of powers is applied between India UK and USA has broad global implications. These three countries, which have different historical origins and constitutional underpinnings, provide special insights into how federal governments operate. This study hopes to clarify the following research question and objectives by contrasting them. There is no power or a right to overarch into another organ's powers and responsibilities. This doctrine contemplates the idea that the government functions must be based on the three-tier division of legislature, executive, and judiciary.

Research Question:

- How does the separation of powers function within the federal framework in India, UK and the USA, and what are the key differences and similarities?²

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² Pandya, Khushi, Separation of Powers - An Indian Perspective (April 22, 2013)

OBJECTIVE:

1. To look into the background and genesis of the separation of powers in India, UK and the USA.
2. To examine the constitutional clauses and checks and balances that three countries' constitutions use to define and uphold the separation of powers.
3. To evaluate the difficulties in maintaining a balanced separation of powers in each federal system as well as their practical implementation.
4. To use the comparative analysis to make recommendations and learn from it for other federal systems and nations that want to better their democratic institutions

1. Constitutional Provisions of Separation of power in USA

Three different democracies, the United States, UK and India, use different constitutional provisions and checks and balances to protect and define the division of powers within their respective administrations³. A fundamental element of the United States Constitution is the division of powers, which is predicated on a tripartite framework that designates discrete roles for the legislative, executive, and judicial branches of government. Each arm of the system is given distinct authority to prevent any abuse by the others, and the system is strengthened by checks and balances. A two-thirds majority in Congress, for example, has the power to override the veto of legislation issued by the President. Nonetheless, the court can examine and overturn choices made by the legislative and executive departments.

The Constitution of the United States⁴ contains a basic principle known as the separation of powers. It is essential to the country's democratic structure, which makes sure that no one branch of government has too much authority. Articles I, II, and III of the United States Constitution serve as the main frameworks for the division of powers.

The United States Congress is the legislative branch of government, as defined by Article I. The House of Representatives and the Senate are its two chambers. Because both houses must concur on legislation before it can be passed, the bicameral system guarantees that various regions of the nation are represented. Congress is able to enact laws, impose taxes, and control trade. A good illustration of the separation of powers is the allocation of power between the two houses and their respective duties.

The President leads the executive branch, which is established by Article II. This branch is in charge of carrying out and upholding the legislation passed by Congress. The President can order the armed forces, veto legislation, and pardon people. Congress, however, has the power to impeach and remove the President from office, therefore it checks the President's authority. The

³ The Constitution of the United States-A Bibliography Edward W. Carter, Charles C. Rohlfing The Annals of the American Academy of Political and Social Science, Vol. 185, The Constitution in the 20th Century (May, 1936), pp. 190-200

⁴ Constitution of USA, Article 1, Article 2, Article 3

system of checks and balances, in which one branch has the authority to restrict the power of the others, clearly illustrates the division of powers.

The judicial branch, which consists of the Supreme Court and other federal courts, is established by Article III. Interpreting the law and ensuring that it is administered equitably and consistently are the duties of the judiciary. The ability to judge whether legislation and executive actions are constitutional gives the courts the power of judicial review.

2. Constitutional Provisions of Separation of power in UK

The UK is one of the particular states in the world. It is one of those few states which doesn't have a written constitution. Since there is the absence of a formal written constitution it is possible to claim that there is no formal separation of powers in the UK. It can't be presumed that it does not exist. They do exist but in weak form because they overlap and work together.

There are many examples of overlap between the three functions of the government for example:

1. Law Lords sit on the appellate committee of the House of Lords and in the House of Lords as a legislative body as well as in the judicial committee of the Privy Council;
2. Magistrates exercise both the administrative and judicial functions in that they grant licenses.

There has been a debate in the UK as to whether or not there is a separation of powers in UK as Professor Munro has noted, two opposing camps had been established. The academic writers of constitutional law can be placed in the first of these camps, the debate that there is no separation of powers. In the opposing camp is the judiciary, senior judges have expressed that the UK's constitutional practices are based on separation of powers.

3. Constitutional Provisions of Separation of power in India

Indian Constitution is the world's largest Constitution. In the Indian Constitution, the theory of separation of powers was nowhere expressly mentioned. The doctrine of the separation of power in the Indian constitution does not confer in a water tight compartment. Separation of judiciary from the executive is enjoyed under Article 50 of the Indian constitution⁵ there is no provision in the Indian Constitution dealing with vesting the legislative and judicial powers in any particular organ. Under Arts. 53(1) and 154(1)⁶ of the Indian Constitution the executive power of the union and state is vested by our constitution in the President and the Governor respectively.

