Chapter – I

INTRODUCTION

1.1 Introduction

Parliamentary democracy was identified by our Founding Fathers to be the most suitable system of governance, as they perceived that only a democratic set up based on Parliamentary system with a federal structure would be able to solve effectively the myriad socio-economic problems that the nation faced at the time of independence and would be able to deal with our vast array of diversity on all fronts of our national existence.

One of the characteristic features of several Constitutional systems across the world is the doctrine of separation of powers, providing for the functions of the three primary organs of the State — the Executive, the Legislature and the judiciary to be carried out by separate bodies. The system envisages an Executive with governing powers; an elected Legislature with the three main functions of representing popular will, enforcing the accountability of the Government and making laws; and the judiciary, to administer civil and criminal justice both between private persons and as between private persons and the State. It also entails that none of these organs should be vested with absolute or unbridled powers, so that no organ or individual assumes powers of despotic proportions.¹

Our Constitution makers also provided in our organic law, namely, our Constitution, that all the three organs of the State, namely, the Legislature, the Judiciary and the Executive would have their distinct roles to play. Through the provisions of the Constitution, they enumerated their powers and responsibilities to be the facilitators of national weal, leaving hardly any scope for doubt or confusion in their mutual relationship.

The doctrine of separation of powers, is an integral part of the evolution of democracy itself, The doctrine, which provides for checks and balances amongst the organs of the State, is one of the most characteristic features of our Constitutional scheme.

Our great leaders who framed our Constitution were able to foresee that excessive powers, if vested with any of the three organs of State, could possibly lead

to unwarranted situations of conflict, which could compromise the quality and content of our democracy itself. Accordingly, they visualised that all organs of the State would need to co-exist harmoniously in a joint and participatory role and with mutual respect amongst them, so that they could work in a smooth and coordinated manner in the areas demarcated for them, for the larger national well being. In our Constitutional scheme, there is no exclusive primacy of any one organ nor any organ has absolute powers, which is anathema to democracy, as the former Chief Justice of India J. S. Verma has observed. As our Constitution ordains, it is the Parliament that enacts laws; the Executive implements them; and the judiciary is the independent authority interpreting them.

Our Constitution makers ensured that the rights of the people were preserved and protected effectively against any Legislative or Executive excesses. Our Constitutional set up has enabled the judiciary to set aside not only laws passed by the Parliament but also executive actions which are held to be not in consonance with the rights of the citizens under our Constitution and its several provisions. Our Constitution contemplates that the Courts will interpret and scrutinise the Constitutionality or validity of laws and executive actions but not will decide what the law should be nor matters of policy nor will usurp the functions of the executive.

It was explicitly stated in the Constituent Assembly by many leading members that the doctrine of judicial independence was not to enable the judiciary to function as a kind of a ‘super Legislature’ or a ‘super Executive.’ In this context, all should be reminded of the wise and profound observations of Pandit Jawaharlal Nehru in the Constituent Assembly.

“No Supreme Court and no judiciary can stand in judgment over the sovereign Will of Parliament representing the Will of the entire community. If we go wrong here and there, it can point it out, but in the ultimate analysis. Where the future of the community is concerned, no judiciary can come in the way ultimately the fact remains that the Legislature must be supreme and must not be interfered with by the Court of law in measures of social reforms.”

In the early years of the Republic, the Supreme Court had already recognised that the Indian Legislature had a distinctly superior position vis-a-vis the other organs of the State. The observations of Justice S. R. Das, who later adorned the office of the
Chief Justice of India with great lustre, in the famous case of *A. K. Gopalan v. State of Madras* made it very clear.2

“Although our Constitution has imposed some limitations. It has left our Parliament and the State Legislature supreme in their respective legislative fields. In the main, subject to limitations our Constitution has preferred the supremacy of the Legislature to that of the judiciary and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature and this is a basic fact which the Court must not overlook.”

Similarly, commenting on the nature of separation of powers delineated by our Constitution, one of our most eminent Judges, the Hon’ble Chief Justice B. K. Mukherjea, in the Supreme Court, in *Ram Jawaya Kapur v. State of Punjab*3, observed:

“Our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

As the supreme representative and lawmaking body, the Legislature has been accorded a pre-eminent position in our Constitutional set up. The powers to make laws, its control over the nation’s purse, the Executive being made accountable to the popular House, its role in the election and impeachment of the Head of State as well as in the removal of incumbents of high Constitutional offices, its constituent powers, and its powers during an emergency, testify to such pre-eminence. Yet, the Legislature must function within the confines as laid down by the Constitution. To quote former Chief Justice Verma,

“The sovereign will of the people finds expression through their chosen representatives in the Parliament. The real political executive is the Council of Ministers, which also controls the Lok Sabha, wherein lies the real legislative powers. Parliament exercises political and financial control over the Executive, and there are inherent checks and balances to keep every organ within the limits of Constitutional powers.

