

DOCTRINE OF SEPARATION OF POWERS

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INTRODUCTION:

The doctrine of separation of powers has a variety of meaning. According to Wade & Phillips the concept may mean three different things.¹

- That the persons should not form part of more than one of the three organs of government,
- That one organ of government should not dominate or hamper the work of another,
- That one organ of government should not exercise the function of another.

The meaning as given by Wade & Phillips is also reflected in the Constitution of United States and France. According to Oxford English Dictionary, “Separation” refers to the action of separating or parting of setting or keeping apart. While “power” is explained as the legal ability, capacity or authority to act. Hence, it can interpret that these two words mean the action of keeping apart the legal authority to act.²

Hence, when this legal authority is separated or divided into various parts, one could have the genesis of the doctrine. In theory the doctrine simply explains that the powers of government are divided among legislative, executive and judicial branches and that the powers of a particular branch can be exercised only by an officer of that branch.

The theory of separation of powers is said to be only re-interpretation of the doctrine propounded by English Jurist John Locke. In 1690 he wrote in his works in “Second treatise of civil government” that

“It may be too great inclination to Human frailty, apt to grasp at power for the same persons who have the power to making laws, to have also in their hands the powers to execute them, whereby they may exempt themselves from obedience to the law they make and suit of law, both in its making and execution subjective of their own private advantage.”³

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¹ Wade & G. Phillips, *Constitutional and Administrative law*, (Second edition- 1945), Page 48

² Oxford English Dictionary, Volume-7 Page 1212 and Volume-9 Page 475

³Id, page 62.

French Jurists Montesquieu in his exemplary work “Esprit des Lois” ameliorated Locke’s statement of doctrine. He stated the essence of the doctrine that:

“When the legislative as well as the executive powers are united in the same person or body, there cannot be any liberty expected because apprehensions may arise given the



same monarch or senate should enact tyrannical laws, to enforce them in a tyrannically were the power of judgment joined with the legislature, the life and liberty of the subject would be exposed to arbitrary interference as the judge would then be the legislature. A reign of oppression shall persist”⁴

Separation of powers is a constitutional doctrine i.e. a theoretical statement about forms of government and in this case about the form of democratic government. It asserts on the one hand that State shall have 3 different powers- law making, executive power and judicial decision. On the other hand, it states that the difference between the powers is not only natural but also that it is rather beneficial in that it gives rise to distinction between the legislature, the executive and the judiciary which ultimately guarantees the individual liberty of the citizen.

It may happen some times that functions may partly be legislative or partly judicial or partly administrative. “This difficulty is solved by the court considering where the administrative agency accomplishes a pre-dominant legislative or judicial or administrative function and then, determining its character accordingly” as Justice Bhagwati observes in the *Express newspapers Ltd. Union of India*⁵.

Hence, the doctrine of separation of powers stated in its taut form means that each of the powers of government namely executive or administrative, legislative and judicial should be confirmed exclusively to a separate department or an organ of government. There should be no overlapping either of functions or of persons.

In absolute form, the doctrine cannot be interpreted in the modern world without a system of checks and balances among the three organs of the Government. Mr. M.C.J. has summed the position as below

“In the modern interpretation of the doctrine it is said that instead of applying the doctrine in strict sense in the functional organisation of the government, it should be deemed to require a system of checks and balances among the three departments of government while opposing monopolisation of government powers by any of the three departments”⁶

⁴ Joel L. Fleishman, Arthur H. Aufses, “Law and orders: The problem of presidential legislation”, *Law and contemporary problems*, Volume 40

⁵ 1958 SC 578

⁶ Cribb, J.T. and Bennett, W.J., 2015. *America the Strong: Conservative Ideas to Spark the Next Generation*. Tyndale House Publishers, Inc..

