Asian Science ISSN–0973–4740 Volume 14 | Issue 1 and 2 | June and December, 2019 | 17-52 DOI : 10.15740/HAS/AS/14.1and2/17-52
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A CASE STUDY

Separation of power constitutional plan and practices

Shriya Singh
Department of Law, New Law College, Bharati Vidyapeeth, Pune (M.S.) India
(Email: shriya.law@gmail.com)

ABSTRACT

This article is an attempt to study the doctrine of Separation of Power as engraved in the Constitution of India and the difficulties faced by the three organs of the government while implementing and interpreting the provisions of the Constitution in letter and spirit. The research also draws a comparative approach with the UNITED STATES OF AMERICA's and UNITED KINGDOM's Constitutional scheme of Separation of Powers. Throughout the course of research various cases have been discussed in which the Courts have recognized that there is no straightjacket formula to determine Separation of Power. With the complexities in all the democracies in the world, overlapping of the jurisdiction is bound to arise. However, the three organs should keep a system of checks and balances, so they do not end up violating the rights of the people. The Doctrine Separation of Power is a part of the basic structure of the Indian Constitution. It is in this context, that the research was made on the 'Constitutional Plan and Practices with respect to Separation of Power'

Key Words : Separation of power, Constitutional plan, Practices

View point paper : Singh, Shriya (2019). Separation of power constitutional plan and practices. *Asian Sci.*, **14** (1and 2): 17-52, **DOI : 10.15740/HAS/AS/14.1and2/17-52.**

The doctrine of *Separation of Powers* excogitates the idea that the governmental functions must be based on a *Tripartite* division of *Legislature, Executive* and *Judiciary*. When it is referred to as tripartite division it means three divisions or branches. *Separation of Power* refers to the idea that the governmental organs of the state should be functionally independent of each other. The three organs should be separate, distinct and sovereign in its own premises or area of functions, so that they do not overstep the authority of the other, which in turn will also keep away the ambiguity. There are three different functions in every government through which the will of the people is verbalized. The *Legislative* organ of the state makes laws, the *Executive* enforces them and the *Judiciary* applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the area of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs. Which means that there is no watertight compartment in the functions although they are divided? The *Judiciary* keeps a check on both *Legislative* and *Executive*. If the legislature makes any law which is not in harmony with the law of the land *'Constitutional Law'*, it is quashed down by the *Judiciary*. Also if the *Executive* tries to work beyond its ambit the *Judiciary* plays a watchdog and keeps it in its area of work. So it can be said as

Judiciary is one of the branches of the government where people go and seek remedy for the wrongs of legislature as well as *Executive*.

Today all the systems might not be opting for the strict *Separation of Power* because it is undesirable and impracticable but implications of this concept can be seen in almost all the countries in its diluted form. *Separation of Power*s is apolitical doctrine originating in the writings of *Montesquieu* in "*The Spirit of the Laws*", where he urged for a constitutional government with three separate branches of government. Each of the three branches would have defined abilities to check the powers of the other branches. It is best suited in Democratic countries preferable with written constitutions as it will demarcate the work and functions of each branch. A Democratic country is one where people have a right to select their leaders. It generates a feeling of common good and larger satisfaction of the needs of the people. Democracies make the leaders responsible and answerable to the public at large. When the people are unsatisfied by one government they may opt to vote it out of the majority in the other tenure. A democracy is a system of government in which all the people of the state are involved in making decisions about its affairs typically by voting to elect representatives to a parliament or similar assembly. The sovereign authority enjoyed by the people in the country can be exercised by them either directly or indirectly.

As it was explained by Montesquieu *Separation of Power* will mean that the government is divided into three branches which means that all are separate and distinct with each other but they have to work hand in gloves for a proper functioning of the state and its constitutional machinery. Montesquieu's theory is one of the basic structures of the Indian constitution and it can be seen in various provisions of the Indian constitutional provisions. The constitution of India clearly lays down the provisions where the functions of all the three organs are divided.

The doctrine is accepted by most of the countries but in its diluted form or it can be said as to have a modified version of the doctrine which is applied by the countries. The doctrine cannot be applied in its strictest form as it will not be possible. If the organs are given total control they might turn upto be Autocrats. This division thus gives no room to ambiguity and also gives certain independence to each governmental department.

The history of the doctrine makes it evident as to how it was deeply thought upon even in those days. It was important for jurists as well as political thinker to do something good for the people so that they do not fall prey of the tyranny of the government. There were many political thinkers like Locke, Montesquieu, Aristotle etc. who have made significant studies in regard to the doctrine of *Separation of Power*. So, declaring the doctrine as obsolete will be wrong that also when the doctrine has been successfully applied to various states.

Under the United States of America Constitution, this theory has been applied to a certain extent, giving *Judiciary* a unique position. The framers of the U.S. Constitution have strictly adhered to the doctrine of *Separation of Power*s. But, in actual practice it evident that this rigidity in the form of watertight compartments is not possible. Therefore, functionally the constitutional provisions are based on the principle of checks and balances. As the UNITED STATES OF AMERICA constitution is the oldest constitution it can be easily seen that they have developed this doctrine with the changing time. It is not possible for a state like UNITED STATES OF AMERICA to completely stick to the doctrine. As the doctrine gives the very base of the working of the machinery in the state so it cannot be eliminated.

Under the United Kingdom Constitution, the major offices and institutions have evolved between the Crown and Parliament. The system is seen to have *Balance Of Powers* more than the formal *Separation Of Power* between the three branches or as quoted by *Walter Bagehot* called a *"Fusion Of Powers"* in the English Constitution. The constitution of UNITED KINGDOM is unwritten, which means no single document is there. They derive their constitution from various sources. There is also an overlapping of the functions in the governmental organs. To prevent the abuse of power, it has system of checks and balances. Although there is a great influence of monarchy on the governmental functions. As the words of the Queen or Monarch is final there can be seen sometime overpowering of one organ on the other earlier but now the Monarch is only symbolic for the government. But he is also the sovereign authority. It can be seen in the application of the doctrine in UNITED KINGDOM that no strict form is applied but only a diluted version of the doctrine.

The framers of the Indian Constitution did not agonize the doctrine of *Separation Of Power*s in a typical sense. It cannot be expressly seen but can be seen through the specialization made in the discharge of

functions by the three organs of the government. The *Article 50* of the *IV Part* of *Directive Principles of State Policy* formally speaks of the *Judiciary* being separate from *Executive*. Although there are many articles in the constitution of India which negate the application of the doctrine of *Separation of Power*, it is easily evident that the doctrine has been modified in the practical implementation of it.

Separation of Power is one of the Golden rule which makes it easier for the country to sustain its existence and also checks the government. There have been many instances where the face of the doctrine of separation of power has been modified by various courts. The doctrine of separation of power has affected the growth of administrative law largely. As a matter of fact Montesquieu based his doctrine on the constitution of UNITED KINGDOM but at no point of time it was accepted and applied in its strictest form.

Essence of democracy:

The doctrine of *Separation of Power*s is an impartible part of the evolution of democracy. Democracy fescue a system in which every citizen can, without fear of retribution, breathe, express himself and pursue his or her interests. It enables him to live a life of his choice to the extent he does not hinder the rights of the other people. It is a form of government in which people have a right to choose their respective leaders by the mode of voting during the general election in the country. It is in this context that it can be presupposed that a system of checks and balances among the three organs of the government to ensure a strong nurtured democratic system.

It can be said to be an organization of a situation where all the people of the country are treated equally in the eyes of the law and have equal rights. The common people are the source of the political authority or rather said to be the sovereign authority of the country. *The Legislature, The Judiciary* and *The Executive* are the pillars of democracy. But these days there is another pillar of Democracy is there which can be said to the *Media*. Media has a very influential role of the thoughts of the people. No democracy indeed contemplates all the power in a single head. As in the words of Lord Acton: *"Power corrupts and absolute power tends to corrupt absolutely"*.[1]

A democracy is a system of government in which all the people of the state are involved in making decisions about its affairs typically by voting to elect representatives to a parliament or similar assembly. The sovereign authority enjoyed by the people in the country can be exercised by them either directly or indirectly. Therefore, the system of checks and balances is one of the salient features of Indian Constitutional scheme. The three organs can practically not be segregated into three watertight compartments due to their interdependence on each other to ensure effective governance. They have to work in accordance and in consonance to achieve a meaningful sustenance and purposeful progress of citizens. All the three organs are expected to work in harmony instead of giving primacy to only one of the organs. The original doctrine which wants a complete segregation of all the three organs of the government is not possible. All the organs have to be with each other. Presume that the three organs are separated and no overlapping is done it will be difficult for them to co ordinate their activities. It will result in utter chaos and confusion. No single organ has an upper hand in the governmental functions. All the three organs have to co ordinate their functions. This will also result in the efficient working of the government in the country. The objective of the historical freedom struggle was to protect and promote the democratic rights of the people. The whole struggle for freedom was based on the idea of giving Indians a right. The various fundamental rights that have been guaranteed to the people is an outcome of one such reflection. So the protection of the rights of the people was the most important thing that was to be kept in mind while framing the constitution of India. The doctrine ensures one such thing to protect the rights of the people and prevent the government from becoming autocratic.

The conscience of our Constitution speaks through its Preamble and the dynamics of its goal is laid in its various provisions. The will of the people finds its best expression in the very words as inscribed in the Preamble *"We the People of India"* and *"do hereby Adopt, Enact and Give ourselves this Constitution"*. Thus, it is the people who are sovereign and they exercise this sovereign power in choosing their representatives to the Parliament. The preamble which has been lately been discussed as to be a part of the constitution or not has gained its position as a part of constitution in the *Kesavananda Bharti v. State Of Kerela*.[2] The preamble

1. Pg. No. 4, The Constitution Of India, P.M. Bakshi Universal Law Publishing Company, Edition 10th Reprint 2011.

2. AIR 1973 SC 1461. Pg. No 369,Constitution of India, A.K. Ranjan, Ambition Law Publishing house, 2015.

not only gained its position but was also described as a part of basic structure. The preamble declares People if India as the sovereign authority. This is evident in the preamble. The preamble also lays down various provisions and phrases and terms which declare the very structure base of the Indian constitution.

According to Larry Diamond[3] democracy consists of four key elements:

a. Free and fair elections
b. Participation.
c. Human rights.
d. Rule of law.

The four key Elements are an essential thing to be present in a Democracy. The first one to be the free and fair election in the selection of the representatives. It is essential that all the people of the country should participate. Although lately it has been felt that a very small part of the population does the voting which again does not fulfill requirement of the democracy. The elections should be held in a proper manner with honesty and fair means. The second one being the Participation. Which means that all the people should participate without being bias towards their known ones and choose the right one. A wrong decision of selecting a wrong person can be fatal for the country as well as the citizens. The third one is the Human rights. There are certain basic rights which are given to the people of the country having a democracy. These rights are essential for the people as they ensure a dignity to them and also give them sustainable conditions and do not make them vulnerable to others. It also gives them a sense of security. The last element is Rule of Law, which means that the law is above all and nobody is above the law. This makes the law of the land as supreme law of the land. The law is there to ensure the security people search for in the country.

The spirit of democracy is not a mechanical thing to be adjusted by abolition of forms. It requires the change of heart and inculcation of the spirit of brotherhood. Democracy must in essence mean the art and science of mobilizing the entire physical, economic and spiritual resources of all the various sections of the people in the service of the common good for all. For the culture of democracy to be strong there has to be a greater freedom of thought and action.

Elections play an important role in any democracy. Democracy helps in making people more tolerant towards one another. Democracy gives people the freedom that they have been guaranteed by the Law. But to make people more tolerant it is also important that they change their mindset. As it is said mind is not a problem but mindset is. So it is important that people have a feeling of more of brotherhood and not hatred among one another. The freedom of thought and action makes the democracy stronger. Since people have the right to choose their leader it can be said seen that people tend to change their leaders in the next coming elections if they are not happy with the works of the representative that they chose. It is the prime duty of the leader to keep the people happy and satisfied. The leaders are answerable and responsible to the people. The democracy makes people the sovereign in the country.

The term democracy is sometimes used as a substitute of liberal democracy. The basic feature of democracy is the participation of voters freely and fully in the life of their society. The term democracy was first coined in the ancient Greek political and philosophical thoughts. Even the roman republic sufficiently contributed to the development of democracy. The democracies can be in both parliamentary as well as presidential form of governments. It can also be there in the form of direct democracy or representative democracy. Another form of democracies can be hybrid or semi-direct democracy. *Aristotle* quoted "But one factor of liberty is to govern in turn; for the popular principle of justice is to have equality according to number, not worth, … and one is for a man to live as he likes; for they say that this is the function of liberty, inasmuch as to live not as one likes is the life of a man that is a slave"[4]

Democracy is the best system of governance. The government elected by the people remains in power only till it enjoys the confidence of the people which makes it the reason to be the best form of government. Democracy by so far is the best form of government as it has more participation of the people. They have rights which are not much highlighted in other forms of governance. This makes it to be the reason for most of the countries to adopt democracy as their form of government.

3. Lecture at Hilla University for Humanistic studies, January 21, 2004.
4. Aristotle, Politics 1317b, book 6, Part II.

Historical Background – Doctrine of Separation of Power:

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The doctrine of separation of power has the basic idea of governmental organs working with each other. The principal of *Separation of Power* deals with the mutual relations among the three organs of the government. This doctrine tries to bring inclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principal. This doctrine aims at a watertight compartment of the working of the organs of the government. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. The doctrine has been a successful experiment in most of the countries. The accountability and answerability makes it one of the best forms of governance. This doctrine wants a total segregation of functions and areas of power. This doctrine is a staunch believer of the thought that all the power should not be concentrated in a single head. There should be a distribution of power in the government. If the power is concentrated in a single head it will be more of a dictatorship or autocracy. If the organs do not keep a check on each other they may end up violating the rights of the people. There has to be a co-ordination in the organs of the government. For the government to be accountable to people it is important that they keep a check on each other also. If they do not check each other they may not know where they have crossed a thin line of not violating the rights of the people.

The doctrine of *Separation of Power*, also known as *Trias Politica*[5], deals with the mutual relations among the three organs of the government. The term *'Trias Politica'* was coined by *Charles-Louis de Secondat*[6]. The French jurist Montesquieu in his book *L. Esprit Des Lois (Spirit Of Laws)* published in 18th Century, in *1748*, for the first time enunciated the principal of *Separation Of Power*. That is why he is known as modern exponent of this theory. Montesquieu's doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the powers of the government. Separation of power means the division of responsibilities into different branches to prevent anyone from exercising the core function of another. The intension behind this is to prevent the concentration of all the power in a single head and also provide for the system of checks and balances. In other words each organ should restrict itself to its own sphere and restrain from transgressing the province of the other. It means that Montesquieu wanted total separation of the powers. An organ which is responsible for one function should in no condition perform the functions entrusted to the other organ. When the executive and legislative power vest in the same body there is always a lack of liberty. Similarly if the judiciary and legislative or executive are in the same body then again there will be no liberty. No democracy may exist with absolute separation of powers or with absolute lack of separation of power. In the view of Montesquieu[7]: "When the Legislative and Executive powers are united in the same person, or in the same body or magistrate, there can be no liberty. Again, there is no liberty if the judicial is not separated from the Legislative and Executive power. Where it joined with the Legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the Executive power, the judge might behave with violence and operation. There would be an end of everything was the same man or the same body to exercise these three powers…".

