

An Analytical Reconsideration of the Separation of Power: A System of Check and Balance in India

Ayushi Aggarwal^{1,*}

Abstract

The Indian political system envisages the concept of the separation of powers and the system of checks and balances. It is rooted in the Constitution of India, which was adopted in 1950 and draws inspiration from various sources, including the Constitution of the United States and the ideas of political philosophers like Montesquieu. An analytical reconsideration of these concepts is necessary to comprehend how these ideas function in the Indian context. Despite the constitutional framework, there have been instances of concentration of power and a lack of effective checks and balances, especially during periods of political instability or when one political party dominates the political landscape. The role of money in politics and the influence of special interest groups can also undermine the system of checks and balances. While the Indian Constitution provides a robust framework for these principles, their effectiveness in practice depends on the commitment of political actors, the judiciary, and civil society to uphold and protect them. This paper delves into the principle of separation of powers and how it relates to the principle of checks and balances from a jurisprudential lens. The paper briefly discusses the historical background, origin and how this principle has been manifested in India, the nature and degree of checks each branch exercises over the others, and broadly, the Indian legislative schemes on separation of powers. It views the separation of power from an international perspective and the embodiment of the doctrine in the United States of America and the United Kingdom.

Keywords: Constitution of India, political philosophers, Montesquieu, political landscape, political actors, the judiciary, and civil society

INTRODUCTION

The democratic framework upholds the robust notion that divergence, decentralisation, and devolution are paramount. Whether by legitimate or illegitimate means, the consolidation of all legislative, executive, and judicial powers in one set of hands may fairly and justly fall within the dimensionality of tyranny. This very occurrence runs antithetical to the genesis and tenets of democracy in a sovereign nation like India [1]. The doctrine of ‘separation of powers’, which was methodically articulated by Montesquieu, transgresses the authority of one organ of the State in another organ’s jurisdiction [2].

*Author for Correspondence

Ayushi Aggarwal
E-mail: ayushi.aggarwal@iilm.edu

¹Assistant Professor, IILM Law School, IILM University, Gurugram, Haryana, India

Received Date: October 23, 2023

Accepted Date: October 30, 2023

Published Date: October 31, 2023

Citation: Ayushi Aggarwal. An Analytical Reconsideration of the Separation of Power: A System of Check and Balance in India. *Journal of Constitutional Law and Jurisprudence*. 2023; 6(2): 135–145p.

One of the cornerstones of Indian Constitutional democracy has been the idea of the separation of powers. From the French Revolution to the United States Constitution [3], the *raison d’être* (“reason for being”) for the aforementioned principle is grounded in the tendency of humans to abuse power; founded on the cardinal canon that each instrument of government must be mutually constrained within its own realm in order to preserve and safeguard the liberty of the people. Therefore, the political power of the sovereign

cannot be concentrated within one state institution. The intent of the welfare state to care for its people from cradle to grave germinated the emergence of administrative machinery [4]. These agencies have acquired a vast array of discretionary powers, including the legislative, executive, and judicial.

The idea of separation of powers was initially put forth by theorists such as John Locke and subsequently concretised by Baron Montesquieu. Montesquieu's conception of separation of powers was that any individual who values the tenets of political freedom cannot dispute that the monopoly of power by an institution of the state, regardless of how it has been defined under the Constitution shall lead to tyranny [5]. He went on to theorise that separation of powers *vis-à-vis* governance is imperative wherein every wing of the government checks and balances the power of other branches.

This paper delves into the principle of separation of powers and how it relates to the principle of checks and balances from a jurisprudential lens. The paper briefly discusses the historical background, origin and how this principle has been manifested in India, the nature and degree of checks each branch exercises over the others, and broadly, the Indian legislative schemes on separation of powers. It views separation of powers from an international perspective and the embodiment of the doctrine in the United States of America and the United Kingdom.

HISTORICAL BACKGROUND TO SEPARATION OF POWER

Philosophical Approach

The philosophical concept of separation of powers, also known as *trias politica*, finds its roots in Ancient Greece and was extensively employed by the Roman Republic. Up until the 18th century, the hereditary monarchy was the predominant form of administration in Europe following the fall of the Roman Empire. The emergence of Parliament in England in the 17th century was the sole exception to this rule. It required centuries of political and intellectual growth to develop a model that separated the state into estates or branches, each having its own distinct roles to play. In his book entitled *Politics* [6], Greek Philosopher Aristotle was the first to describe the three agencies of government – the General Assembly, the Public Officials, and the Judiciary. He wrote, “*there are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it first, the deliberative, which discusses everything of common importance; second, the official; and third the judicial element* [7].”

