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

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, 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

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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.

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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.

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A COMPARATIVE STUDY ON SEPERATION OF POWER BETWEEN INDIA AND U.S.A.

AUTHORED BY - SHIVANGI ROY

INTRODUCTION

The doctrine of separation of powers is one of the cornerstones of many constitutional systems across the globe. This doctrine holds that the three major branches of government — the executive, legislative and judicial — should exercise their powers independently of each other. The executive branch should have governing powers; the legislative branch should be able to enforce the government's responsibility and the power to pass laws; and the judicial branch should have the power to administer civil and criminal justice, whether between individuals or between individual and the state. The doctrine also states that no single organ or individual should possess absolute or limitless powers. The doctrine is an integral part of the evolution of our democracy. It establishes a framework of checks and balances between the various branches of government. It is a defining characteristic of our Constitution.

Our Constitution makers ensured that the people's rights were safeguarded and effectively protected against any excesses by the legislature or the executive. Our Constitution has made it possible for the judiciary not only to annul legislative acts of Parliament but also to annul executive acts which are considered to be against the citizens' rights as laid down in the Constitution and in the various provisions of our Constitution. Our Constitution states that the courts shall interpret and examine the Constitutionality of laws or executive acts but shall not determine the law or matters of politics and shall not interfere with the executive's functions. It is clear from the statements made by many prominent members of the constitutional assembly that the principle of judicial independence does not allow the judiciary to act as a 'super legislature' or 'super executive'. In this regard, it is worth recalling the profound words of Pandit Jawaharlal Nehru: "No court and no law can stand in the way of the sovereign will of the whole community". At the end of the day, the law must be ruled by the Legislature and the Court of Justice cannot interfere with social reforms.

However, for many years now, it has been observed that the dividing lines between the powers

of the various organs of the state have become and are becoming more and more blurred, as a part of the judicial system, with all due respect, seems to believe that it has the power to exercise powers which are reserved by the Constitution for either the legislative or the executive branch of the state and are outside the scope of clearly defined judicial functions. It is to be noted that the Hon'ble Supreme Court has interpreted separation of powers as a 'basic feature' of the Constitution. Therefore, every organ of the State necessarily has distinct areas of functioning where no other organ may enter or interfere unless it is permitted by the Constitution to do so, and if it does so, it would be in breach of one of the 'basic features' of our Constitution and would include the judiciary.

MEANING, ORIGIN AND DEVELOPMENT OF DOCTRINE OF SEPARATION OF POWERS

MEANING: -

Separation of powers is the principle that a government operates best when its powers are not centralized in one authority but are distributed among distinct groups or branches. The United States became the first nation to formalize separation of powers in a written Constitution. The concept originated during the European Enlightenment, which began in the 17th century and continued into the 18th century. Before the American Revolution, Enlightenment thinkers defined three main powers inherent in state:

1. Legislative Power- To legislate the law
2. Executive Power- To execute the law
3. Judicial Power- To enforce the law

The theory of separation of powers states that the three types of powers and functions of government should always be kept separate in a free democracy and should be exercised by three separate bodies of government. This means that one person shouldn't be able to do all three. The legislature should only do legislative functions and powers and shouldn't administer or enforce them. The executive shouldn't control the legislature or take over the judiciary. Wade and Philips¹ explain that separation of powers means that the same person shouldn't belong to more than one of these three bodies of government, that one body shouldn't interfere with another body of

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

government, and that one body of government shouldn't do the functions assigned to another body. Montesquieu argued that when the executive and legislative branches of government are the same person or entity, there is a risk of the legislature legislating oppressive laws that the executive will use to achieve its own objectives. Furthermore, he argued that if a single individual or entity could exercise both executive and judicial power in the same case, there would be an arbitrary power that would amount to absolute tyranny and would not ensure the impartiality of law. This view on separation of functions is based on the principle that if the legislature and executive are also the administrators and dispossessors of law and order, then the public at large will be deprived of any remedy in the event of any injustice, as there is no superior authority. The doctrine has become a fundamental component of the governmental structure; however, its practical application differs significantly from its theoretical basis. The doctrine is intended to have three distinct categories of functions and corresponding organs. However, due to the vast and intricate nature of modern states, where the process of making, administering and deciding on legislation cannot be clearly defined or assigned to separate bodies, it is very difficult to apply this doctrine in a strict sense. It is the responsibility of the government to safeguard individual rights, however, governments have historically been the main violators of those rights. Therefore, a number of strategies have been developed to reduce that risk. The concept of separation of powers is one such strategy. The fundamental premise behind it is that when a person or group has too much power, it can become dangerous for the people. The separation of powers is a method of reducing the amount of power in the hands of any group, thus making it more difficult for it to abuse power.