Montesquieu's separation took the form not of impassible barrier and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as *Checks And Balances.* The framers of the constitution knew that concentration of power in any single organ will lead to despotic results. So this is the reason that the doctrine is not applied in its strictest form. It was applied in a much diluted form, as the doctrine called for the air-tight compartment of separation of powers. There has been a judicious blending of organs and overlapping of their functions, which has helped in keep a check of tyrannical actions of the governmental organs. It is evident that framers were always aware of the fact as to what constituted the legislative, Executive and Judicial powers. So if they actually wanted to apply the doctrine in its strictest. Form they would have applied it. But they knew that it is not possible. It will be absolutely impractical to apply the doctrine as a whole.

It is curious to note that all the constitutionalism of

5. Pg. No. 364, Constitutional law, A.K. Ranjan, Ambition Law Publishing House, 2015.

6. Id.

7. Pg. No. 362, Constitutional law, A.K. Ranjan, Ambition Law Publishing House, 2015.

antiquity operated without and often in conflict with the separation of functions. It is true that both the Greek polis state and the Roman republic assigned specific functions to elected officials. But substantially different functions, *Executive, Legislative* and *Judicial*, were often combined in person of one and the same magistrate. Probably the intrinsic reason for this defect was that everything for the equalitarian rule of law neither the Greek polis nor the Roman republic recognized any rights of the individual. The political ethics of the ancients did not call for a separation of functions and their assignment to different state organs. Political Theories Claim to have discovered as early as in Aristotle's Politics the nucleus of the modern separation of powers. Though the doctrine is traceable to Aristotle but the writings of *Locke* and *Montesquieu* gave it a base on which modern attempts to distinguish between *Legislative, Executive And Judicial* power is grounded. John Locke[8], the apologist of the Revolution of 1688, justified the supremacy of the legislative power, but considered that, because the legislative was not permanently in session and because legislators might exempt themselves from obedience to their own laws, legislation and the execution of the laws were in distinct hands in all well-moderated monarchies and well framed governments. By the *Executive* Locke meant primarily what we should call the *Judiciary*, but he recognized a third Kind of function, which he called the "*Federative*" and which involved the carrying of external relations.

Further Locke distinguished between: *Discontinuous Legislative Power, Continuous Executive Power* and *Federative Power*

He included within *Discontinuous Legislative Power* was the general rule-making power called into action from time to time and not continuously. He included the basis law making power the Legislature. He believed that this power is one where they are called upon in time of need but they do not working continuously. *Continuous Executive Power* included all those powers which we now call executive and judicial. It includes the power of enforcing the laws made by the legislative and also includes application of the law to cases arising out of the breach of law. *Federative Power* included the power of conducting foreign affairs. The relations between two or more countries, how they are to be governed. It includes various treaties, agreements, pacts etc.

Locke[9] was of the opinion that Legislative powers is supreme in having an ultimate authority over how the force for the commonwealth has to be employed. The Executive power has a charge of enforcing the law as it is applied to certain cases. The Federative power means the right to act internationally according to the law of nature. Natural Law is one law that is universally applicable keeping in view the differences of culture in different countries. Locke did not believe Judicial power as a separate power.

Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Later other theorists like Montesquieu, John Locke and James Harrington. Described these functions as *Legislative, Executive* and judicial. All the theories that were forwarded by these political thinkers in relation to the doctrine of *Separation Of Power*s were on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons. At this note it is important to quote Cooley[10]. who emphasizes the importance of the doctrine of *Separation Of Power*s as: "This arrangement gives each department a certain independence, which operates as a restraint upon such action of others as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guarantees against attempts at tyranny"

It is widely accepted that for a political system to be stable, the holders of the power need to be balanced off against each other. The doctrine as it originally explains the distinguishing functions of each organ without any kind of overlapping of functions is highly inappropriate. The organs cannot be treated in isolation with each other. There has to be co-ordination. The doctrine of separation of power, in dilution, deals with the mutual relations among the three organs of the government with a system of checks and balances. India follows a parliamentarian form of government. It follows the doctrine of separation of power min its diluted form. Similarly UNITED KINGDOM has a week separation of power. UNITED STATES OF AMERICA also has a separation of power but in the diluted form of the doctrine.

8. Pg. No. 362, Constitutional law, A.K. Ranjan, Ambition Law Publishing House, 2015.

9. Pg. No. 363, Constitutional law, A.K. Ranjan, Ambition Law Institute, Ambition Law Publishing House, 2015.

10. Id.

Montesquieu has favored a type of government which was not concentrated too much in a single head. Montesquieu was also of the view that the judiciary should be independent not only on papers but also in actions and reality. The judiciary is the most important organ of the government even in the view of Montesquieu. Countries like New Zealand and Canada have a little Separation of power. The doctrine is believed to be based upon the constitution of UNITED STATES OF AMERICA. The doctrine by now has emerged as a most important component of modern democratic political systems. *The Second Treatise Of Civil Government*, a 1690 manuscript was written by John Locke, although the proper description was given by *Montesquieu* only.

Concept analysis- Doctrine of Separation of Powers:

A complete and absolute *Separation Of Power* is practically and theoretically not possible. Though, it is always possible to give a broad meaning to this doctrine. As the doctrine emphasizes on a *Tripartite* system of government, namely, Legislative, Executive and Judiciary. The doctrine itself speaks that there should be no concentration of power in one single head. It will lead to despotism. This can also result in violation of the rights of the people. The object of the doctrine was to eliminate the tyranny that may result if the government is over powered. The doctrine says that there should not be one person forming part of more than organ of the government. The doctrine speaks that there should not be violation of the ambit of work between the organs. They should not trespass the premises of the function assigned to them. They should exercise only the functions that have been given to them.

The *Basic Concept* of the *Separation of Power*s would mean:

– That the same persons should not form part of more than one of the three organs of government.

– That one organ of government should not control or interfere with the work of another.

– That one organ of government should not exercise the functions of another.

Such a clear demarcation is always desirable to keep the democratic system of a nation intact. This helps in clarifying the functions that are to be performed and by whom If *Legislative* and *Executive* powers are vested in the same person, there would be no liberty. So as per the doctrine they should be very distinctive in nature. The demarcation made should be air-tight compartments, so there is no ambiguity that arises. The similar follows if *Judiciary* was distinct from the *Legislature* and *Executive*. If all powers are vested in the same body it will lead to arbitrariness. In the Indian constitution independence of judiciary is the basic structure which cannot be amended. If there is a distinction in the functions and powers of the three organs there can be a system of checks and balances in the government. This will also help in the protection of the rights of the people. Giving *Legislative* power to *Judiciary* would amount to biasness and *Executive* power would lead to despotism and tyranny. So it is necessary that each organ has a separate area of function so that the rights of the people can be very well protected. As per the doctrine if there is need for country to prosper and work without chaos it is important that the doctrine should be there.

As of today, the Parliament exercises political and financial control over the *Executive* and there are inherent checks and balances to keep each organ within the limits of Constitutional power. There has been a dilution of the doctrine with the change in time. The dilution of the doctrine was necessary as it is impossible make strict demarcation. There has to be overlapping of the powers. There is no relationship in this world which is perfect and is prone to certain tensions and strains. But, the way out to this issue is through the development of healthy conventions. There should be mutual respect for each other keeping in mind the purpose of their exercise of these powers. In the end the objective is to achieve a *'Welfare State'*, therefore, a healthy co-ordination among the three can work wonders. The three when co-ordinating will dilute the doctrine. So it makes it possible to work with harmony.

The Legislative:

The Legislature has been accorded high-esteem in the Indian Constitution. It is primarily concerned with enactment of general rules of law that are related to all aspects of the conduct of its citizens and institutions. It is the law making authority in India. The Parliament is the Union Legislature of India comprising two bodies namely *Lok Sabha* and the *Rajya Sabha*. Which has a sanctioned strength of 543 members in lower house. In addition to this two nominees from the Anglo Indians if the president of India so desires to nominate and 245 members in upper house including 12 nominees from the

expertise of different field of history, science, culture and art. Legislature is composed of The President Of India and both the houses of the parliament. The President is the head of the legislature and all the powers to summon and prorogue either house of the parliament. The president of India has the power to dissolve the Lok Sabha also. But he can exercise this power of his only upon the advice of The Prime Minister Of India and his Council Of Ministers. President is a part of Parliament but does not sit or participate in the discussions of the either of the houses. The Lok Sabha is the lower house of the union. The leaders are elected directly by the people of the country. They are elected from various states. The numbers of leaders are determined on the basis of the population of the state. It is also called as the House of people. The members of this house are directly elected through first past the post system. The tenure of the Lok Sabha is five years. There is a system of adult franchise in India. It enacts laws, impose taxes, authorizes borrowing, and prepares and implements the budget, has sole power to declare war, can start investigations, especially against the *Executive* branch, appoints the heads of the *Executive* branch and sometimes appoints judges as well as it has the power to ratify treaties. As it represents the will of the people by ensuring a true and intact democracy, it can be said that it cannot be done all by the Legislature itself. It is an imminent threat to democracy if an absolute power is given to the nation's purse holder. By making the *Executive* accountable to the popular house, the Constitution ensures a proper mechanism of checks and balances to the doctrine of *Separation of Power*s. The entire system has other facets which can help achieve the same. Therefore, this brings into question the role of the other two pillars: the *Judiciary* and the *Executive*.

In case of any conflict between the decisions of the two houses the president has a right to call a joint sitting of both the houses. The money bill originates from the Lok Sabha only. However the other bills can be originated in either house of the parliament. There has to be a Pre Recommendation by the president. He has no authority to send the money bill for reconsideration if he has already recommended it. If hr do so, he can be impeached. Article *79 to 122 and article 148 to 151* deals with The Parliament or The Legislative body of the Union. The officers of the parliament includes speaker and deputy speaker, chairman of Rajya Sabha and Parliamentary secretariat. The Rajya Sabha I the permanent house of the legislature with its 1/3rd members retiring after every two years. The functions of Legislature can broadly be law making, controls of public finance, deliberation and discussions in the session and formation of parliamentary committees. The language which is to be used in the proceedings of The Parliament shall be Hindi or English. Rajya Sabha is not subjected to dissolution. The members of the legislature have special privileges guaranteed to them by The Constitution Of India. The Legislature also has a right to delicate its powers to the executive organ, but it cannot delegate its the law making powers. The two houses of the parliament forms a bicameral legislative body.

The Judiciary:

The framers of our Constitution drafted it so meticulously that it provides for an independent and impartial *Judiciary* as the interpreter of the Constitution and as custodian of the rights of the citizens through the process of *Judicial Review*. This mandates the *Judiciary* to interpret the laws but not to make them. The Supreme Court is the apex court of the country. There is a hierarchy of courts in India. *Article 13(2)* of the Constitution provides for the Judicial Review. The independence of judiciary has been the basic structure of the constitution of India. They are not to lay down the general norms of behaviour for the government. The judiciary acts as a watch dog for the legislature and Executive. The judiciary keeps a check on both the Legislature as well as executive. If any of the two tries to exceed its limits the Judiciary is there to ask them to be in their ambit of work or function. This brings us to the recent debate *whether this behaviour of the Judiciary can be termed as judicial review or judicial activism?* The higher *Judiciary* in India, especially the honorable Supreme Court, the most powerful *Judiciary* in the world, has become an epicenter of controversy over its role in entertaining and deciding public-interest-petitions. In deciding these petitions, the *Judiciary* issues many directions to the Government which includes framing of legislation in many areas. In the recent times there have been many questions that arose about the function of the Judiciary, for example, *Is it that the Judiciary is transcending its limits and trenching upon the fields of the Executive or legislature? And if so is the case, then what is the legitimacy of exercise of such powers?*

The role of the *Judiciary* should only be limited to

scrutinizing the constitutionality of the legislation and not directing the government to enact legislation. All the Judiciary has been providing its best decisions it is more desirable to work for the protection of the rights of the people and granting them proper remedies. The judiciary should only be a watch dog rather than creating a fear to the Legislative or Executive. The scope of judicial review does not extend beyond enquiring whether an impugned legislation or an *Executive* action falls within the competence of the Legislature or of the *Executive* authority or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

The three organs have to exercise their functions keeping in mind certain constitutionally assigned encroachments. They have to make sure that they do not encroach upon the function of the other organ. This means that they have to work in Harmony with each other. However according to *Chief Justice Subba Rao* in *Golak Nath v. State of Punjab*[11]:"*The Constitution 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. …..No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land.*" Therefore if any of the three organs tries to expand its jurisdiction it would follow an unavoidable conflict and affect the harmonious efficacy of the tripartite system of government. It is desirable for the three organs to be in there limits so that there is no chaotic situation. No organ has to superintend over the exercise of powers and functions of another, unless the Constitution strictly so mandates. They have to work according to the constitution only. The constitution has already demarcated their boundaries of work. As already state the Judiciary has played a key role in giving the true, best suited and harmonious interpretation to the provisions of the constitution, it can be said that the judiciary has given life to the provisions of the constitution. Nonetheless, the interpretation by the *Judiciary* of the laws and regulations adds flesh and blood to the basic structure of the Constitution. The Honorable Supreme Court has itself construed that the concept of *Separation Of Power*s is a "basic feature" of the Constitution. So if one encroaches the territory of the other it would be a clear violation of the basic structure of the Constitution and *Judiciary* is not an exception to the same.

The entire debate of limitation of each organ's power has gone through a drastic change in the past two decades. *Justice Pathak* in *Bandhua Mukti Morcha v. Union of India*[12] said:"*It is a common place that while the Legislature enacts the law the Executive implements it and the* Court interpret it and in doing so, adjudicates on the validity of Executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognized that in *a certain sphere the Legislature is possessed of judicial power, the Executive possesses a measure of both Legislative and judicial functions, and the Court, in its duty of interpreting the law, accomplishes in its perfect action in a marginal degree of Legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State"*.

It can be clearly inferred from the above that one may exercise the other one's function upto a limited extent but the issue that predates the Indian scenario is whether this system is working in a well-balanced manner. The constitution has clearly laid down the functions of all the three organs of the government. *Article 124 – 147* deals with the Composition and powers of the Supreme Court. The Supreme Court has Advisory jurisdiction. *Article 143* deals with the advisory jurisdiction of the Supreme Court. The president administers the oath of the chief justice of India. The total strength of Supreme Court judges is one Chief Justice of India and seven other judges. The Supreme Court has the power to review its own judgments. The salaries of the judges are paid from the consolidated fund of India. The judges are appointed by the President of India. The courts in India are the court of records, which means that they keep a record of the cases. There are total five types of jurisdiction of the courts namely, original, writ, appellate, advisory and revisionary jurisdiction.

