



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS



Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

“SEPARATION OF POWER: A CRITICAL ANALYSIS ON THE JUDICIARY’S WITH POLICY MATTERS OF THE GOVERNMENT”

AUTHORED BY - PRANALI GAWADE

ABSTRACT

The underlying idea of the doctrine of separation of power is that the organs of the government do not overlap or interchange the functions that are exercised by them individually. The notion of 'separation of powers' is the division of authorities and duties among the legislative, executive, and judicial branches. The power and accountability are being divided among these three organs of Indian government, viz., judiciary, legislature and executive. This doctrine makes sure that there is no amalgamation of power. This paper attempt to analyse the concept of this doctrine in India, the objective, criticism and how it is a barrier to administrative law.

INTRODUCTION

The doctrine of operation of power is an idea which talks about functioning of government is at its best when the powers are not solely given to a single authority but is sub divided into different branches. This principle is not followed in a very strict sense but is adopted by many nations. It was first adopted by United States of America. In India the doctrine of Separation of power was developed in 17th century. Where the thinkers pointed out three powers of the government which were power to make laws, power to enforce law and power to interpret law.

MONTESQUIEU’S CONTRIBUTION

The idea behind this doctrine is that no man should be empowered with all these three powers. These should be divided accordingly that the law should be made by legislative, administration of law should be done by executive and judiciary should uphold the law and provide justice.

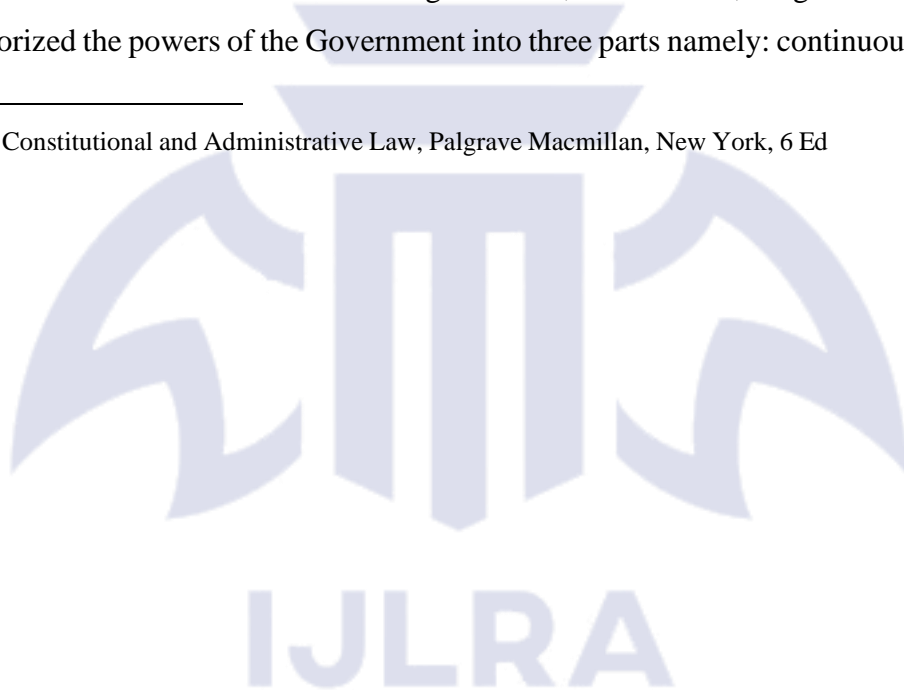
“There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the

public resolutions, and of trying the cause of individuals.”¹

Montesquieu believed that the decentralization of power should be done or else the justice becomes capricious. The three organs Legislative, executive and judiciary should work independently and there should be no overlap between the powers of these organs. According to him the basic assumption behind this principle is that if all the power is given in the hands of one body, it can be dangerous for the citizens because then the law becomes arbitrary and flawed.

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial. Locke categorized the powers of the Government into three parts namely: continuous executive

¹ Aldar John, Constitutional and Administrative Law, Palgrave Macmillan, New York, 6 Ed



power, discontinuous legislative power and federative power. “Continuous executive power” implies the executive and the judicial power, discontinuous legislative power“ implies the rule making power, „federative power“ signifies the power regulating the foreign affairs.²The French Jurist Montesquieu in his book L. Esprit Des Lois (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That’s why he is known as modern exponent of this theory. Montesquieu’s doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive and judiciary. In other word each organ should restrict itself to its own sphere and restrain from transgressing the province of the other. In the view of Montesquieu:

“When the legislative and executive powers are united in the same person, or interest he same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with 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 to exercise these three powers...³

Montesquieu’s “Separation” took the form, not of impassable barriers and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as “checks and balances”. The three organs much act in concert, not that their respective functions should not ever touch one another. If this limitation is respected and preserved, “it is impossible for that situation to arise which Locke and Monstequieu’ regarded as the eclipse of liberty- the monopoly, or disproportionate accumulation of power in one sphere.”⁴

The man behind the principles is to protect the people again capricious tyrannical and whimsical powers of the State.

United Kingdom: The famous English Jurist Blackstone supported the doctrine of Montesquieu. According to him, “wherever the right of making and enforcing the Law is vested in the same man or in the same body of men there can be no liberty”. During the 17th century in England Parliament exercised legislative powers. The King exercised executive powers, and the Courts exercised judicial powers, but with the emergence of cabinet system of Government i.e. Parliamentary form of Government, the doctrine remains no good. The renowned constitutional Bagehot observed. “The cabinet is a hyphen which joins, buckle which fastens, the legislative part of the State to the executive part of the State.

