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# Comparative Study of Check and Balance System India, United States and Australia

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## ABSTRACT

*Doctrine of check and balance system is the exception of doctrine of separation of power, even then both doctrine is important for any kind of federal government to function properly. The discharge of functions by the worldwide political system is more or less the same, or if not the same, but will be comparable. Therefore, this paper compares functioning of check and balance system in India, United States and Australia. Checks and balances are a set of procedures designed to reduce errors, prevent improper behavior, and reduce the risk of power concentration. Check and balance is system in which each person is authorized with their particular responsibilities, considering the objective of assigning authority with avoiding the probability of one person or any particular department gets complete control to make or influence the decision for their own benefit. Along with this it also promotes Mutual Corporation amongst every department to function smoothly. The term is most commonly associated with government. As we all know for the smooth functioning of any democratic country it requires doctrine of separation of power. Therefore, internal controls of this nature in government machinery can help improve operational efficiency*

**Keywords:** Separation of power, abuse of power, check and balance, United States, India, Australia.

## I. INTRODUCTION

In all times, common perception is that when power of command and regulation is given under one hand, it creates the opportunity to misapply it. Official misconduct in any position is regarded as unlawful act and has a profound impact on any country's social health. It is not that the abuse of authority is rare or new, there are numerous instances in history. We see a long list of abuses perpetrated in 1776 by King George III and British officials. Under the leadership of "Muammar Gaddafi," Libya's 42-year of ruling, he continued to appoint a member of his family and it turn up appears to be the nepotism of Gaddafi. The greater the power given to individuals, greater is the risk and consequences of abuse. Therefore, the rule of law also

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requires that any abuse of authority by government officials should be subject to control. For the smooth functioning of any democratic country it requires doctrine of separation of power.

“It has been experienced constantly that every individual who holds the power or controls the authority are capable of abusing and misusing it. Also carrying his/her authority as far as it goes” – Charles De Montesquieu

## **II. HISTORY**

In the past, recommendations regarding the separation of power concept was first raised by Aristotle in his own speech, he gave the idea of “mixed government” or “hybrid government”, he also mentioned the same in his work i.e. a book written by him “The Politics”, and this concept originated from it. Subsequently, John Calvin (1509-1564) favored a government system that split political leverage between democracy and aristocracy (mixed government)<sup>2</sup>. The ancient Greek followed the model of separation of power and from there it became popular and is used by roman republic. Greek philosopher Polybius analyzed roman constitution and opined that their government is utter combination of democratic, aristocratic, and royal elements. Benefits of democracy are also appreciated by Calvin, he stated that It has indispensable gift if people get permitted to elect their own magistrates and government as it will reduce the danger of misuse of powers.

French philosopher Montesquieu has written a book “The Spirit of Laws” in which he specified that, the independence of the judiciary must be real and effective, not only apparent. He encourages the concept of “Montesquieu’s tripartite system”. For keeping check on abuse of authority, decentralization of power and separation of government organ is must.

“Power is liable to be corrupt, and outright power corrupts absolutely.”- Sir John Acton

## **III. SEPARATION OF POWER**

Separation of power is a tool for fixing the flaws in proper functioning of government machinery, by which organ is divided into three parts i.e. legislative, executive or judiciary. This division is made in such a way that every organ assigned for their/its own specified work, no other organ of government can interfere into his functioning or that organ also cannot interfere in the functioning of any other organ. Identification of responsibility will also become easy to identify. Doctrine of separation of power not strictly adopted in India as it in US, only article 50 of India constitution demark the separation of executive from the judiciary. In the

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<sup>2</sup> En.wikipedia.org. 2021. Separation of powers - Wikipedia. [online] Available at: <[https://en.wikipedia.org/wiki/Separation\\_of\\_powers](https://en.wikipedia.org/wiki/Separation_of_powers)> [Accessed 18 December 2020].

case of “I. C. Golaknath vs State of Punjab<sup>3</sup>” the Indian Supreme Court demarcates the jurisdiction of organs and is expected not to interfere with each other. Where in US ‘Article I’ provides legislative power to congress and ‘Article III’ provides all judicial power under the authority of Supreme Court. And when we see the separation of power in the constitution of Australia, section 1 gives to federal parliament the legislative power of the commonwealth, section 61 gives the executive power to the Queen, which is actually exercised on behalf of the Queen by the governor general, section 71 provides for judicial power to be vested in a federal supreme court. In this way, the division of authority and accountability will strengthen democracy and the tripartite system will govern it.