This doctrine, thus, does not mean the seclusion of the three organs of the government which is not desirable and practicable. Three organs must have some unison in the working. The position of the doctrine at the beginning was the same as it is today because in absolute form, it was not applied anywhere. Even the Constitution of America has not given to this doctrine in express or in absolute form. Even at that time Montesquieu was aware that "...three organs in complete separation from each other cannot work at all". Therefore, some flexibility was allowed. Since then, the doctrine has the same meaning but with certain modification in application.

Historical event plays a vital role in modifying the existing dogmas of the time and also influences the future political thoughts. Doctrine, principle and rules cannot remain static for all times to come. Many doctrines were propounded but there are some, the principles of which remain so, not for all times but much longer times than others and apply with certain modifications according to changed circumstances.⁷

So far India is concerned this doctrine has certain elements present in the system of government. India has adopted the British type of government in one or the other form. Constitution of India has provided for independent judiciary with the powers of judicial review. The executive is a part of the legislature and responsible to it. As such theory of separation of power is dispensed within the Indian system. But India has adopted a federal polity and therefore, has recognised the theory of separation of powers so far judicial organ is concerned

DOCTRINE OF SEPRATION OF POWER UNDER THE CONSTITUION OF UNITED KINGDOM:

John Locke advocated that the organic separation of powers while Montesquieu whose primary focus was the improvement of the doctrine clearly maintained that within a system of government, the judicial function should be exercised by a separate body from legislative and executive. He particularly asserted that "there is no liberty if the judicial power is not separated from the legislative and executive. For the executive and legislative, he did not

⁷ Vile, M.J.C., Online Library of Liberty A collection of scholarly works about individual liberty and free markets. A project of Liberty Fund, Inc.

mean that both the organs should not have any influence or control over the acts of each other.”⁸

The functions of the government in Britain seemed to have been distributed among three organs- Legislative, Executive and Judiciary and are separated from each other. But this position was not same always but over the time after various conventions and evolution of practices. By the device of Bill of Rights, the restrictions were put upon the arbitrary powers of the King and thereby people regained their liberty. But the King still had the charge of executive powers.

Act was then passed in 1701. Its passing was an upliftment to the separation of powers doctrine in Great Britain to some extent. It was provided in that Act that the judges were to hold office during good behaviour and not during the pleasure of the King. The judges could be removed from offices only if both the houses of Parliament presented a joint address in the form of a resolution passed by them. The judiciary thus became rather distinct from executive.

This Act of 1701 had also the provisions for the separation of powers executive from the legislative wherein it was provided that no person who has an office or a place of profit under the King or relives a pension from the Crown shall be capable of serving as member of commons. But, over the time Minister were rather made an exception and a minister was to continue to sit in the House of Commons⁹. Hence, the doctrine of separation of power received a jolt in the very initial process as although there seemed to be a separation between Executive and legislation but as there was no written Constitution, the interpretation could not be precisely differentiated and demarcated.

As per Wade and Phillips:

“It is over looked that there is a statutory limit on the number of ministers who may be members of the Commons. Moreover except those ministers, the vast majority of people who held positions within the Executive are disqualified from membership of Commons, namely all members of the civil services, the armed forces, the police and the holders of many public offices”

⁸Supra, Note 4

⁹ Carney, G., 1993. The Separation of Powers in the Westminster System. Queensland Chapter of the Australasian Study of Parliament Group, Speech given at Parliamentary Annexe, Brisbane, 13, pp.1-11.

Hence, he has concluded that there are evidence of an effective separation of membership maintained between Executive and Legislature.

In Constitution theory, there is pretty much a pre-ponderous of the Legislature. But in actual practice, it is the cabinet who enjoys both the Legislative and Executive functions when there is a majority of it the legislature and it retains the confidence of the House. Under such support in the house, majority party whose leader is elected as the Prime Minister initiates the Legislature and it is certain that measure is carried out. Besides, if measure is defeated, which in the normal course is not possible, the cabinet has to resign creating crises. Again, the executive has the power to dissolve the parliament if the Government is defeated.

There are however, certain checks upon the Executive actions applied by the Legislature which are exercised through specialised committees and parliamentary questions. As such it can only be concluded that there is a accessible relationship between the two organs and no separation of powers in the strict sense of the doctrine exists.