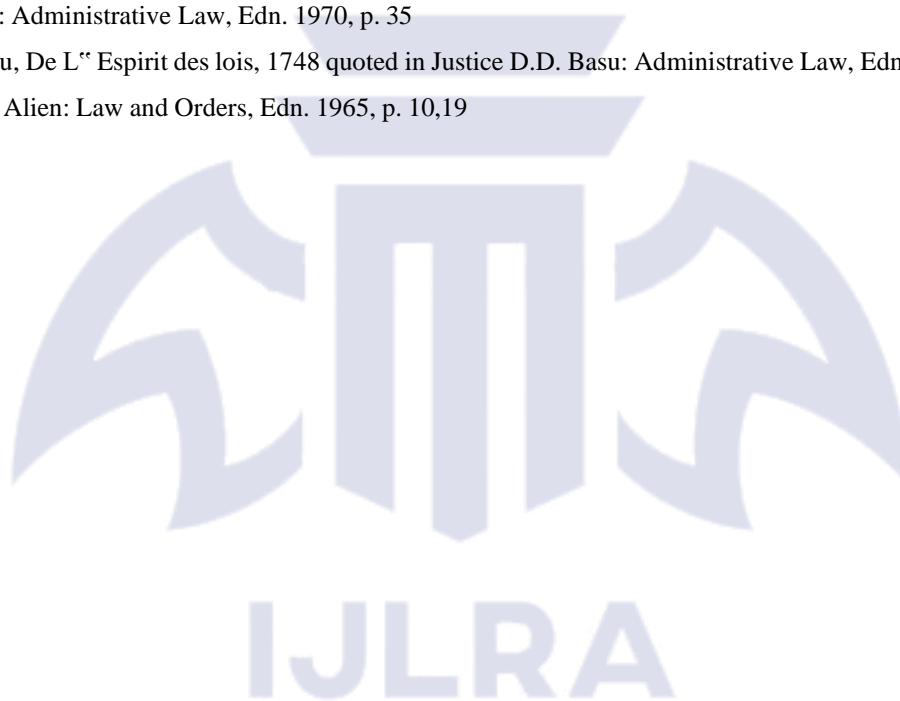
According to Wade and Phillips the doctrine of separation of powers implies:

- i)** The same person should not form more than one organ of the Government.
- ii)** One organ of the Government should not exercise the function of other organs of the Government.
- iii)** (iii) One organ of the Government should not encroach with the function of the other two organs of the Government.

² I.P. Massey: Administrative Law, Edn. 1970, p. 35

³ Montesquieu, De L' Esprit des lois, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn. 199, p. 23.

⁴ Carleton K. Allen: Law and Orders, Edn. 1965, p. 10,19



Now the question in subject is whether this doctrine finds a place in England? In England the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government.

In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that doctrine of separation of powers is not an essential feature of British Constitution.

Donough more Committee has aptly remarked:

“In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers. ”

U.S.A Usually it is said that the principle of separation of powers finds a good mention in the Constitution of United States; while the Federal Constitution of the United States of America does not expressly provide for the principle of separation of powers. Having reliance on the doctrine of Montesquieu, Madison, the Federalist observed; “The accumulation of all powers legislative, executive and judicial, in the same hands whether of one, a few or many and whether hereditary, self appointed or elective, may justly be pronounced the very definition of tyranny.” The same ideas were expressed by Hamilton in 1788.

In American Constitution we find that legislative, executive and judicial powers are vested in separate entities.

Section 1 of Article 1 declares: “All legislative powers herein granted shall be vested in a Congress of the United State”.

Section 1 of Article II says: “The executive power shall be vested in a President of the United States of America.”

Section 1 of Article III reads: “The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. ”

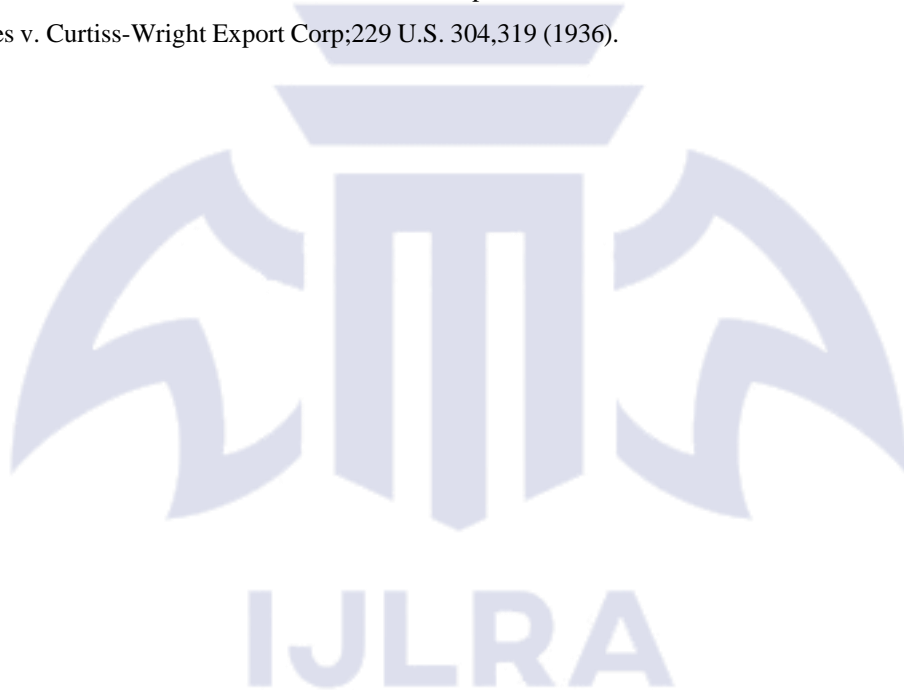
Let's us see the actual position prevailing in America. It is clear from the above mentioned provisions that the President is the head of the executive in U.S.A. Besides he (President)

possesses the power to vote bills ⁵ passed by the Congress and such bills cannot become law unless they are subsequently passed again by each House, with a two thirds, majority. The character of veto power vested in the President is purely legislative. It is true that the power is one of negation only, but the history of its origin shows that even in its qualified form, it is legislative in its nature.⁶ The President also exercises legislative power in making of treaties regarding foreign affairs. As John Marshall said in his great argument of March 7, 1800, in the House of Representative, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”.⁷The President in his legislative capacity gives

⁵ Article 1, Section 7(2) of U.S.A. Constitution.