The Roman government during the Republic was multifaceted and divided into three categories – the *curtus honorum*, the senate and the citizen assemblies. The highest-ranking Roman magistrates were known as consuls, and among their responsibilities were presiding over the senate and commanding forces in combat. Having begun as a council of advisors to Rome's monarchs, the senate continued to operate even after the abolition of the monarchy. Their responsibilities expanded to counselling the consuls, drafting legislation, managing the public treasury, and overseeing foreign policy. The citizen assemblies were the most democratic institutions of the Roman Republic as their main duties involved enacting laws, electing officeholders, and approving significant governmental decisions. As the consuls, senate, and assembly, respectively, merged aspects of a monarchy, an aristocracy, and a democracy into a single political system; and each enunciated the notion of checks and balances – Greek historian Polybius was left enamoured with the Roman Republic [8].

Locke & Montesquieu's Tripartite Approach

Although a German cardinal by the name of *Nikolaus von Kues* (“Nicholas of Cusa”) proposed the division of the legislative, executive, and judicial branches of government centuries prior [9], *Charles-Louis de Secondat*, Baron Montesquieu is the name most associated with the principle of separation of powers, owing to his impact on the evolution of institutions which far outweighed that of any of the earlier writers. He borrowed heavily from John Locke and other contemporary English writers for his work *De L' Esprit des Lois* (“The Spirit of Laws”), which was published in 1748 [10].

English philosopher John Locke distinguished between, what he called, (1) *Discontinuous legislative power* or the general rule-making power called into action from time to time; (2) *Continuous executive power* or the powers which we now call executive and judicial; and (3) *Federative power* or the power of conducting foreign affairs [11].

Montesquieu's dictum of separation of powers conceptualises a rather rigid separation between the three branches of governance. This essentially means that each of the three branches of the government has well-defined functions and there can be no overlap in their functioning. These institutions act as a check on the other without encroaching upon their roles, thereby guaranteeing complete independence of all branches. Montesquieu emphasised the general legislative power and two forms of executive power – "*federative power*", as suggested by John Locke and the executive and judicial power, both encompassed under "*civil law*". He attributed this concept to the British constitutional system, characterising it as a division of powers between the parliament, the courts, and the monarch.

The early eighteenth-century amendments in British Constitutional history provided a foundational framework for the theories of Locke and Montesquieu. After a protracted struggle between Parliament and the King, the emergence of Parliament in England in 1688 gained control over the legislative branch and paved the way for the enactment of the Bill of Rights. As a result, the King acknowledged Parliament's legislative and taxing authority as well as the courts' judicial authority. The King at the time held executive authority, Parliament exercised legislative authority, and the courts exercised judicial authority; however, England subsequently abandoned this fundamental division of powers and switched to a parliamentary system of government [11]. '*There can be no liberty,*' Montesquieu asserted, "*when the legislative and executive powers are united in the same person or in the same body of magistrates.*" This occurs given that there may be concerns that the same senate ruler may enact and carry out despotic laws. In addition, "*there is no liberty, if the power of judging be not separated from the legislative and executive powers* [12]."

In accordance with Montesquieu's doctrine, which places a substantial value on moderation, three fundamental powers – the power to enact laws, the power to put them into effect and the power to enforce them are necessary for a government to function effectively. Thus, the ways to categorise governmental authorities according to their function are threefold – (1) *Legislative*, which includes enacting laws; (2) *Executive*, which includes putting laws into practice; (3) *Judiciary*, which includes enforcing laws through the legal system.

Perspective Developments

Legislative and executive branches were not distinct while the judiciary was separated in the Westminster model of democracy, which allowed for a looser separation based on the idea of Parliamentary primacy in administration. Since the legislative is under the influence of the executive, it always acceded to the executive's demands for power. If the court were independent in such a case, it would act as a check and protect the populace from tyranny. This paradigm was used in England in the past, allowing the English Parliament to change legislation at will. No law could be contested on the grounds that it infringed on the authority of another branch of the government [13].

