



A study on the doctrine of separation of power of Montesquieu in reference to current plans and practices

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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'.

INTRODUCTION

The doctrine of *Separation of powers* excogitate the idea that the governmental functions must be based on a *Tripartite* division of *The Executive*, *The Judiciary* and *The Legislature*. When it is referred to as *tripartite* division it means three divisions or branches. *Separation of Power* refers to the idea that all the governmental organs of the state have to function independent of each other. The three organs should be separate, distinct and sovereign in their own premises or area of functions, so that they do not overstep on the authority of the other, which in turn will also keep them away from 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 the laws to the specific cases that arise out of the violation or breach of law. Each and every organ while performing the activities tends to interfere in the area of working of another functionary because a rigid separation or demarcation of functions is not possible in their dealings with the public at large. Thus, even when they are acting in ambit of their power, overlapping of functions amongst these organs is a general trend which can be seen. This means that there is no watertight compartment in the functions although they are divided. The *Judiciary* keeps a check on both *Executive* and *Legislative*. If the *Legislative* 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*.

Presently, the political systems of the world might not be opting for the strict *Separation of Power* because it is very impracticable and undesirable but the application of this concept can be seen in almost all the countries in its diluted form. The *Separation of Powers* is a political doctrine which finds its origin in the writings of *Montesquieu* in "*The Spirit of The Laws*", in which he favours for a constitutional government with three distinct branches of government. Each of the three branches would have prescribed capabilities to keep a check on the powers of the other branches. It is best suited in democratic countries preferable with a written constitutions as it will democate the work and functions of each branch. The 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 of the 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 decision making about the affairs by voting of the elected representatives of 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* that *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. This theory of *Montesquieu* is one of the basic structure 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 a 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 different position. The framers of the U.S. Constitution have strictly adhered to the doctrine of *Separation of Powers*. But, in actual practice it evident that this rigidity in the form of watertight compartments is not possible. Therefore, as per functions 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 this as a "*Fusion of Powers*" for the English Constitution. The constitution of United Kingdom is unwritten, which means that there is no single document. 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 agnize the doctrine of *Separation of Powers* 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 Powers* is an inseparable part of the evolution of democracy. Democracy fescue, a system in which every person can, without any fear, 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 to be a system of checks and balances among the three organs of the government. This ensures 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 Judiciary, The Executive* and *The Legislative* are the three pillars of any democracy. But these days there is another pillar of Democracy which can be said 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 governance in which all the citizens of the state are involved in decision making about the affairs of the country by voting and electing the representatives to a parliament or any similar assembly. The supreme authority given to the people in the country can be used by them either indirectly or directly. Therefore the system of checks and balances is one of the salient features of Indian Constitutional scheme. Practically, the three organs cannot be separated in three air tight compartments because of their interdependence on each other which ensure effective an good governance. They have to work in accordance and in consonance to achieve sustenance and progress of citizens. The three organs are expected to work in harmony instead of giving primacy to only one of the organs. The original doctrine which wanted a complete separation of the three organs of the government is not possible. All the organs have to be with each other. Let us presume that the three organs are separated and there is no overlapping done, it will be very 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. The three organs should co-operate and 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 compunction of our Constitution speaks through the Preamble and the dynamics of its goal is laid in the various provisions. The will of the people is best expressed in the very words which are inscribed in the Preamble "*We the People of India*" and "*do hereby Adopt, Enact and Give ourselves this Constitution*". So, it is the people who are supreme and they exercise this power in choosing their representatives in the Parliament.

The preamble which has been lately discussed to be a part of our constitution or not has gained its position as an integral part of constitution in the *Kesavananda Bharti v. State of Kerala*.² The preamble not only gained its position as a part of the constitution but was also described as the basic structure. The preamble declares People of India as the sovereign authority. This is evident in the preamble. The preamble also lays down various provisions and phrases on terms which declare the very structure base of the Indian constitution.

Larry Diamond³ says that democracy consists of following four key elements:

- Free and fair elections
- Participation.
- Human rights.
- 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 does 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 democracies spirit is not a machine driven thing which has to be adjusted by the abolition of forms. Change of heart and the sense of brotherhood is required. The art and science of mobilizing the entire economical, physical and spiritual resources for the various sections of the people in the service of the common good for all is the essence of Democracy. For a democracy to be strong

there should be a greater freedom of thought and action.