⁶ Bernard Schwartz: American Constitution of Law, 1955 p.99.

⁷ United States v. Curtiss-Wright Export Corp;229 U.S. 304,319 (1936).



information of the state of the Union to the Congress.⁸Likewise the Congress interferes with the powers of President by casting vote on Budget. The Budget and Accounting Act, 1921 established the principle and practice of the executive budget, under which the President is responsible for formulating and presenting to Congress a complete and detailed expenditure plan for the following fiscal year.⁹Congress also plays important role in ratification of treaties, as well as in appointments through its senators. Congress has also judicial powers. Each house may expel its members by a two thirds, votes or punish them for „disorderly behaviour“. Congress is the sole judge of the reason for expulsion. Not only this, American judges may be removed from the office only by impeachment proceedings instituted before the Congress. So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that legislature enacts the Law, but it is also true that in dealing with the new problems, where Law is silent, the Courts have to create the Law. The Chief Justice Hughes’s remarks are most pertinent in this connection, as he candidly said- „The Constitution is what the judges say it is.“¹⁰ The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers.

India: The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the function of another. In Constituent Assembly Debates Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads:

There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial.”¹¹

Kazi Syed Karimuddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof. K.T. Shah.

Shri K. Hanumanthiya, a member of Constituent Assembly dissented with the proposal of Prof. K.T. Shah. He stated that Drafting Committee has given approval to Parliamentary system of Government suitable to this country and Prof. Shah sponsors in his amendment the Presidential Executive. He further commented:

“Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of Government. In any country or in any government, conflicts are suicidal to the peace and progress of the country Therefore in a governmental structure it is necessary to have what is called “harmony” and not this three-fold conflict.”¹²

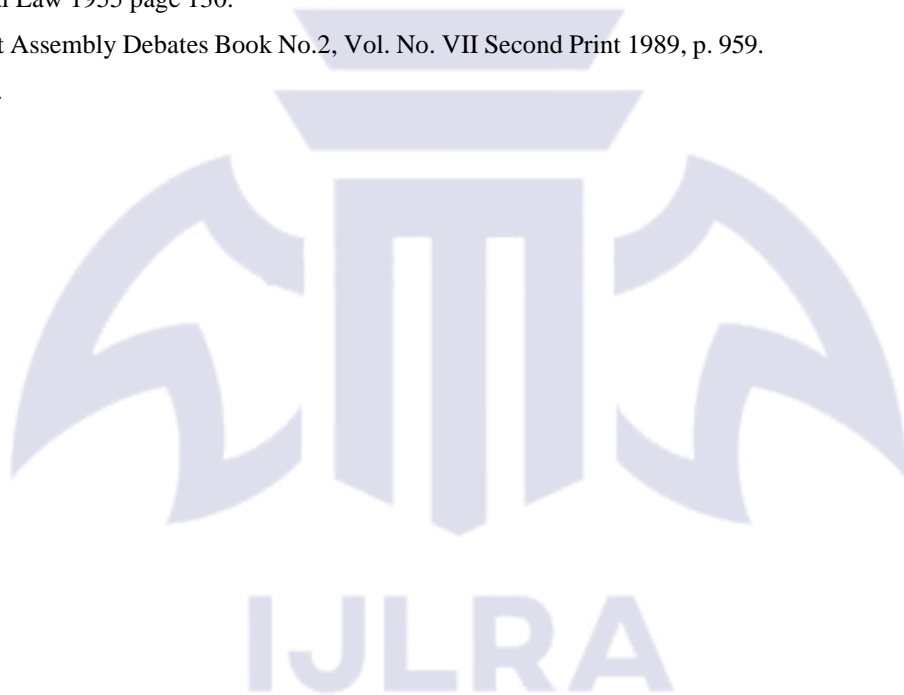
⁸ Article II, Section 2 of Constitution of U.S.A.

⁹ C. Herman Pritchett: The American Constitution 3rd Edn. p.163

¹⁰ Hendel, Charles Evans Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz in American Constitutional Law 1955 page 130.

¹¹ Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.

¹² Ibid p. 962.



Prof. Shibban Lal Saksena also agreed with the view of Shri K. Hanumanthaiya.

Dr. B.R. Ambedkar, one of the important architect of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus:

“There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature..... There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.”¹³

With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negatived i.e. turned down.

In Indian Constitution there is express provision that “Executive power of the Union shall be vested in the President,¹⁴ and the executive power of the State shall be vested in Governor..” (Article 154(1) of Indian Constitution). But there is no express provision that legislative and judicial powers shall be vested in any person or organ.

Now we have to see what is the real position in India regarding the separation of powers?