#### **IV. CHECK AND BALANCE**

Framer of the law soon realized that separation of power is just not enough for proper functioning of government machinery. There is a need of system by which proper surveillance on system can be possible and can make good balance between each other. Therefore, to secure political liberty we need to bring Check and balance system in complimentary to separation of power, in separation of power each organ of government divided with exclusive power where check and balance system prevent the absolute power exercised by one organ of government. Even after clearly assigning duty between the organs of government check and balance work as a stick to control each other thereby reducing mistakes, abuse of power, fear of check and decrease centralization. In this way each organ prevents other to miss apply their authority as well as defending their own power from encroachment of other government organ.

Separation of power is the foundation of constitution, even US constitution follows rigid form of separation of government as compare to India and in Indian constitution it is also part of basic structure of constitution still check and balance system is so included that it is also invisible part of the constitution.

1. There is numerous example in the constitution, where we can identify check and balance system behind separation of power –

##### **(A) US Government**

Concept of separation of power was first established in the US constitution<sup>4</sup>, they have three divisions of branches; legislature headed by congress, executive which is headed by president

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<sup>3</sup> Law Times Journal. I. C. Golaknath & Ors. Vs. State of Punjab & Anrs. - Case Summary -. [online] Available at: <<http://lawtimesjournal.in/i-c-golaknath-ors-vs-state-of-punjab-anrs-case-summary/>> [Accessed 01 january 2021].

<sup>4</sup> National Archives. The Constitution of the United States: A Transcription. [online] Available at: <<https://www.archives.gov/founding-docs/constitution-transcript>> [Accessed 1 January 2021].

and judicial branch which is headed by Supreme Court. Framers of constitution don't want to give too much power to one branch of government that's why they also included check and balance system in which each branch has power over the other two in order to preclude one branch from becoming too powerful.

### **1. Some of the Overriding Function of Government Are**

Congress has authority to impeach and remove President, who is head of US government as well as of state. Till now three presidents have been impeached in US so far, in very recent one of them is Donald Trump in 2019 on charge of abuse of power. Where president also has power under Article I to veto bills passed by congress, he can either pass it or make it law or can exercise power to veto and stop it from becoming a law. However, this power is not absolute even after president's veto both the house of congress with special majority can approve law.

Another overriding power of congress is over Supreme Court by rejecting nominee after president (As president approval subject to confirmation by senate) and congress being responsible to the people of US can impeach members of executive as well as judiciary. Congress also has power to control funds applied on executive actions also known as congress power of purse.

Supreme Court also has power over congress and executive, by declaring law passed by congress as well as any action of president as unconstitutional. It means judicial branch works as protection shield of constitution, if any power exercised by other two branch of government which violate constitution, third branch of government can come in between and prevent it. This is also known as power of judicial review. This power established in US in the case of *Marbury v. Madison*<sup>5</sup> and another example of exercising power of judicial review by US government can be case of *ROE V. WADE* in 1973<sup>6</sup>, by declaring Texas along with all other state laws unconstitutional if prohibiting abortion right of women.

In turn, again congress can by passing amendment under the constitution make such law valid which is the example of check on judiciary functioning, and president under article II of constitution also has power to grant pardon to convicted criminal but not in case of impeachment. One of the very recent example is of President Donald trump, who in initial year of his ruling pardoned former Arizona sheriff Joseph M. Arpaio convicted for contempt of court<sup>7</sup>.

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<sup>5</sup> *Marbury v. Madison*. Available at: <<https://www.britannica.com/event/Marbury-v-Madison>>

<sup>6</sup> {{meta.siteName}}. {{meta.pageTitle}}. [online] Available at: <<https://www.oyez.org/cases/1971/70-18>> [Accessed 9 January 2021].

<sup>7</sup> Justice.gov. U.S. Department of Justice. [online] Available at: <<https://www.justice.gov/>> [Accessed 9 January 2021].