Delegated legislation poses another difficulty because the main function of the legislature is to make law from which the Legislature cannot be spared. Although there is no limitation on the British Parliament to delegate legislative power to the executive, yet it is a matter of enquiry as to the extent to which the Legislature may delegate the powers. Hence, there is no much scope of application of the doctrine of Separation of powers as the above-mentioned organs work in Unison and it is difficult for them to perform in isolation.

Although, judicial independence of the Judges has been secured by Law, constitutional Customs and professional and public opinion, but its implications need to be taken into consideration. One essential function of the Judiciary is to protect the citizens against unlawful acts of government agencies and public offices. For the proper functioning of the judiciary to this end, not only the tenure of the judges is secured but also the method by which they are appointed generally in late middle life from among the leading members of the Bar . Once appointed, a judge has no favour to look for either from government or from anyone else.

There is a convention that member of the executive whether Ministers or civil servants should not criticise judicial decision. At common law no action will lie against for any manoeuvre done or words spoken in his judicial capacity in a court of justice. The functioning of the judiciary is also ensure that government is conducted according to law and thus in a important sense to secure the observance of the Rule Law as well as the independence of the Judiciary.

Judiciary in Britain has to interpret the law passed by the legislature. It has no power of judicial review and therefore, the laws made by Parliament cannot be declared void. While interpreting the statute, new dimensions influencing the law making was thereby given. But the effect of such interpretation is removed by the parliament if it is not in compliance with the policy initial undertaken by the House. The parliament may make amendment accordingly without any challenge from anywhere. It is often said that the common law of England is mostly judge made law.

While the courts may examine acts of the executive to ensure that they confirm with the law, the doctrine of legislative supremacy repudiates the courts the power to review the validity of legislation. The judges are under a duty to apply and interpret the law enacted by Parliament. The effect of their decisions may be altered by Parliament both prospectively and if necessary, retrospectively. In one sense, therefore the courts are constitutionally subordinate to Parliament but, it is essential to observe that the courts bound only by the acts of Parliament and not by resolution of each house which may not have a legal force.

DOCTRINE OF SEPRATION OF POWER UNDER THE CONSTITUION OF UNITED STATES OF AMERICA

Hugh Evander Wills, writing in Constitutional law stated “The correct position, therefore, undoubtedly is that the Doctrine of separation of governmental powers is an American doctrine and an implied doctrine of U.S. Constitution”¹⁰. The framers of the Constitutions has no hesitancy to adopt the power should not be concentrated in any one of the branches of the government. They hadn’t forgotten the tyrannical British rule and hence, did not want the history to repeat itself.

¹⁰ Supra, Note 4

Although the power in a single hand was tried to be restricted but despite the attachment, the framers of the Constitution did not view it as an absolute doctrine.¹¹ The Doctrine was modified to the extent that instead of complete distinction of the three branches of government each was given enough authority in others functional field for the purpose of keeping a check. For instance: two houses i.e. the senate and the House of Representatives were created to have a double check on legislative.

In *Myers v. United States*¹² Justice Brandies dissenting observed:

“Checks and balances were established in order that this should be a government of law and not men. The purpose of adoption of the doctrine was not to avoid friction but by means on the inevitable friction incident to the distribution of the governmental powers among three departments to escape autocracy.”

The description shall continue focussing on one organ at a time.

LEGISLATIVE ORGAN OF GOVERNMENT

Article I, Section. 1 states that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹³ The strictly legislative role of congress exercises by passing the statutes which are of general types.