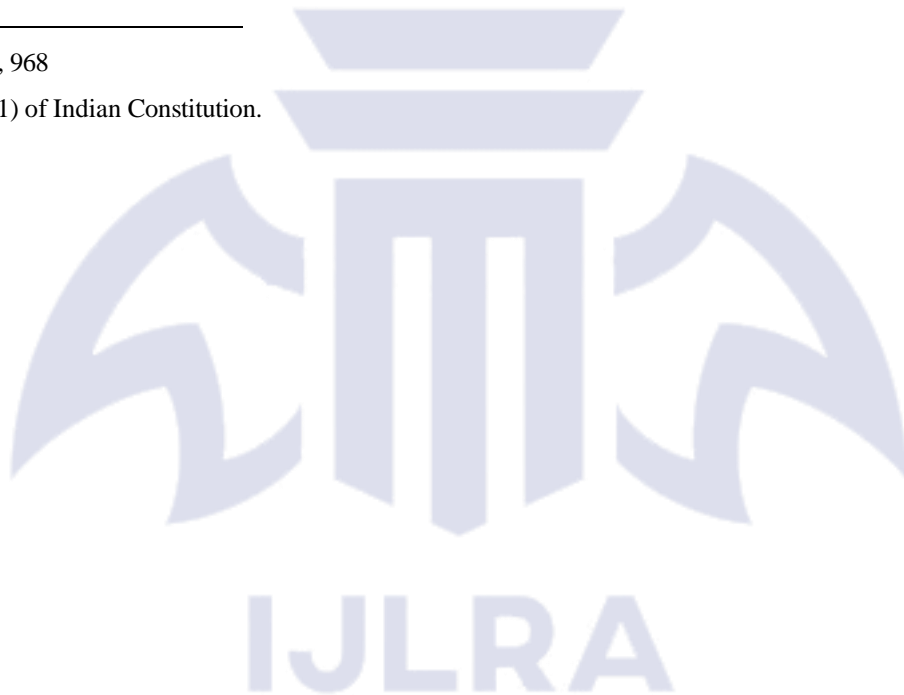
President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate Ordinances in order to meet the situation as Article 123(1) says “If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require”. When Proclamation of emergency has been declared by the President due to failure of Constitutional machinery the President has been given legislative power under Article 357 of our Constitution to make any Law in order to meet the situations. A power has also been conferred on the President of India under Article 372 and 372-A to adapt any Law in country by making such adaptations and modifications, whether by way of repeal or amendment as may be necessary or

expedient for the purpose or bringing the provisions of such Law into accord with the provisions of the Constitution.

The President of India also exercises judicial function. Article 103(1) of the Constitution is notable in this connection. According to this Article “If any question arises as to whether a member or either of House of Parliament has become subject to disqualification mentioned in clause (1) of Article 102, the questions shall be referred for the decision of the President and his decision shall be final”. Article 50 lays emphasis to separate judiciary from executive. But in practice we find that the executive also exercises the powers of judiciary as in appointment of judges. (Articles 124, 126 & Article 127). The legislative (either House of Parliament) also exercises Judicial function in removal of President (Article 56) in the prescribed

¹³ Ibid p. 967, 968

¹⁴ Article 53(1) of Indian Constitution.



manner.¹⁵Judiciary also exercises legislative power, High Court and Supreme Court are empowered to make certain rules legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy it declares the same null and void, and then amendments may be incorporated in the Legal System. Some time High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character.

WHAT IS THE DOCTRINE OF SEPARATION OF POWERS?

- Separation of powers is the division of the legislative, executive, and judicial functions of government.
- Article 50 says that states shall take steps to separate the Judiciary from the Executive.
- The constitutional demarcation precludes the concentration of excessive power by any branch of the government.
- The Indian Constitution lays down the structure and defines and determines the role and functions of every organ of the State and establishes norms for their inter- relationships and checks and balances.

What are the Instruments of Checks & Balances?

- **Legislature Control:**
 - On Judiciary: Impeachment and the removal of the judges. Power to amend laws declared ultra vires by the Court and revalidating it.
 - On Executive: Through a no-confidence vote it can dissolve the Government. Power to assess works of the executive through the question hour and zero hour.
- **Executive Control:**
 - On Judiciary: Making appointments to the office of Chief Justice and other judges.
 - On Legislature: Powers under delegated legislation. Authority to make rules

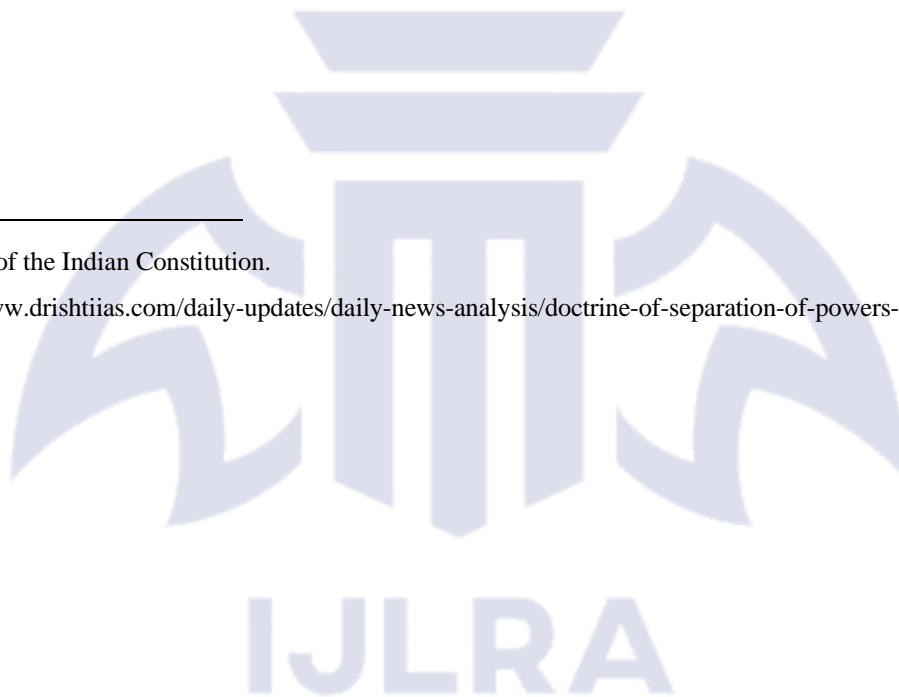
for regulating their respective procedure and conduct of business subject to the provisions of this Constitution.