According to Brandeis J's scientific explanation, the objective of separation of powers is to prevent the exercise of arbitrary authority rather than to increase administrative effectiveness. Its objective is to safeguard the populace from authoritarianism by using inevitable friction brought on by the division of power rather than to prevent conflict between the various state agencies by keeping them isolated [14]. The practical significance is that until all agencies of government work together, no substantial infringement of life, liberty, or dignity of any person may occur. Therefore, the core objective of the idea of separation of powers is to pit government against itself by establishing several centres of authority that might work in concert to prevent one another from threatening tyranny.

Across its course of development, the fundamental premise of the doctrine of separation of powers remains the same. *Firstly, the Exclusivity principle suggests* structural divisions of the three organs; second, *the Functional principle forbids* consolidation and usurpation but permits interorgan interaction; *third, the Check and balance principle stipulates* that each branch of the state may check its counterparts to keep them within the parameters of the constitution; and *last, Mutuality principle* aiming at creating concord not discord, cooperation not confrontation, engagement not estrangement amongst different organs to build a society with a constitutional image – one that is free, egalitarian, inclusive, and governed by the law [15].

The doctrine, in the negative sense, puts limits on the exercise of power by each organ and in the positive sense, not only draws limits but also specifies the minimal scope of authority that can be exercised within those limits for a court to enforce constitutional values [16]. Although no country practises the idea of the separation of powers in its original institutional form, its logic of polarity is still relevant because what threatens the nation's liberty is not the blended power but rather unchecked powers. In theory, it refers to three different ways to describe how governmental powers are structurally categorised:

- i. an individual cannot be a member of more than one of the three organs of government;
- ii. non-interference by an organ of the government into the operations of any other organ of government; and
- iii. exclusivity in the responsibilities allocated to any other organ of the government.

While the history of the division of powers may be traced back to ancient civilizations, intellectuals like Montesquieu expanded and formalised the idea throughout the Age of Enlightenment. His theories had a significant impact on the development of contemporary democratic systems, notably the United States Constitution. Montesquieu's views served as an essential guide for the founding fathers of the United States, namely James Madison, as they created the framework for their new form of government. As a system of checks and balances that guards against tyranny and promotes the concepts of liberty, accountability, and the preservation of individual rights, the separation of powers continues to be the cornerstone of democratic administration in contemporary times. Thus, although the separation of powers underpins democratic governance, each nation's personalised and unique constitutional arrangements and political systems determine the organisational structure and operation of the different facets of government.

INDIAN LEGISLATIVE SCHEMES ON SEPARATION OF POWER

Constitutional Provisions

The Supreme Court of India has held that “*our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another* [17].”

With the three wings being well-defined at both the Union and State levels, India's constitutional framework nonetheless offers a separation model that is far more flexible. The separation of powers doctrine, as an emanation of the rule of law values, has been a discrete area for judicial pronouncements in India. As stated by Upendra Baxi, the constitutional framework prohibits any rigid separation of powers, with the exception of the guiding principles included in Article 50, which mandates separation between the executive and the judiciary. The Constitution only explicitly defines the executive's powers and puts constraints on the Indian Parliament [18]. India consequently has a system of constitutional supremacy that serves as a check on the authority of the legislature.

Overlapping Functions of Organs

The bedrock of any democracy is a free, independent, and impartial judiciary. The primary goal of Article 50, according to the Law Commission of India, is “*to ensure the independent functioning of the Judiciary freed of all suspicion of executive influence or control, direct or indirect* [19].” Furthermore, this guarantees that officers will focus solely on their judicial obligations. In India, however, there is

not only a functional overlap but also a personnel overlap. The Supreme Court has the ability to invalidate laws and executive actions that infringe or violate any provision of the Constitution of India. The Court's oversight also extends to Parliament's ability to amend the Constitution. Any amendment that alters the basic structure of the Constitution may be declared void by the court [20].

The High Courts' perform an administrative role when they utilise their authority to oversee the subordinate judiciary. Another administrative function under Article 228 is the power to transfer a matter from one court to another [21]. The President of India, who holds the executive authority of India, is empowered to make ordinances and wield judicial authority as mentioned under Articles 103(7) and 217(3). With regard to privilege breaches, the impeachment of the President, and the removal of Judges, the Council of Ministers – a body that represents the legislature, has judicial authority. The executive may also have more control over the functioning of the judiciary through the appointment of judges and the Chief Justice. It follows that neither the powers of governmental authorities nor any organ of the government can be maintained in watertight compartments.