2. AIR 1950 SC 27
3. AIR 1955 SC 549
The grey areas are meant to be covered by healthy conventions developed on the basis of mutual respect keeping in view the common purpose to be said by the exercise of that powers."

By its very representative character, in a democracy, no organ other than the legislature is better placed to understand the people’s priorities. It is expected of the people’s representative bodies to voice people’s problems, their demands, their urges and aspirations, and, in the ultimate analysis, to protect and promote their fundamental democratic rights. The inalienable Constitutional right of the Legislature to scrutinise and oversee the functioning of the Executive arises from this basic premise and it has been specifically provided that the Council of Ministers in the Centre shall be responsible to the House of People, which is the directly elected body. There are similar provisions in the Constitution which provide that the State Government are responsible to the Legislative Assemblies in the State. The responsibility for identifying and defining people’s rights and for providing statutory sanction for them and for giving the general direction and momentum to the institutions for social engineering in our democracy has thus been thoughtfully bestowed by our Founding Fathers on our Parliament and our State Legislatures, which represent the people of India as a whole, or the States, respectively.

All institutions of governance in a democracy are expected and are indeed required to remain accountable to the people directly or indirectly. It is this notion of abiding accountability to the people, which holds the key to the success and sustenance of democracy. Elaborate procedure has been laid down for the Legislature to discharge its function of enforcing the accountability of the Executive to the Legislature and thereby to the elected representatives of the people and ultimately to the people themselves. The Members of the Legislature on their turn remain accountable to the people, as they have to face the electorate every five years and their tenure depends on the people’s verdict. However, in view of its insular position, members of the judiciary have to be accountable to the higher Tribunals and the learned Judges of the Apex Court to their own conscience and to the Constitution and they cannot be above it. Provision of any law, on the basis of which, a Court’s verdict is given can be altered or repealed only by the Legislature and cannot be changed or ignored by the Judges.

The framers of our Constitution took great care to provide for an independent and impartial judiciary as the interpreter of the Constitution and as the custodian of
the rights of the citizens, The role that our judiciary has played over the years in ensuring the Rule of Law in general and in providing socio-economic justice to the people at large has been extremely noteworthy. We have had and have many outstanding Judges and eminent members of the legal fraternity, who have contributed and are contributing immensely towards strengthening the edifice of Rule of Law in our country.

There was a lot of appreciation when our Supreme Court was pleased to hold that justice can be provided, through an innovative procedure, to the oppressed citizens, especially those belonging to the vulnerable sections of the community, who have no means, no facilities and, in fact, no possibility on their own to approach the Court, even in cases of glaring injustice and discrimination, by giving liberal meaning to the concept of *locus standi*, without in any way, entering into the areas preserved for the legislature or the executive.

However, for quite a few years now, it is being noticed that the lines demarcating the jurisdiction of the different organs of the State have got and are getting blurred, as a section of the judiciary, with all respect, seems to be of the view that it has the authority by way of what is described as ‘judicial activism’ to exercise powers, which are earmarked by the Constitution for the legislative or the Executive Branches and are beyond the area of clearly demarcated judicial functions.

One may point out that the Hon’ble Supreme Court has itself construed that the concept of separation of powers is a ‘basic feature’ of the Constitution. That being so, necessarily, each organ of the State has separate areas of functioning, into which no other organ can enter or intervene, unless permitted by the Constitution itself, and if it so does, it will be contrary to one of the ‘basic features’ of our Constitution and that includes the judiciary also.

Our Constitution contemplates ‘judicial review’ and not “judicial activism” which is of much later coinage and extends, as one finds, much beyond review. But it has not authorised any organ to superintend over the exercise of powers and, functions of another, unless it is strictly provided.

It is obvious that all organs of the State should act only according to the Constitutional mandate and should not be astute to find any undisclosed source of
powers or authority to expand its own jurisdiction, which will give rise to avoidable conflicts and affect the harmonious functioning of the different organs of the state.4

The Indian federation is one of the new federations which are all found within the British Commonwealth. They are those of India, Nigeria, British Central Africa and the British Caribbean Territories. That this should be so was no accident, but a consequence of British colonial development. In most British colonies the natural units of social and political organization were small, far too small to stand by themselves as self-governing states. In some areas, such as India and Nigeria, British rule had and in those territories progress towards self-government had been accompanied by an increasing pressure for the development of political authority to smaller units. In other areas such as central Africa and the West Indians the units of colonial government were small and some kind of amalgamation was an essential preliminary to the achievement of full self-government. In both these situations federalism was an obvious solution to the problem of balancing the demands of unity and diversity.5

Any country which envisages to establish dual polity or diarchy system of government in which there is a union governments and more than one state and where both the government have been empowered with the concurrent jurisdiction over the same territory, the Constitution of such country must provide for a mechanism by which conflict of jurisdiction can be avoided the same view has been taken by justice E.S. Venkataramiah and Prof. M.P. Singh which is as follows:

To that end the Constitution must divide the totality of governmental powers between the general and regional governments the totality of the governmental powers consist of executive, legislative and judicial powers. Among them the legislative powers have acquired a place of primacy and predominance in Constitutional democracies because most of the executive and almost all the judicial powers need to be backed by the legislation for their exercise unless the Constitution itself makes independent provisions for their exercise without legislative backing.