ORIGIN & DEVELOPMENT

The concept of separation of powers dates back to ancient Greece and became widespread in the Roman Republic with the founding of the original Constitution. In his book, "The Politics," (4th century BC) Aristotle (384-322 B.C.) stated that "there are three elements in every Constitution in respect of which all serious lawgiver must seek what is advantageous to him, the Constitution is well arranged, and the distinctions in constitutions correspond to the difference between these three elements." The three elements are: The deliberative, which discusses all matters of common importance; The official; and the judicial. A French philosopher, Jean-Luc de Montesquieu, divided the government's responsibilities into three different categories: the legislative, the executive, and the judicial. He outlined how liberty is compromised when all powers are given to the same person, which leads to tyranny.

Locke referred to the three powers as legislative, executive and federal. However, he did not mention the separation of functions among them. Instead, he referred to the legislative as the supreme branch and the executive and federal branches as dealing with internal and external affairs. The judiciary operates under the control and authority of the king. However, there is no mention of the judicial branch as a distinct branch of the government. Thus, it has been observed that Locke's theory does not really serve as an explanation of separation of powers.

Montesquieu's separation of powers model involves the division of political power between the executive branch, the legislature branch, and the judicial branch. In this model, each branch is restricted from intervening in the areas of responsibility of the other branch. Thus, the separation of powers involves the division of governmental responsibilities into different branches in order to limit the exercise of power by one branch over the main functions of another. The primary aim of the separation of powers is to avoid concentration of power and provide checks and balances. The Montesquieu separation of powers means that no one should have all three powers in their hands. This means that each organ of the government is to exercise its power independently. The three organs of government are: Legislature (the legislature should only make laws, but not enforce or administer them) Executive (the executive branch should administer the laws that are made, but should not influence or stand in the way of the legislature's law-making process) Judiciary (judiciary should define rights and uphold justice) The judicial branch should not interfere in the work of the legislature or the administration process

SEPARATION OF POWER: POSITION IN U.S.A

The President does not act independently in the United States. At the conclusion of the American Revolution in 1783 the American government was in transition. The Founding Fathers did not wish to create another nation that was governed by a king, so the debates focused on having a strong and balanced national government that protects individual liberties and does not abuse its power. When the new Constitution was ratified in 1787 the design of the infant United States government necessitated the formation of three distinct branches, each of which had its own powers and system of checks. This would ensure that no single branch of the government could ever become too powerful, as the other branches would always have the power to check the other two branches. These branches collaborate to govern the country and provide guidelines for all of us to follow.

The concept of separation of powers was widely accepted and strictly adhered to by the founders of the United States in 1787, and is at the core of the Constitution of the United States. The principle of separation of powers is an integral part of the American Constitution, as it demonstrates the interdependence of the three branches of government. In accordance with this principle, the legislature cannot exercise executive or judicial power, and the executive cannot exercise any of the other two powers, just as the judicial system cannot exercise any of its other powers.

The US Constitution gives each branch of government different powers. The first three articles, called distributive articles, set out the structure and powers of Congress, the executive branch, and the judicial branch. Article 1 of the Constitution gives Congress all the legislative power, Article 2 and Section 1 of the Constitution give the President all the executive power, and Article 3 and Section 1 give the Supreme Court all the judicial power. Each branch has its own powers, and they're all checked or limited by another branch, which is called the checks and balances system.

SYSTEM OF CHECKS AND BALANCES

The separation of powers doctrine ensures that the three branches of government, the legislature, the executive branch, and the judiciary, are kept separate from one another in order to prevent any one branch from becoming a threat to the other. The checks and balances system, on the other hand, is a constitutional arrangement whereby each branch of government has the power to limit the powers of the other, so that no one organ can become too powerful. For instance, Congress will maintain its control over the executive branch through the ratification of the treaty, the impeachment of the President, and, in certain cases, the withholding of funds and the impeachment of the Supreme Court judges. The executive branch can maintain control over the legislature through the exercise of its veto power over the laws that have been enacted and the appointment of judges to the Supreme Court.