- **Judicial Control**

- On Executive: Judicial review i.e., the power to review executive action to determine if it violates the Constitution.
- On Legislature: Unamendability of the constitution under the basic structure doctrine pronounced by the Supreme Court in Kesavananda Bharati Case 1973.¹⁶

¹⁵ Article 61 of the Indian Constitution.

¹⁶ <https://www.drishtiias.com/daily-updates/daily-news-analysis/doctrine-of-separation-of-powers-1>



MEANING OF SEPARATION OF POWER

The doctrine of separation of powers follows the principles of politics. The concept of this doctrine is to remove the abuse of power by the authorities. This doctrine says that no organ of the government can exercise the power other than what is given to them. There are four principles on which this doctrine is based upon:

- Exclusivity Principle which has divided the government into three structural organs.
- Functional Principle which gives the boundaries of the organs, and that one organ shall not perform the functions of the other.
- Check and Balance Principle suggests that check should be made on each other by these organs to look after the functions and duties performed are within the constitutional bounds.
- Mutuality Principle which aims at creating concord, not discord, cooperation not confrontation, engagement not estrangement.

OBJECTIVE

Now let us have an overview of the fundamental concepts and objectives of separation of power:

-

- Firstly, it aims to overcome the inconsistency, despotism and autocracy of the government and helps to make it democratic and more accountable.
- Moving on, secondly, it makes it possible to have a check on the usage of power by the different sections and areas of government, which further have the effect of disallowing the misuse of power by these specific blocks. It is clearly stated in the constitution of India regarding the minima's and maxima's of these domains and their task is to operate within these limits and get their work done. In our country, the ultimate and the sovereign epitome is the constitution and if any form of ideal or notion tends to make anything fall outside of the preview of the constitution and its provisions then it is simply taken as being either null, void or even unconstitutional of the constitution and its provisions then it is simply taken as being either null, void or even unconstitutional
- Thirdly, all branches of the government have their own tasks and must have the sole aim as

the fulfilment of these tasks so through the concept of separation of power it makes each and every branch accountable and responsible for their own and therefore keeps a check on all of them.

- Fourthly, the concept of separation of power divides the power into three segments so that instead of it being with a specific branch wherein this would give rise to inconsistency, it rather makes it possible to have a balance of this power and makes the government more democratic and effective.

- Lastly, when each branch has a specific role to play, it makes each branch able to hone their skills using their resources and make them have an expertise in their particular role and duty, this is done with the intention to enhance, promote, multiply the efficiency of the government.



EVALUATION OF THE DOCTRINE

In strict sense the principle of separation of powers cannot be applied in any modern Government either may be U.K., U.S.A., France, India or Australia. But it does not mean that the principle has no relevance now a days Government is an organic unity. It cannot be divided into water tight compartments.

History proves this fact. If there is a complete separation of powers the government cannot run smoothly and effectively. Smooth running of government is possible only by co-operation and mutual adjustment of all the three organs of the government. Prof. Garner has rightly said, “the doctrine is impracticable as a working principle of Government.” It is not possible to categorize the functions of all three branches of Government on mathematical basis. The observation of Frankfurter is notable in this connection. According to him “Enforcement of a rigid conception of separation of powers would make Government impossible.”¹⁷

It is my opinion that the doctrine of Montesquieu is not merely a „myth“ it also carries a truth, but in the sense that each organ of the Government should exercise its power on the principle of „Checks and Balances“ signifying the fact that none of the organs of Government should usurp the essential functions of the other organs. Professor Laski has aptly remarked: “It is necessary to have a separation of functions which need not imply a separation of personnel.”