Elections have an important role to play in any democracy. Democracy makes people more tolerant towards one another. The freedom that have been guaranteed by the Law is the resultant of democracy. But to make people more tolerant it is important that they should change their mindset. As it is said mind is not a problem but mindset is. So it is important that people should have a feeling of brotherhood and should not hatred between 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. The another form of democracies can be any hybrid or any semi-direct democracy. Aristotle quoted "*The one factor which is of liberty has governed in turn ; for the fashionable principle of justice is having equality for all as per the numbers, and not worth, ... and the one is for a man to live as they like; for it is said that this should be the function of liberty, in as much as to live is not as one likes; slave is the life of a man.*"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.

Historical background – Doctrine of separation of

power :

The variedly accepted phenomenon 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 doctrine of *Separation of Power* deals with the mutual relations or inter-relation 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 which is sought to be achieved through this principal. The 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 have 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 which deals with the mutual or inter 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 spread out the principal of *Separation of Power*. That is why he is known as modern exponent of this theory. Doctrine of Montesquieu signifies the fact that no person or body of persons should not have all the powers of the government. Separation of power means the division of responsibilities into different branches to prevent anyone from exercising the basic functions of the other. The mindset for this was 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 their own sphere and restrict from trespass 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. As per *Montesquieu*: "*If the powers of the Executive and Legislative are combined in one person, or in the same body or magistrate, there will be no liberty. Also, there will be no liberty if the judiciary is not separate from the Executive and Legislative powers. When it joins with the Legislative power, the life and liberty of the people would be exposed to arbitrary or dictator control, for the judges would become the legislators. When it joins 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...*".⁷

Separation of power of Montesquieu took the form not of impassible barrier and unalterable frontiers, but of mutual restraints, or of what later 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 airtight 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 about the fact as to what has constituted the, Executive, Judicial and legislative 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 antiquity is operated without and is often conflicted with the separation of functions. It is true that both the Greek polis state and the Roman republic also assigned some

specific functions to some 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 kind of defect was that everything because of the equalitarian rule of law. As neither the Greek polis nor the Roman republic recognized any rights of the individual. The ethics of politics of the ancients did not call for a division of functions and their stint to different state organs. Political theories claim to have discovered as early as in Aristotle's *Politics* is the nucleus of the modern separation of powers. Although the doctrine is traceable to Aristotle but the writings of *Montesquieu* and *Locke* gave it a strong base on which the modern attempts to distinguish between the *Legislative*, the *Executive* And the *Judicial* power is grounded. John Locke⁸, the apologist of the Revolution of 1688, justified the supremacy of the legislative powers, because the legislature was not always in session and just because legislators might exempt themselves from all the obedience of their own laws. If execution and legislation the of the laws are in distinct hands of all the monarchies as well-moderated and well framed governments can be formed. Through the *Executive* Locke meant primarily what we should call the *Judiciary*, but he then recognized a third Kind of function, which he named as 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 are now called as judicial and executive. 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.

Locke⁹ was of the view point 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 was the first one who perceived and saw that there should be a specialization of functions in each of the Constitutions and developed this theory. After that other political thinkers like James Harrington, Montesquieu and John Locke. They described such functions as *Legislative*, *Executive* and judicial. The theories given by these political thinkers in relation to the theory of *Separation of Powers* were on a simple presumption of the liberties being protected from the tyrannical, autocratic and despotic rulers. If all the powers are vested and exercised by the very same persons, it will lead to injustice being done to the people. According to Cooley. who emphasized on the importance of this doctrine of *Separation of Powers* as: "*it is an arrangement which gives every department a certain independence, which will operate as a restriction on the actions of others. It will encroach on the rights and liberties of the people. Also will make it possible to establish and enforce the guarantees against attempts at tyranny*"¹⁰

It is a widely accepted political phenomena 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 should be co-ordination. This theory of separation of power, in dilution, deals with the inter-relations of the organs of the government with the system of checks and balances. India follows a parliamentary form of government. Indian constitution follows the theory of separation of power in 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. Montesquieu has favoured 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 accomplished *Separation of Power* is virtually 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 Powers* would mean that:

- The same persons should form only a part of one of the three organs of government.
- One organ of government should not control or tamper with the work of another.
- The functions of one organ of government should not exercise by another.