The Executive:

The executive is the branch of the state which has a higher authority and responsibility in the governance of the state. The main function of the executive branch involves enforcement of law. The executive is the most

11. A.I.R. 1967 S.C. 1643. Pg. No. 369, Constitution of India, A.K. Ranjan, Ambition Law publishing house, 2015
12. 1984 3 S.C.C. 161. Ibid.

powerful branch in the three organs. Executive is the only branch which deals with the people on day to day bases. The executive involves the ministers of the various departments, bureaucrats, clerks etc. Executive also makes the laws in the form of delegated legislations and also decides cases through the quasi judicial bodies. The president is the supreme commander of military and the executive. The *Executive* can veto laws, is the supreme command of the military, makes and bring into force the acts, rules, decrees or declarations and promulgate lawful regulations and can appoint judges and has the power to grant pardons to criminals, all of these powers are exercised through the President. Like the other two pillars of democracy, the *Executive* is expected to be free of over burdened work, responsibility and intrusions from the other two. It should be independent. It is always said that *Executive* is independent of the two but the incompetence persists. It is completely stumbled in actual practice. The reason is that the *Executive* is questioned for its actions by the *Judiciary* and the Legislature. This hinders with the independence of the *Executive* to a greater extent. It's not that the question of responsibility or answerability arises only in the case of *Executive*. The *Judiciary* and legislature are equally answerable but in their cases, a built-in system from within would be available for discharging those functions. This is the exact position of the state of affairs, which is there in practice.

Though the Indian Constitution allocates *Executive* powers to the President and Governors *Article 53 (1) and Article 154 (1),* they are empowered with certain *Legislative* powers *Articles 123, 213 and 356* and certain judicial powers *Articles 103 and 192*. Similarly the legislature exercises certain judicial functions *Articles 105 and 194* and *Judiciary* exercises few *Legislative* and *Executive* functions Articles 145, 146, 227 and 229.[13] However the *Judiciary* is made separate from the *Executive* in the public services of the State *Article 50*.[14] In Bihar, the scheme of the separation of the *Judiciary* from the *Executive* was introduced on an experimental basis but later on it was extended throughout the State. In some states, complete separation of *Judiciary* from *Executive* has been achieved through legislation. In seven states, complete separation of *Judiciary* from *Executive* has been effected through *Executive* orders.

In India the constitution tends to establish a parliamentary form of government. The expression executive power is not define in the constitution. However, article 73 provides for the extent of executive power. So it can be said that he executive power are co-extensive with the power of the legislature. In *Ram Jawaya Kapur V. State Of Punjab,*[15] the Court observed "*It may not be possible to give an exhaustive definition of what executive functions mean and imply.*

Ordinarily, the executive power connotes the residue of government functions that remain after the legislative and judicial functions are taken away."

The central executive consists of the president and the council of ministers headed by the prime minister. The constitution formally vests many functions in the president but he has no function to discharge in his discretion, or in his individual judgment. He acts on ministerial advice and, therefore, the prime minister and his council of ministers constitute the real and effective executive.

The structure of central executive closely resembles the British model which functions on the basis of unwritten conventions. The council of minister enjoys the power during the pleasure of the president. However, in actuality, the council of ministers should have the back of Lok Sabha.

Separation Of Power and Current Plans And Practices:

As we have already discussed the doctrine of separation of power above, following are a description of the present day application of the doctrine different countries:

The Doctrine And The United Kingdom Constitutional Plan:

The constitution of UNITED KINGDOM has no absolute separation of power doctrine. Also there can be seen overlapping of function s among the organs of the government. It is clearly seen that they have a system of checks and balances. This system of check and balances prevents the abuse of power in the three organs. The power of UNITED KINGDOM's government is enjoyed by legislative executive and judiciary. They enjoy these powers within their own spheres with an exclusive system of checks and balances. The concept of

13. Pg. No. 450. The Constitutional Law Of India, Dr. J.N. Pandey, Central Law Agency, 2010, 47th Edition

14. Pg. No. 492, Ibid.

15. AIR 1955 SC 549.

*Separation Of Power*s history can be traced back to seventeenth Century. Monarchy has influenced British government for the years but now it acts more like a symbolic position. However, the monarch is still the sovereign body. This may be because the *Separation of Power*s helped mould Dicey's belief that parliamentary sovereignty favors the supremacy of Law.

The doctrine in UNITED KINGDOM is called as fusion of powers more than separation of powers, as suggested by many jurists and political thinkers. As per the doctrine no single organ should exercise all the powers. There should be a division powers among the organs. No organ of the government should interfere with the working of the other.

In UNITED KINGDOM if a new bill has to be enacted it has to be approved by the House of Commons and the house of lords with the ascent of the monarch. But as per the parliaments act of 1911 and 1949 any enactment can be enacted even if the house of lords has rejected it. The House of Lords can keep any bill with them for twelve months only.

"There is no single written document of constitution in UNITED KINGDOM but there are varied sources of constitution from other ordinary laws. The legislative makes the laws the executive enforces them and the judiciary resolves the disputes. The judiciary includes all the judges of the courts also judges of the tribunals and magistrate. The civil and criminal courts are presided over by the professional judges. The jurisdiction of the civil courts includes both private as well as public law. These courts are said to have exercise some legislative functions by making certain rules which govern the courts as well as the administrative functions.

The doctrine has divided the government into three branches. But to run country effectively it is important that these three branches must communicate with each other. If these three branches do not communicate properly there will be a lot of conflicts which can result into destruction of the country and its people. It is important to note that the welfare of the people and protection of the rights of the people should be the main objective of the doctrine, country, government and the monarch.

So even if there is no written constitution the application of doctrine of separation of power can be seen. The legislative and the judiciary are made as an independent organ. The judiciary to bound to protect the rights of the people by the despotic actions of the executive and also strives to keep the executive within its limits.

Before the constitutional reform act of 2005 there was no, as such, institution of judiciary. There was a member of cabinet and the speaker of the House of Lords who was called as Lord Chancellor acted as an institution of judiciary. He belonged to all the three organs, acting as an exception to the doctrine of separation of power.

However, the overlaps and the system of checks and balances can be seen in the judiciary, legislative and executive. This means that each branch used to have an eye on the other organs and also protected each other from interference. The monarch has the power to dissolve or refuse to dissolve the parliament during emergency. It can be said that House of Lords was a kind of a check over the executive body. Judicial appointments were made by the monarch individually or on the recommendation of the Lord Chancellor.

It is a symbol of democracy in the modern times to have the separation of powers between the legislative, executive and judiciary. However, the judges should rely on parliament and government in setting up precedents and deciding the cases. Although, there are many reasons as to why the parliament should not just be a symbol or nearly a seal, it is important to realize that the three organs have to work with more mutual dependence than independence.

Although there is separation of powers in Britain, any of the two organs have to work with co-ordination or dependently, which renders it difficult to say that there is the application of separation of power. According to the British parliamentary documents the executive has monarch and parliament, who formulates the laws. The legislature includes the monarch and both the houses of the parliament. The judiciary has the judges of both tribunals and the courts. The relationship between the judiciary and the legislature forms the second position of the doctrine. The judges are expected to interpret the laws made by the parliament in such a way that it best conveys the intention of the legislature. According to the constitution of the UNITED KINGDOM the judges are the subordinate of the parliament and are not allowed to challenge the validity of an act of parliament. In *Pickin v. British Railway Board*,[16] it was held by the court: "*The judges of the courts are not allowed to question any act of the parliament or challenge it*."

16. 1974 AC 765.

The executive and judiciary form the third step of the doctrine of separation of power in UNITED KINGDOM. It is the duty of the judiciary to scrutinize the executive action in the form of delegated legislation that it should be in the scope of parent act and power granted to executive by the parliament. The judicial review is a process through which the courts can question the lawfulness of actions of the executive that are made by the public bodies. This refers to the independence of judiciary in UNITED KINGDOM.

Hence, it can be said that there was not much of a separation in United Kingdom in the 18th Century. On the Bird's eye view of the British Constitution, it can be perceived that the Legislature, *Executive* and *Judiciary* are by not totally separate, independent and distinct from each other. The *Executive* magistrate also forms an important part of the *Legislative* authority. He alone has the facility of the *Legislative* authority. He facilitates making treaties with foreign sovereigns, which have the force of *Legislative* acts. He removes the members of the Judiciary, and can remove them by calling the joint session of the two houses. He has the powers in matters regarding the impeachment procedures also and is vested with the supreme appellate Jurisdiction in all other cases.

The British System has discarded the theory in its parliamentary practice. Though no *Separation of Power*s in the strict sense exits in UNITED KINGDOM, yet the interesting fact is that this doctrine has gained attention of the Framers of many modern constitutions precisely during the 19th Century. It is even impracticable in UNITED KINGDOM to apply the doctrine in its strictest sense. It can be seen as the application of the diluted form of the doctrine in UNITED KINGDOM.

The Doctrine And The United States Of America Constitutional Plan And Practice:

The constitution of UNITED STATES OF AMERICA is one of the oldest written of the world. The Constitution of the United States of America which came into effect on *4 March, 1789* which probably provides us with the most apt example of a practical application of the doctrine of separation of powers. The concept of separation of power is embodied in *Article 1, 2,* and *3* of UNITED STATES OF AMERICA. The doctrine of separation of power that attracted the framers of U.S. constitution was designed to prevent the majority from being dictator. From their past experiences, the framers wanted to be sure that no new government has too much power, rather a system of checks and balances. *Article 1* of the constitution provide for a legislative comprising of the house and the senate. *Article 2* provides for the executive, which includes the President, the Vice-president and the departments. *Article 3* provides for the judiciary comprising of the federal courts and the Supreme Court. Each branch has their own powers, their own ambit with a system of checks and balances. The system of checks and balances was designed rather than evolved by an accident. This system makes each branch accountable and responsible to each other, which helps any of the branches from becoming dominant.

The doctrine is based upon a mistaken interpretation by the French writer Montesquieu of the position in England in the 18th Century. The framers who inspired, conceived and wrote the United States Constitution were determined to distribute the powers of government among the legislative, *Judiciary* and *Executive* and further preventing the government to become dictatorial. The framers intended that if there is a separation of power it will protect the rights of the people and their liberties and will also avoid tyranny at the hands of the government. The doctrine aimed at not concentrating the power of the government in the single head. Although, they never thought that it would prove to be a very good method of governance.

The powers of executive include veto over the bills, making of treaties appointments of judges and other official. But the chief function of executive remains to be the enforcement of law. The executive head that is the president is the commander- in- chief of the military. He also has pardoning powers. There is a system of checks and balances by the legislative and judiciary so that the executive does not exceeds its ambit of work.

However, the legislative power includes the law making power establishment of lower federal courts and enactment of all federal laws. The powers regarding president is overriding of Presidential veto and impeachment of president. The checks and balances are done by the executive and judiciary so that there are no hindrances with the rights of the people.

The judiciary has the power to interpret the laws in federal cases and try them. The additional powers vested with the courts are declaring any law or executive action as unconstitutional. The checks and balance system by the executive and legislative works in the same way.

The constitution of UNITED STATES OF

AMERICA was written approximately 200 years ago. It is a central instrument of U.S. government and supreme law of the land. In UNITED STATES OF AMERICA there is a system of confederation, where the states are more powerful then the centre.

"The doctrine of the *Separation of Power*s was adopted by the Convention of *1787*. The doctrine was established to eliminate the arbitrary use of the power of the government. The purpose behind adopting the doctrine was to bring smoothness where there can be frictions among the functions of the governmental organs. The framers ensured that there is a system of checks and balances to keep a check by one organ or the other.

Although there was a system of checks and balances, the three branches were not in water tight compartments. They had to work in co-ordination. Tyranny occurs when the power is concentrated in a single head. Also, there is a single person acting in behalf of all. Many political thinkers claim that separation of power has given a distinct feature to UNITED STATES OF AMERICA. For the smooth functioning of the country it is important that the legislative as well as executive have a partial agency of co-ordination.

The power of the three branches appears to have made an exclusive mutual dependence. As there is no water tight compartment the three organs are paralyzed without each other. They must have a back of one another to function properly and smoothly run the state.

The following will illustrate properly, the separation of power that exists

– The President has a right to veto legislation of Congress. Similarly, this veto may be overridden by a 2/3rd majority in each Horse of congress.

– Any treaties which the president enters into with the other Countries must be ratified by a 2/3rd majority in the senate before they may come into effect.

– The normal rule is that no member of the government may also be a member of congress but the Vice-President is the ex officio and presides over the senate.

– Also, the president appoints judges and officials in the Supreme Court.

– There is no express provision that the Supreme Court should have the power to declare Acts of Congress or of any state legislature or actions of the President illegal, but the Judiciary keeps a check on the other two branches.

The system in the United States has justly been described as a *Separation of Power*s modified by checks and balances. The constitution of UNITED STATES OF AMERICA does not believe in air tight compartment of functions. It believes, for the function of the state and protection of the rights of its people it is important for three organs to work in harmony. Lately, the president of UNITED STATES OF AMERICA is directly elected by the people through the system of universal adult franchise. The framers believed the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation of power doctrine prevents any organ to become supreme. The president at the same time is popularly elected and is the real *Executive*.

Despite of the express mention of this doctrine in the constitution U.S. incorporate certain exceptions to the principle of separation of power with a view to introduce a system of checks and balances. For a bill passed by the congress may be vetoed by the president in the exercise of his legislative power. Also treaty making power is with the president but it is not affective till approved by the senate. It was the exercise of the executive power of the senate due to which the U.S couldn't become the member to the League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organ does not behold the power absolutely.

This means that functioning of one organ is checked by the other to an extent that no other organ may miss use the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow in its rigidity and hence, has opted for the dilution of powers.

The powers of the president are very real though the exercise of it varies greatly with the personality of the President, and it is the presidents business to execute the Laws passed by Congress, he can and does influence the actions of Congress in its legislation. He influences the congress to a greater extent when he gives his speech.

In present times, a Bill vetoed by the President Seldom gains the majority afterwards and so the President's veto can be a potent weapon in his hands. The President is Commander-in-chief of the Army and

Navy ; he has the function to making all the important appointments in the federal government and the conduct of foreign affairs is in his hands, though the senate may refuse its assent to certain appointments and a treaty made by the president requires the ratification of two-third of the senate. The power to declare war belongs to Congress as a whole, but clearly *Executive* action may bring negotiation to such a pass as to make war utmost inevitable.

So although relations exist in the United States between the *Executive* and legislature, the intimacy of which varies with party strength and the personality of the President, the two powers are quite distinct, and it is safe to say that no constitutional state in the world today does there exist an officer with such vast powers as those of the President of the American Union.

Like the rule of law has affected the growth of administrative law in Britain similarly the doctrine of separation of power had an integral effect on the development of administrative law in UNITED STATES OF AMERICA. The doctrine did not give the Supreme Court the power to decide political questions, because it wanted to avoid interference with the exercise of power of the executive. Supreme Court did not get the power to over ride judicial reviews. The president has the right to co-exercise the powers of the congress through his vetoes. The president also exercises the law making power through his treaty making decisions. When the president appoints the judges it can be seen as hindering with the judicial decisions also.

Even though separation of power is an issue for some controversies it is still the widely accepted doctrine. Most of the modern constitutions have a diluted version of the doctrine it still forms the basis of many modern constitutions.

