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# Constitutional Scheme of Separation of Powers Issues and Challenges with special reference to Judicial Review

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## ABSTRACT

*The Doctrine of separation of powers means that one person or body of persons should not exercise all three types of powers of government i.e. Executive would be the same persons there would be a danger, because the one who implements the law will become the Legislature himself and he will make arbitrary law, not only this, he also interprets the law himself, likewise if one person or body of persons could exercise both executive and judicial powers in same matter there would be complete tyranny. Hence, the separation of government powers is essential. The typical division is in to three branches : a legislative, an executive and a judiciary, which is the trias political model. It can be contrasted with the 'fusion of powers' in 'parliamentary and semi-presidential systems', where the executive and legislative branches overlap. But at the same time this division of powers creates some controversy, when the legislative organ try to overriding on judiciary, or the judiciary declares the laws as unconstitutional which made by the legislature, not only this, the parliament has always taken the support of amendment of constitution to prevent the effect of judicial decisions. Article 50 of our constitution provides that the state shall take steps to separate the judiciary from the executive in the public services of the state. But the practice no separation is visible. In India, each organ of the government, being independent in it own sphere, is subject to another organ to some extent following the principle of checks and balances. The concept of check and balances implies that the functioning of one organ is to be checked in some measure by the other.*

## I. INTRODUCTION

It is often said that if all powers of the govt. is to be vested in a particular wing or in a specific section of Administration, then the result would be very draconion or tyrannical and public welfare in democracy will not in a true sense but shall be a daydream. Hence it becomes necessary that there should be a division among the three powers of the government and each

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organ should exercise its powers equitably under the limitation of law and governance. The division of the three powers of the government and its independent exercise in their respective areas is called 'separation of powers'. Separation of powers[3] refers to the division of a state's government into branches, each with separate, independent powers and responsibilities, so that the powers of one branch are not in conflict with those of the branches : a legislative, an executive and judiciary, which is the trias political model. It can be contrasted with the 'fusion of powers' in 'parliamentary and semi-presidential systems', where the executive and legislative branches overlap.

According to monstesquieu, the doctrine of separation of powers (des pouvoirs) means that one person or body of persons should not exercise all three types of powers of government, namely executive, legislative and judicial. The legislative should make law and should not administer or enforce it. The executive should neither control the legislature for getting laws it wants, nor should, it take over the functions of the judiciary, if that were so, justice will be arbitrary and capricious. The judiciary should be independent both of the executive and of the legislature. He further said that if the executive and the legislature are the same person or body of persons, there would be a danger of the legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter there would be arbitrary powers which would amount to complete tyranny, if the legislative powers would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of person. The different organs of government should thus be prevented from encroaching on the province of the other organ.

## II. HISTORICAL BACKGROUND OF THE PRINCIPLE

The doctrine of separation of powers is of ancient origin. The history of the origin of the doctrine is traceable to Aristotle.[4] Aristotle first mentioned the idea of a 'mixed government' or hybrid government in his work politics, then John Calvin (1509-1564) favoured a system of government that divided political power between democracy and aristocracy. Calvin appreciated the advantages of democracy, stating : "It is an invaluable gift if God allows a people to elect its own government and magistrates."[5] In order to reduce the danger of misuse

[3] Wikipedia en.m.wikipedia.org
[4] Vanderbilt – The doctrine of separation of powers and its present day significance 38-45 (1953)
[5] Quoted in Jan Weerad, Calvin, in Evangelisches soziallexikon Third Edition (1960), Stuttgart (Germany) Col.

of political power, calvin suggested setting up several political institutions that should complement and control each other in a system of checks and balances. He was always oppoes absolute political powers in a particular organ of the govt. John Locke (1632-1704) had suggested that dividing political power into the legislative (which should be distributed among several bodies, for example, the house of lords and the house of commons) on the one hand, and the executive and federative power, responsible for the protection of the country and prerogative of the of the monarch, on the other hand, as the kingdom of England had no written constitution. Locke believed that the legislative power was supreme over the executive and federative powers, which are subordinate. ***Locke*** reasoned that the legislative was supreme because it has law-giving authority, for what can give laws to another, must be needs be superior to him. According to Locke, legislative power derives its authority from the people, who have the right to make and unmake the legislature. Lock maintains that there are restrictions on the legislative power. Lock says that legislature cannot govern arbitrarily, cannot levy taxes or confiscate property without the consent of the governed. No taxation without representation and cannot transfer its law making powers to another body, known as the non-delegation doctrine.