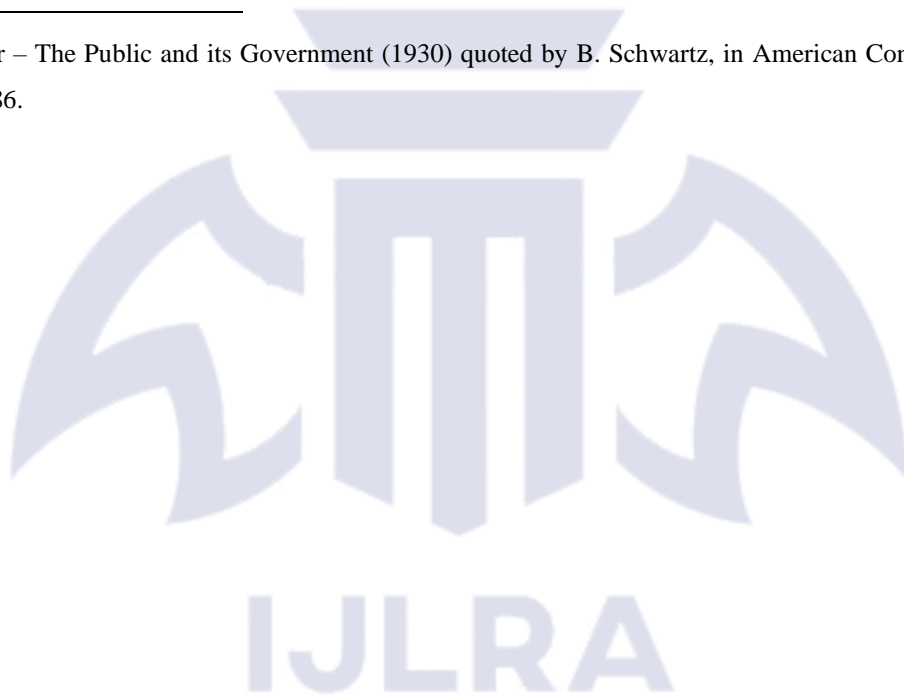
SEPARATION OF POWER IN INDIA

In India there are three major powers of government and each of them is performed by separate organ. Legislature is responsible for making the laws, executive is responsible for enforcing law and judiciary is responsible for implementing laws. The major question that arises is that should there be dependence of these organs on each other or whether there should be a strict separation of powers among them. There is strict provision that defines separation of powers absolutely but there are provisions in Constitution of India that have made distinction between the powers of the organs of the government. Even though there is no express provision for this doctrine, but it is followed in India in an implied manner. It has defined the roles of each organ of the government.

The constitution of India had laid separate functions of the organs of the government in following ways:

- The judiciary is independent as laid down under Article 50. The conduct of the judges cannot be taken about in the parliament and state legislature as provided under Article 121 and 211. The powers of executive are vested with president and in a state is vested with governor as per Article 53 and 154
- The legislature in certain cases like impeachment of the president or removing of the judges may have judicial powers. Likewise, the executive has certain powers to appoint the judges and chief justice which can affect the functioning of the judiciary.

¹⁷ Frankfurter – The Public and its Government (1930) quoted by B. Schwartz, in American Constitutional Law, 1955 Page 286.



- The executive can exercise the powers of the legislature in circumstance when the legislature is not in session and there is an urgent need to make law. This is provided as under Article 123 to promulgate ordinance.

The constitution has also provided a system where checks and balances are done to prevent misuse of powers that have been vested. This clearly shows that the constitution of India does not provide a rigid structure of this doctrine of separation of power. It is used in a broad sense and the three organs can exercise their powers and functions even with some overlap.

PRACTICAL APPLICATION OF SEPARATION OF POWER

Apart from the separation of judiciary provided by directive principles under Part IV of the Constitution but apart from this there is no division of power. After the constitution was adopted there have several judgments by the supreme court which have created boundaries by applying the doctrine of separation of power. The question raised in the case **Keshvananda Bharti Sripadagalvaru and Ors. v. State of Kerala and Anr**¹⁸, was that till what extent the constitution can be amended by the legislature. The argument was that judiciary should not interfere if the parliament decides to change the law even if it was unconstitutional. However, the court held that the argument is vague and the doctrine of separation of power is the basic structure of the constitution, and it shall not be violated. This has always been an integral part of the constitution and the judiciary along with executive and legislature are bound to follow the constitution which has provided distinction between the relationship of these three organs. After this decision the doctrine was recognised as an integral part of the basic structure of the Indian constitution.

Further in **Ram Jawaya Kapur v State of Punjab**¹⁹, it was held by the court that even though the doctrine of separation of power is not mentioned in the constitution but the functions of one organ should not be performed by the other. These organs should exercise their powers beyond what is provided by the constitution. Even in the case of **Indira Nehru Gandhi v Raj Narain**²⁰, it was observed that the basic structure of the constitution cannot be changed even when Article 368 provides the amendment of the constitution. The court further observed that the doctrine in India has a broad sense than that of UK and USA which follow the doctrine in a very rigid

manner. “The constitution of India is supreme, and no other authority can be above it”. The functions of the three organs should be carried out within the respective power as provided by the law of land. All the organs should work as per the law of land, as observed in the case of **Golak Nath v State of Punjab**.²¹

In reality a strict follow of doctrine of separation of power is not possible. There exists interdependence. From the above judicial pronouncements, it can be seen that the doctrine of separation of power is followed in a broad sense in India.

¹⁸ 2 AIR 1973 SC 146

¹⁹ 3 AIR 1955 SC 549

²⁰ 4 AIR 1975 SC 2299

²¹ 1967 AIR 1643



SEPARATION OF POWERS AND JUDICIAL OPINION:

The following cases explain the real position of doctrine of separation of powers prevailing in our country.

In re Delhi Law Act case²²Hon^{ble} Chief Justice Kania observed:

“Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?” To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon^{ble} Chief Justice B.K. Mukherjea observed:

“Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?” To the same effect another case is Rai Sahib Ram Jawaya v. State of Punjab reported in AIR 1955 S.C. 549 at p.556 in which Hon^{ble} Chief Justice B.K. Mukherjea observed:

“The Indian Constitution has not indeed recognised the doctrine of separation of powers in the 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 the functions that essentially belong to another.”

In Ram Krishna Dalmia v. Justice Tendolkar reported in AIR 1958 S.C. 538 at p. 546, Hon^{ble} Chief Justice S.R. Das opined that in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial- is nevertheless implicit in our Constitution. Same view was expressed in Jayanti Lal Amrit Lal v. S.M. Ram, AIR 1964 SC 649.

The judiciary is independent and separate wing of the Government. The executive or legislature has no concern with the day to day functioning of the judiciary. In terms of Biblical apologue, Francis Bacon in his “Essay of Judicature” showing the importance of „Temple of Justice“ has expressed thus:

“Solomon”s Throne was supported by lions on both sides; Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.” (Quoted in S.C. Advocates-on-Record Association v. Union of India, AIR 1994 SC 268 at p. 301).

²² AIR 1951 S.C. 332 at p.346 = (1951)S.C.R. 747.



