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SEPARATION OF POWER – AN INDIAN PERSPECTIVE

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CHAPTER.1

1.1 INTRODUCTION

¹ Parliamentary democracy was identified by our Founding Fathers to be the most suitable system of governance, as they perceived that only a democratic set up based on Parliamentary system with a federal structure would be able to solve effectively the myriad socio-economic problems that the nation faced at the time of independence and would be able to deal with our vast array of diversity on all fronts of our national existence. One of the characteristic features of several Constitutional systems across the world is the doctrine of separation of powers, providing for the functions of the three primary organs of the State — the Executive, the Legislature and the judiciary to be carried out by separate bodies. The system envisages an Executive with governing powers; an elected Legislature with the three main functions of representing popular will, enforcing the accountability of the Government and making laws; and the judiciary, to administer civil and criminal justice both between private persons and as between private persons and the State. It also entails that none of these organs should be vested with absolute or unbridled powers, so that no organ or individual assumes powers of despotic proportions. The principle of detachment of abilities, is a basic piece of the development of a majority rule government itself. The tenet, which accommodates governing rules among the organs of the State, is one of the most trademark highlights of our Constitutional plan. Our incredible chiefs who outlined our Constitution had the option to anticipate that unreasonable powers, whenever vested with any of the three organs of State, might actually lead.

Our Constitution makers ensured that the rights of the people were preserved and protected effectively against any Legislative or Executive excesses. Our Constitutional set up has enabled the judiciary to set aside not only laws passed by the Parliament but also executive actions which are held to be not in consonance with the rights of the citizens under our Constitution and its several provisions. Our Constitution contemplates that the Courts will interpret and scrutinise the Constitutionality or validity of laws and executive actions but not will decide what the law should be nor matters of policy nor will usurp the functions of the executive. It was explicitly stated in the Constituent Assembly by many leading members that the doctrine of judicial independence was not to enable the judiciary to function as a kind of a 'super Legislature' or a 'super Executive.' In this context, all should be reminded of the wise and profound observations of Pandit Jawaharlal Nehru in the Constituent Assembly.

¹ Sri Somnath Chatterjee, Former Speaker Lok Sabha, "Separation of Power and Judicial Activism", AIR, 2013 Journal p. 97 (Date 21/08/2022 time 6:56 pm)

By its very representative character, in a democracy, no organ other than the legislature is better placed to understand the people's priorities. It is expected of the people's representative bodies to voice people's problems their demands, their urges and aspirations, and, in the ultimate analysis, to protect and promote their fundamental democratic rights. The inalienable Constitutional right of the Legislature to scrutinise and oversee the functioning of the Executive arises from this basic premise and it has been specifically provided that the Council of Ministers in the Centre shall be responsible to the House of People, which is the directly elected body. There are similar provisions in the Constitution which provide that the State Government are responsible to the Legislative Assemblies in the State. The responsibility for identifying and defining people's rights and for providing statutory sanction for them and for giving the general direction and momentum to the institutions for social engineering in our democracy has thus been thoughtfully bestowed by our Founding Fathers on our Parliament and our State Legislatures, which represent the people of India as a whole, or the States, respectively.

Montesquieu

Baron-de-Montesquieu² is a French philosopher credited with expounding a systematic and holistic theory of separation of powers in his book *De L'Esprit des Lois* (The Spirit of the Laws) in 1748. His theory of separation of powers was inspired by his observations of the English system which had by then acquired a higher degree of distinction between its three branches. Montesquieu's idea of separation of powers laid great emphasis on the concept of 'political liberty'. According to him, political liberty could be safeguarded only when the government is such that citizens do not fear one another, which in turn can only be ensured when there is no abuse of power by the Government. This also meant that for preventing this abuse of power the Government should be structured in a manner that balances and checks power against power.

Montesquieu divided governmental power into the categories of legislative, executive and judicial and outlined how liberty is affected if these powers are vested upon the same person, leading to tyranny. Unlike Locke, he did not overlook the role of the independence of the judiciary and instead deemed it as the most important of all. Moreover, he took Locke's ideas of legislative, executive and federative functions and modified them for the sake of political liberty, considering the judiciary as a branch separate from the broadly categorized executive in Locke's theory.

² <https://blog.ipleaders.in/critical-analysis-separation-power/> Date 12/09/2022 at 1:00 pm

John Locke

In the 17th Century, England witnessed the emergence of the Parliament, and a semblance of the tripartite governmental structure was expounded by the British politician John Locke in his book titled 'Two Treatises of the Government'. Locke described the three powers as being legislative, executive and federative, but did not envision a coequal or independent distribution of functions among them. Rather, he regarded the legislative as the supreme branch, while the executive and federative branches were only concerned with the internal and external affairs of the country respectively, operating under the control and authority of the King. His theory was more in consonance with the prevailing dual form of government in England at that point of time, which fixated upon the Parliament and the King. Furthermore, Locke's theory evidences a noticeable absence of the mention of the judiciary as a separate branch of the government. It regards the judicial functions under the ambit of 'Executive functions', thereby bestowing the same to the control of the King. Therefore, it has been pinpointed that Locke's theory, in a strict sense, does not truly qualify as an explication of the doctrine of separation of powers.