The Doctrine And The Indian Constitutional Plan And Practice:

The doctrine of separation of powers has no place in strict sense in Indian constitution, but the function of different organs of the government has been sufficiently differentiated, so that one organ of the government could not usurp the function of another. In constituent assembly debates *Prof. K.T.* Shah a member of constituent assembly laid emphasis to insert by amendment a new article concerned with doctrine of separation of powers. This article reads "There shall be complete separation of powers as between the principle organs of the state that is the legislative, executive and judiciary."[17] Pg. no.366 Ambition Law.

Kazi Syed Karimuddin, a member of constituent assembly, was entirely in agreement with the amendment of Prof. K.T. Shah, Shri K. Hanumanthia, a member of constituent assembly dissented with the proposal of Prof K.T. Shah. He stated that drafting committee has given approval to parliamentary system of government suitable to this country and Prof. Shah sponsors in his amendment the presidential executive. He further commented: "Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the Legislature, Executive, and Judiciary conflicts are bound to arise between these three departments of the government. In any country or in any government, conflicts are suicidal to the piece and progress of the country. Therefore in a governmental structure it is necessary to have what is called harmony and not this threefold conflict."[18]

Dr. B.R. Ambedkar is one of the important architects of the Indian constitution, disagreeing with the argument of *Prof. K.T. Shah*, advocated thus: "There is no dispute what so ever that the executive should be separate from judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does not exist in the constitution of United States; but many Americans themselves were quite satisfied with the rigid separation embodied in the American constitution between the executive and the legislature. There is no slightest doubt in my mind and in the minds of many students of political science, that the work of parliament is so complicated, so vest that unless and until the members of the legislature receive direct guidance and initiative from the members of executive sitting in the parliament it would be very difficult to carry on the work of legislature. I personally therefore, do not think that there is great loss that is likely to occur if we do not adopt the American method of separating the executive from the legislature."[19] With this observation the motion to insert new article 40A dealing with the separation of powers was turned down.

Legislature, executive and judiciary are the three

17. Pg. No. 366, Constitution of India, A.K. Ranjan, Ambition Law Publishing House, 2015.

18. Ibid.

19. Pg. No. 366, Constitution of India, A.K. Ranjan, Ambition Law Publishing House, 2015.

organs of government which represent the people and their will in our country and also responsible for the smooth running of a democratic government in our society. The constitutional law is the supreme law of the land, all the ordinary laws flow from it. The constitution of India is the combination of Government of India act and the borrowing from other countries. Like the concept of separation of powers is taken from U.S.A. The constitution of our country is framed by the constituent assembly and first election to the constituent assembly was held in July 1946. The Muslim league boycotted the first session of constituent assembly which was held on 9th of December in 1946 preceded by the Dr. Sachidanand Sinha over the inaugural session. After presenting many draft constitution our constitution was framed this took 11 sessions and a long time period of 2 years 11 months and 18 days.

Most of the concepts of our constitutions are taken from the Government of India Act 1935, which is almost 60 per cent of the total constitution of India. We also have borrowed some concepts from United Kingdom constitution which is also called as mother of parliamentary form of government, some concepts from United States of America., Ireland, Canada, South Africa, Germany, and Australia etc.

The separation of power can be seen in the directive principles of state policy concept of which is taken from Ireland, which common in the IVth part of our constitution. The Directive principle of state policy of the Indian Constitution includes three principles in it, which are Socialist, Gandhian principles and the western liberal principles. Western Liberal principles talks about the separation of powers under *Article 50*, which separates the judiciary from executive. There are always three segregate activities in every government according to which the will of the people are expressed. Legislative, executive and the judiciary are those three activities of government corresponding to which are the three organs of government namely, the legislature, the judiciary and the executive, functions and powers of which are separated. The legislative organ of the state make laws, executive enforces them and the third organ judiciary applies them to the exclusive cases sprouting out of the breach law. Each organ is tends to interfere in the sphere of working of another functionary while all these organs are performing their activities because a strict delimitation functions is not possible in their dealings with the general people, overlapping functions tend to appear amongst all the three organs even when acting in ambit of their own power.

In Indian constitution there is express provision under *Article154(1)*, that "Executive power of the union shall be vested in the president and the executive power of the state shall be vested in governor"[20] But there is no express provision that legislative and judicial power shall be vested in any person or organ.

In the Indian Constitution, the constituent Assembly had proposals to incorporate the doctrine in the constitution, but they did not accept them, as the doctrine was absolutely rigid for provisions of the constitution. The constitution did not make any absolute or rigid division of functions among the three branches of the state. Often the *Legislative* and the Judicial functions are given to the *Executive*. There is a functional separation in the constitution. The *Executive* power of the union is vested in the president, and the powers of the State, in the Governors of the states. The president is the head of the Executive branch... He exercises his powers on the aid and advice of his prime Minister and his council of Ministers. The Supreme Court is the highest court of appeal. The constitution recognizes the three fold functional division of governmental powers.

Article 50 expressly requires the state to apply the Doctrine of independence of *Judiciary* form the *Executive* as a sign of Efficient Government.

The directive principle of state policy has provision of separation of judiciary from the executive, but it is to be noted that they are not enforceable a\in any court of law. The president is also given *Legislative* powers. He can make regulations. The power extends to all the actions that are within the *Legislative* ambit of parliamentary actions and its duration of being into force. The president makes laws for a state, after there has been a state emergency. After the proclamation of emergency the state will have Presidents rule.

The executive also has some members of legislature. The minister when sitting in the parliament is a part of legislature but when he is sitting in his office he becomes a part of executive. The president in parliament and governor in state are important for any law to come into force. It is necessary to take his ascent. The president can call for the joint sitting of both the houses when the

20. Pg. No 337, Indian Constitutional Law, M. P. Jain, 7th Edition, 2015.

houses are not in session. The laws made by him will have the same binding as if it had been passed by the houses. Pardon granting power is also given to the president in the union and governor in the state. The legislature can punish for committing breach of privilege. The *Executive* depends on the legislature and performs some *Legislative* functions such as delegated legislation or subordinate legislations, the legislature controls the *Executive* and can even remove it and can also performs some *Executive* functions that are required for maintaining order in the House.

However, there is institutional separation of powers between all the organs of the government. The judges of the Supreme Court are appointed by the president in consultation with the chief justice of India and such of the judges of the Supreme Court and the High Courts, as he may deem necessary for the purpose[21]. The judges of the high court are appointed by the president after consultation with the chief justice of India, the Governor of the State, and in the case of appointment of judges other than the chief justice, the chief justice of the High Court[22]. It has now been held that in making such appointments, the opinion of the chief justice of India is of prime importance.

The judges of the Supreme Court and the High Court's cannot be removed except for misconduct or incapacity and unless an address supported by two thirds of the members and absolute majority of the total membership of the Houses is passed in each House of Parliament and presented to the president. An impeachment motion was brought against a judge of the Supreme Court but it failed to receive the support of the prescribed number of Members of Parliament.[23]

The salaries payable to the judges are provided in the constitution or can be laid down by a law made by the parliament. Every judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension, as may from time to time be determined to such privileges, allowances and rights as are specified in the second schedule. Neither the privileges nor the allowances nor their rights in respect of leave of absence or pension shall be varied to her disadvantage after her appointment.[24]

So, every government is required to perform these *Legislative*, *Executive* and judicial functions. Each organ depends on the other in some or the other aspect. But this will not mean to discard or disapprove the doctrine altogether. But also such discard will be done only by the procedure established by law.

Indian Judiciary And The Acceptance Of The Doctrine In Its Practice:

The President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate ordinances in order to meet the situation as *Article 123(1)* says "*If at any time, except when both houses of parliament are in session, president is satisfied that circumstances exist which render it necessary for him take immediate action, he may promulgate such ordinances as the circumstances appear to him to require*" Pg. no. 49 Bare Act. When proclamation of emergency has been declared by the president due to failure of constitutional machinery the president has been given legislative power under *Article 357* of our constitution to make any laws in order to meet the situations. A power has also been conferred on the president of India under *article 372 and 372A* to adapt any law in country by making such adaptations and modifications whether by way of repeal or amendment as may be necessary or expedient for the purpose or bringing the provisions of such law in accord with the provisions of the constitution.

The president of India also exercises judicial function *Article 103(1)* of the constitution is notable in connection. According to this article "If any question arises as to whether a member of either house of parliament has become subject to disqualification mentioned in *Article 102(1)*,the question shall be referred for the decisions of the president and his decision shall be final. Pg. no.41 Bare Act. *Article 50* lays emphasis to separate judiciary from executive. But in practice we find that the executive also exercises the powers of judiciary as in appointment of judges under *Article 124, 126, 127*. The legislature also exercises the judicial function in removal of president under *Article 56*in a prescribed manner. Judiciary also exercises legislative power; high court and Supreme Court are empowered to make certain rules in legislative character.

21. Pg. no. 192, Indian Constitutional Law, M.P. Jain, Lexis Nexis, 2015, 7th Edition, reprint 2015.
22. Pg. No. 571, The Constitutional Law Of India, Dr. J.N. Pandey, Central Law Agency, 2010, 47th Edition.
23. Pg. No. 199, Indian Constitutional Law, M.P. Jain, LexisNexis, 2015, 7th Edition, reprint 2015.
24. Pg. No. 198, Ibid.

Whenever high court and Supreme Court find a certain provision of law against the constitution or public policy it declares the same null and void, and then amendments may be incorporated in the legal system. Sometimes high courts and supreme court formulate the principle on the point where law is silent. The power is also legislative in character.

Case Laws Explaining Separation OF Power Prevailing In India:

The supreme court has never devoid itself of the existence of the application of doctrine although it does not form the very base of our constitution. But it makes a founding stone in the United States of America. However, the separation of powers of the Government into *Legislative Executive* and judicial powers is present impliedly present in the provisions of the constitution.

In *Kesavananda Bharti v. State of Kerala*[25], Hon'ble *Chief Justice Sikri* observed: "*Separation of powers between the legislature, the executive and judiciary is a part of the basic structure cannot be destroyed by any form of amendment*."

The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*[26], held "*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 government have been sufficiently differentiated and consequently it can be very well said that our constitution does no contemplate assumption by one organ or part of the state of functions that essentially belong to another*".

In *Re Delhi Laws Act Cas*[27], *Chief Justice Kaniya* observed; "*Although in the constitution of India there is no express separation of power. It is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the Legislature. Does it not imply that unless it can be gathered from the other provisions of the constitution, other bodies executive or judicial are not intended to discharge legislative functions*."

In *Chandra Mohan v. State Of U.P*[28]., the Supreme Court held: "*The Indian constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the state but at the time the direct control of the executive. Indeed it is common knowledge that in pre independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based on the assumption that unless they were separated, the independence of judiciary at the power levels would be a mockery.*"

In *Smt. Indira Nehru Gandhi v. Raj Narayan*[29], the petitioner was one of the candidates along with the respondent Raj Narayan Seeking election from the Raebareli Parliamentary Constituency in the state of Uttar Pradesh, she was declared elected on March 1, 1971. The respondent was the nearest rival defeated candidate. He challenged the validity of the petitioner's election on various grounds including on the ground of commission of corruption election practices in the election. He moved the Allahabad High Court by an election petition under the provisions of the Representation of the peoples Art, 1951. The High Court allowed the petition and declared by the judgment of June 12, 1975, the petitioner's election to be void. The content also declared her to be disqualified for a period of six years from the candidature for and membership of any House of Parliament as also of any of the state legislature. The petitioner, who was at the time the prime minister asked for a stay of the order of the High Court, and then preferred on appeal the judgment of the High Court. While this appeal was still pending parliament passed, with unchaste haste before the appeal came up for hearing in the supreme Court the election laws (Amendment) Act, 1975; and further immediately thereafter passed the constitution (thirty-Ninth amendment) Act, 1975. The amending election law retrospectively removed the grounds. On which the petitioner's election had been declared to be void and provided the manner of conferring immunity from the consequential disqualifications under the unlamented election Law. As if this was not enough they said

25. AIR 1973 SC 1461, Pg. No. 369, Constitution of India, A.K. Ranjan, Ambition Law publishing house, 2015.
26. AIR 1955 SC 549, Pg. No. 368, Ibid.
27. AIR 1951 SC 332, Pg. No. 367, Ibid.
28. AIR 1966 SC 1987 @ Pg. No. 1993, Pg. No. 368, Constitution of India, A.K. Ranjan, Ambition Law publishing house, 2015.
29. AIR 1975 SC 2299, Pg. No. 369, Ibid.

constitutional amendment further declared that the petitioner's elector would not be deemed to be valid on any of the grounds on which the High Court had decided against her. The constitutional amendment declared the petitioner's election not is void… Further the amendment laid down that any appeal including one filed by the petitioner in the supreme court would abate and shall be disposed of in conformity with the provisions of clauses (4) set out above. Further *Ray, C.J.* observed in the same case that, in the Indian Constitution there is *Separation Of Power* in a broad sense only. A rigid *Separation Of Power*s as under the American or Under the Australian Constitution does not apply to India. Hon'ble *Justice Chanadrachud* observed: "*The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, the legislative and judicial. It is essential principle of that constitution that powers entrusted to one department should not be exercised by any other department. The Australian constitution follows the same pattern of distribution of powers. Unlike these constitutions, the Indian constitution does not expressly vest the three kinds of powers in three organs of the state. The principle of separation of powers is not a magic formula for keeping the three organs of the state within the strict confines of their functions*."

In *Asif Hamid v. State Of Jammu and Kashmir*[30], The supreme court observed: "*Although the doctrine of separation of power has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the constitution no organ can usurp the functions assigned to another. The constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed there in. the functioning of democracy depends upon the strength and independence of each of its organs*."

In *Ram Krishna Dalmia v. Justice Tendulkar*[31], Hon'ble *Chief justice SR Das* opined that: "*In the absence specific provisions for the separation of power in our constitution, such as there is under the American constitutions, some such divisions of power legislative, executive and judicial is nevertheless implicit in our constitution.*"

In *Uday Ram Sharma v. Union of India*[32], the supreme court held that: "*The American doctrine of well defined separation of legislative and judicial power has no application to India.*"

In *Sita Ram v. State Of U.P.*[33] , Hon'ble Hegde J. expressed the current attitude of the court regarding delegation of legislative powers in the following words; "*However much one might deplore the new despotism of the executive the very complexity of the modern society and the demand it makes on its government have set in motion forces which have made it absolutely necessary for the legislature to entrust more and more power to the executive. Text book doctrines evolved in the nineteenth century have become out of date. Present position as regards delegation of legislative powers may not be ideal, but in the absence of any better alternative, there is no escape from it.*"

In *Hari Shankar Nagla v. State of M.P.*[34] , it was observed that: "*The legislature cannot delegate its functions of laying down legislative policy in respect of a major and its formulation as a rule of conduct. The legislature must declare the policy of law and the legal principle which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislature function consists in the determination of the choice of the legislative policy and formally enacting that policy into a binding rule of conduct*."