## III. TRIPARTITE SYSTEM

During the English civil war the parliamentarians viewed the english system of government as composed of three branches- the king, the house of lords and the house of commons, where the first should have executive powers only and the latter two legislative powers, one of the first document proposing a tripartite system of separation of powers was the instrument of govt., written by the English general John Lambert in 1653 and soon adopted as the constitution of England for few years during the protectorate. The system comprised a legislative branch (the parliament) and two executive branches, the English Council of State and the Lord Protector, all being elected (though the Lord Protector was elected for life) and having checks upon each other.

A further development in English thought was the idea that the judicial powers should be separated from the executive branch. An earlier fore runner to Montesquieu's tripartite system was articulated by John Locke in his work ***'Two treaties of government'***. In the two treaties, Locke distinguished between legislative, executive and federative power. Locke defined legislative power as having ...the right to direct how the force of the common wealth shall be employed, while executive power entailed the 'execution of the laws that are made, and remain

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in force. Locke further distinguished federative power, which entailed 'the power of the war and peace, leagues and alliances and all transaction with all persons and communities without (outside) the commonwealth or what is now known as foreign policy.[6]

The term 'Tripartite System' is commonly ascribed to French Enlightenment Political Philosopher ***'Baron de Montesquieu'***, although did not use such a term but referred to distribution powers. In the spirit of the law[7], Montesquieu described the various forms of distribution of political power among legislative, an executive and a judiciary. He said that in every govt. there are three sorts power, the legislative, the executive in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or prepetual laws and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security and provides, against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

Montesquieu argues that each power should exercise its own functions. He clarified that 'when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, least the same monarch or senate should enact tyranical laws, to execute them in a tyranical manner. Again there is no liberty, if the judiciary power to be not separated from the legislative and executive were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator, were it joined to the executive power, the judge might behave with violence and oppression. Separation of powers requires a different source of legitimization or a different act of legitimization from the same source, for each of the separate powers. If the legislative branch appoints the executive and judicial powers, as monstesquieu indicated, there will be no separation or division of its powers, since the power to appoint carries with it the power to revoke. Montesquieu actually specified that the independence of the judiciary has to be real and not merely apparent. The judiciary is the most important of the three powers, independent and unchecked.[8]

**Wade and Phillips[9]** says that the doctrine means the following three things:-

[6] Locke, John (1824) Two Treaties of Govt. C&J Rivington p. 215
[7] Montesquieu, The spirit of Laws, at pp. 151-152.
[8] Przeworksi 2003, p. 13
[9] Prowade and Phillips : Constitutional Law, Part II, Ch. 2

(a) The same set of the persons should not compose more than one department of the three department.

(b) One department should not exercise the functions of the other two departments and

(c) One department should not control or interfere with the work of other two department.

## IV. SEPARATION OF POWERS IN INDIA

Article 50 of Indian constitution provides that ***'The state shall take steps to separate the judiciary from the executive in the public services of the state.'*** But in practice no separation is visible. The constitution of India has been cast on the model of the American constitution. However, it is an out and out replica of the British system of cabinet government. The British parliamentary form of government has been adopted. It has thus led to the fusion of the executive with the legislature.

According Article 53(1) the executive powers of the union is vested in the president[10] in this regard Article 74(1) provides that there shall be a council of ministers for 'the aid and advice' to president at the same time the president is an integral part of the union parliament.[11] The President also exercise the legislative function, no bills can become law without the consent of the president.[12] His prior recommendations are required before certain bills[13], are introduced in the house of parliament. President summons the sessions and prorogues the session of the house of parliament.[14] During the recess of the parliament, the president may in the exercise of his legislative power, promulgate an ordinance such ordinance would have the power effect and existence as an act of the parliament.[15] The union council of ministers constitutes of the prime minister and other ministers, these all belongs to house of parliament,[16] in this regard the conception of doctrine of separation of power by wade and Phillips does not come true. The council of ministers is collectively made answerable to the house of people for anything and everything it does in matters of administration of the country.