Montesquieu a political thinker of the same time as Locke, emphasized upon the independence of the judiciary from the clutches of the King and to some extent, influenced the demand for the same through his writings. Nonetheless, the 17th and 18th century saw a flurry of scattered expositions on the separation of powers until a concrete and influential expansion of the theory emerged through Montesquieu.

1.2 AIMS & OBJECTIVES

- To understand the Origin and Source of Separation of Power.
- To understand Meaning of Separation of Power.
- To Doctrine of Separation of Power.
- To Why Need Separation of Powers..
- To understand the Indian Constitution and separation of powers

1.3 REVIEW OF LITERATUR

Separation of Powers in the Contemporary Constitution this 2010 book, Roger Masterman analyzes the splitting lines between the powers of the legal part of government and those of the chief and regulative

branches in the illumination of two of the main sacred changes of late years: the Human Rights Act (1998) and Constitutional Reform Act (2005). The two rules have suggestions for the partition of abilities inside the United Kingdom constitution. The Human Rights Act brings the appointed authorities into a lot nearer closeness with the choices of political entertainers than recently allowed by the Wednesbury standard of survey and the regulation of parliamentary sway, while the Constitutional Reform Act denotes the development of an institutionally free legal branch. Taken together, the two regulative plans structure the foundation of a more extensive arrangement of protected governing rules policed by a legal branch supported by the authenticity of institutional freedom.

The Rule of Law and the Separation of Powers Law and order is every now and again summoned in political discussion, yet seldom characterized with any accuracy. Some utilize it as an equivalent word for a majority rules government, others for the subjection of the lawmaking body to a composed constitution and its legal watchmen. It has been viewed as dutifulness to the properly perceived government, a type of overseeing through formal and basic guideline like regulations and the standard of rule. Considering this variety of view, it is maybe obvious that specific researchers have viewed the idea as something like a self-celebratory logical gadget. This assortment of eighteen vital expositions from legal advisers, political scholars and public regulation political researchers, expects to investigate the job regulation plays in the political framework. The presentation assesses their contentions.

1.4 HYPOTHESIS

1. The Doctrine of Separation of powers is a basic feature of Indian Constitution
- 2 Doctrine of Separation of Powers is no more a pure Doctrine in any legal system

1.5 RESEARCH QUESTION

- Do the Constitutional provisions in union and state legislative relations are sufficient or some amendment is necessary?
- What are various doctrines evolved by judiciary to interpret the Constitutional provisions in union state relations?
- Whether the doctrine of Separation of Power is recognized in rigid/absolute sense under the Constitution of India or not?
- How the judiciary is saviour for the Separation of

1.6 RESEARCH METHODOLOGY

The researcher intends to adopt a doctrinal method of research for the purposes of this research work. The doctrinal research methodology provides an ample scope to examine the existing literature from both primary and non-primary sources. Doctrinal methodology mainly helps the researcher to find out the gaps in the existing provisions of the law basing on statutes, international and national documents,

case law, juristic writings and other scholarly literature available on the area of the research. An examination of these sources relevant to the topic of study certainly helps the researchers to find out the ways and means to fill the gaps in the existing legal system and also to suggest the redressal mechanism that need to be injected by the State in its future policy formulations.

1.7 SOURCES OF DATA

In order to complete the research study, the researcher will collect the material through various primary and secondary sources, such as the occasional policy papers of the State, statutes, commentaries, case-law, text books, juristic opinions, policy formulations of various governmental bodies, reviewing the existing literature on the area, the views and perspectives of stake holders, policy makers and all other relevant sections of the society which includes the efforts of charitable organizations, non-governmental organizations and philanthropists.

1.8 LIMITATION OF RESEARCH

The research will be limited to specifically mentioned cases and provisions only.

2 Separation of power

The Baron de Montesquieu, a legal scholar, coined the phrase "separation of powers." Enlightenment thinker from France. But the actual division of authority among the origins of several governmental branches can be found in ancient Greece. Those who drafted the American governmental structure would be based on the concept of three separate Braches i.e. Executive ,Judiciary, and Legislative. The three branches are unique from one another and serve as checks and balances. No branch will be able to abuse its authority or acquire total power in this way.

The executive branch of the US is led by the President and consists of the bureaucracy. The Senate and the House of Representatives make up the legislative branch of government. The Supreme

Court and the lesser federal courts make up the judicial branch.

The term "separation of powers," which is frequently erroneously interchanged with the trias politica principle serves as a guide for state administration.