4. Ibid.
5. Chandra Pal, Center State Relations and Cooperative Federalism, p. 73.
Thus the question of division of powers between the general and regional government is primarily the question of distribution of legislative powers.\(^6\)

Indian Constitution also provides for the division of powers for the purpose of legislation of different subject matters in part XI, chapter I along with VIIth Schedules of the Constitution of India deals with the distribution of legislative powers. It is here where Indian Constitution has to pass the acid test of federalism. It is here where Indian Constitution failed to satisfy the traditionalist of it’s federal credibility due to some provisions in this chapter which has been declared as biased in favour of centre. But there are enough justification for these provisions due to peculiar condition of Indian polity, and it’s claim as federal Constitution can’t be ignored only on the above ground.

The present Constitutional provision have it’s roots into the Government of India Act, 1935. Some articles of the present Constitution are mere reproduce of the sections of 1935 Act. Some provisions of the Act find place as modified wisdom in the new Constitution. As it has been observed by Ashok Chanda, in following words:

‘The constituent assembly didn’t consider that, having regard to the evolution of India’s political system and insistent needs of co-ordination of economic and industrial development centrally, any basic departure should be made from the modified federal concept embodied in the 1935 Act. The Constitution however enlarged the scope of the legislative authority of states by transferring several items from the central list of 1935 Act to the provincial (State) list; but at the same time it made other adjustment to strengthen the powers of the centre to foster national economic unity. National highways, interstate trade and commerce and several other items were accordingly transferred to the union list from the provincial list of the 1935 Act. And inter-state rivers were made a concurrent subject. Comprehensive provisions were also incorporated to make India a single economic unit for the purposes of trade and commerce under the overall control of the parliament.\(^7\)

There were other reasons too for the present provisions III of the Constitution of India as it was noted by the Dr. K.C. Markandan as follows:

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'The objective had always been to frame a Constitution that would curb divisive tendencies and enable unity and integrity; the federal idea with autonomous states has only been to accommodate Muslims with British still ruling India."

As noted above distribution of powers generally and predominantly refers to the legislative distribution of powers. But there is no uniformly accepted Method or formula for the division of powers in the Federal Constitutions. It is the most difficult and delicate job for the framer of any Constitution in the world. The framers of the Constitutions must have to do some mental logical acrobats, while balancing the powers between general and regional government. The above view has been also supported by M.P. Jain as follows:

“Federalism constitute a complex governmental mechanism for governance of a country. It has been evolved to bind into one political union several autonomous, distinct, separate and disparate political entitles or administrative units. It seeks to draw a balance between the forces working in favour of concentration of powers in the centre and those urging a dispersal of it in a number of units, it thus seeks to reconcile unity with multiplicity. Centralization with decentralization and nationalism with localism.”

Despite all the difficulties and peculiarities one can find two broad categories or patterns for distribution of legislative powers. First is led by America and followed by Australia and Switzerland. Another is led by Canada and followed by India.

The Indian Constitution provides for a new kind of federalism to meet India's peculiar needs. Federalism is held to be one of the basic pillars of the Constitution.

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8. Dr. K.C. Markandan: Centre-State Relations' at 66 (1986)
11. The Constitution of the United States of America, 1787, the oldest and the most respected member of the family of Federal Constitutions, enumerates the powers of the Federal Government. It then prohibits the Federal and the State Governments from doing certain things and leaves the residue to the States, without enumerating the powers of the States. The Constitution of the Commonwealth of Australia, enacted in 1900, enumerates the powers of the Commonwealth and leaves the residue to the States. The Canadian Constitution, which is titled as the British North America Act, 1867, makes a two-fold enumeration, namely, powers of the Dominion Government and the Provincial Governments. There is no concurrent list. The residuary powers are vested in the Dominion Government.
The federal distribution of powers are one of its unique features. In the matter of
distribution of powers, the Framers followed the pattern of the Government of India
Act, 1935, which had laid the foundation for a federal set-up for the Nation. Though,
the distribution of legislative powers between the Union and the States, as envisaged
in the Act of 1935, has not been adopted in the Constitution in every respect, but the
basic framework is the same. India is said to have adopted a loose federal structure.
It is an indestructible union of destructive units.