In absolute sense, the legislative function should not be abdicated, or transferred by the legislation or law making is the essential function of the legislative branch and it cannot delegate the function to any other authority¹⁴. There is a common law maxim that “Delegatus Potestas non Potest Delegara” which means that delegated power cannot be delegated. It is held that the power of legislation has been delegated to it by the people or the Constitution. As such the delegates are not supposed to further transfer its power to other organs of government. Supreme Court has invoked this maxim many times. But the delegation of legislative powers has become an absolute

¹¹ *U.S. Const. amend. XX, § 4.*

¹² 272 U.S. 52 (1926)

¹³ *U.S. Const. amend. XX, § 4.*

¹⁴ Aranson, P.H., Gellhorn, E. and Robinson, G.O., 1982. Theory of legislative Delegation. *Cornell L. Rev.*, 68, p.1.

necessity of practical government and has been practised from the very beginning. However the Supreme Court has also recognised the need of delegation. But the



extent and character of permissible delegation must be fixed according to necessities of the governmental co-ordination.

The general delegation of power under the NIRA was held unconstitutional not only because the legislative therein undertook to delegate a power which it did not possess but because it was violation of the doctrine of separation of powers and a violation of the rule against delegation of delegated powers.¹⁵ In many cases the Supreme Court upheld specific delegation in spite of the fact that it also repeated the rule that the congress could not delegate legislative powers. The congress men do not have complicated problems there is no way for the Congress except to delegate some of the legislative powers.

The Legislative branch of the government has exercised many other functions which may be classified wither as executive function or as judicial functions such as proposing amendment to the Constitution, electoral function, ratification of treaties and appointment and removal of officers. These are regarded as executive function. The Constituon requires the advice and consent of the senate for Presidential appointment and the approval of the treaties. The doctrine of separation of powers does not allow one branch of the government to investigate about the other branch.

But it has been established that the legislative branch of the federal government may investigate the executive for the purpose of determining the need and scope of legislature. Even with the permission of the Supreme Court the legislative has exercised functions which should essentially be classified as judicial. In some of these instances, the legislative branch of the government has actually done judicial work.

Hence it may be concluded that besides legislative function, the legislative wing of the government has many other functions to perform such s executive and judicial. But this does not mean the denial of the doctrine of separation of powers as propounded by the founding fathers of the Constitution of America. The Legislative has not wholly abandoned

¹⁵ ALA Schechter Poultry Corporation v. USA

its own functions and assumed those of other departments. In some respects, the doctrine of separation of powers as above defined has been upheld.¹⁶

EXECUTIVE ORGAN OF THE GOVERNMENT:

Article 2, Section 1 states that “The executive power shall be vested in a President of the United States of America.”¹⁷ While, Section 3 provides that he shall take care that the law be faithfully executed and shall commission all the offices of the United States. But he alone can’t be vested with such prodigious responsibilities which has been rightly pointed in the case of *Myers v. U.S.*¹⁸ that

“The vesting of executive power in the President was essentially a grant of a power to execute the laws but the President alone and unaided could not execute laws. He must execute the same by the assistance of subordinates. But it is urgent that the natural meaning of the term of executive power granted the President included the appointment and removal of executive subordinates”

Again, the power of executive becomes extensive when it comes to the point of President’s veto. Even when he has qualified or suspended veto, it can be overridden by a 2/3 veto of both the houses. Delegation of legislative power by the Congress in spite of maxim “*Delegatus Non Potest delegare*” has made the executive indispensable in the matter of legislation.

It is significant to note here that the President is not the law maker. It has been further objectified by Justice Black in the case of *Youngstown Sheet & Tube V. Sawyer*¹⁹ who stated that

“In the frame work of this Constitution, the President has the powers to see that the laws are faithfully executed refutes the idea that he is a law-maker. The Constitution limits his functions in the law making process to the recommendation of laws he thinks to be wise and the vetoing of laws he thinks bad”

¹⁶ Benwell, R. and Gay, O., 2011. The Separation of Powers. *Parliament and Constitution Centre, House of Commons Library*, 15.