The Roman Republic used the model extensively as a part of its uncodified Constitution, which was initially created in ancient Greece. This model divides the state into branches, each with their own distinct and independent powers and spheres of authority, ensuring that no branch has more authority than the others. The three branches of government are often divided into an executive, a legislative, and a judiciary.

Several nations have adopted the idea of separation of religion and state for comparable reasons, though to varied degrees depending on the relevant legal frameworks and common beliefs regarding proper role of the society

The French Enlightenment political philosopher Baron de Montesquieu is credited with coining the phrase. The division of political authority between the executive, the legislative, and the judiciary was described by Montesquieu. He modelled this system on the British Constitutional system, where he saw a division of authority between the king, Parliament, and the legal system³

According to Montesquieu, "the independence of the court must be actual, and not only apparent." In addition to being viewed as hazardous, "the judiciary was typically perceived as the most important of powers, independent and unrestrained." Every government expresses the desire of the people through one of three specific actions. These are the government's legislative, executive, and judicial responsibilities. The legislative, the executive branch, and the judiciary are the three branches of government that correspond to these three activities. The state's legislative branch creates laws, the executive implements them, and the court applies them to particular instances resulting from law violations.

The modern concept of constitutionalism and the theory of separation of powers covers a position of almost unparalleled global world as foundational tenet of liberal democracy. The doctrine of long standing historically and politically significance over the attitudes, and public opinion which pronouncement of academics, official, and citizens alike. In recent times this theory has even attracted comment from a number of eminent English academics a notable development in a jurisdiction whose Dicey Heritage had inculcated an extreme disparagement of this doctrine as a

³ https://www.law.ox.ac.uk/sites/files/oxlaw/ak_separation_of_powers_philfounds_book.pdf Date 10/09/2022 Time 5:53 pm .

'Rickety Chariot' an invention and dubious system. In a similar point of view the Supreme court of Irish proclaimed this doctrine to be a high constitutional value , through the ideologically prism of all the other constitutional provisionsought to be perceived.

The doctrine of separation of powers under the Indian jurisprudence is an amalgam of all the powers which comprises legislative, executive , judicial powers. it is flow from the constituent powers through the constitution to the various department and heads. Their is no demarcation of powers in the hands of constituent authority. It is only when the constituent authority defines the authorities or demarcates the areas that separation of powers is discussed and creates the organs and distributes the powers , it is shows the sovereign powers of the constituent.

The constitution of India under part XI, chapter I with Schedules VII of the constitution also provides for the division of powers for the purpose of legislation of different subject matters it is reflected the distribution of powers . It is here where Indian Constitution needs to breeze through the corrosive assessment of federalism. It is here where Indian Constitution neglectedto fulfill the conservative of it's government believability due to a few arrangements in this section which has been pronounced as one-sided for focus. In any case, there are sufficient legitimization for these arrangements because of curious state of Indian commonwealth, and it's case as government Constitution can not be disregarded exclusively on the abovementioned ground.

That the present constitution of India contains provision have its roots into the government of India act 1935, 4According to Ashoka chanda observations some provisions of the act find place as modified words: The constituent assembly did not consider that having regard to the evolution of india's political system and insistent needs of co-ordination of economic and industrial development centrally, The basic departure should be made from the modified federal concept which was embodies in the 1935 Act. However the constitution enlarged the scope of the legislative authority of the states by delivering number of subjects in the central list and state list of 1935 act but at the same time if made other adjustment to strengthen the powers of the centre to promote National economic unity. National highways, interstate trade and commerce and several other subjects were accordingly deliver to the union list from the state list of the act of 1935. And inter state rivers were subjected to the concurrent list, so the comprehensive provision incorporated to overall control of the parliament of India to make a single economic unite for the purpose of trade and commerce.

⁴ <https://www.jstor.org/stable/41856368> Date 10/09/20022 Time 11:20 AM

In the recent time all the democratic systems not be adopting for the strict form of separation of powers because that is not sustainable and impracticable in implementation of this concept, Almost all the democratic system adopted its diluted form. So in the recent time that the philosophers theoretical concept of separation of powers is no longer to day to day functioning of the government.

2.1 Doctrine of Separation of Power

The governmental powers, broadly speaking are divisible in three categories executive, legislative and judicial. A reign of law, in contrast to the tyranny of powers, can be achieved only through separating appropriately, several powers and functions of Government. If the law makers should also be the administrators and dispensers of law and justice, then the people must be left without a remedy in case of injustice since no appeal can lie to any superior.