The supreme court also uses its power of judicial review to hold the legislative branch accountable. It can annul any law that the legislature has passed that is invalid, and it can annul any executive order that is unconstitutional by the supreme court. There are three main branches of the American government: the law-making, executive, and judicial. The law-making branch is responsible for making laws and setting aside funds for the government. The executive branch is

responsible for executing the public policy that the legislative branch makes and administers. The judicial branch is responsible for explaining the Constitution and laws and for applying the simplifications to the arguments and cases that are brought before it. Marbury v. Madison was a landmark case that laid the foundation for judicial review under the US Constitution.

JUDICIAL PRONOUNCEMENT:

In 1881, the United States Supreme Court ruled in Kilbourn vs. Thompson²-

“It is essential to the successful working of this system that the persons entrusted with power in anyone 'of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of power. As a general rule inherent in the American Constitution system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.”

In the case of Marbury v Madison³, Chief Justice Marshall ruled that Congress was unable to expand the jurisdiction of the Supreme Court when it came to invalidating legislation. This ruling essentially resolved the question of the legitimacy of judicial review.

In Satinger vs. Philippine Islands⁴, the Court ruled as follows:

“It is inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power, the executive cannot exercise either legislative or judicial power, the judiciary cannot exercise either executive or legislative power.”

SEPARATION OF POWER: POSITION IN INDIA

The Indian Constitution is the largest in the world. In the Constitution, the concept of separation of powers has not been explicitly mentioned. The concept of separation of power in the Constitution does not exist in a watertight compartment. The separation of judiciary from executive is provided for in Article 50 of Indian Constitution. There is no provision in the Constitution concerning the vesting of legislative and judicial powers in any specific organ.

² (1881) 103 U.S. 168 (190)

³ 5 U.S. 137 (1803)

⁴ (1928) 103 U.S. 168 (192)

According to Article 53 (1) and Article 154 (1) of the Constitution, the executive power of the Union and the state is vested in the President & the Governor respectively.

The executive powers of the Union are vested in the President in accordance with Article 53. The execution powers are vested in the Governor in accordance with Article 154. However, the Governor exercises his powers with the support and advice of the Council of Ministers at the Centre (article 74) or at the State (as the case may be). The President and the Governor both exercise the power of Ordinance making under the Constitution. Thus, they perform legislative functions. The President makes laws for the State after the dissolution of State Legislature, after the President's Rule (Article 356) is imposed. President has the power to suspend any member of the House of Representatives under Article 103. The Chief Justice of the Supreme Court is appointed by the President. The Parliament has the right to impeach the Chief Justice. The Chairperson has the power to determine whether a judge of the Supreme Court or a High Court Justice is set restrain from the Judicial Service for the purpose of set restrain.

Parliament's judicial function is over-extended in some ways. It can decide whether there has been a breach of any parliamentary privilege; in the event of a charge being laid, it has the power to punish contempt of Parliament. In certain areas, the High Courts exercise functions which are more administrative than judicial. Under Article 227, their power to supervise other subordinate courts is more of an administrative nature than a judicial one. When it has power under Article 228 to transfer cases, it exercises administrative control over State district courts. Parliament's legislative power includes its power to set rules, which is relatively broad. The Union council of ministers is under the authority of the Lok Sabha as per Article 75. The Lok Sabha has the power to initiate the impeachment procedure against the President and the Supreme Court judges (Article 61). The members of the Council of Ministers would be members of both houses of Parliament as per Article 75 (5) which also means that there would be overlapping of staff. In India, the Executive is empowered to legislate on behalf of the delegated legislation. In order to adjudicate the rights of individual citizens in the form of administrative agencies (statutory tribunals) and national tribunals (domestic tribunals), administrative agencies have been established and carry out judicial functions.

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JUDICIAL DECISIONS:

It has been established that any legislative act passed by the Legislature that delegates its primary powers to another branch of government or that usurps the primary functions of the Legislature shall be deemed to be unlawful and void. The Supreme Court is empowered to invalidate the laws passed by the Legislature and the acts of the executive branch if they contravene any provisions of the Constitution, and the Parliament's authority to amend the Constitution is subject to review by the Court of Justice. The Court of Justice may invalidate any amendment if it alters the fundamental structure of the Constitution in any way. The Constitution has vested in the constitutional courts the power to invalidate acts of Parliament and the State Legislature that exceed constitutional limits. In the event that an Act made by the legislature is annulled by the courts for reasons of legislative impotence, the legislature cannot pass a law declaring that the judgment made by the court will not be enforceable; it cannot override the judgment of the courts.