It thus, depicts the fusion of the executive with the legislative authority leading to functional, as well as, personal overlapping. The doctrine of 'separation' is thus not accepted in India, in strict sense. The legislature, besides law making powers, exercises judicial powers in cases of

[10] Article 154 says 'the executive powers of state will vested in the governer.
[11] Article 79
[12] Article 111
[13] Article 117(1)
[14] See article 85 of the constitution
[15] Article 123(1) and 123(2)
[16] See Article (75(5)

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breach of its privileges,[17] impeachment of the presidents and the removal of judges of supreme court and high courts.[18] In their turn, the courts are vested with power of judicial review and may invalidate laws passed by the legislature, transgressing constitutional limitation. Though, the legislature cannot enact law declaring that the judgement of the court shall not operate, it may overrule or annual the decision of the court.[19] It may, even alter the basis of the judgement or may re-enact the law declared void by the court.[20] The law so enacted or amended can be challenged on other ground in the court but not on the ground that it seeks to in effectuate or circumvent the decision of the court. From the above discussion it becomes clear that the doctrine of 'separation' in its literal sense does not operate. Though the constitution of India recognises the need for the separation of the executive from the judiciary in actual practice, it provides 'checks and balances' and not any rigid separation of powers. The supreme court in Ram Jawaya case has explained that:- 'The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of govt. 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 functions that essentially belong to another.'

Likewise, Justice Subba Rao, in Golaknath case has observed : The constitution brings into existence different constitutional entities, namely, the union, the states and the union territories. It creates three major instruments of powers, namely, the legislature, the executive and the judiciary. It demarcates their jurisdiction minutely and expects them to exercise their limits. They should function within the spheres allotted to them.

In Indian democratic system there is rule of law in governance. It means 'government are based on principles of law and not of men'. Further, that, law must not be arbitrary or irrational and must satisfy the test of reason and the democratic form of polity seeks to ensure this element by making the framers of law accountable to the people. If a law made by legislature invade the constitution or violates the constitutional provisions, the judiciary can declared null and void of such law as well desist it from being implementation. The examination into the constitutionally of a law is part of judicial review, which is the original jurisdiction of the higher courts. Likewise the provision is enshrined in Article of the constitution. Clause (2) of Article 13 says: The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of the

[17] See Article 105 & 194
[18] See Article 124(4) & 217 (1)(b)
[19] See Also – People Union for Civil Liberties (PUCL) V. Union of India, AIR 2003 SC 2363
[20] Municipal Committee, Patiala V. Model Town Residents Association AIR 2007 SC 2844

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contravention, be void. Clause (1) and (2) of Article 13 thus declare that laws in consistent with or in contravention of the fundamental rights, shall be void to the extent of inconsistency or contravention as the case may be.

## V. SEPARATION OF POWERS VIS-A-VIS JUDICIAL REVIEW

The Doctrine of separation of powers guarantees the independent existence of the three organs of government as well as laissez faire principle. The legislature is competent to make laws and executive agency is empowered to implement such laws. But judiciary plays a significant role whenever any deadlock arises between legislative and executive. The judiciary is empowered to establish control on arbitrary act of govt., through judicial review. The judiciary has the privilege to prevent not only the arbitrary actions of the government but also the implementation of unconstitutional laws or which is contrary to the constitution. Judicial review is the extraordinary power of the courts by which they could check the validity of law made by the government. In this regard Article 13(2) clearly provides that the state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void law means or includes any ordinance, order, bye-law, rule regulation, notification, custom or usage having in the territory of India the force of law and if such laws would be derogatory to the fundamental rights then be void. The dissonance between the government and the judiciary have arisen from the very first amendment of the constitution in 1951 and which is continuous at present. Whenever the parliament had amended the constitution and the supreme court rejected the validity of such amendments, the parliament amended the constitution again instead of following the decision of supreme court, so that the decision of the supreme court could be set aside.