Therefore, an age-old search has gone on for the secret of good Government ensuring to the citizens individual liberty. Montesquieu's common sense coupled with Locke's opposition to Hobbes absolutism saw the dangers of concentration of powers. He felt that the history of the despotic Tudors and absolutist Stuarts, showed that freedom was not secured, if the executive and the legislative powers were held on the same hands. He deduced his ideas of separation of powers from his observations and ideas of the relations between the Stuart King and the Parliament. He thought that Parliament would never be arbitrary and the denial of legislative powers to king alone could make the rule by extemporary decrees impossible. Montesquieu have experienced the tyrannies in the monarchical France, must have watched the conditions on the other side of the Channel with envy.

In the second half of the Seventeenth century, he would not fail to notice that the Englishmen stood under the warm sunshine of the Magna Carat. Having lost his legislative and tax powers to Parliament, the English King was left with no prerogative. Parliament made the laws. His majesty's Government was, even though the cabinet system was not yet developed, administering the laws passed by Parliament. By the end of the century, the Judges, like the Great Coke, could not be dismissed by the King at this will, because, the Act of Settlement gave them a tenure during good behaviour as distinguished from a tenure during the pleasure of His Majesty. Montesquieu concluded that the secret of the Englishmen's liberty was the separation and functional independence of the three departments of the Government from one another.

Locke in his treatises expounded this theory and influenced the thinking of men on the other side of the Atlantic. It became a political fundamental of American constitution.

According to Montesquieu, the doctrine of separation (*des pouvoirs*) means one person or body of person should not exercise all the three types of powers. Wade and Phillips says that the doctrine means the following

- (a) the same set of persons should not compose more than one department of the three governments departments:
- (b) one department should not exercise the functions of the other twodepartments; and
- (c) one departmental should not control, much less, interfere with the workof the other two departments.

The division of Government into three branches does not imply, as its critics would have as think, three water-tight compartments. The machinery and procedure of legislative and appointment of judges and judicial review of legislation and executive action are essential features of any sound Constitutional system. It is said instead of applying the doctrine in a strict sense of the functional machinery and procedures of the Government, the doctrine should be deemed to require a system of checks and balance among the three departments of Government while opposing the concentration of governmental powers in any of the three departments.

⁵ Turning into India in Constituent Assembly there were proposals to incorporate the doctrine into the Constitution; but deliberately the assembly did not accept them. The doctrine in its absolute rigidity is not inferable from the provisions of the Constitution. The Constitution has not made any absolute or rigid division of functions among the three agencies of the State. Often the legislative and the judicial functions are entrusted to the Executive. Nevertheless functional separation of the different powers has not been ignored, nor, it is stressed. The executive powers of the Union is vested in the President of the Union of India and the powers of the State Governments, in the Governors of the respective states. The President is thus made the highest executive head of the Union. He exercises his powers Constitutionally on the aid and advice of his Council of Ministers. There is no similar vesting of legislative powers in Parliament and the State Legislatures; and of judicial powers in the Supreme Court and other courts.

The Constitution recognizes of the three fold functional division of governmental powers. Article 50 expressly requires.⁶ the State to apply the principle of separation of the judiciary from the executive as a sound principle of Government. This declaration is made in the Chapter on Directive principles of State policy, and therefore, has no mandatory character and cannot be said

⁶ Article 50 of the Indian constitution Bare act edition 2021

⁵ <https://loksabhaph.nic.in/writereaddata/cadebatefiles/C23051949.html> Date 10/09/2022 Time 9:10 Am

to incorporate the whole doctrine. The President is given extensive legislative powers. He can make Ordinances. The powers to promulgate an Ordinance, is an essential legislative powers, and its extent had scope would have been envied even by Henry VIII, and would have taken the Judges in the case of Proclamations by surprise.⁷ The powers extend to all things which are within the legislative competence of Parliament, and its limited operative duration of an Ordinance. The President makes laws for a State, after the dissolution of the State Legislature, following the imposition of the President's rule and delegation of legislative functions of the state Legislature to him by parliament by law.

2.2 Why Need Separation of Powers

Clement Walker, a member of the Long Parliament in 1648, saw distinctly enough the kind of arbitrary, tyrannical rule against which the governed had to be protected. The remedy, he lay in separation of governmental functions cast in terms of "the Governing powers," "the Legislative powers," and "the Judicative powers." For Marchamont Nedham, writing under Cromwell's Protectorate in 1656, the required separation is that of legislative and executive powers into different "hands and persons." As used by him, the distinction resembles the sharp dichotomy between the formation of policy and its administration favored by mid-twentieth century American administrative theorists. Separation, for Nedham, is an indispensable means for locating responsibility and fixing accountability. An executive, unambiguously charged with executing a policy set by the Law-makers can be held liable for its performance or nonperformance. Let that clear line of distinction and responsibility be blurred, and liberty and the people's interest are alike in jeopardy.