Principle of Checks and Balances vis-à-vis Indian Political Institutions

The Legislature

The President, the Lok Sabha, and the Rajya Sabha constitute India's Parliament, which is the body in charge of enacting laws and serving as the representative of the people. The legislature, key to the process of governing and formulating policies, has the authority to enact, amend, and repeal laws. The Supreme Court ruled in *Re Delhi Laws Act*, 1912 that the Indian Constitution did not ascribe to a rigid form of separation of powers [22]. Herein, the Court debated whether the State Legislature must exercise complete legislative authority. The Court held that any essential or core legislative function of the legislature, such as formulation of legislative policy and the enactment of the same as operative rules of law, cannot be abdicated by them. However, once this broad legislative policy has been formulated, the executive can exercise its power of delegated legislation for administrative expedience [23].

The legislature also has certain judicial powers under the Constitution, such as those relating to impeachment of judges under Articles 124(5) and 217, and the power to punish for contempt of the House under Article 194 [24]. Moreover, the tenth schedule empowers the Speakers or Chairmen to act as a tribunal in discharge of their functions. The Supreme Court has held that a judgement of the court cannot directly be nullified by the enactment of a law [25]. Additionally, the legislature may pass similar laws after removing the infirmity owing to which it was struck down by the court, and this would not encroach upon the power of the judiciary. However, the legislature cannot pass a law to overturn a judicial decision involving two parties, unless in a judicial manner with express authorisation to do so. Anything to the contrary would be a legislative judgement, and cannot be done in the garb of legislative function [26].

The Constitution was amended to incorporate Article 31B in order to curtail the power of judicial review [27]. Any statute listed in the ninth schedule is exempt from legal challenge on the grounds that it violates Part III, according to the Article [28]. The Parliament and State legislatures have also been given the authority to establish tribunals to adjudicate disputes on certain matters, excluding the court's jurisdiction in some cases [29]. In addition, subject to a parliamentary majority, the Parliament has the authority to impeach judges.

The Executive

As the head of the executive branch, the President of India carries out his or her duties in accordance with the Constitution. The Prime Minister leads the Council of Ministers, who assists the President in carrying out his executive duties. The executive branch is entrusted with the responsibility of implementing the laws, administering governmental policies and maintaining law and order in the society. Although the Constitution grants executive powers to the President, Prime Minister, Cabinet Ministers and other Governors [30], they have certain legislative powers as well. Under Article 73, the

executive at the Centre has the power to make executive orders, and this power is coextensive with the Parliament. Under Article 162, the Governor has similar authority that extends to the State legislature.

Further, the executive is additionally delegated certain legislative powers. The Constitution also grants other legislative powers to the President, such as promulgation of an ordinance under Article 123 which has the “*same force and effect as an Act of Parliament* [31].” Similarly, the power is also enjoyed by the Governor of the State under Article 213 with respect to matters enumerated in List II. However, the most controversial form of executive powers is emergency provisions of the Constitution stipulated under Article 356. If the Governor believes the State can no longer operate in conformity with the Constitutional provisions, he or she must report to the President under this article, which allows for President’s Rule in the State. In such a case, the executive assumes all legislative activities of the State [32].

The executive also has certain judicial powers including the ability to decide whether a member of Parliament is to be disqualified or not [33]. In the event of a presidential pardon or an alteration in the punishment for a convicted individual, they also have the right to advise the President or Governor, which they are bound to accept [34]. According to Articles 323A and 323B, the executive also appoints judges for administrative tribunals who perform judicial functions. Beyond that, the Prevention of Corruption Act of 1947 allows the executive to prosecute judges [35].

The Judiciary

The Indian judiciary, led by the Supreme Court, is responsible for interpreting laws and adjudicating matters. By serving as an independent and unbiased adjudicator in settling conflicts and defending individual rights, the judiciary upholds the separation of powers. Judicial review, a power granted to the judiciary, permits it to determine the legality of legislation and governmental actions.

The Indian Constitution provides wide powers of judicial review to the Supreme Court and High Courts to check on the powers exercised by the other two branches and to ensure that their actions are not violative of the Constitution [36]. According to Part III of the Constitution, no law can violate or infringe the fundamental rights, and any law that is inconsistent with this part shall be void to the extent of the such inconsistency. The extent of control that the executive and legislature have over the Indian judiciary is significantly less compared to other countries [37].