Under the Constitution, there is a three-fold distribution of legislative powers
between the Union and the States. For that the Seventh Schedule to the Constitution
divides the subjects of legislation under three lists, viz. Union, State and Concurrent
List.

The distribution of legislative heads between the Centre and the States
explained above, reflects the bias of the Founding Fathers, towards the Centre. These
provisions unmistakably show that they intended to create a strong Centre. It is said
that the historical background relevant at the time of the framing of the Constitution,
warranted a strong Centre naturally and necessarily. Referring to several provisions of
the Constitution, the Apex Court in State of W.B. v. K. Industries Ltd., accepted that
the Centre had been given more powers. However, the Court observed:

The Constitution is an organic living document. Its outlook and expressions as
perceived and expressed by the interpreters of the Constitution must be dynamic and
keep pace with the changing times. Though the basics and fundamentals of the
Constitution remain unalterable, the interpretation of the flexible provisions of the
Constitution can be accompanied by dynamism and lean, in case of conflict, in favour
of the weaker or the one who is more needy.

Part XI, Chapter-I of the Constitution of India is the nerve centre of union-
state relationship. Provisions under this chapter play a significant role in determining
the sphere of Centre-state relationship. Similarly different entries in the three lists in

15. State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal, AIR
2010 SC 1746.
16. AIR 2004 SC 1647. The Central Government has appointed a Commission on Centre-State
relations, with Justice M.M. Punchhi, as its Chairman, to make recommendations as to vesting
the Centre with overriding powers and to examine the possibility of sending forces to the
States and to take up investigation of inter-State crimes. The Tribune, May 1, 2007.
the VIIth schedule works like an artery, as an artery supplies fresh blood to different part of the human body which is necessary for life, similarly these entries supply different legislative bodies (i.e. parliament and legislative assembly) with the powers to legislate. Legislative bodies are literally nothing without these legislative powers. It would be just like a dead organ of a human body. Legislative bodies would be just like body without soul if there is no Constitutional mandate to legislate on different subjects.

There are total 11 articles (Art 245-255) in the first chapter of Part XI of the Constitution of India. These article directly deals with the division of legislative powers between centre and states. These article provides powers i.e. with respect to territory as well as with respect to subject matter. This is clear from plain reading of the Article 245 which provider as under Extent of laws made by Parliament and by the legislatures of states. The provision reads as:

"245 (1) Subject to the provisions III this Constitution, Parliament may make laws for the whole or any part of the territory the India, and the legislature of a state may make laws for the whole or any part of the state.
(2) No law made by the parliament shall be deemed to be invalid on the ground that it would have extra- territorial operation.

Article 246 further provides provision on the subject matter of law made by parliament and by the legislature of the states. The provision read as
Article 246 (1) further provides notwithstanding in clauses (2) and (3), parliament has exclusive powers to make laws with respect to any of the matters enumerated in list I (union list) of the seventh schedule.

Article 246 (2) provides that notwithstanding anything in clause (3), Parliament, and subject to clause (1) the legislature of any state also, have powers to make laws with respect to any state also, have powers to make laws with respect to any of the matter enumerated in list III (Concurrent list) in the seventh schedule.
Article 246 (3) contents that subject to clause (1) and (2), the legislature of any state has exclusive powers to make laws for such state or any part of there of with respect to any of the matters enumerated in list II (state list) in the seventh schedule. According to article 246. (4) Parliament has powers to make laws with respect to any matter for any part of the territory of India not included (in a state) notwithstanding that such matter is a matter enumerated in state list.

Without acquiring even the brief knowledge about the three lists in the seventh schedule of the Constitution, the meaning of the above articles would be worthless. Because, in practice both\(^\text{17}\) works together and therefore it should be read together and interpreted accordingly. Seventh schedule has three lists. These are follows:

1. List I - This list is known as union list. This list contains 97 entries (100 in 2008), which are of national importance like defence, communication finance etc. subjects, which are enlisted in the union list are exclusively open for the union government.\(^\text{18}\)

2. List II - Second list as known as state list. It has 66 entries in it. These entries are basically local in nature, which should be governed on that level only. For example agriculture, law and order etc. In normal circumstances state is exclusively entitled to legislate on these entries.\(^\text{19}\)

3. List III - This list is known as concurrent list. There are some subjects on which both union as well as state legislature can legislate. Some time it may happen that a state require a special law, but centre is not ready to legislate on it only for that particular state. In that situation a particular state may proceed on its own. Some time centre may enact a law to bring uniformity among the different state laws. There are 47 entries under this list and both parliament and state legislatures are equally entitled to legislate on it.\(^\text{20}\)

\(^{17}\) Part XI and VII schedule of Constitutional of India.

\(^{18}\) In Union list, entry 2A was inserted by 42nd amendment, while entry 33 was omitted by the amendment. Therefore their no actual change in number of entries in union list.