Here the expression “Solomon’s Throne” symbolizes the majesty of our justice system and the word „Lions” represents the Legislature and the Executive. Briefly it may be stated as” „Majesty of Justice system” is supported by the Legislature and the Executive from both sides, nevertheless, these Legislature and Executive are under the control of Judiciary. Legislature and Executive must not go against any point of Sovereignty. As regards „Sovereignty” it is enough to state that in a democracy it vests in the will of people.

Showing the importance of judiciary, Supreme Court in the same case has also observed: “Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged.” (p.338)

In Chandra Mohan v. State of U.P., AIR 1966 SC 1987 at p. 1993 Supreme Court held: “The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States. But at the time the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the power levels would be a mockery.” (See also S.C. Advocates-on-Record Case, AIR 1994 S.C. 268 at p. 272).

absolute separation of powers is not possible in any form of Government. In view of the variety of situations, the legislature cannot fore-see or anticipate all the circumstances to which a legislative measure should be extended and applied. Therefore, legislature is empowered to delegate some of its functions to administrative authority (executive). But one thing is notable that legislature cannot delegate its essential legislative power. On this point following cases are notable:

(1) Sri Ram v. State of Bombay, AIR 1959 S.C. 459,473,474

(2) Makhan Singh v. State of Punjab, AIR 1964 S.C. 381,401

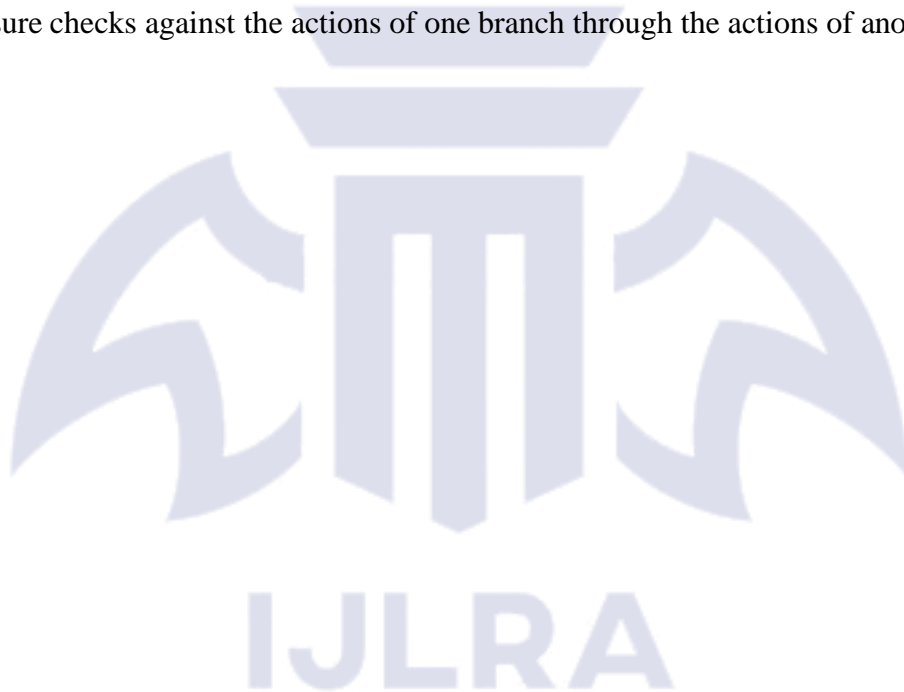
(3) Laxmi Narayan v. Union of India, AIR 1976 S.C. 554.

In these cases the Supreme Court held that excessive delegation is not permissible. So many other cases are also notable on the point.

THE SEPARATION OF POWERS AND DEMOCRACY

Ensuring the exercise of power is shared between the Executive, Judicial and Legislative branches is, at its core, an attempt to:

1. Ensure no one body or institution governs alone.
2. Act as a protection against arbitrary or unlimited government.
3. Allow the representation of different interests, ideas and principles as law circulates through the three bodies, for example legal principles, popular consent and the needs of the state.
4. Ensure checks against the actions of one branch through the actions of another.



As Indian economist, philosopher and Nobel-Prize winner Amartya Sen has noted, democracy has long been seen as government by “conversation” or “discussion,” and not solely balloting and elections.

The separation of powers is arguably a powerful means to make this ideal a reality. Under the separation of powers, laws and policies must be proposed, scrutinised and potentially amended, before being passed, and even then, are subject to ongoing scrutiny and challenge.²³

CHALLENGES IN ACHIEVING THE SEPARATION OF POWERS

1) The balance between separation and supervision

According to academic Aileen Kavanagh, the desire to separate the three branches must also interact with the principle that each branch has a responsibility to check and balance the actions of another. This leads to the question of how to balance separation with supervision.

The Commonwealth Latimer House Principles recognise this tension, with Parliaments and the Judiciary recommended to work in a “complementary and constructive manner” and for the branches to “respect” the duties of the other.

Supervisory actions can include establishing audit commissions to monitor public finances or adhering to a model of constitutional supremacy, where all laws and actions are judged against constitutional provisions (in contrast to the model of parliamentary supremacy).

2) The ‘Westminster system’ and Executive membership of the Legislature

The ‘Westminster system’ broadly refers to a system where the effective head of government (usually termed the Prime Minister or Premier), together with their Cabinet, sit in the Legislature while wielding Executive power. The role of the Governor-General (in a Commonwealth Realm) or President (in a Republic), in contrast, is often limited. This system was inherited by many Commonwealth jurisdictions at their independence from the United Kingdom.

The Executive presence in Parliament may facilitate scrutiny provided necessary procedures are in place.