Judiciary acts as the only effective constitutional balance to the growing dominance of the executive with parliamentary majorities. The judiciary has consistently asserted its independence throughout the years and struck down any executive or legislative encroachment within its domain [38]. In the landmark case of *Kesavananda Bharati*, the Supreme Court held that the legislature cannot amend the “*basic structure*” of the Constitution in exercise of its power to amend the same [39]. Furthermore, it has also been held that any law under the Ninth Schedule is still subject to judicial review under the basic structure test, thereby limiting their unbridled legislative power [40].

Another concept that has evolved is the role of ‘*due process of law*’ concerning Articles 14 and 21. In *Maneka Gandhi*, it was held that any procedural law depriving an individual of their liberty had to be “*fair, just and reasonable, not fanciful, oppressive or arbitrary* [41].” This enables the judiciary to keep a check on legislative and executive power regarding the deprivation of individual liberty. Furthermore, the Supreme Court has the power to issue binding directives under Article 142 until an appropriate law is enacted. Such directives have been passed by the Court in several cases such as the *Vishaka* case [42] which led to the formulation of the Protection of Women from Sexual Harassment Act, 2013, and its directives on acid attacks in *Laxmi v. Union of India* [43].

It is worth noting that, while there is some overlap, attempts are taken to ensure independence and separation of powers. The judiciary serves as the Constitution’s guardian, ensuring that the legislative

and executive branches' activities are consistent with constitutional principles and defend the rights of its citizens. The Indian Constitution and judicial interpretations try to achieve a balance between the separation of powers and the need for cooperation and coordination among the branches to promote successful governance and the protection of the rights of citizens.

SEPARATION OF POWERS ACROSS THE GLOBE

The principle of separation of powers is inextricably linked to the development of democracy. It is highly regarded and recognised by jurists and politicians in both England and America. A society free from fear of retaliation is necessary for democracy so that each and every citizen can breathe, express themselves, and follow their interests. Legislative impeachment of executive officers and judges, executive veto power over legislation, and executive action are the essential components of any functional constitutional democracy. It is said that the doctrine should be interpreted to require a system of checks and balances among the three branches of government while opposing the concentration of governmental powers in any one of the three departments, rather than applying it to the operational machinery and procedures of the government.

Separation of Powers in The Americas

The theory of separation of powers was gospel to all fascinated with the rulers in England combining all powers and violating their life, liberty, and dignity. As a result, the drafters of the United States Constitution made this idea a fundamental tenet of the document. James Madison said, "*Accumulation of power, legislative, executive and judicial, in the same hand, whether one, a few or many, whether hereditary, self-appointed or elected may be justly pronounced as the definition of tyranny* [44]." Jetterson also emphasised, "*It would be no alleviation that these powers will be exercised by plurality of hands and not by a single person* [45]."

The Presidential system of government is founded on the building block of separation of powers between the executive and the legislature. The President is both the state's head and its main executive. He oversees the policies and the acts of governmental departments by appointing and removing other executive authorities. The Secretaries of State, or those in charge of the several departments are accountable to him and acts more like his personal advisors. The President has the last say over any veto and is under no duty to abide by the advice of a Secretary. Unlike India, the President and other members of the government are not included in the Congress and the legislative and the executive are kept apart from each other [46].

The American Constitution has clearly demarcated the legislative, executive and judicial power to the Congress (Article I, Section I), the President (Article II, Section I) and the Supreme Court and subordinate courts (Article III, Section I) respectively. The US Supreme Court has not been granted the authority to rule on political matters because of the idea of separation of powers, which prohibits the court from interfering with the executive branch of government's use of power. To make sure that no organ has more authority than another, a system of checks and balances is in place. The fact that the court has usurped the authority of judicial review is a peculiar element of American constitutional history. However, due to the evolution of American administrative law and the rise of government machinery, full adherence to this rigorous idea is impractical. As a result, the theory of separation of powers has been loosened in some circumstances [47].

The President may veto a bill passed by Congress, in which case the President is said to be acting in the capacity of a legislator. However, the legislative branch i.e., Congress has the authority to remove the president from office in order to monitor the executive branch. It also has control over the judiciary, including the nomination and impeachment of judges. In a similar vein, the judiciary uses its power of judicial review to exert control over the legislative. The President's treaties are not effective until authorised by the Senate; thus, the Senate may be considered exercising executive duties. The Congress investigates executive function on a regular basis through its numerous committees, and it also has the

authority to tax and approve funds for governmental activities. The Supreme Court can rule that acts of Congress are unconstitutional. In contrast, the Senate gives its consent to the President in the matters of appointment of the judges to the Supreme Court. The principle of checks and balances justifies the exercise of a function of one type by an organ of the other type. It means that the working of one organ is regulated to some extent by the functioning of the other organ, so that no organ may run amok with its powers and misuse them [48].