In **Golaknath V. State of Punjab**[21] the supreme court ruled that parliament could not curtail any of the fundamental rights in the constitution. Fundamental Rights cannot be abridged or taken away by the amending procedure in Article 368 of the constitution. An amendment to the constitution is 'LAW' within the meaning of the Article 13(2) and is therefore subject to part III of the constitution. But parliament has passed the 24th Amendment in 1971 to abrogate the supreme court judgment; it amended the constitution to provide expressy that parliament has the power to amend any part of the constitution including the provisions relating to fundamental rights. This was done by amending article 13 and 368 to exclude amendments made under article 368, from article 13's prohibition of any law abridging or taking away any

[21] AIR 1967 SCC 762

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of the fundamental rights.[22] In 1973, the supreme court in the landmark case of **Kesvanand Bharti V. State of Kerla**[23] held that the parliament under the Indian constitution not supreme, in that it cannot change the basic structure of the constitution. It also declared that in certain circumstances, the amendment of fundamental rights would affect the basic structure and therefore, would be void. Likewise the supreme court has held unconstitutional to 39 constitutional amendment act 1975, which was placed the election of the president, the vice president, the prime minister and the speaker of the Lok Sabha beyond the scrutiny of the Indian courts. In **Indira Nehru Gandhi V. Raj Narayan.**[24] This amendment along with Article 339-A was challenged in supreme court, due to Indira Gandhi becoming the prime minister, on the ground of misbehavior. Although the supreme court declared the election of the prime minister as valid, but this constitutional amendment was termed as unconstitutional. The supreme court held that the system of free and fair election is the basic structure of the constitution which cannot be amended.

In **Justice K.S. Puttuswamy (Retd.) V. Union of India**[25] it was contended that it was not open to the supreme court to interpret the constitution in a manner that would give effect to a right (i.e. right to privacy) that had been rejected by the founding fathers and that is was open only the Union parliament to introduce such a right in the exercise of its constituent power, under Article 368 of the constitution of India.

Rejecting the above contention a nine-judge bench of the supreme court observed; ... in our constitution it is not left to all the three organs of the state to interpret the constitution. When a substantial question of law as to interpretation of the constitution arises, it is this court and this court alone under Article 145(3), that is to decide what the interpretation of the constitution shall be, and for the purpose the constitution entrusts this task to a minimum of 5 judge bench of this court. In the light of the doctrine of separation of powers, it may be stated that judiciary is considered to be guardian of the constitution.

In state of **H.P. Vs. Satpal Saini**[26], the question was whether the High Court could give direction to the state govt. to amend the provisions of section 18 of the H.P. Tenancy and land reforms act 1972. Holding that the directions were unsustainable, the supreme court ruled: A direction cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power, which is vested in parliament and the state legislatures under

[22] en.m.wikipedia.org
[23] AIR 1973 SC 1461
[24] AIR 1975 SC 2299
[25] AIR 2017 SC4161
[26] AIR 2017 SC 810

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Article 245 and 246.

The legislature is repository of sovereign legislative power, is vested with authority to determine whether a law should be enacted.

The doctrine of separation of powers entrusts to the court constitutional function of deciding upon validity of law, enacted by the legislature where a challenge is brought before the High Court under Art. 226 or the supreme court under Art. 32, on ground that law lacks in legislative competence or has been enacted in violation of a constitutional provision.

But judicial review cannot encroach upon basic constitutional function, which is entrusted to legislature to determine whether a law should be enacted. Whether a provision of law, as enacted, sub-serves object of law or should be amended, is a matter of legislature policy. The court cannot direct the legislature either to enact a law or to amend a law, which it has enacted for simple reason that this constitutional function lies in exclusive domain of legislature.

The judiciary is one amongst three branches of the state, the other being the executive and the legislature, Each of the three branches is co-equal. Each has specified and enumerated constitutional powers.