In the case *Ram Jawya v/s State of Punjab*⁷, It has been held by the Supreme Court that there is no rigid separation of powers. In the popular case of *Kesavananda Bharati v/s State of Kerala*⁸ Beg. J has added that the separation of power is also part of the basic structure of the constitution.

⁵ Separation of judiciary from executive

⁶ The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

⁷ *Ram Jawya v/s State of Punjab*, AIR 1955 S.C. 549.

⁸ *Kesavananda Bharati v/s State of Kerala*, 1975 Supp SCC 1, 61, para 136.

To further uphold the division of powers, both countries employ particular phrases and provisions. The "Necessary and Proper Clause" (Article I, Section 8) of the U.S. Constitution gives Congress the power to pass laws that are necessary for it to perform its designated duties. The creation of a separate and independent judiciary in India is required by Article 50 of the Directive Principles of State Policy⁹, which emphasizes the separation of the executive and judicial institutions.

In conclusion, despite having different constitutional structures, both the US and India use a variety of branches, checks and balances, and specific clauses to uphold the fundamental idea of the separation of powers. This prevents any one branch from becoming overly dominant and ensures that the balance of power is maintained within their democratic systems

Practical Application: Challenges to separation of power

The way the separation of powers is really implemented in India, UK and the United States is a reflection of their respective fundamental democratic principles and political systems. With three separate parts of government—the legislative, executive, and judicial—India's Constitution upholds the separation of powers. Laws are created by the Indian Parliament (legislature), are carried out by the President (executive), and the constitution is upheld and interpreted by the judiciary¹⁰. However, the parliamentary system's ability to give the executive sway in the legislature can occasionally result in confrontations that undermine the separation of powers.

Indian challenges to the separation of powers have generated discussion and worry. For each of the aforementioned issues, the following are some salient aspects and case studies.

1. Appointment of Judges: - Challenge: There have been accusations of disproportionate executive branch involvement in the selection of judges.

An attempt was made to alter the appointment process in 2014 with the introduction of the "NJAC Act" (National Judicial Appointments Commission Act). However, the Supreme Court overturned it in the 2015 case of *Supreme Court Advocates-on-Record Association v. Union of India* because they thought it went against the independence of the judiciary.

2. Judicial Activism – Judges Making Laws: -

Problem: The judiciary has occasionally come under fire for going beyond what is expected of it by dictating policy and giving orders to the executive branch. –

Case Study: *Vishakha v. State of Rajasthan* (1997) is an illustration of a case in which the Supreme Court outlined rules for preventing sexual harassment at work. Although significant, others contend that this was a legislative duty¹¹

⁹ Constitution of India, Article 50, Directive Principles Of State Policy

¹⁰ <https://byjus.com/free-ias-prep/separation-power-indian-constitution/>

¹¹ <https://www.legalbites.in/vishaka-ors-v-state-of-rajasthan-1997/>

3. The speaker of the house interpret laws to maintain decorum of the house:- Speaker's position as an unbiased arbiter in the legislature has been called into doubt when they are a member of a political party. The Speaker of the Legislature interprets laws to maintain decorum.

Case study- The Speaker's decision to disqualify dissident MLAs during the 2019 political crisis in Karnataka was hotly contested because it seemed to favor the ruling party.

4. The executive branch has the authority to enact ordinances without parliamentary approval, which has the potential to undercut the legislative process.

DIFFERENCE BETWEEN SEPARATION OF POWERS IN US AND UK:

The American model has separation of powers as a part of the American constitution, wherein the Britain model they have integration. In the U.S all three branches were systematically split between the executive, the legislative, and the judiciary whereas in Britain this is not so clearly done. The constitution in us is codified which gives power to all the three organs of government but in Britain, it's not the same the constitution is not codified and thus ultimately queen has the power. American model has separation of powers as a part of the American constitution, wherein the Britain model they have integration. In the U.S all three branches were systematically split between the executive, the legislative, and the judiciary whereas in Britain this is not so clearly done.¹²

DIFFERENCE BETWEEN SEPARATION OF POWERS IN INDIA AND US:

In American democracy, Congress can have a check on the power and actions of the president but in Indian democracy, the Prime Minister can control the legislature in the parliament by the virtue of his party's dominance. In the U.S judge can hold office if he can perform his duties but in India, a judge can hold office only till the age of retirement. In the U.S each and individual states have their constitutions to regulate their governance but then in India, Indian Constitution is followed by all individual states except Jammu & Kashmir.