\(^{19}\) In state list, entries 11,19,20 and 29 was omitted by 42nd while entries 36 was omitted by amendment leading to decrease in actual number of entries i.e. (66-5) 61

\(^{20}\) In concurrent list, entries ii ‘A’, 17 ‘A’ 17 ‘B’ 20 ‘A’ and 33 ‘A’ was inserted by 42\(^\text{nd}\) amendment. Therefore leading to increase in actual number of entries i.e. (47+5) 52.
‘Interse relations and working among these three lists of the seventh schedule as well as relationship of seventh schedule with the part XI and how these dynamics affects the volatile equation of Centre-state relationship are discussed later on, under the different legislative powers is not as simple as it appears. It also has been noted by Amal Ray:

Mere enumeration of the subjects for the legislation is not the sole determinant of the ambit of the powers and jurisdiction of the centre and state. Power expands and shrinks in various ways through Judicial interpretation.21

Before coming to those head and doctrines it should also be noted that besides these entries there are some provisions which directly confer legislative powers to the legislature. These provision are related to:

1. Admission or establishment of new states.22
2. Formation of new the states and alternation of areas, boundaries or name of states.23
3. To regulate the citizenship by law.24
4. Power of parliament to provide for the establishment of certain a additional courts.25
5. Adjudication of dispute relating to waters of interstate rivers or river valleys.26

Language to be used in the Supreme Court and the high court and for Acts, Bills, etc.27

The Indian federation is unique among the federal structures of the world. It is characterized by high degree of centralization. The Indian Constitution can be both unitary as well as federal according to the requirements of the time and circumstances.

The Constitution of India is federal in form but unitary in spirit. The founding fathers of the Constitution made the centre superior to the states. They did so because they were fully aware that in order to curb regionalism, communalism and

21. Amal Ray: Inter-Governmental Relations in India at 31 (1966)
22. Article 2 of Constitution of India.
23. Article 3 of Constitution of India.
25. Article 247 of Constitution of India.
26. Article 262 of Constitution of India.
27. Article 346 of Constitution of India.
sectarianism and to bring about the socio-economic development in the country it was imperative to have a strong centre. But at the same time they had provided limited autonomy to states in the sphere of activity. But user a period of five decades the centre has become all dominating and has encroached greatly even in the sphere of limited autonomy of the states. Consequently the demand for true federalism and real autonomy has arisen time to time.

1.2 Origin and Source of Separation of Power

The term separation of powers originated with the Baron de Montesquieu, a French enlightenment writer. However, the actual separation of powers amongst different branches of government can be traced to ancient Greece. The framers of the Constitution decided to base the American governmental system on the idea of three separate branches: executive, judicial, and legislative. The three branches are distinct and have checks and balances on each other. In this way, no one branch can gain absolute powers or abuse the powers they are given.

In the United States, the executive branch is headed by the President and includes the bureaucracy. The legislative branch includes both houses of Congress: the Senate and the House of Representatives. The judicial branch consists of the Supreme Court and the lower federal courts.

The separation of powers, often imprecisely used interchangeably with the *trias politica* principle, is a model for the governance of a state. The model was first developed in ancient Greece and came into widespread use by the Roman Republic as part of the uncodified Constitution of the Roman Republic. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that no branch has more powers than the other branches. The normal division of branches is into an executive, a legislature, and a judiciary. For similar reasons, the concept of separation of church and state has been adopted in a number of countries, to varying degrees depending on the applicable legal structures and prevalent views toward the proper role of religion in society.

The term is ascribed to French Enlightenment political philosopher Baron de Montesquieu. Montesquieu described division of political powers among an executive, a legislature, and a judiciary. He based this model on the British Constitutional system, in which he perceived a separation of powers among the monarch, Parliament, and the courts of law.
Montesquieu did specify that "the independence of the judiciary has to be real, and not apparent merely". "The judiciary was generally seen as the most important of powers, independent and unchecked", and also considered it dangerous.

There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applied them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of the functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own powers, overlapping functions tend to appear amongst these organs.

The question which assumes significance over here is that what should be the relations among these three organs of the state. Whether there should be complete separation of powers or there should be co-ordination among them. An analysis into these three organs and the relations between them is to be done with the experience in different countries along with India which will give a clear idea about this doctrine and its importance in different Constitutions.

Today all the systems might not be opting for the strict separation of powers because that is undesirable and impracticable but implications of this concept can be seen in almost all the countries in its diluted form.

In the modern context, the doctrine of separation of powers is no longer a mere philosopher’s theoretical conception. It is a practical concept, determining the structure and organization of the day to day functioning of governments.