Such a fair delimitation 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 powers of the *Legislative* and *Executive* 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 *Judiciary* the power of *Legislative branch* 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 to put each organ of the government within the limits of Constitutional power there are inherent checks and balances. 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 prone to certain stress and exertion. But, through the development of healthy conventions is a way out to this issue. There should be mutual respect for each other keeping in mind the purpose of their exercise of these powers. The main motive at the end is to achieve a '*Welfare State*', therefore a healthy coordination among the three can work wonders. The three when coordinating will dilute the doctrine. So it makes it possible to work with harmony.

The legislative :

In the Indian Constitution the Legislature has been accorded high-esteem. 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 number of leaders is 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, prepares and implements the budget, authorizes borrowing, and impose taxes, has sole power to declare war, can start analysis (chiefly against the *Executive* branch), appoints the heads of the *Executive* branch and sometimes appoints judges not only this but it also 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 the Legislature cannot it did all by itself. It is an imminent threat to democracy if complete power is given to the purse holder of the country. By making the *Executive* accountable to the popular house, a proper mechanism of checks and balances ensured by the Constitution to the doctrine of *Separation of Powers*. The entire system has other appearances which can help to achieve the same. Therefore, this brings into question of the role of the other two organs of the government (judiciary and 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 he 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 include speaker and deputy speaker, chairman of Rajya Sabha and Parliamentary secretariat. The Rajya Sabha is the

permanent house of the legislature and 1/3rd members of Rajya Sabha retires 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 cannot delegate it's the law making powers to the executive organ, but it has a right to delicate its powers. The two houses of the parliament forms a bicameral legislative body.

The judiciary:

The Constitution provides for and impartial and neutral *Judiciary* as the interpreter of the Constitution and custodian of the citizens' rights through the process of *Judicial Review as framers drafted it so meticulously*. This does not mandate the *Judiciary* to make the law but allows interpreting 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 pony up the general norms of behavior 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 fetches us to the neoteric debate *whether this type of the behavior of the Judiciary can be defined as judicial review or judicial activism?* The higher *Judiciary* in India, peculiarly the honorable Supreme Court which is the world's most powerful *Judiciary*, has become a focal point of contention over its role in engrossing and deciding public-interest-petitions. The *Judiciary* issues many directions to the Government in deciding these petitions 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 Judiciary transcending its limits and trespassing upon the fields of the legislature or Executive? And then what is the legitimacy of exercise of such powers if so is the case?*

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

scrutinizing the legislation's constitutionality and not directing the government to enact legislation. All the Judiciary has been providing its optimum decisions and 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 distend athwart enquiring whether an impugned legislation or an *Executive* action falls within the competence of the *Executive* authority or of the Legislature or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

The Executive, Legislative and Judiciary 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 the Chief Justice Subba Rao in *Golak Nath v. State of Punjab*¹¹: "The Constitution demarcates their jurisdictions modestly and expects them to utilize their respective powers without infringing their limits. They should function within the spheres allotted to them.Any authority which is created under the Constitution is not supreme; the Constitution is supreme law of land and all the authorities function under it." 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 functions and exercise of powers 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 Powers* is a "basic feature" of the Constitution. So if anyone encroaches the territory of

the other it would be a clear violation of the basic structure of the Constitution and to the same *the Judiciary* is not an exception.

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 that: *It is a generic place that while the Legislature enacts the law the Executive implement and the Court interprets it and adjudicates in doing soon the legitimacy of Executive action and under our Constitution even judges the legislation's validity itself. And so far it is well accepted that in a certain sphere the Legislature is procured of judicial power, the Executive procures a measure of the both Legislative and judicial functions, and the Court in its duty of portraying the law, accomplishes in its perfect action in a marginal degree of Legislative exercise. However a dainty and brittle balance is presumed under our Constitution among these primary institutions of the State.*