¹⁷ *U.S. Const. amend. XX, § 4.*

¹⁸ 272 U.S. 52 (1926)

¹⁹ 343 U.S. 579 (1952)

In the Re Neaggle, it was held that “The duty lies upon the President to overlook that the laws are faithfully executed. It is consequently not limited to the enforcement of



Acts of the Congress but includes also rights, duties and obligation growing out of the Constitution itself, international relation and all the protections implied under the Constitution”

But the doctrine of separation of powers as to Executive branch of government is still upheld as not all of the powers exercised by the executive are those which it has taken from the judicial and legislative branch of the government, and not all the executive powers have been taken away from the executive by the other branches of the Government. The Supreme Court has also upheld the doctrine of separation of powers, as to execute in denying to the Court the power to suspend sentence as also pardoning power of the executive.

JUDICIAL ORGAN OF THE GOVERNMENT:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.²⁰“The Judicial power shall be extended to all cases in law and equity” is laid down in Section 2 which states the jurisdiction of the Courts. The Congress has been given the authority to determine the number of judges necessary for the proper functioning of the Supreme Court. The constitution provides for permanence of tenure during good behaviour and a compensation for their services, which in turn ensures independence and integrity of the judges of all such courts.

While upholding the independence of the Judiciary in the federal structure of the United States, the Constitution also established judicial supremacy. The main functions of the Supreme Court, then, are the defending as well as preserving of the Civil liberty and sovereignty of the people. The Supreme Court is hence, the ultimate interpreter of the Constitution.

“When an Act of parliament is against common rights or reason, said Coke, the common law will control it and adjudge such act to be void.”²¹This view failed to impress in England but applied in the United States. It was to be taken as the foundation

²⁰ Article 3, *U.S. Const. amend. XX*, § 4

²¹ Dr, Bonham’s case(1610) 8 Co. Resp 188

of judicial review. This doctrine of judicial review was given its power in the renowned case of Marbury v. Madison²²



²² 1 Cranch 137, 2 L Ed. 60 (1803)

“If a law be in opposition to the Constitution if both the law and the Constitution apply to a particular case confirmable to the law, disregarding the Constitution or Confirmable to the Constitution, disregarding the law, the court must determine which of those conflicting Rules governs the case, this is of the very essence of the judicial duty.”

It is not out of place to state here that the Judiciary has also taken up on itself certain executive functions. The legislature may vest in the courts or judges the appointment of the officer whose selection is not otherwise provided for in the Constitution. But the Courts cannot do so where full power of removal has been vested in an executive officer. Courts may issue mandamus to compel the executive officer to perform the ministerial duties. The Judiciary, thus, has also some of the executive functions to perform likewise as the executive and the legislative performs judicial functions.

In relation to the legislative, the schools have also certain powers. There are many instances in which the court has through interpretation, giving rise to judicial legislation. In exercise of this duty regarding the great political powers, the Supreme Court has a super legislative. But there are certain limitations on Judicial review which has been imposed on itself by the court. In the case of *United States v. Butler*²³, Justice Stone had a dissenting opinion that

“The power of the Courts to declare a statute unconstitutional is subject to two guiding principles of decisions which are never to be absent from judicial consciousness. One is that the courts are concerned only with the power to enact statute and not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check up on our own exercises power is our own sense of self restraint. For the removal of unwise laws from the statute book, it appears that it is not up to the courts but the process of democratic government.”

²³ 297 U.S. 56 (1936)

Hence under self imposed restraints, the Supreme court will not exercise the power of Judicial review if there is no case involving a real conflict of rights and interest between the parties.

“It is seen that the Judiciary has upheld the doctrine of separation regarding itself as in all cases where the Courts have refused to allow the legislature to deprive them of the judicial powers, generally called by the Court’s inherent powers , though ofcourse only delegated powers, the court has upheld the doctrine of separation of powers, and in all those cases where under the doctrine of Supremacy of Supreme Court, the Supreme Court has determined the question of Jurisdiction and undertaken to set aside legislations and hence it has more than upheld the doctrine.”²⁴

Since it may be concluded that the doctrine of separation of powers with checks and balances is implied under the Constitution of the United States but it is expressly upheld so far for the functions of the three branches which are concerned here. Under the federal system of government in United States, three Wings of government or not working in quite separation from each other but in cooperation and in adjustment with each other. Function of the Congress is making law while the executive duties are to execute the laws faithfully.