RE DELHI LAW CASE⁵

No organ of government within the framework of the Constitution can take over the functions or powers assigned to it by the Constitution, either explicitly or by necessary implication. Similarly, no organ of government can relinquish the essential functions that it holds under the Constitution. It has been noted that the functions (except for the executive) were not assigned to specific bodies, but the Constitution, which is a written document, must be interpreted as meaning that all powers and functions must be derived from the Constitution itself. Consequently, except for exceptional provisions such as Articles 123 and 213 and Article 357, it is clear that the Constitution intends for powers of legislation to be exercised solely by the legislative body established by the Constitution. The power of delegation is a complement to the power to legislate; however, essential legislative powers cannot be transferred to the executive.

⁵ 1951 S.C.R. 747

RAM JAWAYA KAPOOR V STATE OF PUNJAB⁶

The Delhi Laws case had a big impact on the decision in this case. The recognised schools in Punjab only used the textbooks prescribed by the education department. The Government decided to nationalize textbooks in 1950 and took over the business of printing and publishing them. The author, who was selected by the government for the purpose by contract, gave the copyright of the books to the government in lieu of royalties. The scheme was contested on the grounds, inter alia, that the executive cannot carry out any trade or business activity without a law being passed for that purpose. The Supreme Court rejected this argument saying that the government does not need any additional power to carry out the business as whatever is necessary for that purpose can be obtained by entering into contracts with authors and other persons. In the present case, the carrying on of the business of publishing books without a specific law sanctioning the same is not beyond the powers of the Executive.

INDIRA NEHRU GANDHI V. RAJ NARAIN⁷

C.J. Ray also noted that in the Indian Constitution, the separation of powers is only in a broad sense. India does not have a strict separation of powers such as in the American Constitution or in the Australian Constitution. Beg, J. further clarified that the principle of separation of powers forms the basis of the Constitution and none of the three organs of the Republic can assume the functions entrusted to the other institution. This structure cannot be altered even by recourse to Article 368. The Supreme Court has held that the judicature of a particular dispute is the judicial function which Parliament, even in the exercise of its constitutional amending powers, cannot exercise. On the basis of the above judgments, it is clear that India does not accept any doctrine of separation of powers between the executive power and the legislative power of the Government. As the Supreme Court has held, in India there may be a distinction and demarcation between the functions of the legislature and of the executive power. Generally speaking, the Constitution would not envisage that one organ should take over essentially the functions belonging to the other organ. However, the absolute rigidity of the Constitution makes no distinction between them. From the time of the judgment in *Keshvananda Bharti v. State of Kerala*⁸ and the legal formulation of the fundamental structure and fundamental characteristics of the Constitution, the concept of separation of powers has been interpreted as the cornerstone of

⁶ A.I.R. 1955 SC 549

⁷ A.I.R. 1975 SC 2299

⁸ A.I.R. 1973 SC 1461

the constitutional system and cannot be altered.

COMPARATIVE ANALYSIS ON SEPARATION OF POWER **BETWEEN INDIA AND UNITED STATES OF AMERICA**

Both the Constitution of India and the Constitution of the United States have adopted the doctrine of separation of powers. The United States Constitution has adopted this doctrine in its entirety. This means that the three bodies of the government, the executive, the legislative and the judicial, work within their respective spheres of power without interfering or interfering with the work and functions of another body. On the other hand, the provisions of the Constitution of India have separated the powers but not absolute or absolute separation. In the event of misuse or abuse of power by any body of the state, or in the event that one organ fails to function properly or within its own sphere of power, the other organs are well within their constitutional powers to intervene in that organ's functions.

There are significant differences in how the organs of system operate and work in both countries. In the USA, judicial powers are vested in the courts and only the courts can exercise these powers. In India, judicial power is vested in the courts, but also in the tribunals, which are quasi-judicial authorities. In some matters, the executive has the power to pardon the President and the governor, and the legislature has the power to remove the executive and judicial officers by law. The legislative power in the United States of America is vested in the Congress, i.e., the Senate and House of Representatives. In India, the legislative power is vested in Parliament and the State Legislature, but in some matters, legislative powers are exercised by the executive (power to make ordinances) and in some cases, by the Judiciary.

Contrasting the system of delegation of power in the United States with the system of delegation in India. Whereas in the United States, there is only one list, in India, there are three such lists: Union, state, and concurrent. In the United States, only the power of the centre is interpreted in the Constitution, no concurrent list exists, and the excess remains with the States. In the Indian Constitution, the power of the Union is defined also by the power of the states, and there is a wide concurrent area, with the excess staying in the Union rather than with the States. The functions assigned to the Union in India are much more complex than those assigned to the Centre in the United States. Defence and External Affairs are central subjects of the Union in both the United States and India, but the Centre's external powers in India appear to be broader than in the US. In

the United States, the Supreme Court has strengthened the power of the Centre, whereas in India the Constitution has strengthened the strength of the Centre.