In *S.P. Gupta v. Union of India*[35] it was held by the Supreme Court: "*The appointment of judges was not an executive act but the result of consultation process which must be observed in word and spirit.*"

30. AIR 1989 S.C. Pg. No. 370, Constitution of India, A.K. Ranjan, Ambition Law publishing house, 2015.
31. AIR 1958 SC 538,Pg. No. 368, Constitution of India, A.K. Ranjan, Ambition Law publishing house, 2015.
32. AIR1968 SC 1138, Pg. No. 369, Ibid.
33 AIR 1972 Sc 1168, Ibid.
34. AIR 1954 SC 468, Ibid.
35. AIR 1982 SC 149, Pg. No. 369, Constitution of India, A.K .Ranjan, Ambition Law publishing house, 2015.

Chief Justice Subba Rao in *Golak Nath v. State of Punjab*[36]: "*The Constitution 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. …..No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land.*"

Parliamentary And Presidential Form Of Government:

The parliamentary and presidential forms of government are two most famous kinds of governance forms in the world. The United States Of America has a presidential form of government. India has a parliamentary form of government. Both kinds of government have their own merits as well as demerits. The following is the description of the two forms of government.

Practices In Parliamentary Form Of Government:

In the parliamentary form of government the powers are distributed between the three organs of the state. The parliament is supreme. The parliament is answerable to the people. In this system of governance the head of the state is not the same person who is the head of the government. The countries with parliamentary form of government can be either: *Constitutional Monarchies or Parliamentary Republics*.

The modern system of parliamentarian system finds its origin to *1707 – 1800* in the Great Britain. The parliamentary system can be with a bicameral legislature or unicameral legislature. Bicameral means two houses. Unicameral means one house.

The parliamentary form of government can be further divided into two Types.

– *Westminster System.*

– *Consensus System.*

The Westminster form of government can be seen mostly in the *Commonwealth of Nations*. This kind of system is believed to have a more adversarial fashion of debates and discussions and parliamentary sessions. For the purpose of elections the elections are single transferable vote, instant runoff voting, proportional representation and plurality voting system. Some also use the Proportional representation system. The western European countries have Dualism as form of Separation Of Power.

India is also one of the Commonwealth Nations. The countries which were once a colony of the British rule is called as the Commonwealth Of Nations. In India the legislature and the executive are interconnected to each other. The period of emergency during the time of Mrs. Indira Gandhi was the turning point which forced the thinkers to re think if the parliamentary form of government is the best form of government.

India adopted this kind of government during the 1947 as it was very much familiar with this kind of government. The drafters of the constitution of India were greatly influenced by the English system of governance. Since India was a land of several varied groups it was important that each of the group has a representation so they do not feel left out. The presidential form of government was rejected was there was too exclusiveness in the functioning of Executive & Legislature. Which may further result in conflicts in the country.

Under the parliamentary form of government the head of the state is the President nominally while the prime minister is the real head of the state. There are several powers given to the president but he merely gets a chance to exercise them. The real powers are exercised by the Council Of Ministers headed by the Prime Minister. Since India has a partial separation of powers between the executive as well as the legislature, so they are not totally independent of each other. They are mutually dependent on each other.

The residuary power vests with the Executive Branch of the government. In this kind of system the executive is more responsible to the legislature. The council of ministers has a collective responsibility towards the each other. The prime minister has the power to remove any minster from the office without giving any reasons for the same.

The essential Features of parliamentary form of government will be.

– Presence of nominal head in the government.

– Close nexus between the executive and legislature.

– Accountability of the executive.

– Collective responsibility.

36. AIR 1967 SC 1643, Ibid.

– Leadership of prime Minister.

Smooth Functioning, Quick Decision Making, Flexible System, Open Administration is some of the advantages of this system of government. The closeness between the executive and the legislature helps in the smooth running of the country. If the party is in majority without any kind of alliances then the decisions can be taken smoothly and quickly. In the Indian Constitution, the constituent Assembly had proposals to incorporate the doctrine in the constitution, but they did not accept them, as the doctrine was absolutely rigid for provisions of the constitution. The constitution did not make any absolute or rigid division of functions among the three branches of the state. Often the *Legislative* and the Judicial functions are given to the *Executive*. There is a functional separation in the constitution.

The *Executive* power of the union is vested in the president, and the powers of the State, in the Governors of the states. The president is the head of the Executive branch. He exercises his powers on the aid and advice of his prime Minister and his council of Ministers. The supreme court is the highest court of appeal. The constitution recognizes the three fold functional division of governmental powers. *Article 50* expressly requires the state to apply the Doctrine of independence of *Judiciary* form the *Executive* as a sign of Efficient Government.

Even the implementation of the changes does not become an issue in the parliament. Since this kind of government if flexible in nature they adapt to changes quickly.

There can be certain drawback in this kin d of system as well, like *Absolute Majority, Politicization of Administration, and Unsuitable for Multi-Party system, Emergencies and Mal- Administration*. The parliamentary form becomes a virtual dictatorship if the party is in majority. Also they sometimes tend to become autocratic in their actions also. They sometimes also tend to have more politics than the welfare of the people. Parliamentary system has no qualifications to deal with situations like Emergencies etc.

The men drafters of constitutions were people of practical and political experiences and it was their practical expedient that they opted the doctrine of the *Separation of Power*s. But they did not believe in the air-tight separation that the doctrine of separation of power. They wanted to avoid the concentration of power in any one department of government, as supported by the doctrine, as that would enable that departments or organs to become despotic. This end could best be achieved not by a theoretical application of the pure form of separation of power among the legislature, *Executive* and judicial powers. But by a judicious mixing, blending and overlapping of powers which would let them have a check and balance on the other branches and avoid the tyrannical tendencies of the others. It is clear that the framers never intended to apply the doctrine in its strictest form. If they actually intended to adopt the doctrine they would have done it by applying it in its totality.

Practice In Presidential Form Of Government:

The presidential system is a form of government where the head of government is also act as the head of states, not only this but he also leads the executive branch which is separated from legislative branch. The United States of America, has a presidential system. The legislature may have the right, in rare most cases, to dismiss the executive through impeachment.

In the Presidential form of government the executive is led by the President. The President in this form of government act both as the head of the sate and also the head of the government. In this form of government the President takes up the charge in his own capacity rather than acting on the aid and advice of the Cabinet, as in the form of Parliamentary Form of Government. The President is elected directly by the people. The President s also the supreme commander of the Army and also has the power to carry on the Foreign Policies.

It was hoped that by making each branch accountable to different groups a variety of interests would be reflected hence, compromises and a balancing of interests would result.

The framers of the constitution of United States have strictly adhered to the doctrine of *Separation Of Power*s. The drafters of the Constitution intended to have the balance of powers which can be attained by checks and balances between separate organs of government. The pure doctrine of the *Separation Of Power*s had to be modified as it was not able to cope up with the changing dimensions of states responsibilities and changing in the complex politico-economic problems of democratic socials. It is difficult to apply the doctrine in the strict form as it will be impracticable.

Separation of powers finds its origin in the draft of

1789 constitution of UNITED STATES OF AMERICA. The powers of the government are vested in three organs of the government. The American system also accepts separation of power as for Authority. It means that no person should hold office in more than one of three branches of government. *Article 1, section 6* specially says, "No person holding any office under the United States, shall be a member of either House during his convenience in office." It is clear from the practice. Robert Kennedy resigned as Attorney General in order to become senator to become Secretary of Defense. Byron White resigned from Assistant Attorney General in order to become a Justice of the Supreme Court. Arthur Goldberg resigned the post of Justiceships of the Supreme Court to become U.S Ambassador.

However, the American Constitution opted for a diluted version of the *Separation of Power*s. A plain reading of the American Constitution of *1789* reveals that this does not formulate doctrinaire or prohibitive idea of the *Separation Of Power*s. Further Holmes J. made it clear that distinction between *Legislative* and *Executive* actions cannot be carried out with mathematical precision. Neither can it be divided into watertight compartments nor is it desirable to do so.

Presidents have always been active members in the political processes, although their level of participation will depend upon the legislature in majority. It is difficult to make policies in the presidential form of government as there will be slow responses. But the presidential form of government is proved more efficient in larger countries. The president is always in a dominant position in this type of government. But this does not mean that the separation of power is totally neglected or discarded.

The process of impeachment by the *Legislative* body may be termed as judicial function. But it does forms a part of the system of checks and balances which is peculiar trend. The three branches of the government are not at all totally isolated from one another. Each of it has a sufficiently engraved system of checks and balances so that they can check each other when ever required. The congress may keep checks on other departments in many ways in which it alone may propose. The house has the power to impeach and the senate will try the impeachment proceedings of *Executive* and Judicial officers. This is how their removal from the office is done. The Congress through legislation establishes, regulate, limit or abolish inferior courts and *Executive* governing body. The Congress acts as a treasury for all. The Senate has the power control the *Executive* and the courts. The executive can also reject the nomination of the President. Congress may refuse the bill to pass which president requires passing.

The congress has the power to limit the appellate jurisdiction of the Supreme Court. Similarly, there are other ways through which the president may check the other branches. The president has the power to veto through which he can keep a check on the congress. But this veto can be overridden by a 2/3 vote. He can keep a check on the courts though his power to appoint judges.

Similarly, the courts can check the other departments by interpreting and applying acts of congress and treaties of the United States. This gives them the power to have a check on both congress and the president. The courts may also declare acts of congress to be unconstitutional and thus prevent enforcement. The courts also control *Executive* and administrative actions though entertaining suits and issuing court orders against public officers.

Presidentialism cannot be treated as a sufficient cause for the failure of democracy. The presidential system has its own ways to keep checks on each other. There is less danger of oppression in the presidential form of government. Since the president is elected directly is it is easy to make him accountable.

Even in the presidential form of government people can be called as sovereign authority. The powers of the state are limited. The president holds the office for a fixed term. The other procedure to remove the president is through impeachment.

The basic Features of a Presidential form of government are:

– President is the real head.

– Separation of power.

– Ministers are accountable to the President.

The president is elected directly by the people. So the congresses as well as the president are not a part of the legislature. Neither have they held the offices like monarchs. They become accountable to the people and not to the legislature. The powers of the president are very real though the exercise of it varies greatly with the personality of the President and it is the presidents business to execute the Laws passed by Congress, he can and does influence the actions of Congress in its legislation. He influences the congress to a greater extent when he gives his speech. Even the president has no powers to dissolve the congress. The independence of

judiciary can be clearly seen. So a system of checks and balances can be seen in the residential form of government. The doctrine did not give the supreme court the power to decide political questions, because it wanted to avoid interference with the exercise of power of the executive. Supreme court did not get the power to over ride judicial reviews. The president has the right to co-exercise the powers of the congress through his vetoes. The president also exercises the law making power through his treaty making decisions. When the president appoints the judges it can be seen as hindering with the judicial decisions also.

The presidential form of government has its own merits and demerits. *More Democratic, Stability and Continuity of Government, People Choose President, More Efficient in Working, Prompt Decisions, Best Deals with Emergencies, More Suitable for Multi Party System* and *More Unity Can Be Seen* are some of the merits of the presidential form of government.

The power of executive includes veto over the bills, making of treaties appointments of judges and other official. But the chief function of executive remains to be the enforcement of law. The executive head that is the president is the commander- in- chief of the military. He also has pardoning powers. The judiciary has the power to interpret the laws in federal cases and try them. There is a system of checks and balances by the legislative and judiciary so that the executive does not exceeds its ambit of work. The legislative power includes the law making power establishment of lower federal courts and enactment of all federal laws. The powers regarding president is overriding of Presidential veto and impeachment of president. The checks and balances are done by the executive and judiciary so that there are no hindrances with the rights of the people. The additional powers vested with the courts are declaring any law or executive action as unconstitutional. The checks and balance system by the executive and legislative works in the same way.

The framers of the constitution of United States have strictly adhered to the doctrine of *Separation of Power*s. The drafters of the Constitution intended to have the balance of powers which can be attained by checks and balances between separate organs of government. The pure doctrine of the *Separation Of Power*s had to be modified as it was not able to cope up with the changing dimensions of states responsibilities and changing in the complex politico-economic problems of democratic socials. It is difficult to apply the doctrine in the strict form as it will be impracticable.

The doctrine of separation of power that attracted the framers of U.S. constitution was designed to prevent the majority from being dictator. From their past experiences, the framers wanted to be sure that no new government has too much power, rather a system of checks and balances. *Article 1* of the constitution provide for a legislative comprising of the house and the senate. *Article 2* provides for the executive, which includes the President, the Vice-president and the departments. *Article 3* provides for the judiciary comprising of the federal courts and the supreme court. Each branch has their own powers, their own ambit with a system of checks and balances. The system of checks and balances was designed rather than evolved by an accident. This system makes each branch accountable and responsible to each other, which helps any of the branches from becoming dominant.

Conflicts and deadlock, absence of accountability to people, rigidity, weak foreign policy can be termed as some of the demerits of this form of government. This form of government is less accountable to people as compared to the parliamentary form of government. In the Indian Constitution, the constituent Assembly had proposals to incorporate the doctrine in the constitution, but they did not accept them, as the doctrine was absolutely rigid for provisions of the constitution. The constitution did not make any absolute or rigid division of functions among the three branches of the state. Often the *Legislative* and the Judicial functions are given to the *Executive*. There is a functional separation in the constitution. The *Executive* power of the union is vested in the president, and the powers of the State, in the Governors of the states. The president is the head of the Executive branch. He exercises his powers on the aid and advice of his prime Minister and his council of Ministers. The supreme court is the highest court of appeal. The constitution recognizes the three fold functional division of governmental powers. *Article 50* expressly requires the state to apply the Doctrine of independence of *Judiciary* form the *Executive* as a sign of Efficient Government

Although there have been controversies that the presidential form of government is not much appreciation to this form and is seen mostly in United States Of America, it is important to note that every form has their own merits and demerits. They have been running since

a longer time. As a matter of fact they still run with all the glory and success.

Recent Trends in The Doctrine Under The Indian System:

The doctrine of *Separation Of Power*s is a strict and absolute doctrine. But it has been modified to meet the challenges of different societies. The Indian Parliamentary system has its own systems of modifications. There is a little divergence from the "*Pure Doctrine*" of the *Separation of Power*s and even the American model has made a lot of modifications. We have adopted the doctrine from the constitution of America. The modifications have been made due to changes in the present day requirements in which isolation of the organs will not work. The system of checks and balances has been established to prevent the government from becoming Despotic.

The following heads will discuss the latest application of the doctrine of separation of power in The Indian Parliamentary set up:

Accountability Of Executive To Parliament:

The Indian parliament has been facing challenges regarding the accountability of executive to the parliament. It is believed that the decline in the effectiveness is caused by the lack of accountability of the executive to the legislature. Globalization has also eroded the powers of the parliament. Firstly the economic decisions are taken keeping in mind the global prospective. Secondly by the restructuring of the regulatory framework which has to be given to a lot of non elected institutions. The weakness of the Indian Parliament has also give a slow pace to the formation and implementation of legislations. Even the political leaders do not have the caliber of person who should be entering the parliament. The lack in their educational and professional background has affected the executive negatively. Although the constitution of India has always aimed at the democratic accountability it has to some extent lagged behind in parliamentary accountability. Looking at the recent past India has widened the scope of democratic participation to a greater extent. India has also gained a lot of significance in the economic area. India always had a bicameral legislature. India also has a concept of universal adult franchise. The Lok Sabha and the Rajya Sabha are the two houses where as the members of Lok Sabha are directly elected but this kind of election is more of favoritism banned the actual assessment of the work of the leaders. The authority in accountability of parliament is limited by the system of checks and balances exercised by the other organs. There was a time when there was a perfect balance between the legislature and the executive but the two organs now have been losing this balance lately.