SIMILARITIES BETWEEN INDIA AND US:

The Indian legislature is known as a parliament and the U.S. legislature is known as congress. Both India and America have a bicameral legislature. There is a well-organized judiciary in both U.S. and India having the Supreme Court as the apex court.

SYSTEM CHECK AND BALANCE:

The framers of the Indian constitution have ingeniously developed a system of checks and balances and they had included checks and balances in the constitution. The system of checks and balances is very important for the proper functioning of the three organs of the government. All the three organs of the state impose checks and balances on the other for decentralization of

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https://www.google.com/search?q=diiference+betetween+sepatation+of+power+UK+and+USA&rlz=1C1GCEB_enIN992IN992&oq=d&gs_lcrp=EgZjaHJvbWUqBggAEEUYOziGCAAQRRg7MgYIARBFQDkyDQgCEAAygwEYsQMYgAQyCggDEAAysQMYgAQyEAgEEAAygwEYsQMYgAQYigUyDQgFEAAygwEYsQ

powers. Every judge of the Supreme Court shall be appointed by the president as said in Article 124(2) of the Indian Constitution. We might think that there is the possibility that the president can be manipulative and appoint judges who will favor his view but Article 124(2) of the Indian Constitution says that the chief justice of India mandatorily is consulted while appointing judges in the Supreme Court. The president has the power to remove any judge from the office but he can exercise this power only if at least 100 members of Loksabha or 50 members of Rajyasabha give written notice to the speaker. So numerous provisions in our constitution puts a bar on the power of the president, after getting written notice an investigation is also conducted and that if the judge is found guilty then a motion for removal is issued and it has to be adopted by each house of parliament by a majority of the total members of the house and a majority of at least two-thirds of members of that house present and voting once this motion is adopted in both houses only then the president can issue an order for the removal of a judge.¹³

The division of powers is a fundamental concept in both the American and Indian governments, serving to guarantee checks and balances among the branches of government and avoid the consolidation of power. In the context of India, a number of suggestions and thoughts can be made to strengthen this idea. The executive, legislative, and judicial departments should have stronger authority separation in order to avoid infringing on one other's jurisdictions. Additionally, to protect them from political meddling, India may benefit from greater independence and autonomy of important institutions like the judiciary and election commission.¹⁴

To further uphold the division of powers, both countries employ particular phrases and provisions. The "Necessary and Proper Clause" (Article I, Section 8) of the U.S. Constitution gives Congress the power to pass laws that are necessary for it to perform its designated duties. Article 50 of the Directive Principles of State Policy, which highlights the division of the executive and judicial branches, mandates the establishment of a distinct and autonomous judiciary in India. In conclusion, despite having different constitutional structures, both the US and India use a variety of branches, checks and balances, and specific clauses to uphold the fundamental idea of the separation of powers. This prevents any one branch from becoming overly dominant and ensures that the balance of power is maintained within their democratic systems.

CONCLUSION:

In conclusion, the comparison of the federal systems of India, UK and the USA's separation of powers illustrates a nuanced interplay between institutional frameworks, historical contexts, and political cultures. Although the executive, legislative, and judicial departments of both countries are intended to function in harmony, there are differences in the ways in which these branches operate and the difficulties they encounter. The parliamentary structure of India, which is firmly based in its multifaceted and federal nature, promotes a synthesis of powers that may increase executive authority. In contrast, the tight division of powers that characterizes the presidential system in the USA frequently leads to checks and balances that might slow down decision-making. The formation of these systems has also been influenced by historical developments, with post-

¹³ Constitutional and Administrative Law, by Alex Carroll

¹⁴ M.P. Jain, "Indian Constitutional Law" Lexis Nexis Butterworths Wadhwa Nagpur, Gurgaon

colonial nation-building in India and revolutionary ideas of limited government in the USA. Their approaches to government, and specifically the function of the court, are influenced by these diverse origins.

We can say this very clearly that the Indian constitution did not adopt the separation of powers very rigidly, but it is crystal clear that the Indian constitution has adopted the division of powers. This doctrine signifies the fact that one organ or body of organs should not exercise all the three powers of the government. The centralization of authority degenerates into tyranny and abuse of power.