The separation theory has resulted in certain distinguishing aspects in American administrative law. The Courts' recognition that the executive might be granted legislative authority was a significant violation of the concept, leading to the adoption of the delegated legislation system. However, in order to effectively maintain the separation doctrine work, the courts have decided that Congress cannot give an uncontrolled and unrestricted legislative power; that Congress cannot give up its role as primary legislative authority, and the Congress must consequently establish the guidelines that the delegatee must adhere to when creating regulations. The United States Constitution applies the notion of separation of powers to some extent, thereby giving the Court a unique function [49].

Separation of Powers in The United Kingdom

Separation of Power is frequently a cornerstone constitutional requirement in presidential systems like the US and others. But in the UK and other common law jurisdictions, the idea of separation has gotten far less attention. The main offices and organisations have developed to provide a balance between Parliament and the Crown, or more recently, the Government. The structure is more like a 'fusion of powers', as defined by Walter Bagehot in the English Constitution than it is a formal division of the three branches [50].

With the Constitutional Reform Act 2005, the previous government made indications that it was moving towards a more explicit separation of powers in the judiciary. The establishment of an independent Supreme Court and the abolition of the multifaceted position of Lord Chancellor unpicked certain components of the power fusion. The Human Rights Act, 1998, which mandates that Courts take into account both the rulings of the Strasbourg-based European Court of Human Rights and the European Convention on Human Rights, has further complicated the matters. The use of parliamentary privilege, the anticipated reduction in the number of members of Parliament, and the participation of members in super injunctions have raised concerns recently over the interactions between state institutions. The Crown and the Government, which is composed of the Prime Minister and Cabinet ministers, make up the executive branch in the United Kingdom. The executive creates and carries out the policy. The House of Commons, the House of Lords, and the Crown comprise Parliament. Judges in courts of law, judicial officers in tribunals, and lay magistrates staffing magistrates' courts comprise the judiciary. Senior judicial appointments are made by the Crown [51].

Within the United Kingdom and other common law jurisdictions, the legislative and executive branches are closely intertwined. Members of Parliament who sit in the House of Commons include the Prime Minister and the great majority of those in his or her cabinet. Consequently, the executive occupies a central position inside Parliament. The integration of the administration and legislature in the United Kingdom is considered to bring stability and efficiency to government operations. It has been described as "*a system that intentionally promotes efficiency over abstract concerns about tyranny*" [52]. For instance, the Prime Minister typically leads the majority party in the legislature and serves as the head of the executive branch in a presidential system of government, giving the executive branch significantly more authority than the President does.

The second element of the separation of powers is the division of the legislative and judicial branches. Judges are not allowed to contest elections for the UK Parliament under the House of Commons (Disqualification) Act, 1975. In addition to creating common law, judges are supposed to interpret legislation in a way that reflects the intentions of Parliament (judge-made law). *Constitutional*

Partnership, i.e., the collaboration of the judiciary and the legislature has been recognised by the Parliament granting implicit assent to judge-made law by not meddling with it. For example, Lord Woolf has argued that “trust, not coercion, is the basis of the crown's relationship with the courts [53].”

The division of power between the executive and judicial branches is the third element of the doctrine of separation. The role of the judiciary in oversight of the executive branch is to verify that legislation that has been delegated complies with the authority granted by Parliament and that conduct by the government and other public bodies is lawful. Upon an individual's application, judicial review is a method by which the courts may question the legality of actions taken by public authorities. This necessitates judges being free of government and parliamentary control. Judges have typically exhibited self-control or “*deference*” in areas of authority that they believe they are equipped to assess. Some uses of the royal prerogative, for example, entail “*high policy*” issues such as ministerial appointments, financial resource allocation, national security, treaty signing, and defence matters, and Courts would not normally intervene in these subjects.

It cannot be overstated that the British Constitution, though largely unwritten, is firmly based on the separation of powers- Parliament makes the laws, and the judiciary interprets them. This is especially true at a time when an increasing number of cases involve the application of legislation to give effect to policies that have sparked bitter public and parliamentary debate.