Although parliament is not the supreme authority but it has been controlling the other two organs either directly or indirectly. In India the will of the people is embodied the parliament, so it is the duty of the parliament that the people are their prime importance. The executive accountability will ensure the public character of the organ and also will prove that there is no despotism or corruption or any other kind of inappropriate behaviour.

The accountability will also promote performance leading to setting standards and norms which are important for the public welfare. The accountability of the executive will also lead to easy access to the government. The three organs have to work in co-ordination with each other for the smooth running of the country. The council of ministers is accountable to the parliament for their actions, but there is no legal duty on the parliament to enforce the accountability to the executive. A good responsible government always follows the guiding principles of the constitution.

The constitution of India speaks about the parliamentary form of government which means that the Parliament is supreme. Certain provisions give parliament to have a control over the government. The council of ministers is collectively responsible to the Rajya Sabha as per *Article 75(3)*. According to this article individual minister is accountable for his respective department. For the executive to declare emergency at the state level, the power is subjected to parliamentary control.

For the money matters it is important to obtain grant from the Lok Sabha for which the government has to show the need and the amount which it wants to spent. It is evident with the present working of the executive and the legislature that the executive has a control over the parliament and not vice versa. Also there is a lack of accountability on the part of executive.

The Democratic theory provides that since power generates from the people within the government, each level of the *Executive* authority is accountable to next, running on up to the cabinet or the president. The *Executive* authority is accountable to the legislature. First

of all, as a matter of principle legislatures can be effective in its control over the *Executive* only in proportion to the strength and appeal to the electorate, expects that some day it would have a chance to a cabinet of the future.

There is an opposition party which tends to work as a barrier for the present government if they try to act despotic. Not only this but the strength and quality of public opinion also affect the functioning of the parliament. Strong opinion of public which supports the legislature can effectively retain *Executive* and administrative action. Public opinion controls the *Executive* both through independent expression of opinion on public issues, supporting or opposing the legislature in its attitude towards the *Executive* and also during the time of elections by choosing such people who would be honest and fearless in criticizing actions of the Government. Moreover, the effectiveness of *Legislative* control over the *Executive also* depends upon the devices and procedures installed by the legislature in carrying out its functions to meet the changing needs of the modern society.

Groups in the Parliament of India and the state legislature are such that they cannot endow an unwinding counter weight to the powerful *Executive*. So, in the matter of power the role of the parliamentary party assumes special significance. The control of parliament is weakened upto a great extent because of the incapability of the opposition to present a staring, dominant and constructive challenge to the party in power.

The efficiency of parliament lies in its mastery of details and the unwinding attention it pays to aspects of implementation of policy. It has no voice in the laying down of policy except in so far as its work is influenced by the majority party. But its control can be more effective if the members are alert to the way the policies are introduced and implemented and point out competence to understand the contents of policy over them accordingly on the floor of the house.

Administrative Pronouncements:

Administrative Adjudication is the process by which an administrative agency issues an affirmative, negative, injunctive or declaratory order. The formal proceedings before an administrative agency adopt the process of rule making or adjudication. In recent times, the administration has obtained powers of adjudication over disputes between itself and private individuals inter alia, and has emerged with a plethora of tribunals. The administration has secured detailed powers to grant, refuse or revoke licenses, impose sanctions and take actions of various kinds in its discretion or subjective satisfaction. Proceeding to this, it has been given vast powers of inquiry, inspection, investigation, search and forfeiture and super vision.

For determination of major policies a *Legislative* body is best suited in the given setup, but it also lacks time, technique and expertise to handle it. Therefore, the legislature has to be satisfied by laying down broad policies and leave the rest to the administration, thus has resulted in delegated legislation. In support of this, administrative adjudication has arisen largely because of the multitude of cases arising for adjudication under the modern legislation that need to be decided sweepingly without much formal and technical delays, and with the special persons with the specialized skills. The courts are not in a position to fulfill these conditions and so the administrative tribunals have come into picture.

Administrative adjudication is the power of an administrative agency of judicial powers which have been given to them by a legislative body. These Agencies typically possess both legislative and judicial powers. The legislative power gives this administrative adjudicatory body an authority to issue regulations, where as the judicial power gives this administrative adjudicatory body an authority to adjudicate cases. The current distinction between adjudication within administrative agencies and adjudication in courts of law was not made historically.

Administrative courts mostly work for determining the rights and duties of individuals against other individuals. They also entertain the cases that are against the government. This function that mainly distinguishes administrative tribunals from civil courts. The administrative tribunals are have the power to assess various penalties, like forfeiture of licenses for violating a statutory or administrative regulation. Many administrative bodies are not vested with adjudicative powers and they must proceed through the regular courts of law for civil or criminal sanctions.

Adjudication can also be in the competitions, like it can also be the process, at dancing competitions, in television, game shows and at other competitive forums, according to which competitors are evaluated and ranked and a winner is found. But we are talking about the Adjudication in the legal terms that is “A legal process to resolving a dispute.” The academic giving or uttering

of a judgment or decree in a court proceeding, also the judgment or decision given. The entry of the decree by a court in respect to the parties involved in the case. It implies a hearing by a court, after a notice of legal evidence on the factual issue involved. The equivalent of a determination, which indicates that the claims of all the parties thereto have been considered and set at rest. Adjudication is a process by which an arbiter or a judge analysis evidence and disputation, including legal reasoning set forth by opposition parties or offender to come to a decision which determines rights and obligations between the parties involved in it. Three types of disputes are resolved through adjudication: Disputes between the private parties, which may be individuals or corporations, disputes between the private parties and public officials, disputes between public officials or public bodies.

Another point of difference between administrative tribunals and regular courts is nature of subject matter. The subject matter of an administrative tribunal is a single economic activity, or a set of densely related economic activities, or specific benefits conferred by government. The administrative tribunals are mostly the quasi judicial bodies. They are established either through a law or by any act of delegation by the legislature to executive. The executive has a jurisdiction over the administrative tribunals.

Administrative adjudication has been gaining a lot of importance in the recent past. It is a new branch of law that finds its origin in the *Droit Administratiff* of France. Administrative law has gained its importance in the whole world. Administrative law deals with the principles that govern the governmental agencies both of the state or union as well as that of the federal. The basic aim is to see that the government acts within its limits of jurisdiction. They should not violate the rights of the people. Administrative law is one of the branch of Public law. This branch of law was popularised in the 20th Century. The administrative law has been an outcome of the socio-economic functions of the state that have been increasing at a very fast pace. Due to this reason there has been an increase in the administrative functions as well as powers.

Judicial Review:

The countries with common law system have the method of judicial review, which is embodied in their constitutions or any source of the same. Any law which is passed by the legislature or executive, the power to review that law is vested in the High Courts and Supreme Court. It is important as if the measure through which legislative and executive remains under the surveillance. The system of the checks and balances has made it easy so that they can check other branches.

For the judicial review of legislations The Indian Constitution has some provisions. This concept has taken from the constitution of United States of America. which makes the judiciary empower to make decisions and review the laws passed by the legislature. If any part of the legislation is in coercion with the constitution of India then it can also be rendered as unconstitutional.

This power conferred on the Judiciary has a lot of significance as it has to deal directly with people and protect their rights as against the tyranny f the other two organs. It is however important to see that the procedure of judicial review forms a part of the system of checks and balances.

In *Union Of India v. Satish Chandra*[37], Krishna Iyer, J. observed: "We are in no mood to condone willful procrastination nor suffer want on stagnation in administration as a ground for default in obeying courts order. The law does not respect lazy bosses nor cheeky evaders. Nevertheless, behaving in a pragmatic manner and taking into consideration on the paper logged procedure, millions of people and miles of red tape in governmental functioning, the court stressed that contempt power must be used sparingly if it is conceived that there has been willful defiance or disobedience. Court has now developed the concept of *'Continuous Mandamus'* to monitor compliance of its direction."

The Judicial Review has been controlling the powers of the government over the years. It has acted as a controlling mechanism so that the government does not become autocratic. It is necessary to control the government because otherwise it will be hindering the rights of the people. The welfare of the people is the prime aim of the people.

As we have a written constitution, there have been several situations when it had become necessary to decide whether Acts passed by the parliament had adversely affected the fundamental rights guaranteed under the Constitution. In this context the principle of

37. 1980 2 SCC144, Pg. No. 389, Constitution of India, A.K .Ranjan, Ambition Law Publishing House, 2015.

judicial review has played a very important role.

Judicial review is the doctrine under which actions of legislative and executive are subject to review by the judiciary. With a judicial review power a court may overrule laws and decisions that are inappropriate with a higher authority, such as the terms of a written constitution. In the separation of powers the term is one of the checks and balances: the power of the judiciary to administer the legislative and executive branches when the latter exceed their authority. The agenda and scope of judicial review may differ between and within countries because the doctrine varies between jurisdictions.

Civil law and Common law are two distinct but parallel legal systems in the context of which the term Judicial review can be appreciated, and also by two distinct theories of democracy with reference to the manner in which government should be formulated with respect to the principles and doctrines of the separation of powers and legislative supremacy.

One more reason why the judicial review should be understood in the situation of both the development of two distinct legal systems, common law and civil law and two theories of democracy, "that are legislative supremacy and separation of powers" is that some countries with common law systems don't have any judicial review of the primary legislation. Still in the United Kingdom a common law system is presented, the country still has a strong attachment to the idea of legislative supremacy; consequently, judges do not have the power to shoot down primary legislation in the United Kingdom. Nonetheless, there has been tension between united kingdom's propensity toward legislative supremacy and the EU's legal system since the United Kingdom became a member of European Union, which categorically provides the power of judicial review to the Court of Justice of the European Union.

The court is granted to review administrative acts by the most modernized legal systems (individual decisions of a public body, such as a decision to assist a subsidy or to withdraw a permit of residence). In most of the systems, review of secondary legislation are also included (legally enforceable rules of general appropriateness approved by administrative bodies). Some countries, markedly France and Germany, have enforced a system of administrative courts which are charged with resolving disputes between administration and the members of the public. In other countries counting the United States and the United Kingdom, the judicial review carried out by the regular civil courts, although it may be assigned to specialized panels within these courts.

The United States employed a mixed system in which the district courts of the United States review some administrative decisions, some decisions are directly reviewed by the courts of appeals of the United States and the specialized tribunals like the United States Court of Appeals, for Veterans Claims which is not technically part of the federal judicial branch despite its name, review other decisions . It is quite common that such preliminary conditions like a complaint to the authority must be fulfilled before a request for judicial review of an administrative act filed with a court. In most of the countries, the courts apply such special procedures in administrative cases.

Civil law and common law are the two distinct legal systems of the starting, which have contrasting views about judicial review. The Common law judges are seen as sources of law, skilful in innovating new legal principles, not only this but also experienced in rejecting legal principles that are no longer lawful. Who apply the law are seen as judges, having no power to destroy legal principles according to the tradition of civil law. Not only this but the idea of separation of powers is also a different theory about how the government of a democratic society should be organized. In comparison with the legislative supremacy, Montesquieu was the first to introduce the idea of separation of powers.

In *Marbury v. Madison*[38] *case* the Supreme Court ruled under the court of John Marshall in the United States. "The Separation of powers is based on the idea according to which, without any due process of law no wing of government should be able to drill power over any other branch, there should be a check on power with each branch of the government, so that it could check the other branches of government, thus creating a bureaucratic balance among all the branches of the government, checks and balances is a key to this idea. On the powers of the other two branches of the government by the judiciary, judicial review is treated as a key check in the United States."

Regarding judicial review, along with the societies based on common law and those underscoring the

38. 5 U.S. 137 (1803).

doctrine, differences in constructing such democratic societies led to different views being the most likely to utilize judicial review. Still, many countries, whose legal systems are stationed on the idea of legislative supremacy, have learned the possible dangers and limitations of assigning power absolutely to the legislative branch of the government. To branch the tyranny of the majority with the civil law system many countries have adopted a form of judicial review.

Nullification Of Judicial Decisions:

All the organs of the government get their powers from the constitution. To enact laws the legislature has residuary power. *Articles 245* and *246* of our constitution read with three lists of *7th Schedule* distributes the *Legislative* powers between the state legislatures and the parliament both territorially and on the basis of subject matters. Within the sphere allotted to the legislature, it is supreme.

The legislature can enjoy the constitution power of making laws both eventually and retrospectively. The legislature enacted the law; the defects are identified by the *Judiciary*. Then it is legislature again which amends the law and abolishes defects pointed out by *Judiciary*. Validating laws can also be passed by it. The power of legislature to validate invalid laws by making retrospective enactments has been admitted by the Supreme Court. If a law is not valid for the reason that without *Legislative* competence the legislature has passed it and action is taken under its provisions, if the subsequent law passed by the same legislature then they said action can be validated, after it is covered with the necessary *Legislative* power. The power to validate an invalidate law also included with the power to make laws. By changing the basis of decision retrospectively the legislature can abolish the effect of a decision. The courts have maintained distinction between two sorts of *Legislative* abolition of judicial decision; first of all abolishing the effect of a judicial decision by changing law retrospectively and then, making encroachment with judicial process. The former is allowed but the latter is not. However, during the emergency of 1975, when most of the dissenters were interned and truncated parliament mutilated the constitution through various constitutional amendments, the possibility of abuse of power no longer remained imaginary. The Supreme Court itself faced that reality in Indira Gandhi case, where Iyer. J., held that she could not vote in parliament or perform any such duty which was associated with her membership of parliament. Hence, the promulgation of emergency in 1975 came soon after the above decision of the Supreme Court. After the promulgation, the Gandhi government enacted a number of constitutional amendments. But the constitutional harmony between the legislature and *Judiciary* is fundamental for constitutional peace and good government. it is not enough in the constitutional law to separate the two "In water-tight compartments". Though the separation is no doubt necessary but what is more essential is an active and dynamic co-operation between the two.

The theory of abolition is based on a view that the States formed the Union by an agreement (or "compact") among the States, and that as founder of the federal government, the final authority to determine the limits of the power of that government vested in the hands of state. Under this, the compact theory, the States and not the federal courts are the eventual interpreters of the extent of the power of the federal government. Under this theory, the States therefore may reject, or abolish, federal laws that the States admit are beyond the constitutional powers of the federal government. The related idea of interposition is a theory that when the federal government enacts laws a state has the right and the duty to arbitrate itself that the state believes to be unconstitutional. The theories of nullification and interposition were boosted by Thomas Jefferson and James Madison in the Kentucky and Virginia Resolutions in 1798.

In a verdict that could influence the pending inter-state water disputes, the Supreme Court ruled that Parliament and Assemblies have no power to enact laws that abolish the judicial verdicts based on facts and findings. Because of this pretension of power, legislature has no power to neutralize the effect of any judgment which is given after scrutinising the facts by means of evidence or materials placed by the parties before the court of law.