The Judiciary is to uphold the constitution and to guard against the possible usurpation of power by the other branches which the constitution has not given to them. Although the three Wings are working in checks upon each other keeping balance within, yet it is not treated as an infringement of the principal of the doctrine of separation of powers. Separation of functions of the government into three is adapted by many States but to maintain separation of powers is the unique feature of United States.

SEPRATION OF POWER IN THE CONSTITUTION OF INDIA:

Federal Constitution provides for two types of government one for the centre and other for state. Then again, it provides for distribution of functions among three organs of government i.e. legislative, executive and judiciary. India has adopted Parliamentary form of Government like Britain and there is therefore, a nominal executive head who

²⁴ Hart, H.M., 1954. The Relations Between State and Federal Law. *Columbia Law Review*, 54(4), pp.489-542.

acts exclusively on the advice of Council of Ministers. The head of the state is designated as President.

Constitution of India vests the executive powers of the union in the present article 53(1)²⁵ and similar is the provision for the state under Article 154. In India, the real executive is the Council of Ministers headed by Prime Minister. The members of the cabinet headed by Prime Minister remain in office so long as the policy of government is approved by the legislative. Hence, executive is a part of the Legislature. The working of the doctrine of separation in such circumstances will be further elucidated.

LEGISLATURE UNDER THE CONSTITUTION OF INDIA

There is a provision in the constitution of India that there shall be a Parliament for the Unions which shall consist of the President, two houses to be known respectively as the Council of states and the House of People²⁶. The president is, therefore, the essential part of the Parliament. But, it is important to note here that the Indian legislature is not a Sovereign body like the British Parliament. In Britain there is no limitation upon the law making power of parliament, but Indian Constitution provides that the power of Parliament to make laws is subjected to the provision of the Constitution, such as fundamental rights and Article 303.

Another important function of the house of people in India is the sanctioning of the expenditure, living the taxes and raising loans and advances etc. Money bill is to originate in the lower house and when it is passed it has to be sent to the Council of states for the recommendation who has to return it within 14 days. But, it is important to note here that in financial matters House of people is stronger than the Council of states.

Legislature has also been given electoral functions for the elections of the President and Vice President. The house also maintains a constant control by demanding information about the actions of the Government and also by criticizing the same, if needed. Also the house seeks information from the executive in oral or written about the questions affecting the public in general. Parliament has certain other powers besides law making and the control of the executive. It has the power of the removal of judges of the Supreme court and High Court, Chief Election Commissioner, Comptroller and Auditor General. Provided, address for such removal is required to be passed by two third majority of each house. It also has been

²⁵V.N. Shukla's Constitution of India, 219 (M.P. Singh, 12th ed., 2013)

²⁶ Article 79, Constitution of India

empowered with contempt which is although a judicial power but has been conferred upon the legislature by the constitution.

It is also important to focus upon the delegation power of the legislature which is essential to cover gaps under the pressure of present day works. But the same should not obliterate the Constitutional trust regarding the discharge of duties which should not be delegated. In re-article 143²⁷ of Constitution of India, Justice Fazal Ali observed that

“In my judgement, all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duties which it has been entrusted. This rule has been recognised both America and in England”

The power to carry out the policy and programme, remove doubts arising in the process of implementation of that program can also be delegated. What cannot be delegated is the legislative discretion, the prerogative to formulate the legislative policy, so to say, essential legislative function.

EXECUTIVE UNDER THE CONSTITUTION OF INDIA:

The president is the head of the executive and has to act on the advice of the Council of Ministers who are collectively responsible to the parliament²⁸. The executive power of the union is vested in the President and shall we exercise by him directly or through officers subordinates to him in accordance with the Constitution²⁹. One of the most essential features of the executive is its responsibility to the Legislature which is borrowed from British parliamentary system.