OBSERVATIONS AND SUGGESTIONS

The work clearly shows the flexibility in the concept of separation of powers as practised in India and internationally. Each branch of the government also assumes some aspects of the power of other branches in its functioning. However, none of them can encroach into the core functioning of the others. Although this separation has had some friction and blurred boundaries, it leads to greater functional efficiency since the branches of governance are not bound to a rigid separation.

Through this research and the trends observed, the author believes that without separation of powers, there would be a concentration of power in a single institution. Not only is this functionally unviable [54], but would also lead to a scenario where this unbridled power is exercised in a tyrannical manner. There have been several historical instances of the same, such as in the case of the former Soviet Union, Fascist Italy, Communist China, Nazi Germany, and North Korea [55]. Therefore, separation of powers is necessary to prevent a state of tyranny. However, it is *not* a sufficient condition to ensure checks and balances across the three branches of governance.

Several “*fourth*” branch institutions have emerged in modern democracies that also act as a check and balance on the three traditional branches and can further help in advancing the principle of separation of powers [56]. In India, some of these institutions include the Finance Commission (Article 280), Election Commission of India (Article 324), Comptroller and Auditor General, Central Bureau of Investigation, and so on. Some of these are constitutional or quasi-constitutional bodies [57]. The word “*quasi*” was used to achieve reconciliation. It was observed that the functions of the administrative agencies are partly legislative and partly judicial. Thus, it is becoming ever more apparent that the “*cult of quasi*” must evolve from a theoretical prohibition to a rule against unrestrained delegation bound by the authority of judicial review under the constraints of modern administration [58].

Given the growing powers of the executive in modern democracies, notably the trend of executive aggrandisement in India, the existence of fourth-branch institutions is essential. They are not meant to replace, but rather to supplement, the three conventional branches in their working; acting as a check on their functioning and serving a role that the other three branches cannot entirely fulfil. Within the fourth branch, there may be multiple speciality organisations that deal with different areas and can assist the other three wings in governance and responsibility. To ensure that the fourth branch functions properly, a certain degree of independence must be guaranteed so that it is not undermined in carrying

out its functions by the other branches. Tarunabh Khaitan contends that this can be accomplished by passing the “*Independent Institutions Bill*” [59]. Three elements must be met, namely, (1) *Multi-partisan appointments*; (2) *Impartiality and operational independence*; and (3) *Accountability to the legislative* rather than the executive [60].

CONCLUSION

Lord Acton rightly pointed out that *Power corrupts and absolute power tends to corrupt absolutely*. When a single authority holds all the power, it leads to monarchy in the system. Similarly, Professor Wade claims that Montesquieu’s objection was to accumulation and monopoly rather than interaction. The term “*separation*” was never used by Montesquieu himself. Therefore, rather than being founded on impenetrable walls and unchangeable borders, the concept of separation of powers is predicated on mutual restraint in the exercise of authority by the three organs of the state.

Through arguments and analyses presented in this paper, the doctrine of separation of powers is evaluated through a jurisprudential lens. Its historical background, structural developments, overlapping nature, improvement measures and comparative analysis in the context of India, The United States of America and The United Kingdom are sufficiently illustrated. The model of separation that India follows is different from the rigid conceptualisation of Montesquieu. Each branch of the government has been granted certain powers of the other branches to the extent that they can efficiently manage their institution while also ensuring a check on the functioning of others. Additionally, there are a lot of fourth-branch institutions that have emerged in modern democracies which complement the traditional tripartite model in exercising a check and balance on their functioning. Such institutions are necessary to contrariwise executive aggrandisement and further entrench the principle of separation of powers, leading to more checks and balances, and greater accountability of the State in its functions of governance.

In conclusion, in today’s context of liberalisation, privatisation, and globalisation, the doctrine cannot be interpreted to mean “*separation of powers*,” “*check and balance*,” or “*principle of restraint*,” but rather “*community of powers*” exercised cooperatively by various organs of the State in the best interests of the people.