The Supreme Court has acknowledged that the legislature has the power to make judicial decisions as ineffective by enacting a law which validates the legislative field by fundamentally altering or changing the character even retrospectively.

This power has not much application where a judicial decision has been given by recording the finding of facts. A Judicial decision which of the matter by giving findings upon the facts should not be changed by legislature. A

final judgment should operate and remain in force until it is altered by the court in appropriate proceedings.

Thus, judicial review is a weapon to check whether the *Legislative* and *Executive* are in their ambit of work or not. It is important to keep them in check as it will be leading to chaos and confusions. This will also lead to them becoming autocratic. The character of the government which is democratic should not be changed because of this to despotic. The framers of our Constitution drafted it so flawlessly that it aims for an independent and impartial *Judiciary* as the interpreter custodian and guardian of the Constitution and also protector of the rights of the citizens by the process of *Judicial Review*. This makes it mandatory for the *Judiciary* to interpret the laws but not to make them. The Supreme Court is the apex court of the country. There is a hierarchy of courts in India.

There has been a lot of dissatisfaction regarding the failure of Judiciary, it has been felt that an independent machinery like the NJC which, would have helped in achieving the accountability which is much desirable these days. The suggestions that were made for a NJC formed the part of the Report of the Law Commission of India.

As Judiciary is one of the three crucial pillars of Indian democracy. It is the final interpreter of the Constitution of India and laws. It helps in maintaining the social order by dealing with the ones in the opposition of the law. It has been an upholder of the Rule of Law and has enforced of the right to liberty, the role of the Judiciary is incomparable. The people have faith and confidence in the Judiciary. This is an evidence of the fact that the Judiciary has responded to the needs of the hour. Justice is best accepted when it is much in the access of the people.

The Maintenance of the Rule of law is the an important attribute of the judicial branch in every democracy. The Constitution of India sets out the noble objective of securing justice to all the citizens of India, of social, economical or political nature. In ancient times too, the rule of law was more about the sustenance and holding together the human society through the norms which are the moral command of the consensus.

If the poorest of the poor has an Access to justice this would Mean *Justice For All*. An independent and compassionate judicial system is a must for a country which has a lot of poor citizens in the country. *Article 39A* of the Constitution provides for a free legal aid service to all. This means that the one who is not in a position to afford the legal expenses must not be denied of the legal aid service. They should be able to have a fee access to the services of the lawyers. Voluntary efforts by all those who are concerned with his provision are required to make this provision a celebrated truth. It is required to educate the people leally. Imparting the positive and good values in the young lawyers and is important. The Legal Services Authorities Act was enacted in 1987 to give a static base to the uniform legal aid programmes in the country. The Judges have played an important role in enforcement of the Act. Provision of free legal service to the weaker sections would provide a strong impetus to the cause of 'Justice for all.

The Constitution in India is a written constitution. The provisions are recorded in a single document. It can be termed as *Magana Carta* of India. The Supreme Court has been interpreting the importance of good government as enshrined in the Constitution of India continuously.

Judicial Accountability As An Exception:

Independence of the *Judiciary* is a one of the basic structure of the Indian democracy as well as the constitutional culture under this constitutional system being equally important as the guarantee of the liberties which are given to every person in the country but are kept in check by the judiciary. It is important to keep a check because these ensure lawfulness in the country.

The three organs of the government – Legislature, Executive and Judiciary perform the three most important functions *i.e.* law making, enforcement of the law and interpretation of the laws. The basic agenda behind this is separation of powers. This brings accountability also keeps the government in check and also the rights and liberties guaranteed to us are safeguarded.

The another principle that has been working with the separation or balance of power is the system of checks and balances. In simple words the principle of checks and balances means that no organ of the government should be have unchecked powers. The power of one organ should be checked and balanced by the other two. So in this way the balance is also achieved. In India the executive is answerable and accountable to both legislature as well as the judiciary. Because of the anti-defection law there has been a decrease in accountability. The parliament also is answerable and accountable to the people and also the other two branches.

Independence is an embankment of the rule of law. It is equally important that Judges should be independent in implementing law and rendering judicial decisions, if the law, which is to be applied to all citizens in the country, is equal to all. Judges can be subject to intimidation and pressures from litigants, including criminal element of society. Independence of judiciary is an accepted principle adopted by most of the democratic countries. With the history of judicial independence in United Kingdom, United States the history of judicial independence in India has been provided.

Judges were appointed by the Crown before independence, yet they are independent from it. This principle was taken seriously after independence and it became a part of the Basic Structure of the Constitution, which cannot be amended. The independence of judiciary is given by the Constitution to the judges of the Supreme Court and the High Court will hold office till they attain 65 and 62 years of age. The parliament is authorized to determine the privileges, allowance, leave and pension of the judges of the Supreme Court. High qualifications for the judges is prescribed by the constitution.

President cannot remove any judge from his office except upon the presentation of him of an address by both the houses of the parliament for such removal on the grounds of misbehavior and incapability. The President of India appoints the judges of supreme court and high court in consultation with the CJ of India and such judges of the supreme court and High Court as he may deem necessary. The SC is also treated as the court of record. However, many people have misused this independence and it has also been the reason for the growth of colossal power. The problem actually lies in the understanding of the independence. It has to be understood as independence from legislature and executive and not as independence from being accountable. The spirit of independence has been captured very aptly, the independence of the Judiciary is not the property of Judiciary, but a commodity to be held by the Judiciary in faith for the public.

The need for the independence of the Judiciary is essentially imminent. In order that the justices administer justice freely, without any fear and favor, fairly, It is imperative that their tenure is not depend upon the pleasure of the president who is the appointing authority. They are servant to the law not to the President. Therefore, their tenure has been made dependent upon the pleasure of good behavior so that there is no internal consequence and this is secured by an express provision in the Indian Constitution that Judges of SC and of HC shall not be removable except by an address by both the Houses of the Parliament to the president, passed by a special majority and on the ground of proved misbehaviour or disqualification. The independence of the Judiciary is the basic and essential feature of the constitution. It is an integral part of our constitutional system and without the rule of law would become an illusion and an impractical promise.

A democracy republic is one where the government if of the people, for the people and by the people also because of the democracy they also become answerable to the people. The accountability includes not only the politicians, but everybody who are called as public servants like the bureaucrats, judges and everyone in whom the power is vested. The person who has been assigned some power by the government becomes accountable to the people. Through the agency of courts the judicial system deals with the administration of justice. Judges are the human stuff who presides over the courts. They are not simply visible symbols of courts, in the flesh and blood they are actually their representatives. The image of courts determined by the manners in which judge's discharge their duties and the creditability of judicial system itself. From the ancient time the judges have been held in high venerate and revered as super humans in India but coming across recent incidents in Bihar (like killing of an under trial in the court itself and execution a suspected thief to death) represent that disheartened by the failure to get justice, faith of people in judiciary is going downward slowly and are taking law into their hands. This is highly disastrous. A need absolutely is there to make judiciary accountable, because judiciary has to act as the guardian of our constitution so denigration of values in judiciary is far more dangerous than in any other wing of the government. Judicial accountability and liability of the judges is an old concept. Several countries have already provided for ensuring accountability of judiciary in their constitutions. This is to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and ravage into the domain of other organs. But at the same time for every judge whose oath of office requires him to act without fear or favor Judicial independence is a pre- requisite, closeness of ill-will and to vindicate the constitution and laws of the country

The only available mechanism, that is impeachment, is too impractical. The only way through which the members of the higher judiciary that are the Chief Justices and Judges of Supreme Court (SC) and High Courts (HC) are accountable or can be removed is through impeachment according to the Indian Constitution. Many regard impeachments as a failure, but before moving into that, is far-reaching to see the constitutional provisions. Under Article 124(4), only on the grounds of proven misbehavior or incapacity the process of impeachment is carried out. The Judges Inquiry Act 1968 says that a complaint against a judge is to be made by a resolution signed either by 100 members of the Lok Sabha or by the 50 members of the Rajya Sabha to their respective presiding officers. There is a three member committee comprising two judges one from supreme court and the third is the Chief Justice of India if it is against the judge of a high court and two supreme court judges if it is against a sitting judge at the supreme court before making a recommendation Investigations are carried out to the house. If the committee concludes in favor of the impeachment process it takes place. The matter is then discussed in both houses of the parliament. The accused judge is also given a chance to speak in his favor. After the discussion is over and the judge is heard, the house put the motion for vote. A resolution then passed by both houses with 2/3rds majority. This whole process should be completed within a single session. Once the resolution is passed it is sent to the President for his assent.

According to the Oxford Dictionary 'Accountable' means 'to be responsible and answerable for your own actions. Being able to explain the reason those actions '. Accountability is the precondition of democracy. Transparency promotes accountability. All the public servants and departments are accountable. But there manner of being accountable may differ from department to department. Judiciary is also answerable to legislature as well as executive, anlthough the accountability meter differs for judiciary also in comparison to legislature and executive. However, because of various social problems like corruption it is a severe blow to the government. This has shaken up the faith of the people.

The superior courts have been a great organ which has exercised its powers variedly and also one of the strongest organs of the government. The executive activity as well as the legislation can be struck down by the judiciary. It is beyond imagination that even the judicial system which has all the burden of saving the rights of the people has gone wrong at many points.

The Judiciary in the present days has been given the function of expanding the laws and their scope but also the function of protecting the rights of the people. The courts should not only on answering the questions of law but also of the people.

The framers of the Constitution have not imagined that within a small period the Judiciary would become the most powerful organ in the State. The Constitution has established the High Courts and the Supreme Court as watchdog, independence of the executive and the legislature for not only giving justice but also to keep a check on the legislature as well as the executive. The Judiciary has the powers to interpret the Constitution and quash any executive activity that hinder any law or the rights of citizens. It also checks the laws framed by Parliament that they are within the limits of constitution of India. Where the Supreme Court has been given power to check legislature and executive also empowering the executive and legislature to make law, the judiciary ha also curtailed them by keeping a check on them. Many acts, regulations, laws and constitutional amendments have been turned down by the Courts.

Since the courts are the most important organ the legislature has found a way to curtail its limits by the collegiums that was earlier to be made but later was turned down because it was hampering the independence of the judiciary which was the basic structure of the constitution. No system as such is followed in the selection of judges and there is no transparency is there in the system. There is no much importance is given to examining of the records and credentials of a judges of their ideology and adherence to the constitutional ideals of a socialist, secular and democratic republic or their understanding of sensitivity towards the common people of the country who cannot afford much legal services or poor, unable to fight for their rights in the courts or are marginalized.

The courts in India enjoy absolute and unchecked power unequalled by any Court in the world. These days it is very much vital that the judges of the Supreme Court be more accountable for their performances and their conducts be it for corruption or the disregard of the constitutional values and hindering the rights of citizens. Sadly, there is no law that can measure the performance of a judge or his attitude towards the same. Impeachment

is the only removal procedure of the High Court and Supreme Court judges. This process is long and requires signatures of the MPs of the House of People and of the Council of States for it to initiate. An Inquiry Committee of 3 judges is constituted for the trial of the judge. If a motion consisting the charges about the misconduct with the requisite signatures is submitted.

Justice is denied when it is delayed. Justice should be affordable, accessible and speedy. In today's time Our Courts are overburdened on account of the large number of cases pending before them. The number of vacancies is the basis for the pending cases in the courts. The judges have to keep a check on the legislature and the executive so they do not violate the rights of the people. This is one of the main aims of judiciary.

The judiciary has widened the ambit of justice to a greater extent *locus standi* has been widened by the Supreme Court through judicial activism. Anyone can file a suit who is having a *bonafide* intention for filing the suit. The courts have tried to make it comfortable for the common man to reach the courts. Even a letter written to a supreme court judge may act as a PIL. These are some of the new inventions.

The time is now correct to make the *Judiciary* as a more accountable organ. Democratic and transparent methods to be used for removal, transfer, appointment of the judges. It is also necessary that proper mechanism is there in the constitution to punish the judges who has acted maliciously.

The judiciary needs to be independent of outside influence like of political and economic persons like government parties or industrial associations. This does not make the judges autocratic they have a set standard in which they have to behave. The basis of Judicial independence is public trust and judges must have the highest of standards of answerability and accountability in them. If the judges or court officials are suspected of any activity which s not pleasant then strict actions are to be taken against them.

Accountability is the ability to hold anybody responsible for their actions. The judiciary should be accountable towards the law like the decisions made should be in accordance with the law and should not be arbitrary. The judiciary should be accountable to the general people it serves.

The judiciary is more independent, impartial which gives it a new way to lead in the organs. There should be more of accountability than that of the other branches. There should be code of conduct for the judiciary as well as others so the accountability and the independence are not hampered. As they serve as a guide to and also a measure for the judicial conduct. The judges should interact more often so that they can impart true values of law under the law graduates and also they can develop more ways if they are allowed to speak their mind out. Even though there is judicial accountability even the public should act properly so that they can help the judiciary to maintain the law and order situation in the country.

The judges are the true interpreters of the constitution and they know exactly from where they should begin. Since ancient ages various laws have been enforce to govern the country. Sometimes it was the Muslim legal court while the other time it was about the criminal justice. Indian judiciary is the most powerful judiciary after USA in the world. Since India is a democratic country judiciary has the highest place it is considered to be the most vital and crucial organ of the government. These days there are many questions that arise on the judiciary and its accountability. The judicial standards and accountability bill 2010 has replaced the judges enquiry act 1968. This act has enforced certain standards for the conduct of the judges of the high court and the Supreme Court.

The Judicial Standards are set by Accountability Bill and the judicial standards and make judges accountable for their lapses. It will also instruct that judges of the Supreme Court and High Court to declare their assets and liabilities having in mind those of their dependants and spouses. The draft Judicial Standards and Accountability Bill 2010 has approved by The Union Cabinet that provides for setting up a oversight committee of five members to deal with complaints against members of the higher judiciary. These details will be put up on the websites of the Supreme Court and high courts. It will further require judges that they should not have close relation with any member of the Bar especially with those members who practice in the same court the growing concerns regarding the need to ensure greater accountability of the higher judiciary will address by the enactment of the Bill by bringing in more transparency, and it will further build up the independence of the judiciary and credibility. The former chief justice of India headed the proposed oversight committee which include the attorney general, a chief justice of a high court, a Supreme Court judge and an eminent person nominated by the President.

For this it is imperative for the parliament to amend

the law in this respect. The present laws are either proving to be inadequate or have become abortive or obsolete to cure the miscarriage of Justice. But again the delicate methods of removing a Judge poses a threat to the independence of the *Judiciary* vis-à-vis abdicating the doctrine of *Separation of Power*s implicit in the constitution. At present, the *Executive* and the legislature are subject to heavy criticisms at the hands of both public and media. But where should an aggrieved person so if the protector becomes destroyer. Let us not get stuck into the old well settled laws or doctrines. Judicial accountability can be an exception to the rule of independence of *Judiciary*. In present scenario what is at stake is not the independence of *Judiciary* but the very existence of rule of law and constitutional values, elements and culture. It is high time now to demarcate the arena of judicial independence and secure its accountability.