The constitution further provides for the Council of Ministers with the Prime minister as the head to advise the President in the exercise of his functions and therefore, the executive powers vested in him is to be exercised through the Council of Ministers.³⁰ All important appointments are made by the president and include the Prime Minister, advocate general, comptroller, Chief Auditor General, governor and judges. President is a part of the Legislature³¹ and has also the right to address and send messages to the house, the right of special address at the commencement of every sessio

²⁷ AIR 1955 SC 332

²⁸ Article 53, Constitution of India

²⁹ Article 73, Constitution of India

³⁰ Article 74, Constitution of India

³¹ Article 79, Constitution of India

The Legislature cannot meet, dissolves itself without the initiative of the executive. Also, he has the power to issue Ordinance with the same force and effect as an act of parliament³².

President also has the judicial powers grant pardons, reprieves, suspend, remit or commute sentences of a person convicted by the court and in all cases where death sentence have been passed³³.

Accordingly, the Indian Constitution has not recognised the separation of powers in its absolute sense but the function of the government has been distributed among the organs and differentiated with sufficient precision that one organ does not assume to itself the function of the other. The executive indeed can exercise the power of departmental or subordinate legislation when such powers delegated to it by the Legislature. It can also, when so empowered, exercise judicial functions in a limited way³⁴. Indian Constitution does not provide for the separation of powers even with checks and balances as adopted by the United States.

The two organs of the Indian government Parliament and executive cannot precisely be separated because the executive functions compromise both the determination of the governmental policies as well as its execution. The relation of the legislative and executive are so interrelated that the separation of powers is quite impossible entirely.

Although the function of the Parliament is to make laws according to the constitution and the executive to execute them with the aid and advice of Council of Ministers collectively responsible to the Parliament, there is no encroachment of powers of one another in the field of legislations or executive.

JUDICIAL ORGAN UNDER THE CONSTITUTION OF INDIA:

Constitution of India provides that, There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven(now 30) other Judges³⁵. The constitution secures by specific provisions the independence and impartiality of the judiciary. The importance of independent judiciary is further emphasised when it was observed in the case of Chander Mohan V. State of U.P.³⁶ by C.J. Subba Rao that “ Indian constitution, though it does not accept strict doctrine of separation of powers provide for an independent judiciary in the states.”

³² Article 123, Constitution of India

³³ Article 72, Constitution of India

³⁴ Ram Javaya v. State of Punjab, AIR 1955 SC 549

³⁵ Article 124, Constitution of India

³⁶ 1976 AIR (SC) 1482

Every judge of the supreme court is appointed by the president whose discretion in the matter of appointment is unfettered. He has to make appointment after consultation with such of the judges of the Supreme Court and of the high court in the states as the President may be deemed necessary. In the case appointment of a judge other than chief justice, the chief justice of the India shall always be consulted. Thus, the appointment of the judges is not at the absolute discretion of the executive.

Judge of the supreme court hold office until he attains the age of 65 years and he may be removed from his office only by an order of the president passed after an address by each house of parliament supported by which authority of not less than two third of the members of present voters. Hence it can be discerned that security of the tenure has been granted to every judge. Also, judges once appointed, their privileges allowances and other rights cannot be altered to their disadvantages. Similarly the administrative expenses of the Supreme Court including salaries, allowances and pensions payable to them and its officers are charged on the consolidated fund of India³⁷. Similar are the provisions for the High Court³⁸.

³⁹The Supreme Court has original jurisdiction in any dispute between Government of India and one or more states or between the Government of India and any state or State on one side and one or more States or the other or between two or more States. Supreme Court also has appellate jurisdiction⁴⁰ as well as advisory jurisdiction⁴¹.

All authorities Civil and judicial in the territory of India shall act in accordance of Supreme Court. The law declared by it shall be binding on all courts and they are bound to follow it. It has been observed by the Supreme Court in *Sajjan Singh v. State of Rajasthan*⁴² that

“It is true that the Constitution does not place any restriction on our power to review early decision or even to depart from them and there can be no doubt in matters relating to the decision of the constitutional point, which have a significant impact on the fundamental rights of the citizen, we would be prepared to reviewer earlier decisions in the interest of public good.”