**Doctrine of Checks and Balances**

According to the principle of check and balances, each of the branch of the state should have the power to limit or check the other two, creating a balance between the three separate power of the state. Each branch's efforts to prevent either of the other branches becoming supreme from part of an enternal conflict, which leaves the people free from government abuses. Immanuel Kant was an advocate of this, nothing that 'the problem of setting up a state can be solved even by a nation of devils' so long as they possess an appropriate constitution to pit opposing factions against each other. Checks and balances are designed to maintain the system of separation of powers keeping each branch in its place. The ideas is that it is not enough to separate the powers and guarantee their independence but the branches need to have the constitutional means to defend their own legitimate powers from the encroachments of the other branches. They guarantee that the branches have the same level of power (co-equal) that is, are balanced, so that they can limit each other, avoiding the abuse of power. The origin of checks and balances, like separation of powers it self, is specifically credited to Monstequieu in the enlightenment (in spirit of the laws, 1748). under this influence it was implemented in 1787 in the constitution of the redefined the judiciary as a separate branch of government co-equal with the legislative and the executive branches.

The example of the separation of powers and their mutual checks and balances from the

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experience of the United States constitution is specifically presented in Federalist No. 51 as illustrative of the general principle applied in similar forms of govt. as well.

The political usefulness of the doctrine of 'separation of powers' was now widely recognized, Hon'ble Justice Chanarachud, in Indira Nehru Gandhi Case said : The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour. In this sense, the doctrine can be rather better appreciated as a 'concept of check and balances' Hon'ble Justice Chandrchud observed:- No constitution can survive without a conscious adherence to its fine check and balances. Just as courts ought not to enter into problems entwined in the 'political thicket', parliament must also respect the preserves of the court. The goal of the 'separation' doctrine says Vanderbilt is to have a government of law rather than of official will or whim. The value of the doctrine, therefore, lies in the emphasis on 'check and balances' which are necessary to prevent an abuse of the enormous powers of the executive.

Although, the doctrine of 'separation' in the classic sense, cannot be applied to any modern functional govt., this does not mean that the concept has no relevance in the world of today. The rational underlying the doctrine as discussed above, has been that if all power is concentrated in one and the same organ or person, there would arise the danger that it may enact tyranical laws, executive them in a despotic manner and interpret them in an arbitrary fashion without any external control. Its object is the preservation of political safeguards against the capricious exercise of power. Its logic, say Jaffe and Nathanson, "is the logic of polarity rather than strict classification ... the great end of the theory is by dispersing in some measure the centres of authority, to prevent absolutism." The doctrine can be better understood as a doctrine of check and balances." It is here that, its value lies. The goal of the doctrine says vanderbilt, is to have a government of law rather than of official will or whim.

Stating that the theory of 'separation of powers' in modern practice 'means an organic separation'. Basu says that the doctrine explains that 'one organ of govt. cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function there to.

The concept of 'check and balances' implies that the functioning of one organ is to be checked in some measure by the other.

## VI. Conclusion

It may thus, be stated that it is not possible to apply the doctrine of 'separation' in its strict sense, particularly on the context of the modern functional state. But, at the same time, it must

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be accepted that 'the doctrine has not lost its relevance. The logic behind the concept is prevention of abuse of absolute power. It is widely recognised that absence to the concept of separation is the other name of 'Tyranny'. Theoretically impracticable, in practice the doctrine prevails everywhere, under every system of Government may be in the form of 'checks and balances. It may at the most be said that in view of the growth of the administrative process, we are living not 'in its shade but shadow'. Without pointing to its hard core principles it must be said as observed by Hon'ble Supreme Court that 'no constitution can survive without a conscious, adherence to its fine check and balances'. Still, one feature of doctrine is emphasized by the jurists is that the judiciary must be independent of and separate from the remaining two organs of the government. 'Freedman' rightly maintains that 'there is no liberty, if the judicial power be not separated from the legislative and the executive. According to the constitutional scheme the each organ of the state- the legislature, the executive and the judiciary must have respect for the other and that key must not encroach into each others domains. Judges must know their limits and must not try to run the government. They must have modesty and humidity, and not behave like emperors at the same time the judiciary is also to function subject to self-imposed discipline of judicial restraint, and that the judges must exercise judicial restraint and must not encroach into the executive or legislative domain. The legislature should also follow the decisions of the judiciary within the ambit of the constitution and not amend the constitution to nullify the effect of the decision. Apart from this, the legislature should not compel to executive to implement the desire law. There should be a coordination, cooperation and balance between the three organs of the government.

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