A central concept of modern Constitutionalism28, the theory of the separation of powers enjoys a position of almost unparalleled global repute as a foundational tenet of liberal democracy. A doctrine of long-standing historical and political significance, it exerts considerable influence over the attitudes, opinions, and public pronouncements of academics, officials, and individual citizens alike. In recent times the theory has even attracted favourable comment from a number of prominent English academics-a notable development in a jurisdiction whose Diceyan heritage

had inculcated an orthodox disparagement of the doctrine as a ‘rickety chariot’ of alien invention and dubious design. 29 In a similar view, the Irish Supreme Court has proclaimed the doctrine to be ‘of itself, a high Constitutional value’ through the ideological prism of which all other Constitutional provisions ought to be perceived. 30

Though it may still be possible to acknowledge that the functions of government are divisible into three categories- deliberative, magisterial and judicial, as they were in the days of Aristotle, it is impossible, in a modern State, to assign these functions exclusively to the three organs-the Legislature the Executive and the Judiciary. To put it conversely, it is not possible, to define the functions of the three organs with mathematical precision and say that the business of the Legislature is to make the law, of the Executive to execute it, and the Judiciary to interpret and apply the law to particular cases. An eminent authority illustrated this interaction among the different organs with reference to modern conditions thus:

“Functions have been ‘allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive laws have been sustained which are contingent upon executive judgment on highly complicated facts. By this means Congress has been able to move with freedom in modern fields of legislation with their great complexity and shifting facts, calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modem government impossible. 31

In order to function efficiently, each department must exercise some incidental powers which may be said to be strictly of a different character than its essential functions. For example, the Courts must, in order to function efficiently possess the powers of making rules for maintaining discipline or regulating procedure, even though that powers may be of the nature of a legislative powers. The powers of making rules of procedure in the Courts is not regarded as of the essence of the

29. R. Robson, Justice and Administrative Law (2nd ed., Stevens, 1947) at 14
functions of the Legislature.\footnote{Wayman v. Southward. (1825) 19 Wh. 1 (42)} Again, in interpreting laws and in formulating case law, the Courts do, in fact, perform a function analogous to law making. In particular in dealing with new problems where authority is lacking, the Courts to create the law, even through under colour of interpretation of and deduction from the exercising law).

Under the Indian Jurisprudence the source of the doctrine of separation of powers is constituent powers which is an amalgam of all the powers.\footnote{Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC. 2299.} When the constituent powers exercises powers, the constituent powers comprises legislative, executive and judicial powers. All powers flow from the constituent powers through the Constitution to the various departments or heads. In the hands of constituent authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of powers is discussed. The constituent powers is sovereign. It creates the organs and distributes the powers.\footnote{Ibid.}

### 1.3 Meaning of Separation of Power

There are generally three categories of governmental powers -

(i) \textit{The legislative} = Parliament

(ii) \textit{The Executive} = Cabinet Secretariat

(iii) \textit{The Judiciary} = Supreme Court

At the same time there are three organs of the government in a State (i) the Legislative (ii) the Executive and (iii) the Judiciary. The theory of separation of powers postulates that these three powers of the government must, in a free democracy, always be kept separate and be exercised by separate organs of the...
government. Accordingly, the legislature cannot exercise executive or judicial
powers, the executive cannot exercise legislative or judicial powers, and the judiciary
cannot exercise legislative or executive powers of the government.

1.4 **Doctrine of Separation of Power**

The governmental powers, broadly speaking are divisible in three categories
executive, legislative and judicial. A reign of law, in contrast to the tyranny of
powers, can be achieved only through separating appropriately, several powers and
functions of Government. If the law makers should also be the administrators and
dispensers of law and justice, then the people must be left without a remedy in case of
injustice since no appeal can lie to any superior. Therefore, an age-old search has
gone on for the secret of good Government ensuring to the citizens individual liberty.
Montesquieu’s common sense coupled with Locke's opposition to Hobbes absolutism
saw the dangers of concentration of powers. He felt that the history of the despotic
Tudors and absolutist Stuarts, showed that freedom was not secured, if the executive
and the legislative powers were held on the same hands. He deducted his ideas of
separation of powers from his observations and ideas of the relations between the
Stuart King and the Parliament. He thought that Parliament would never be arbitrary
and the denial of legislative powers to king alone could make the rule by extemporary
decrees impossible. Montesquieu have experienced the tyrannies in the monarchial
France, must have watched the conditions on the other side of the Channel with envy.
In the second half of the Seventeenth century, he would not fail to notice that the
Englishmen stood under the warm sunshine of the Magna Carta. Having lost his
legislative and tax powers to Parliament, the English King was left with no
prerogative. Parliament made the laws. His majesty’s Government was, even though
the cabinet system was not yet developed, administering the laws passed by
Parliament. By the end of the century, the Judges, like the Great Coke, could not be
dismissed by the King at this will, because, the Act of Settlement gave them a tenure
during good behaviour as distinguished from a tenure during the pleasure of His
Majesty. Montesquieu concluded that the secret of the Englishmen’s liberty was the
separation and functional independence of the three departments of the Government
from one another.\(^35\) Locke in his treatises expounded this theory and influenced the

\(^{35}\) *The L'Esprit des Lois, BK XI Ch. VI*
thinking of men on the other side of the Atlantic. It became a political fundamental of
the American Constitution.