³⁷ Article 125, Constitution of India

³⁸ Article 146, Constitution of India

³⁹ Article 131, Constitution of India

⁴⁰ Article 133, Article 136, Constitution of India

⁴¹ Article 143, Constitution of India

⁴² 1965 AIR 845

In this way the independence of the Judiciary has been maintained and it has been kept beyond the interference and influence of the legislative and executive. Even the constitution



has secured the independence of subordinate Judiciary and maintained the integrated system of Courts throughout the country. Apart from these provisions, the constitution has various other provisions in regard to subordinate Judiciary. Appointment of persons, the posting and promotion of district judges in a state shall be made by the Governor in consultation with the high court exercising its jurisdiction in relation to such matters⁴³. Hence, it can be concluded that the rule making power of the executive and the law making power of the legislative cannot override the judiciary.

Besides, the Indian Constitution contains Express provisions for Judicial review of legislation as to its conformity with constitution. Legislative or executive acts which go beyond competency of the authorities concerned which invade fundamental rights are liable to be struck down in appropriate proceedings. In India, the constitution is the supreme law of the land and therefore all the organs of the government derive their powers from its provisions. All of them must function, within the framework of the constitution. They should not do anything which is inconsistent with the provisions of the constitution. They should remain within the framework of the Constitution. Therefore for this purpose there is a specific provision for judicial review of their acts or omission. This task has been given to the independent judiciary.

In America this power judicial review was implied but in India the said power is expressly conferred by the constitution itself. It has been provided that the state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall to the extent of this contravention be void. Hence, it shall be concluded that in a federal polity it is necessary consequence to have an impartial and independent Judiciary who is to act as an arbitrator in a dispute arising between the centre and the units.

It is, therefore, imperative on the supreme court that any action of the legislative or the executive which is in violation of the Fundamental Rights in part III of the Constitution are inconsistent with any provision of it, shall be declared void to that extent. It has been further focused upon in the case of A.K. Gopalan v. State⁴⁴ that

“What the constitution, therefore, attends to do with declaring the right of the people is to Strike a balance between individual liberty and social control”

But it is important to note that, Constitution does not recognise the absolute supremacy of the Supreme Court over the legislative authority in all respects.

⁴³Article 233, Constitution of India

⁴⁴ AIR1950 SC 27

CONCLUSION

“A constitution must be necessity be the vehicle of the life of a nation, it is not a document for fastidious dialectics, but the means for ordering the life of the people”

The above observation was made in the case of *Keshavananda Bharti v. State of Kerela*⁴⁵. Doctrine of separation of powers is also not an end in itself although it may be a Constitutional necessity. The Constitution has created three organs of the Government to work harmoniously with each other for the welfare of the people. This doctrine has a federal genesis rather than a genesis in unitary system of government. But, its application in an absolute sense is not practicable solution. The main objective of the same is to provide political protection against the tyrannical application or abuse of power.

Under the Indian constitution, the relation among the three organs is not based on an absolute separation of powers but on mutual respect. Judicial decisions cannot be overridden by the legislative and it cannot assume traditional functions. The legislature can amend or repeal a law affected by a verdict. the executive must respect the decision of judiciary and should execute them faithfully. Constitution of India has recognised the doctrine of separation in a sense where each organ could act with cooperation and mutual respect.

In USA the doctrine found its place and accordingly the constitution was framed as three powers were separately vested legislative, executive and judiciary under the specific provisions of the constitution. In Britain there is no separation of power owing to the existence of parliamentary system of government except that there is an independent judiciary exercising its judicial functions upholding the liberty of the people.

In the light of the above observation, it may be concluded that the state has to strengthen the democratic institutions with application of the doctrine of separation of powers in a broader sense of the term and not to stand by the doctrine of a strict sense. India's aim should be to improve the lot of the people in a democratic way and without the powers being centralised in any one organ of government.

⁴⁵ (1973) 4 SCC 225