Among Americans reflecting on new political arrangements in the latter half of the eighteenth century, no political authority was invoked more often than "the celebrated Montesquieu." Thanks in some measure to those Americans themselves; the name of Montesquieu is firmly attached to the doctrine of the separation of powers. But like most teachings of that subtle mind, this one has its ambiguities and invites differing interpretations. Although Montesquieu separated governmental functions and separated governmental powers, there is no clear one-to-one correspondence between the two because he did not insist on an absolute separation. Thus, although the executive is a separate branch, it properly partakes (through the veto, for example) in a legislative function. This blending or overlapping of functions is in part

⁷ Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299

necessitated by Montesquieu intention that separation checks the excesses of one or the other branch. Separation of powers here reinforces or even merges into balanced government. Excesses may come from all or almost all sides. Thanks to bicameralism, the licentiousness of the many and the encroachments of the few are alike checked. The nobility mediate between a potentially overbearing lower house and the executive. The executive's powers to convene and prorogue the legislature and to veto. Its enactments are forms of self-defence, while the legislature's powers to impeach and try the agents or ministers of the executive is necessary and sufficient to hold the executive accountable to examination without holding him hostage⁸If the goal is liberty--that is to say, individual safety--the model to follow (Montesquieu suggested) is that of the English Constitution portrayed in his pages. But one might pursue an alternative goal with more or less separation of powers and more or less happiness--like "the monarchies we are acquainted with. Although maintaining that sovereignty resides in the king in Parliament, Blackstone draws heavily on elements of Montesquieu argument and adapts them to his peculiar purpose (no. 6). For all his insistence on three distinct powers--and they are now the familiar executive, legislative, and judicial powers, with the latter a recognizable judiciary with independent tenure of office--and for all his insistence on separation for the sake of warding off oppressive government, Blackstone seems less interested in separation than he is in balance. I-{is mechanical image fits his point; balance is to be sought not in total separation but in the artful involvement and mutual interactions of the several branches of the civil polity: executive, nobility, and people. The separation of powers and balance of social orders are inextricably interwoven⁹. If the instructions of the Bostonians to their representatives in the Massachusetts provincial congress are any sign (no. 8), the reasons of Montesquieu and the others had become commonplace by 1776. No less effective in directing American thoughts to the separation of powers would have been the protracted, painful controversies between royal governors, councils, and colonial assemblies. The colonists' experiences with what they saw as executive usurpations, corruption of elected officials, and manipulation of electoral processes focused their minds on suitable remedies. For the Bostonians the tripartite separation of powers, functions, and persons is a sine qua non if arbitrary powers is to be checked and liberty secured. A correlative of the separation of persons is the prohibition of plural office-holding; and in the democratic context that entails adequate salaries so that officials are "above the necessity of stooping." John Adams's early Thoughts on Government (see ch. 4,

⁸ Separation of Powers and the Madisonian Model: A Reply to the Critics - George W. Carey, In Defense of the Constitution (1989)

⁹ sites.http://www.adminet.com/elus/an.html Date 07/09/2022 Time 8: 00pm

no. 5) similarly confirms the high expectations held for the separation of powers and the broad spectrum of ills that it would guard against: passionate partiality, absurd judgments avaricious and ambitious self-serving behavior by governors, and the inefficient performance of functions.

The experiences under the early state Constitutions and the Articles of Confederation reinforced the belief in separation. Jefferson's critique of the Virginia Constitution (no. 9)

raised the familiar concerns with safety and efficiency; both to establish free principles and to preserve them once established required a division and balance that went beyond those embodied in existing arrangements. Despotism is no less despotic because 'elective.' The Philadelphia Convention usually discussed the adequacy and proper degree of the separation of powers in terms of the ends to be achieved: stability (Dickinson), defense (Gerry, Madison, G. Morris, Wilson), independence (King), and proper function (Gerry). No less worrisome, however, was whether the means available to the several branches of government to defend themselves against the others might not be excessive (Franklin).

2.3 Constitutional status and practice pre 2014

.¹⁰ Following the general elections in 1952—the first after independence—the Indian National Congress (INC) party emerged as the most dominant party at the centre as well as the states. The Congress party would from thereon completely dominate Indian politics, until the 1967 elections when it faced a major electoral setback. The federal arrangement was such that the national political scene was presided over by Congress's national leadership, led by the prime minister, Jawaharlal Nehru, while the regional Congress leaders had a mass base of their own and possessed considerable power and influence in their respective states. Political scientists, Yogendra Yadav and Suhas Palshikar, have observed that Congress's success was "a combination of its state level organization along with Nehru's plebiscitary leadership and popular appeal." co-existence[of national and state leadership in their respective realms of influence was a consensual model of inner party federalism that marked the era of Congress dominance. Even after the death of Nehru in 1964, the regional leaders continued to play an important role in national politics. The political decline of these notable regional leaders of Congress would happen eventually, after their electoral defeat in the 1967 national elections and following their power tussle with Indira Gandhi.