From the above it can be clearly inferred that one may drills the other's function up to a moderate limit but the issue that predates the Indian scenario is whether this system is working in a sophisticated manner. The constitution has clearly laid down the functions of all the three organs of the government. *Article 124 – 147* deal 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 branch is the branch of the state which has a higher authority and responsibility in the governance of the state. Enforcement of law is included in the main function of the executive branch. Among the three organs of the government the executive is the most powerful branch. Among the three organs of the

government only Executive branch deals with the people on day to day bases. The executive involves the ministers of the various departments, bureaucrats, clerks etc. the laws are also made by the executive branch in the form of delegated legislations and also decides cases through the quasi-judicial bodies. The president is the supreme commander of all the forces and the executive. The *Executive* has the power to veto laws, is the supreme command of the forces 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, The President exercises all of these powers. The *Executive* is expected to be free from overburdened work, instructions and responsibility from the other two organs of the government like the other two pillars of democracy. It should be independent. It is always said that *Executive* is devoid of the two but the incapability adhere. In actual practice it is completely stumbled. The reason of this is that the *Executive* is questioned by the *Judiciary* and the Legislature for its actions. This hinders the independence of the *Executive* up to great extent. It is not that the question of responsibility or accountability arises only in the case of *Executive* but The *Judiciary* and legislature are also equally answerable but in their cases a inhere system from within would be available for discharging those functions. It is the exact position of the state of affairs, which is there in practice.

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

The constitution tends to establish a parliamentary

form of government in India. In the constitution of India the expression executive power is not define. However, article 73 of the Constitution provides for the extent of executive power. Therefore it can be said that the 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 be impossible to give an exhaustive definition of what executive functions mean and imply.*”

Generally the executive power connotes the residue of government functions are taken away that remains after the functions of legislative and judicial.”

The central executive consists of the president and the council of ministers which is headed by the prime minister. Many functions are formally vested in the president by the constitution but he has no function to discharge in his individual judgment or in his discretion. The President acts on the advice of council of ministers; therefore, the real and effective executive constituted by the prime minister and his council of ministers.

The British model closely resembled by the structure of central executive and this British model functions on the basis of unwritten conventions. The council of minister enjoys the power during the pleasure of the president. But in reality the council of ministers should have the back of lower house of the parliament.

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 of 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 functions among the three 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 among the three organs. The power of the government of United Kingdom is enjoyed by the legislative, executive and judiciary. With an exclusive system of checks and balances they enjoy these powers within their own spheres. History of the concept of *Separation of Powers* 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 a sovereign body. This may be because the *Separation of Powers* helped belief of mould Dicey that the supremacy of Law favored by parliamentary sovereignty.

In United Kingdom the doctrine is called as fusion of powers more than separation of powers, as many jurists and political thinkers suggested this. As per the doctrine all the powers should not be exercised by a single organ. There should be a division powers among the organs. There should not be any type of interference by any organ of the government with the working of the other.

If a bill has to be enacted in United Kingdom 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 cannot hold any bill with them more than twelve months.

“There are varied sources of constitution from other ordinary laws but there is no single written document of constitution in United Kingdom. The legislative makes the laws the executive enforces them and the judiciary resolves the disputes. The judiciary includes all the judges of the courts including judges of the tribunals and magistrate. The professional judges presided over the civil and criminal courts. Both private as well as public law include in the jurisdiction of the civil. By making certain rules these courts are said to have exercise some legislative functions which govern not only the courts but also the administrative functions.

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

Therefore, the application of doctrine of separation of power can be seen even if there is no written constitution. The two organs of the government the legislative and the judiciary are made as an independent organ. By the despotic actions of the executive the judiciary is bound to protect the rights of the people and

also strives to keep the executive within its limits.

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

Nevertheless, the overlapping and the system of checks and balances can be seen in the three organs of the government. It means that each branch of the government used to have an eye on the other organs and also protected each other from interference. During emergency the monarch has the power to dissolve or refuse to dissolve the parliament. It can be said that the executive body was kindly checked over by the House of Lords. The monarch individually made judicial appointments or on the recommendation of the Lord Chancellor.