In many states, there is no rule on how many Members of the Legislature can be Ministers, often leading to a substantial Ministerial bloc in a jurisdiction’s Parliament. Around a third of the UK House of Commons are Ministers or have unpaid government positions, for example, while India’s constitution states that no more than 15% of the Members of the lower house (Lok Sabha) may hold Ministerial office.

²³ https://issuu.com/the-parliamentarian/docs/parl2023iss4finalonline_single_reduced/s/402939

In smaller Parliaments, it is possible that all Members of a governing party are Ministers. This puts greater pressure on a small number of backbenchers to undertake scrutiny roles. It also makes establishing cross-party Committees to scrutinise the Executive challenging.

3) Parliamentary independence from the Executive

Published in 2020, the Commonwealth Parliamentary Association's (CPA) 'Model Law for Independent Parliaments' recommends that Parliaments establish their own corporate bodies to strengthen their institutional, financial and administrative independence from the Executive. On the launch of the model, the CPA said there were "many examples [...] everyday" in Commonwealth Parliaments of "Executive interference" that can result from a lack of parliamentary control over their own finances, staffing and physical infrastructure.

According to Inter-Parliamentary Union (IPU) data, 18% of IPU members globally (31 out of 172) report that the Executive continues to have sole responsibility for preparing their country's parliamentary budget, while 17% (29) have a shared responsibility with Parliament.

4) Continuing influence of the Executive over judicial appointments

2015 research by the Bingham Center also found continuing Executive influence over judicial appointments in the Commonwealth.

In 15 of the 48 Commonwealth independent jurisdictions (27%), it was the Executive, rather than a separate judicial appointments commission, which had the sole power to appoint members to the country's highest court (for this study, the six states covered by the Eastern Caribbean Supreme Court counted as a single unit).

The Chief Justice (or equivalent) position was also appointed by the Executive in half of Commonwealth states.

5) Inclusive institutions

Even with effective institutions, representative government and perceptions of democratic fairness can be limited if not all groups are represented. The role of the separation of powers in

drawing on a range of different evidence, knowledge and values will therefore be limited. Inclusive Parliaments are particularly important given that in many jurisdictions the Executive has taken the lead in proposing legislation, with the Legislature playing a primarily scrutinising role. This role is strengthened if Parliaments are representative and accessible to the wider public.

6) Small jurisdictions

The Commonwealth Latimer House Principles recognise that “small and/or under-resourced jurisdictions” may experience challenges in achieving a strong separation of powers.



OBSTACLE TO ADMINISTRATIVE LAW

Administrative law is a subset of public law that governs the structure, powers, and responsibilities of administrative agencies. The idea of separation of powers establishes a boundary between the three branches of government. However, administrative law is now incompatible with this principle. The Administrative agencies are not only performing the administrative functions but also quasi-judicial and quasi legislative functions as well which might violate the doctrine of separation of power. In order to develop efficient and adroit government and assure competent law enforcement, it is now an absolute requirement to delegate further legislative and judicial responsibilities to administrative authorities. These tribunals were created with an objective to reduce the burden of the legislature and the courts. It will also speed up the lawmaking process and also provide timely justice. However, this not possible if the doctrine of separation of powers is followed in a strict sense because it limits the administrative law.

CRITICISM

Like every pointed end has a blunt side, the same way every doctrine has two faces to its effects. Even though the concept of separation of power into 3 heads might sound like an amazing concept, but the same when put to task in the real world lacks the appeal as now is the time when the edge of the blunt side comes to light. The problem arises when we make an attempt to make a distinction between these 3 heads, namely legislature, executive and judiciary. The only way that a government can operate in a correct and timely manner is when these powers have cohesiveness and cooperation. If we try to make these sections execute independently it might lead to a system failure and even ineffective working of the government. Now let us suppose that we adopt this idea in its full-fledged existence. It will make it practically impossible to carry forward and take actions in certain and specific matters. Think of it this way that the legislature which has the capability to delegate powers won't be able to do it for the executive which might have the genesis and expertise of any subject which is being considered. Also, the courts which dictate and make laws for all matters will not be able to do so for the courts itself and the proceedings.

In the present systematic world scenario, it is the job of the state to bring its foot forward and work for the prosperity and the welfare of its people. Whatever the case, from the common to

the complex issues, it must be able to solve them within the society. So, when taken into consideration, the separation of power does seem and portray to be impossible. This means that as long as the rigid and stringent concepts of this doctrine are being imposed, it will not be able to fulfil the objectives of the modern state. Therefore, it can be concluded that separation of power is theoretically improbable and practically impossible. This theory was backed by Montesquieu, whose aim was to ensure freedom and liberty of an individual while protecting and safeguarding the same. But this is not at all possible if the stringent concepts of separation of power are at play.



CONCLUSION

The theory in debate i.e., the separation of power theory must be judged not only in an absolute way but in relation to its actual purpose. The only way to fully extract its meaning is to have a broader view and perceive it within a wide context, especially in this age of privatization, anarchy, and globalization. Limiting it to just the idea of being used as a medium of categorizing that too in a rigorous way should not be done, instead should be used in good spirit of unity, collective enhancement and for the greater good of the people. It can be argued that this idea or notion is not compatible to work in its literal meaning, but it can do so and succeed by laying emphasis on the checks and balances that are placed so as to make it a good government in its true form and make it possible to eradicate power manipulation and misuse by the different sections and domains of the government. It is seen that states do not follow this doctrine in strict sense, and it is very impractical to follow the doctrine of separation of powers. India with the help of this doctrine check and look after the functions of the three organs of the government. The effective working of a democracy requires doctrine of separation of power to be an essential part of the constitution however it should not be used in a strict sense.