According to Montesquieu, the doctrine of separation (des pouvoirs) means
that one person or body of persons should not exercise all the three types of powers.
Wade and Phillips say that the doctrine means the following three things, namely:

(a) the same set of persons should not compose more than one department
   of the three governments departments;
(b) one department should not exercise the functions of the other two
   departments; and
(c) one departmental should not control, much less, interfere with the work
   of the other two departments.

Thus, the doctrine lays emphasis on the separation-both personnel and
functional. In an ideal set-up the separation in both these aspects should be clear and
complete. However, the ideal remains yet unrealised. The nearest approximation is
reached under the State Constitution of Massachusetts in the United States of
America. It is said therein that-

..The legislative department shall never exercise and executive and
judicial powers, or either of them; the executive shall never exercise
the legislative and judicial powers, or either of them; the judicial shall
never exercise the legislative and executive, or either of them, to the
end it may be a government of law and not of men.

Professor Ullman says, “England is not the classic home of the separation
of powers. Each powers there has taken on a character of its own while at the same time
preserving the features of the others.”

The position has been summed up by the Donoughrnore Committee in the
following words:

In the British Constitution there is no such thing as the absolute
separation of the legislative, executive and judicial powers. In
practice it is inevitable that they overlap. In such Constitution
as those of France and the United States of America attempt to
keep them rigidly apart have been made, but have proved
unsuccessful. The distinction is none-the-less real and. . .
important. One of the main problems of modern democratic
State is how to preserve the distinction whilst avoiding too
rigid an insistence on it, in the wide border land where it is convenient to entrust minor legislative and judicial functions to executive authorities.

The division of Government into three branches does not imply, as its critics would have as think, three water-tight compartments. The machinery and procedure of legislative and appointment of judges and judicial review of legislation and executive action are essential features of any sound Constitutional system. It is said instead of applying the doctrine in a strict sense of the functional machinery and procedures of the Government, the doctrine should be deemed to require a system of checks and balance among the three departments of Government while opposing the concentration of governmental powers in any of the three departments.

Turning into India in Constituent Assembly there were proposals to incorporate the doctrine into the Constitution; but deliberately the assembly did not accept them.  The doctrine in its absolute rigidity is not inferable from the provisions of the Constitution. The Constitution has not made any absolute or rigid division of functions among the three agencies of the State. Often the legislative and the judicial functions are entrusted to the Executive. Nevertheless functional separation of the different powers has not been ignored, nor, it is stressed.  The executive powers of the Union is vested in the President of the Union of India and the powers of the State Governments, in the Governors of the respective states. The President is thus made the highest executive head of the Union. He exercises his powers Constitutionally on the aid and advice of his Council of Ministers. There is no similar vesting of legislative powers in Parliament and the State Legislatures; and of judicial powers in the Supreme Court and other courts. The Constitution recognizes of the three fold functional division of governmental powers. Article 50 expressly requires the State to apply the principle of separation of the judiciary from the executive as a sound principle of Government. This declaration is made in the Chapter on Directive principles of State policy, and therefore, has no mandatory character and cannot be

36. Prof. K.T.Shah wanted to move an amendment which suggested insertion of a new article in the Constitution to the following effect: There shall be complete separation of powers as between the principal organs of the State, Viz. the legislative, the executive and the judicial.
38. Article 53 (1)
said to incorporate the whole doctrine. The President is given extensive legislative powers. He can make Ordinances. The powers to promulgate an Ordinance, is an essential legislative powers, and its extent had scope would have been envied even by Henry VIII, and would have taken the Judges in the case of Proclamations by surprise. The powers extend to all things which are within the legislative competence of Parliament, and its limited operative duration of an Ordinance. The President makes laws for a State, after the dissolution of the State Legislature, following the imposition of the President’s rule and delegation of legislative functions of the state Legislature to him by Parliament by law.

One of the Characteristics of many legal systems is the doctrine of separation of powers which provides that the functions of the three arms of government should be carried out by separate bodies of people. Such a separation of the arms of government enables a check on the concentration of powers in the hands of a few. The doctrine is associate with the French Philosopher Montesquieu, and the clearest example of this is found in the American Constitution where the legislative powers of the federation is vested in the Congress the executive powers is vested in the President and the judicial powers in the Supreme Court. With the exception of the Vice-President who ex-officio presides over the Senate, no member of one arm of government can be a member of another arm. Extent of the separation of powers in Australia the doctrine applies but to a limited extent. Strictly, the doctrine requires that all three arms of government should be separate. However, in Australia this is not possible as there are some overlaps between the legislative arms and executed arm. The Constitution in fact provides for a formal relationship between the executive and parliament and the institution of representative and responsible government.