In the modern times it is a symbol of democracy to have the separation of powers among the three organs of the government. Nonetheless, the judges should rely on parliament and government in deciding the cases and setting up precedents. Admitting, 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 in Britain there is separation of powers, any of the two organs of the government have to work dependently or with co-ordination, which renders it very difficult to say that there is the application of separation of powers. The executive has the monarch and the parliament according to the British parliamentary documents, who prepares the laws. The legislature includes both the houses of the parliament and the monarch. The judiciary has the judges of the courts and both tribunals. The relationship between the legislature and the judiciary forms the second position of the doctrine. The laws made by the parliament are expected to interpret by the judges in such a way that it best conveys the intention of the legislature. The judges are the subordinate of the parliament according to the constitution of the United Kingdom but they are not allowed to challenge the validity of an act of parliament. In *Pickin v. British Railway Board*¹⁶ The court held that: “*The judges of the courts are not allowed to challenge or question any act of the parliament.*”

The executive and judiciary are the two organs of the government which forms the third step of the doctrine of separation of powers in United Kingdom. Scrutinizing the executive action in the form of delegated legislation is the duty of the judiciary that it should be in the scope of parent act and power granted to executive by the parliament. The courts can question the lawfulness of actions of the executive through the process of judicial review which are made by the public bodies. This indicates the independence of judiciary in United Kingdom.

Thus, it can be said that in the 18th Century there was not much of a separation in United Kingdom., It can be recognized that the three organs of the government are by not totally independent, separate and distinct from each other on the British Constitution's Bird's eye view. An important part of the *Legislative* authority is also formed by the *Executive* magistrate. Only he has the facility of the *Legislative* authority. Making treaties with the foreign sovereigns facilitated by him, which have the strength of *Legislative* acts. He can remove the members of the Judiciary by himself or by calling the joint session of the two houses. He also has the powers regarding the impeachment procedures and is vested in all other cases with the supreme appellate Jurisdiction.

The British System has damaged the theory in its parliamentary practice. So in United Kingdom no *Separation of Powers* in the strict sense exists, this doctrine has gained attention of the Framers of many modern constitutions precisely during the 19th Century is still an interesting fact. In United Kingdom it is even impracticable to apply the doctrine in its strictest sense. In United Kingdom it can be seen as the application of the diluted form of the doctrine.

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 constitutions of the world. The Constitution of the United States of America probably provides us with the most apt example of a practical application of the doctrine of separation of powers which came into effect on 4 March, 1789. The concept of separation of power is embodied in the constitution of United States of America in *Article 1, 2, and 3*. The doctrine of separation of power was designed to prevent the majority from being dictator that attracted the framers

of U.S. constitution. From their previous experiences, the framers wanted to be sure that rather a system of checks and balances no new government has too much power. *Article 1* of the constitution which provide for a legislative comprising of the senate and the house. *Article 2* which provides for the executive, and which also include The President, the departments and the Vice-president. *Article 3* which provides for the judiciary comprising of the federal courts and the Supreme Court. With a system of checks and balances each branch has its own powers, its own ambit. The system of checks and balances was constructed rather than evolved by an accident. Each branch made by this system accountable and responsible to each other, which helps from becoming dominant, any of the branches.

The doctrine is based upon a wrong 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 three organs of the government and further preventing the government from becoming dictatorial. The framers intended that it will protect the rights of the people and their liberties if there is a separation of power and it will also avoid tyranny at the government's hands. The doctrine aimed at not concentrating the power of the government in the single head. Not only had this but they also never thought that it would prove to be a very good method of governance.

The power of executive includes veto over the bills, appointments of judges and other official and making of treaties. But enforcement of law is the chief function of executive. The executive head is the commander-in-chief of the military that is the president. Not only has this but he also had pardoning powers. By the legislative and judiciary there is a system of checks and balances so that the executive does not exceed its ambit of work.

Nonetheless, the law making power establishment of lower federal courts and enactment of all federal laws also included in the legislative power. Prevailing of Presidential veto and impeachment of president are the powers regarding president. The checks and balances are done by the two branches of the government which are executive and judiciary so that there will be no hindrances with the rights of the people.

In federal cases the judiciary has the power to interpret the laws and try them. Declaring any law or

executive action as unconstitutional is the additional power vested with the courts. The system of checks and balances by the executive and legislative work in the same way.

The constitution of USA was written approximately 200 years ago. It is a central instrument of U.S. government and supreme law of the land. There is a system of confederation in United States of America . Where the center is not more powerful than the states.