The mass-based popular regional leaders of the Congress party were sidelined, resulting in the

¹⁰ <https://www.thehindu.com/opinion/letters/separation-of-powers/article7770901.ece> Date 11/09/2022 Time 10/09/2022

concentration of power in the Congress central leadership. Only those who were “loyalists” to Indira Gandhi were installed as state party leaders and chief ministers. As a result, the party was deprived of its organisational strength at the grassroots that earlier had been built with the support of the popular state-level leaders. Over time, the Congress vote share started to decline. In 1971, the national elections were separated from the state elections. The Congress party fought the elections mainly based on national issues and Indira Gandhi’s personal popularity. This gave Congress victories in three national elections in this period (except in 1977). The Congress also won the state elections in 1972 due to Prime Minister Indira Gandhi’s electoral appeal. However, the social base of Congress’s electoral support began to shrink gradually from this time due to organisational weakness at the local level and the absence of strong state leaders. This era also coincided with the political rise of many regional parties in a number of Indian states.

CHAPTER-III

3.1 Majoritarianism and Separation of Powers

The basic structure doctrine permits unelected judges to impose near-permanent checks upon parliament’s power to amend the Constitution. Recall that we have proposed two philosophical defences that render this doctrine compatible with democracy as we understand it. The first – and let us call this the substantive defence – posits an expanded idea of democracy, one that guarantees equal concern and respect to all members of a polity, and that therefore accords legitimacy to majoritarian decision-making procedures only insofar as these procedures respect certain basic individual rights without which equal concern and respect cannot genuinely be said to exist.

Two important points may be raised now: First, certain questions of grave Constitutional importance often arise that pit the interests of the majority against the minority. Allied to this is the fact that most of the basic human rights are rights against the majority. In such a situation, allowing the majority (through Parliament) to be the ultimate arbiter would be tantamount to it judging its own cause, and deciding upon matters that it has a close and intimate interest in. This problem is clearly recognized by Professor State, who points out that the basic structure doctrine is essentially the “ultimate counter-majoritarian” check upon democracy” (see Sathe, *Judicial Activism in India*). The argument above, of course, is different in that it defines democracy itself as separate from majoritarianism, but the basic point remains that it is axiomatic that the deciding authority must be of a non-majoritarian character and so, cannot be the Parliament¹¹.

¹¹ <https://indconlawphil.wordpress.com/tag/majoritarianism/> Date 11/09/2022 Time 9:20 am

Secondly, certain principles are by their very nature beyond the pale of majoritarian authority. These include the most basic individual rights against the State, e.g., the right to life, equality and the fundamental freedoms, and the right to freedom of conscience. These are matters to be governed by individual autonomy, central to how an individual decides to order and determine his own life, and cannot be subjected to external majoritarian authority – because to make even those rights subject to majoritarian control would destroy individual autonomy in a way that would not be consistent with according equal concern and respect to all. Professor Dworkin gives the classic example of an orchestra conductor.¹²

3.2 Testing the water: position post 2014 in India

The 2014 general elections challenge nether era of coalition politics at the national level. The BJP gained a parliamentary majority on its own and formed the government at the Centre led by Prime Minister Narendra Modi. This phase marked the beginning of what is called the “renationalisation of Indian politics” with BJP as the new national political force. After its victory in the national elections, BJP as a major political party also went ahead to capture power in 21 states in India either on its own or with a strong regional ally. BJP’s more impressive win in the 2019 elections strengthened its position as the new ‘dominant party’ in India. However, unlike in the first phase, the BJP is the most dominant national political force amongst other parties but faces substantial political opposition from the national opposition party (Congress party) and many regional parties at the state level.

Modi as Chief Minister of Gujarat realised the need for empowering the states, and made ‘cooperative federalism’ a major electoral promise in his campaign in the 2014 national elections. After coming to power, the BJP government took some major steps in the direction of strengthening the states. The centralised Planning Commission was replaced by the Niti Aayog which the Union government assured would have “active involvement of the states in the spirit of “co-operative” federalism.” Second, the Goods and Services Tax (GST) by which the Centre and states would “become equal fiscal partners in sharing a common indirect tax base” was implemented. A GST Council was formed to create a consensus amongst the states regarding the decision. Third, the Union government accepted the 14th Finance Commission recommendation to give the states 42-percent share of the funds from the central pool (from the previous 32

¹² <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1075&context=jcl> Date 11/09/2022 Time 7:20 pm

percent). However, how far Niti Aayog and the devolution of increased funds have a bearing on has its own challenges.