REFERENCES

1. Pallavi Bajpai and Mohit Vats, *Separation of Power & Delegated Legislation: An implicit poise created by judicial detour* 6(2) International Journal of Creative Research Thoughts (IJCRT) 923 (2018).
2. Pradeep Kumar Pandey, *Doctrine of Separation of Powers in India* ResearchGate 51-65 (2022).
3. David Landau, David Bilchitz, ‘Introduction’ in *The Evolution of the Separation of Powers in the Global South and Global North* (David Landau, David Bilchitz (eds) Elgar 2018).
4. *Ibid.*
5. Justice (Retd) Ruma Pal, *Separation of Powers* in Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of The Indian Constitution* 372 (OUP 2016).
6. Aristotle, *Politics*, Vol. IV, 14.
7. John A. Fairlie, *Separation of powers* 21 Mich. L. Rev. 393 (1922).
8. Mary T. Boatwright, et al. *A Brief History of the Romans* (Oxford University Press, New York, 2nd ed., 2014).
9. B.L. Garg, *Problem of Separation of Judiciary in India* 25(2) Indian Journal of Political Science 331- 338 (1964).
10. M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, Indianapolis, 2nd ed., 1998).
11. *The Second Treatise of Civil Government*, chs. 12, 13.
12. Montesquieu, *The Spirit of Laws*, (Translated from French) Vol. I 5th ed. Edinburgh: Silverster Doig, Royal Exchange Book XI, ch. VI, 164-165.
13. George Paton, *A Textbook of Jurisprudence* 332 (Oxford University Press, 4th edn, 2004).
14. K.L. Bhatia, Review of *Administrative Law* by I. P. Massey, 38(2) *Journal of the Indian Law Institute* 253–259 (1996).
15. *Ibid.*
16. See, *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586.

17. *RS Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.
18. Upendra Baxi, *Developments in Indian Administrative Law*, A.G. Noorani (ed.), Public Law in India 136 (Vikas Publishing House Pvt. Ltd., New Delhi, 1982).
19. Law Commission of India, “14th Report on Reforms of Judicial Administration” Vol II (Ministry of Law, Government of India, 1958).
20. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
21. *Buhari Sons (P) Ltd. v. State of T.N.*, (2014) 4 CTC 113.
22. *In Re Delhi Laws Act Case*, AIR 1951 SC 332.
23. *Ibid.*
24. The Constitution of India, 1950, arts. 124(5), 217, 194.
25. *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.
26. *Ibid.*
27. The Constitution (First Amendment) Act 1951.
28. The Constitution of India, 1950, art. 31B.
29. *Id.*, arts. 53(1), 154.
30. *Ibid.*
31. The Constitution of India, 1950, art. 123(2).
32. *Id.*, art. 356(1)(b).
33. *Id.*, art. 103.
34. *Id.*, arts. 72, 161.
35. *K Veeraswami v. Union of India* (1991) 3 SCC 655.
36. The Constitution of India, 1950, arts. 32, 226.
37. *Union of India v. Raghbir Singh* (1989) 2 SCC 754.
38. *Special Reference No 1 of 1964*, AIR 1965 SC 745.
39. *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
40. *Waman Rao v. Union of India* (1981) 2 SCC 362. See also *IR Coelho v. State of Tamil Nadu* (2007) 2 SCC 1.
41. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
42. *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.
43. (2014) 4 SCC 427.
44. The Federalist Papers: No. 47, Yale Law School, available at: https://avalon.law.yale.edu/18th_century/fed47.asp
45. *Id.*, The Federalist Papers: No. 48.
46. Ettamena Venugopal, *Separation of Powers; Comparative Analysis of the Doctrine an International Perspective* 3(3) International Journal of Law Management & Humanities 1345-1354 (2020).
47. *Ibid.*
48. *Ibid.*
49. *Ibid.*
50. Richard Benwell, Oonagh Gay, *The Separation of Powers*, SN/PC/06053, The House of Commons Library. 2.
51. Richard Benwell and Oonagh Gay, *The Separation of Powers*, SN/PC/06053, available at: <https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf>
52. Ronald J Krotoszynski, ‘The separation of legislative and executive powers’ in Tom Ginsburg, Rosalind Dixon (eds) *Comparative Constitutional Law*, Cheltenham: Edward Elgar 248 (2011).
53. *M v. Home Office*, (1994) 1 AC 377
54. Udai Raj Rai, *Constitutional Law - Governance Structure* 53 (Eastern Book Company, 2nd edn., 2022).
55. Eric Schmitt, ‘The Separation of Powers Protects Our Freedom’ *Newsweek*, 21 April, 2021.
56. *People v. Landau*, 214 Cal. App 4th 1.
57. Gautam Bhatia, Tarunabh Khaitan, “The Importance of Fourth Branch Institutions to Constitutional Democracy” *Indian Constitutional Law and Philosophy* (7 April 2019)
58. Bernard Schwartz “Administrative Law: The Third Century” 29(3) *Administrative Law Review* 291-319 (1977).
59. *Supra* note 57.
60. *Ibid.*