All in all, we can say that check and balance is working as it should be for the functioning of the US government, not only it was used in the last century, but it has been going through for so long. It plays very efficient mechanism for the functioning of three branches of government at present and this power is frequently exercised by each branch of government.

## **(B) Indian Government**

In India, parliamentary form of government is followed. For proper functioning of democracy, doctrine of separation of power is adopted in government system. By prima facie separation of power can be easily identified in Indian constitution but after critically analyzing working of government machinery, we find doctrine of check and balance also has deep roots in the constitution. Even if separation of power is part of basic structure of constitution in India which is also mentioned in *Kesavananda Bharati vs State of Kerala*<sup>8</sup>, in 1973 but still this doctrine is not accepted in strict sense. Hence, we can undoubtedly say that in India separation of functions is followed in spite of separation of powers, and principle is not adhered rigidly.

Government system is divided into three branches: Executive branch power vested to president, Legislative branch i.e. parliament consisting of two houses (Lok sabha and Rajya sabha) and judicial branch power vested with Supreme court at apex or high court and other courts at different levels.

List of Constitutional articles which describe separation of power in India are – Article 50, Article 122 and 212, Article 211, Article 53 and 154, Article 361.

### **1. Examples of Check and Balance**

Legislature has power over judiciary as process of impeachment of judges being in their hands, as prescribed under Article 124(4) can be exercised with 2/3<sup>rd</sup> majority in case of proven misconduct or incapacity. In India, one example is of Supreme court judge Veeraswami Ramaswami against whom very first removal proceeding was conducted.

Along with this, legislature may also punish person concerned in the event of breach of privilege so, whenever judge abuse his power, legislature can punish him accordingly. Legislature power does not end here, they also have authority to amend law which was before declared as unconstitutional by the court and revalidate it. We can recall this power at the time of Mrs. Indira Gandhi's ruling i.e. 39<sup>th</sup> amendment which was inserted new Article 329A.

In respect of executives, head of each government ministry is the member of legislature itself

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<sup>8</sup> Indiantanoo.org. *Kesavananda Bharati ... vs State Of Kerala And Anr* on 24 April, 1973. [online] Available at: <<https://indiantanoo.org/doc/257876/>> [Accessed 9 January 2021].

and government is bound to vacate the office if no confidence motion is passed in the lower house of parliament. Another check we can identify in the minister's work is that minister's council is collectively accountable to the legislature, there are different parliamentary committees dedicated for reviewing the functioning of different ministries, such as annual working reports of various organizations like UPSC, CAG, etc. If it is deemed necessary to do so, any member of legislature may ask questions to ministers about their working in question hours provided to them, thereby keep track record of their dormant activity. When considering impeachment of president then again we can identify that according to article 61 president can be removed from his office prior to expiry of his term for 'violation of the constitution', on this ground of charges against him process of removal can be initiated by either of the house of parliament and with 2/3rd majority president can be removed.

While considering overriding power of executive in respect of judiciary, we can clearly identify that in case of appointment of Chief Justice of India and the Judges of the Supreme Court power lies in the hands of President under Article 124(2) of the Constitution and president also has authority according to grant pardon to person convicted of any offense (according to Article 72).

Various quasi-judicial court and tribunal have been set up to reduce workload, by taking burden of already overburdened courts but these are the part of executive itself and discharging function of judiciary.

We can also find overlapping power of executive over legislature as One is provided under Article 123 which gives ordinance making power to the president and has equivalent to the Act made by the parliament or state legislature. Another overlapping power is; according to separation of power, legislature is responsible to make laws but under power of delegated legislature rule making power is also enjoyed by executives.

When overlapping power exercised by judiciary over executive then Supreme court in accordance with Article 71(1) can remove president from his position and also for complete justice discretionary power is provided under Article 142 to the supreme court to pass such decree or order as deemed necessary. In numerous cases this extraordinary power is exercised by Supreme Court to do "complete justice".

Judiciary power over legislature is of "judicial review" which is provided under Article 13(2) that union or state can't pass any law contravention to any fundamental right, if they do so it will be considered as void and for this power chairman of Draft Committee Dr. B.R. Ambedkar, narrates judicial review as 'Heart of Constitution'.