CONCLUSION

The functions of government can be divided into three categories: the legislature, the executive branch and the judicial branch. While it is still possible to accept that the functions are divided into three categories, in a modern state, these functions cannot be attributed to the legislature, executive branch and judicial branch alone. In fact, most constitutions have a checks and balances system that is partly separation of powers. This is due to the fact that the issues and functioning of government in a contemporary scenario are interdependent. Consequently, it is not feasible or practical to construct a watertight compartment and delineate the functions of the three bodies with mathematical accuracy and state that the business of the Legislature is to enact the law, the Executive Branch to enforce the law, and the Judicial Branch to interpret and enforce the law in specific cases. The United States Constitution clearly and explicitly recognizes the separation of powers between the executive and legislative branches of government. However, the strict implementation of this system is not in practice in the United States. This is due to the fact that the President has the power to legislate and adjudicate, as mandated by the Constitution. The Congress, on the other hand, has the power to intervene in the executive domain through the budget and accounts act, which empowers it to make modifications to the budget approved by the executive branch. The Congress also exercises judicial powers in the form of censure and expulsion of members of the United States Senate and United States House of Representatives, as well as the initiation of impeachment proceedings against judges before the United States Senate. This, to a lesser extent, confers judicial powers on the Congress. The Indian Constitution makes no distinction between the legislative, executive and judicial powers of the government. If there are provisions which provide for separation of powers, there are also provisions which are contrary to the principle of separation of powers. The Supreme Court has ruled in various cases that there is no such thing as a "strict separation of powers" in India. Therefore, it can be concluded that the principle of strict separation of powers is not applicable in India. The principle of Montesquieu cannot be applied in the Indian context. If we look into United Kingdom, there is no such thing as separation of powers in the UK. However, with the creation of a Supreme Court in October 2009, there has been an attempt to create a separation between the judiciary and the other branches of government. The House of Lords acted as the Court of First Instance until October 2009. Before that time, there was no separation of power in the UK. The setting up of a

Supreme Court highlights the importance of the separation of powers which has been recognised by the UK. There is, however, a combination of legislative and executive powers. In any government, an institution may not exercise the powers of another institution, but it may exercise some of the subsidiary powers of another institution without disregarding the principle of the separation of powers in the strict sense. If the doctrine of the classical sense of separation of powers cannot be applied to a modern government, this does not mean that the doctrine is irrelevant in the modern world. The rationale behind this doctrine is sound and legitimate, as it ensures that the centre of authority must remain dispersed in order to prevent absolutism, and the idea is not to create strict classifications with limited flexibility. Fulfilling this logic is essential for the proper functioning of any government.

SUGGESTIONS: -

1. Central and state governments must adhere to certain conventions, such as effective consultation between Centre government and State government before enacting a Bill in the parallel field. Therefore, it is suggested that Inter State-Council is always consulted before bill in the parallel field is introduced in Parliament. This forum would be the best forum for that purpose. The most important thing is that there should be cooperation and coordination between the Centre and the states. This will ensure a harmonious relationship between the two tiers of government. Several elements and provisions of the Constitution seem to have been designed to institutionalize the concept of cooperatively federalism.
2. A strong Centre is essential for the preservation of the country's unity and integrity, as a weak one is likely to lead to a decline in the nation's strength. A weak nation is likely to be vulnerable to external attack or to lead to instability, as evidenced by its past and current separatist tendencies.
3. In modern times, strict separation of powers is not possible because without the cooperation of the various organs of the state, the development of the nation cannot take place. Therefore, in modern practice, separation of powers is an organic separation and a distinction must be made between 'essential' powers and 'incidental' powers. A single organ of government cannot take over or interfere with the essential functions of another organ, but it may exercise an incidental function of that organ. The concept of justice is dynamic, and liberty which is expected of the judiciary in a democratic system to

safeguard and protect through the exercise of power and judicial review. Therefore, it is absolutely essential that the judiciary is independent from executive pressure and influence. The independence of the judiciary is an essential requirement of a free society under the rule of law.

4. In order to ensure the independence of the judiciary, there must be a proper functioning of a judge, free from a vicious circle, and also an independent judge, free from fear and favoritism of the executive. There must be a rational and uniform policy for the transfer of judges, which must be formulated by the parliamentary status. The current policy of pick and shoot is contrary to the spirit of the Constitution and independent of the judiciary.