The judiciary and the judges are associated with the higher cause of truth and justice is given a distinct position. The constitution of India calls for an impartial and independent judiciary. No authority in India can be absolute and unaccountable. They should be accountable either to its origin or to the organ and most importantly to the people. All the organs of the government have the people a sovereign. Nobody is above the law and also no institution no matter how high can claim to be unanswerable. So every organ is accountable to the people of the country in every democratic constitution. Many countries already have the accountability of judiciary. This prevents the concentration of power in a single hand. Also it is important to have Judicial Activism. The Judicial independence is a pre condition for all the judges whose office wants him to act without fear or favors, attraction towards the ill- will and who has to uplift the constitution and other laws of the country. This may sometimes lead to tension between Judicial Independence and Judicial Accountability.

The powers are not to be allowed to be absolute can be seen from the powers of judges which are very wide. One of the constitutional limitations on the judges is the 'removal' of judges of the High Court's and Supreme Court by addressing by the Houses of Parliament to the President on the basis of proved misbehavior or incapacity. *Article 124 (2)* and *(4)* talks about the removal of the judges of the Supreme Court *Article 217* provides for the procedure removal of judges of the High Court.

The judges of the high court and Supreme Court have their own ambit of powers which is checked by the legislature as well as the executive. No organ has immense power that they become not answerable to anybody.

Democracy is a mirror of rule of law and the foremost duty of the government to make sure that the rule of law is obeyed by the people. When the rule of law is broken, corruption and injustice will come into picture. If a crime goes unpunished then it will hinder the rule of law. The law should not be too liberal. Corruption erodes the values that people cherish and projects the State as rude and unjust organ. Corruption tends to decrease the decency of the State and makes a joke out of the rule of law. Corruption comes from the human beings.

The basic deficiency in the manner in which the candidates are elected to the legislature has its brunt on the law making. Only the composition of the legislatures is broken by the corruption but also the process of law making and application.

The constitutional organs which are supposed to protect and uphold freedom and rule of law turn against them because of corruption. The only way left is bring into play the local mafia to the majority of Indians, who are more than wanting to allocate rough and ready justice for a price, outstanding to criminalization of Indian society. The very aspects of a modern democracy are access to justice and Rule of Law and we cannot call ourselves a great democracy in any sense without both of them.

Global Corruption Report 2007 is a report by Transparency International. This report was built on 2005 survey conducted in the whole country of publics perceptions and experiences about the corruption in the lower judiciary area, manipulated by the Centre for Media Studies, found that a very high percentage of respondents believe the Indian judiciary is corrupt. It says that bribe seems to be petitioned as for the price of getting the things done. The estimated amount paid for bribe in a period of 12 month was around 580 million dollars.

So the predator kills the pray and Corruption kills Rule of Law therefore wherever there is corruption there is no Rule of law.

Our constitution is a very comprehensive document. Different roles are assigned by it to all the three wings of governance that are the executive, judiciary and the legislature. There is no confusion about powers of each wing, duties and privileges. Parliament makes law,

Executive executes them and the judiciary interprets them. Overstepping is supposed to be there.

Battle of Judiciary versus the Executive or legislature is not new but in recent times the battle is unprecedented with both the executive and judiciary taking the separation of powers to a next level. The Lok Sabha Speaker fired the first salvo as there are many who accuse the Judiciary for hindering with the legislative matters and stated publicly that everyone should remain within the boundary of the Constitution. The conflict sometimes arises in practical application of law that sometimes oversteps. Finally, it is for the judiciary to decide if there has been a hindrance with law in each other's ambit. The judiciary should be in the its limits of the Constitution.

The *Article 121* of the Constitution of India speaks that the conduct of a judge should not be discussed in the Parliament. There is a separate and comprehensive procedure for impeachment of judges which was the intention to secure the impartiality and independence of the judiciary. Also *Article 122* talks about the proceedings of the parliament which cannot be questioned by the judiciary. This is indirectly anticipate about the supremacy of the legislature for making laws that are based on ample policies that should not be questioned.

Nations like India are excited to incorporate international treaties and even traditional international law into the municipal or local laws where there is no exclusive confusion. They, contribute for the cooperation which is necessary and certainly inevitable in different legal systems so that they make sure that society and the State and the economy are not hindered by differences of legal systems. The conviction of cooperation in the nations and all the legal systems wants understanding by both the Courts and legislature of the globalised world we are living in.

So thinking that any one branch is superior to the other is wrong on the part of people. It is good to know that the three organs try to keep each other's dignity saved. And also work with coordination and co operation.

India is a democracy and should be governed only by elected representatives and not just the judges, or various committees and some commission that are answerable to the Supreme Court. The judiciary should barge upon the wrongs instead of going after the enforcement. The friction of the organs until solved will result in problems in governance.

In The doctrine of Separation of Power judicial review is important. There are three organs of the state Executive, Legislature and Judiciary with their function clearly jotted down in the constitution of India. *Article 13* of the constitution states that the State should not make any law which violates, hinders or abridges or takes away rights given by Part III'. This means that the Judiciary and the Legislature can make a laws. But with the system of checks and balances, the judiciary has been given the powers to keep a check on the rules made by the legislature. This is how it exercises the judicial review.

The judicial accountability of a judicial review is still questioned. The Judgesare accountable anyone not even to the other judge then question of legislature and executive has no meaning at all. The supremacy of the constitution always prevails, but the limit has been left for judges to decide.

All the amendment and ordinary laws are going beyond the examination of judicial review. Frictions between the three organs of the state are not new. Every department clarifies saying that it is as per the provisions of the constitution. It is the judiciary that has a firm footing in the interpretation of the constitution.

The Supreme Court of India has gained a global recognition for its high standards and great ideals. Landmark are passed by this Court which have not only strengthened the legal and constitutional framework of India but are also widely quoted by the Judiciary in many other nations which seek to build progressive mark. The judges of the Supreme Court are known for their intellect, wisdom and legal attitude. The Supreme Court has over the years been serving the vigor, vitality and intellectual depth which is necessary to create a globalised institution.

The judiciary and legal system of India has reached a stage now where the public openly criticize the judiciary and debate of the News Channels even the judgments delivered by the Constitutional Courts. It is an open fact in the opinion of author that the public opinion in the legal system in India and as to how the judiciary is not able to deliver results meeting the desires of the public, has taken away the caution to be enjoyed while referring to the legal system. The respect can never effectively be received and it should come voluntarily. The functioning of the legal system has a direct effect on the society and the rights of the people. If a criminal could manage a magistrate or dealing of court with his case, then who

will protect the people from the evil forces? In the Indian political system we cannot expect the government to be very clean and conscious given the complications. As such the legal system has played a vital role in protecting the rights of the people, ensuring systemization in the system and even making a judgment on the actions of the executive when those are not in conformity with the public interest. There are critics on the allegations of corruption and scarcity of transparency in the judicial system. Accordingly many people talk about the judiciary and the judicial reforms only because of the people who have the hope that Judiciary can protect their rights and ensure their right to life as enshrined under Article 21 of Constitution of India and further widened.

Conclusion:

The constitution of India is the *Lex Loci*. The role which constitution assigned to the organ they should not go beyond the roles. It is the obligation of the three organs of the government to strictly stick to one of the most fundamental features of the Constitution that is separation of powers. It is not required to criticize the Constitutional Plan of *Separation Of Power*s if the existing provisions are not being religiously observed. Beyond the doubts there is a need for a more booming interpretation and our dynamic Constitution has enough space to include the same. There is a vast gap between the Constitutional plan and practice of the doctrine of *Separation Of Power*s. India also has a concept of universal adult franchise. The Lok Sabha and the Rajya Sabha are the two houses where as the members of Lok Sabha are directly elected but this kind of election is more of favoritism banned the actual assessment of the work of the leaders. It can only be bridged when the entire executive, the legislative and the judiciary move a step towards all the other democracies of the world by working in peace. The position and the powers of the three organs of the state defined by the founding framers of the constitution. They felt that the government would never be able to accomplished the complete *Separation Of Power*s. But, it does not mean that each branch has absolute powers, but they have limits according to the Constitution to be adhered to. The spirit of the Constitution is not on explicitly but on shared cooperation.

The constitution of India was framed after a presenting many draft constitutions, as the constitution of India is the combination of government of India act and the borrowings from the other countries. As we took many concepts from many countries like, UK, USA, Ireland, Canada, South Africa etc. the constitution was framed by the constituent assembly, election for which was held in 1946. The members of the constituent assembly were elected by the provisional assembly by the method of single transferable vote system of proportional representation. The first session of constituent assembly was held on 9th of December in 1946 and Dr. Sachidanand Sinha presided over the inaugural session.

Constitution was finalized after some drafting constitution drafted by the drafting committee. Drafting committee was appointed by the constituent assembly on 29th of august and Dr. Bhim Rao Ambedkar was appointed as the chairman of drafting committee, who is also known as the Father Of Our Indian Constitution.

The *Executive* has grown very powerful in the current time that has certainly led them towards a wide misuse of powers. In India, we do not follow *Separation Of Power*s but we follows separation of functions. And so we do not abide by the principle in its concrete. The principle of the checks and balances remains like a part of this doctrine. So, the essential functions of the organs can be usurped by the none of the three organs. Constitution is the supreme Lax Loci. No organ should exceed the limit of the role as given to it by the Constitution. It is the obligation of the three organs of the constitution to strictly stick to one of the most important pillar of the Constitution that is Separation of Powers. There is no need to criticize the Constitutional Plan of separation of powers when the existing provisions are not being religiously observed.

The Indian parliament has been facing challenges regarding the accountability of executive to the parliament. It is believed that the decline in the effectiveness is caused by the lack of accountability of the executive to the legislature. Globalization has also eroded the powers of the parliament. Looking at the recent past India has widened the scope of democratic participation to a greater extent. India has also gained a lot of significance in the economic area. India always had a bicameral legislature. Firstly the economic decisions are taken keeping in mind the global mindset. Secondly by the reconstruction of the regulatory framework which has to be given to a lot of non elected institutions. The weakness of the Indian Parliament has also give a slow pace to the formation and implementation of legislations.

Even the political leaders do not have the caliber of

person who should be entering the parliament. The lack in their educational and professional background has affected the executive negatively. Although the constitution of India has always aimed at the democratic accountability it has to some extent lagged behind in parliamentary accountability. The authority in accountability of parliament is limited by the system of checks and balances exercised by the other organs. There was a time when there was a perfect balance between the legislature and the executive but the two organs now have been losing this balance lately.

Beyond the doubts, there is a need of a more booming interpretation and our ever changing Constitution has enough space to accommodate the same. The towering ideal of the Constitutional system needs to be guarded which can be kept only when brought into practice. There is a huge gap between the Constitutional plan and practice of the doctrine of Separation of powers. It can only be successful when the three organs of the government take a step towards all the other democracies of the world by working in sheer peace and coordination.

They are discouraging the rights of the people by not doing so. The position and the powers of the three organs of the state is defined by the framers of the constitution. They knew it will be impractical to achieve the doctrine in its strictest sense. The efficiency of parliament lies in its mastery of details and the unwinding attention it pays to aspects of implementation of policy. It has no voice in the laying down of policy except in so far as its work is influenced by the majority party. But its control can be more effective if the members are alert to the way the policies are introduced and implemented and point out competence to understand the contents of policy over them accordingly on the floor of the house.

So talking in vacuum is equivalent to aiming for a complete separation of powers. The doctrine of *Separation Of Powers* excogitate the idea that the governmental functions must be based on a Tripartite division of, Judiciary and Executive Legislature.

When it is referred to as *tripartite* division it means Three divisions or branches. *Separation Of Power* refers to the idea that the governmental organs of the state should be functionally independent of each other. The *Legislative* organ of the state makes laws, the *Executive* enforces them and the *Judiciary* applies them to the specific cases arising out of the breach of law. Each organ should perform the activities intends to interfere in the ambit of work of another organ because a stringent demarcation of functions is not possible when they are dealing with the public at large.

The three organs should be, distinct sovereign and separate in their own premises or area of functions, so that they do not overstep the authority of the other, which in turn will also keep away the ambiguity. There are three different functions in every government through which the will of the people is verbalized. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs, which means that there should not watertight compartment in the functions although they are divided. The *Judiciary* keeps a check on both *Legislative* and *Executive*.

It does not means that each branch will have explicit powers rather they have their Constitutional limits to stick to. The spirit of the Constitution is not on arbitrariness but on mutual co-ordination.

The Executive is very powerful in the recently that has certainly led them to a big misuse of powers. Aloof from the check kept on them by the Legislature and Judiciary, NGOs and the media have played a vital role in revealing the misconducts of Government. If the legislature makes any law which is not in harmony with the law of the land *'Constitutional Law'*, it is quashed down by the *Judiciary*. Also if the *Executive* tries to work beyond its ambit the *Judiciary* plays a watchdog and keeps it in its area of work. So it can be said as *Judiciary* is one of the branches of the government where people go and seek remedy for the wrongs of legislature as well as *Executive*.

Finally, the objective of the three organs of the government is to protect the rights of the people. Vigilant attitude of the people can help ensuring a proper functioning in a democracy and keep away arbitrary use of the power. The three organs have to be at peace for our accomplishment.

We do not follow Separation of powers in India but we follow the separation of functions. And now we do not stick to the principle in its rigidity. A Democratic country is one where the people have a right to choose the leaders. It generates a feeling of common good and larger satisfaction of the needs of the people. Democracies make the leaders responsible and answerable to the public at large. When the people are unsatisfied by one government they may opt to vote it out of the majority in the other tenure.

A democracy is a system of government in which

all the people of the state are involved in making decisions about its affairs typically through voting for the elected representatives to a parliament or similar assembly. Though in India strict separation of powers like in American sense is not followed but, the principle of checks and balances exists as a part of this doctrine. So no organs can conflict the functions of the organs, which constitute a part of the basic structure doctrine. Even by amending the Constitution any such amendment is made then the court will strike it down as unconstitutional.

The countries with common law system have the method of judicial review, which is embodied in their constitutions or any source of the same. Any law which is passed by the legislature or executive, the power to review that law is vested in the High Courts and Supreme Court. It is important as if the measure through which legislative and executive remains under the surveillance. The system of the checks and balances has made it easy so that they can check other branches.

For the judicial review of legislations The Indian Constitution has some provisions. This concept has taken from the constitution of United States of America. which makes the judiciary empower to make decisions and review the laws passed by the legislature. If any part of the legislation is in coercion with the constitution of India then it can also be rendered as unconstitutional.

The doctrine of separation of power is one of the basic structures of the constitution which aims at keeping the country under the law and order situation. It is important for the judiciary, executive and legislature to be in the limits prescribed to them by the constitution.

The doctrine has made the government more accountable and answerable to the people. It aims to treat the people as the sovereign authority in the country. The Rule of law is the most important aspect of the judiciary in a democracy. The Constitution has recognized and has also set some of the noble objective as securing justice to all the citizens and cheaper justice in terms of money which can be social, economical or political. In ancient times also, the rule of law was there retain and hold together the human society through the norms which are the moral and command the consensus of the good men in the whole community.

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Received : *16.10.2019;* **Accepted :** *28.11.2019*