### **(C) Australian Government**

Australian constitution is influenced by the U.S. constitution<sup>9</sup>. It is having division of government into three branches; parliament, executive and judiciary (High court and other federal courts). Nevertheless, strict separation of power is not seen between the executive and legislative branches. High court also declared this statement in *Dignan's case* of 1931. Just to make accountable to each organ, Australia government also follow doctrine of check and balance.

#### **1. Examples of check and balances**

High court of Australia is responsible to keep check on executive action along with laws passed by legislature on the parameter of constitutionality by exercising power of 'Judicial review'<sup>10</sup>, and if not then it can declare that action or law as unconstitutional. Australia considered that any federal government necessarily require judicial review and in number of cases it is evident that Australian High Court accepted a case from U.S. i.e. of *Marbury v. Madison* many times. Another provision provided under Article 109 also support judicial review by considering unconstitutional to those provision which are inconsistent with federal law. However, if we take the process of appointment of judges either at federal or state level, we find that appointment is made by governor general of Australia, who is the part of parliament or the executive.

Another point to note in this system is that the Queen is the first or "prime" Head of State, but once she appoints a Governor-General, he (or she) assumes the role of monarch in the country, and the Queen is no longer involved in administrative matters. Still Because the Queen appoints and, when petitioned by the Prime Minister, has the power to dismiss the Governor-General, they refer to her as the 'prime' head of state, this is the major part of their check and balance system.

Another example is of "the Prime Minister informs the Queen of the person he wants to nominate for Governor-General, and the Queen is expected to accept the nomination. 'Why do we need The Queen, and why can't the Prime Minister nominate the Governor-General himself?' one might reasonably ask. The reason, of course, is that if the Prime Minister was empowered to appoint and dismiss the Governor-General it would make that Office subservient instead of supervisory, as is the case at present where the Governor-General is allegiant to the

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<sup>9</sup> n.d. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900.

<sup>10</sup> Foley, K., n.d. Australian Judicial Review. [online] Washington University Open Scholarship. Available at: <[https://openscholarship.wustl.edu/law\\_globalstudies/vol6/iss2/4/](https://openscholarship.wustl.edu/law_globalstudies/vol6/iss2/4/)> [Accessed 29 January 2021].

Crown and therefore to the people and not to any politician. While it is customary for the monarch to accept the prime minister's nomination, this does not mean that a completely unsuitable nomination cannot be challenged. The procedure is part of the checks and balances that are built into their constitutional arrangements to protect the people's democracy<sup>11</sup>”.

All government departments, agencies and statutory bodies are responsible towards the parliament thereby controlling abuse of power.

## V. CONCLUSION

We can easily understand by analyzing the different provisions of the respective countries that absolute separation of power was not adopted by all three countries. United States being the first country who established this principle and even after India and Australia influenced by U.S. they accepted this principle on their own way. The constitutions of both India and the United States do not explicitly provide for separation of powers in all departments, it can be inferred from the constitution's various provisions as discussed above. Hence, we find different approaches in the respective countries. The doctrine separation of power used in the constitution of the United States or in the Australian constitution is stricter than in India. Accordingly, these countries also follow the doctrine of check and balance, as it is clear that without this principle, separation of power is not as effective as it should be. The structure that these three countries have adopted is frequently criticized. However, it is important to note that the countries have chosen the practice that is best for them, taking into account the social and historical circumstances in which they have found themselves. Therefore, we can summarize that the functioning of these three countries is fundamentally similar, but not the same.

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<sup>11</sup> D3n8a8pro7vhmx.cloudfront.net. The powerful checks and balances in Australia's Constitution. [online] Available at: <[https://d3n8a8pro7vhmx.cloudfront.net/monarchist/pages/202/attachments/original/1581461729/FOR.SCHOOL.S.-CHECKS\\_AND\\_BALANCES\\_IN\\_AUSTRALIAS\\_CONSTITUTION.pdf?1581461729](https://d3n8a8pro7vhmx.cloudfront.net/monarchist/pages/202/attachments/original/1581461729/FOR.SCHOOL.S.-CHECKS_AND_BALANCES_IN_AUSTRALIAS_CONSTITUTION.pdf?1581461729)> [Accessed 29 January 2021].