deepening of federalism in tangible proportions, has to be more closely examined with time as it Despite the centralizing tendencies of the dominant national ruling party, BJP has been facing tremendous challenge in the state-level elections since 2017. BJP, led by Modi, remains largely politically unchallenged at the national level. But its reliance on national agendas and its inability to accommodate the regional and local issues in the state elections resulted in its electoral setbacks despite its efforts. Further, the electoral understanding that BJP manage to have with the regional political outfits, helped it to capture power in many states. Though the regional forces are unable to shape national politics unlike in the previous phase, they provide some opposition to the political dominance of the BJP at the state-level elections in a limited manner, despite many regional parties being co-opted by the national ruling party in many instances. Particularly, the regionalist parties which have strong appeal based on sub-nationalism and cultural identity like the ones in Tamil Nadu, Orissa and West Bengal, have been more successful in fighting the BJP in their respective regional turfs so far. Moreover, in states like Punjab, Rajasthan, Haryana or Chhattisgarh, the Congress was able to gain in state elections by relying mostly on their regional leaders and addressing regional concerns. This reveals a limited form of 'de-nationalised party system in India even under a dominant national party. Moreover, the main political opposition against the proposal of implementing the all-India National Register of Citizens (NRC), came from the states and regional forces.

Most of the state governments ruled by Congress or regional parties including the ones being ruled by some of the BJP's own political allies, opposed it.

3.3 Judicial Review vis-à-vis the Doctrine

As regards the power of judicial review, it has, in its modern exercise, often been questioned as being antithetical to separation of powers and the extent of its exercise has been argued to infringe India's model of the doctrine by surpassing the intended constitutional limits. It is important to note, however, that judicial review ensures the supremacy of the people and not the judiciary, as pinpointed by Alexander Hamilton. Judicial review as granted by the Indian Constitution enables the judiciary to act as a protector of the Constitution and the rule of law, both of them being underlying values of separation of powers. It does not oppose the doctrine but emanates from it, as a means to enforce the same where it is infringed.

In the¹³ Keshav Singh case, the Supreme Court upheld the independence of the judiciary and pronounced the scope of judicial review. Commenting on the extent of judicial review of Legislative affairs in light of the doctrine, the Supreme Court pronounced that only in matters of 'irregularity of procedure' would the Legislative proceedings be immune from judicial interference, and that their 'illegality' is subject to judicial review. The special role of the Courts as enforcers of the rule of law, also allows them to safeguard the rights of individuals in the absence of legislation or executive action, so as to fill the void in law for the meantime as a constitutional obligation.

In the Vishakha case,¹⁴ the Court laid down a set of procedural guidelines pertaining to sexual harassment at workplace consistent with CEDAW, to fill the gap of legislation in that regard. Thus, judicial review complements and furthers the principle of checks and balances, thereby furthering the concept of separation of powers as understood in India and has rightly been accorded to comprise basic structure of the Constitution.

Modern view and the way forwards

In Bhim Singh v. Union of India and Ors.¹⁵, the Supreme Court displayed an interesting take on the doctrine, stating that modern governance does not have any place for a strict separation of powers. Rather, separation of powers has the aim of achieving the maximum extent of accountability of each instrument, and functional overlap does not infringe the doctrine if the constitutional accountability is maintained. This view is correct, as it falls in line with the present needs and emphasizes the impracticality of the strict version of the doctrine in the modern scenario. The emergence of the field of administrative law calls for increased harmonious integration of the functions of the instruments through administrative tribunals and delegated legislation, so as to reduce the burden on the prime organs of the State. Strict implementation of the doctrine would encumber the objectives of expediency and efficacy sought to be achieved through the function of administrative authorities and would act as a limit on administrative law. Thus, strict implementation of the doctrine is undesirable. The way forward consists of a practical approach that is in touch with the felt necessities of time.

¹³ IN RE KESHAV SINGH, AIR 1965 SC 745

¹⁴ Vishaka and others V. State of Rajasthan and others. (AIR 1997 SUPREME COURT 3011)

¹⁵ Bhim Singh v. State of Jammu and Kashmir Citation : AIR 1986 SC 494

In *Indira Gandhi Nehru v. Raj Narain*,¹⁶ The Supreme court asserted the Kesavananda ruling and upheld the basic structure as well as the separation of powers doctrine, making it a landmark case in our country. The dispute in this case was regarding the Prime Minister elections, where the constituent body had declared that the elections weren't void, thus acting in a judicial capacity. This made the actions of the constituent body ultra vires. It was thus held that a parliament cannot under any constitutional amending power or the like take on the role of the judiciary. Thus the position of separation of powers was upheld and asserted in this case.

Delhi Development Authority v M/s UEE Electricals Engg. Pvt. Ltd Supreme Court ruling has sought to clarify the meaning and objective of judicial review as a protection and not an instrument for undue interference in executive functions. The Supreme Court made the observation that, "One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality" and the third "procedural impropriety".

*I.C. Golak Nath v. State of Punjab*¹⁸ It was observed: "The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.