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

Although there was a system of checks and balances, the three organs were not in water tight compartments. They had to work in co-ordination. Tyranny occurs that time when the power is concentrated in a single head. Not only this but when a single person acting also on the behalf of all. Separation of power has given a distinct feature to United States of America which is claimed by many political thinkers. For the smooth functioning of the country it is very important that the executive as well as legislative have a partial agency of coordination.

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

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

- The President has a right to veto the legislation of Congress. Similarly, this veto may be overridden by the 2/3rd majority in each House of congress.
- Any treaties with the other Countries which the president enters into 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 Powers* 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 checks and balances should attained the balance of power 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. The president may veto the bill in the exercise of his legislative power, which is passed by the congress. Also the treaty making power is with the president but it is not affective till it is 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 act passed by the congress, The Supreme Court has the power to declare as unconstitutional. There are also some other functions of an organ which are exercised by the other. In adoption of the checks and balances India also followed U.S. which make sure that the single organ does not behold the power absolutely.

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

The exercise of it varies greatly with the personality of the President because the powers of the president are very real, 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 management of the affairs of foreign is in his hands, therefore 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 to be very clear *Executive* action may bring negotiations 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 there is no constitutional state in the world in today's time that 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 override 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 :

In Indian constitution the doctrine of separation of powers has no place in strict sense, but the functions of different governmental organs have been sufficiently differentiated, so that one organ of the government could

not usurp the function of another. In the debates of constituent assembly, *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 among the three organs of the government.*"¹⁷

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

Dr. B.R. Ambedkar, is one of the Indian constitution's important architect, disagreeing with the argument of *Prof. K.T. Shah*, advocated: "*what so ever there is no dispute that the executive should be separate from judiciary. With a view of the separation of the legislature from the executive, 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 incorporated in the American constitution between the two organs the executive and the legislature. There is no slightest doubt in my mind and in the minds of students of political science that the work of parliament is very difficult. So vest that unless and until the members of the legislature receive direct initiative and guidance from the members of executive sitting in the parliament. It would be very complicated to carry on the work of legislature. I personally therefore, do not think that if we do not adopt the method of America of separating the executive from the legislature there is great loss that is likely to crop up.*"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 organs of government which represent the people and their will in our country and also responsible for the glossy 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 which 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 judiciary, the legislature 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 the Constitution of India there is express provision under *Article 154(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 expressed provision for the legislative and judicial that their powers shall be vested in any person or organ.

The constituent Assembly of the Indian Constitution had proposals to incorporate the doctrine into the constitution, but they did not accept them. As the doctrine was definitely inflexible for the provisions of the constitution. The constitution did not make any absolute or fix division of functions among the three organs of the state. Generally the *Legislative* and the *Judicial* functions are given to the *Executive*. In the constitution there is a functional separation. The *Executive* power of the union is vested in the president and the powers of the State in the Governor of the states. The president is the head of the Executive branch. He exercises his powers on the aid and advice of the 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 he houses when the 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 president appoints the judges of the Supreme Court in consultation with the chief justice of India and such of the judges of the Supreme Court and the High Courts as he may assume compulsory for the purpose²¹. The President appoints the judges of the high court also after consultation with the governor of the state and the chief justice of India, and in the case of appointment of chief justice of high court and the judges aside from the chief justice of High Court²². It has now been held that the opinion of the chief justice of India is of prime importance in making such type of appointments.

Nobody can remove the judges of the Supreme Court and the High Courts except for misconduct or incapacity and unless two thirds majority of the members supports the address and absolute majority of the total membership of the Houses is passed in both Houses 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, which are 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 designated to such allowances and privileges and to such rights in respect of the leave of absence and pension, as may be determined to such privileges, allowances and rights from time to time as mentioned in the second schedule of the constitution. Neither the privileges nor the allowances nor their rights in respect of leave for the absence or pension shall be varied to her disadvantage after her appointment.²⁴

So, every government is required to perform the functions of *Executive*, *Legislative* and judicial. Each organ depends on the other organ in some or the other aspect. But this will not mean to disapprove the doctrine

generally. But the procedure established by law will only done such type of discard.

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