I.R. Coelho vs. State of Tamil Nadu S.C. took the help of doctrine of basic structure as propounded in *Kesavananda Bharati* case and said that Ninth Schedule is violative of this doctrine and hence from now on the Ninth Schedule will be amenable to judicial review which also forms part of the basic feature theory. The basic structure theory and the Golden triangle comprising of A. 14, 19, and 21, will now be the criterion in scrutiny of the Ninth Schedule. In a democratic country goals are enshrined in the constitution and the state machinery is then setup accordingly. And here it can be seen that constitutional provisions are made as such to support a parliamentary form of government where the principle can't be followed rigidly. The S.C. rulings also justify that the alternative system of checks and balances is the requirement, not the strict doctrine.

¹⁶ 1975 AIR 865, 1975 SCR (3) 333.

¹⁷ Appeal(civil)1725 of 2004

¹⁸ 1967 AIR 1643; 1967 SCR (2) 762

¹⁹ AIR 2007 SC 861

Conclusion & Suggestions

It has been well said by Lord Acton:- “Power corrupts and absolute Power tends to corrupt absolutely”.

Conferment of power in a single body leads to absolutism but, even after distinguishing the functions, when an authority wields public power, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such power. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely. The status of modern state is a lot more different than what it used to be. It has evolved a great deal from a minimal, non-interventionist state to a welfare state, wherein it has multifarious roles to play, like that of a protector, arbiter, controller, provider. This omnipresence of the state has rendered its functions becoming diverse and problems, interdependent and any serious attempt to define and separate those functions would cause inefficiency in government. Hence, a distinction is made between ‘essential’ and ‘incidental’ powers of an organ. According to this differentiation one organ can’t claim the powers essentially belonging to other organ because that would be a violation of the principle of separation of powers. But, it can claim the exercise of the incidental functions of another organ. This distinction prevents encroachment of an organ into the essential sphere of activity of the other. It is the exercise of incidental powers only which has made executive grow everywhere in this social welfare state. It has assumed a vital role but, it has not usurped any role from any other wing. It just happened that the other two organs, namely, judiciary and legislature, became unsuitable for undertaking the functions of this welfare state and as a consequence the functions of the executive increased. As controller and provider, the judicial processes were very time consuming and the legislature was overburdened with work. Therefore, it was in natural scheme of things which made the administrators end up performing a variety of roles in the modern state including those of legislature and judiciary too, to an extent. Further, the check of the adjudicators over functioning's of the other two has been regarded as an ‘essential’ feature of the basic structure theory. The judicial review power is a preventive measure in a democratic country which prevents administrators and law-makers to exercise their whims and caprices on the lay man and turn it into a despotic regime. There have been cases where the judiciary has dictated the ambit of their power to the implementers and the mode to exercise it. Recent Supreme Court judgments- on the cash-for-query case and on the Ninth Schedule — have once again brought the powers and roles of the legislature and the judiciary into focus. In the case of the former,

the court upheld the Lok Sabha's decision to expel members of Parliament, who were caught on camera taking bribes, but clearly rejected the contention that it cannot review parliament's power to expel MPs and claimed for itself the role of final arbiter on decisions taken by the legislature. The judgment on the Ninth Schedule has curtailed Parliament's power to keep certain progressive laws outside judicial Review. Constitutionalism the philosophical concept of the constitution also insists on limitations being placed upon governmental power to secure basic freedoms of the individual.

Hence, the conclusion drawn out of the study is that there is no strict separation of powers but the functions of the different branches of the government have been sufficiently differentiated.

References/ Bibliography

1. M.P Jain, Constitution of India
2. NATIONAL CONFERENCE ON AFFIRMATIVE ACTION AND THE INDIAN CONSTITUTION, SUB THEME – OPPORTUNITIES IN PUBLIC EMPLOYMENT TITLE OF THE RESEARCH PAPER – ARTICLE 16 OF INDIAN CONSTITUTION: OVERCOMING PAST DISCRIMINATIONS Author- Aishwarya Singh
3. Affirmative Action in India and the United States: the Untouchable and Black Experience by M. Van Chandola*
4. Indian Constitution of India 1950
5. [Potchefstroom Electronic Law Journal \(PELJ\)](#) On-line version ISSN 1727-3781 PER vol.12 n.1 Potchefstroom Jan. 2009
6. M. J. C. Vile, Constitutionalism and the separation of powers (1967)
7. Montesquieu, The Spirit of Laws (Nugent) 152 (1748).
8. Basu, D.D., Administrative Law (6 ed. 2004)
9. <https://samarthagrawalbooks.com/2021/08/05/separation-of-power-2/> Title Separation of power Author name Samarth Agarwal (Date 26/08/2022 , time 1:33 pm).
10. Title Principal of separation of power and concentration of authority Author Name Tej Bahadur Singh <http://ijtr.nic.in/articles/art35.pdf> (Date 022/08/2022 time 8 pm)
11. Carolina Academic Press, 2018, Title Separation of Powers Law
13. Author's Name [Peter M. Shane](#), [Harold H. Bruff](#), [Neil J. Kinkopf](#)