Despite the safeguards it gives against tyranny, the modern day societies find it very difficult to apply it rigidly. In principle they go for separation of powers and dilution of powers simultaneously.

Though, just like American Constitution, in Indian Constitution also, there is express mention that the executive powers of the Union and of a State is vested by the Constitution in the President and the Governor, respectively, by articles 53(1) and 154(1), but there is no corresponding provision vesting the legislative and judicial

40. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299
powers in any particular organ. It has accordingly been held that there is no rigid separation of powers.

Although prima facie it appears that our Constitution has based itself upon doctrine of separation of powers. Judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or the legislature. Constitution restricts the discussion of the conduct of any judge in the Parliament. The High Courts and the Supreme Court has been given the powers of judicial review and they can declare any law passed by parliament as unconstitutional. The judges of the Supreme Court are appointed by the President in consultation with the CJI and judges of the Supreme Court. The Supreme Court has powers to make Rules for efficient conduction of business.

It is noteworthy that Article 50 of the Constitution puts an obligation over state to take steps to separate the judiciary from the executive. But, since it is a Directive Principles of State Policy, therefore it’s unenforceable.

In a similar fashion certain Constitutional provisions also provide for Powers, Privileges and Immunities to the VIPs, Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent, in a way. The Constitution provides for conferment of executive powers on the President. His powers and functions are enumerated in the Constitution itself. The President and the Governor enjoy immunity from civil and criminal liabilities.

But, if studied carefully, it is clear that doctrine of separation of powers has not been accepted in India in its strict sense. The executive is a part of the legislature. It is responsible to the legislature for its actions and also it derives its authority from legislature. India, since it is a parliamentary form of government, therefore it is based upon intimate contact and close co-ordination among the legislative and executive wings. However, the executive powers vests in the President but, in reality he is only a formal head and that, the Real head is the Prime minister along with his Council of Ministers. The reading of Art. 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet.

Generally the legislature is the repository of the legislative powers but, under some specified circumstances President is also empowered to exercise legislative functions. Like while issuing an ordinance, framing rules and regulations relating to

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Public service matters, formulating law while proclamation of emergency is in force. These were some instances of the executive head becoming the repository of legislative functioning. President performs judicial functions also.

On the other side, in certain matters Parliament exercises judicial functions too. It can decide the question of breach of its privilege, and in case of impeaching the President; both the houses take active participation and decide the charges.

Judiciary, in India, too can be seen exercising administrative functions when it supervises all the subordinate courts below. It has legislative powers also which is reflected in formulation of rules regulating their own procedure for the conduct and disposal of cases.

So, it’s quite evident from the Constitutional provisions themselves that India, being a parliamentary democracy, does not follow an absolute separation and is, rather based upon fusion of powers, where a close co-ordination amongst the principal organs is unavoidable and the Constitutional scheme itself mentions it. The doctrine has, thus, not been awarded a Constitutional status. Thus, every organ of the government is required to perform all the three types of functions. Also, each organ is, in some form or the other, dependant on the other organ which checks and balances it. The reason for the interdependence can be accorded to the parliamentary form of governance followed in our country. But, this doesn’t mean that this doctrine is not followed in India at all.

The debate about the doctrine of separation of powers, and exactly what it involves in regard to Indian governance, is as old as the Constitution itself. It was extensively debated in the Constituent Assembly. It also figured in various judgments handed down by the Supreme Court after the Constitution was adopted. It is through these judicial pronouncements, passed from time to time, that the boundaries of applicability of the doctrine have been determined.

In the Re Delhi Laws Act Case\(^43\), it was for the first time observed by the Supreme Court that except where the Constitution has vested powers in a body, the principle that one organ should not perform functions which essentially belong to others is followed in India. By a majority of 5:2, the Court held that the theory of separation of powers though not part and parcel of our Constitution, in exceptional circumstances is evident in the provisions of the Constitution itself.

\(^{43}\) AIR 1951 SC 332
As observed by Kania, C.J.:

“Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?”

In essence, this judgment implied that all the three organs of the State, i.e., the Legislature, the Judiciary, and the Executive are bound by and subject to the provisions of the Constitution, which demarcates their respective powers, jurisdictions, responsibilities and relationship with one another. Also, that it can be assumed that none of the organs of the State, including the judiciary, would exceed its powers as laid down in the Constitution.

While there was a broad agreement on the principles put forth by this judgment, in practice, from time to time, disputes continued to arise as to whether one organ of the State had exceeded the boundaries assigned to it under the Constitution. This question of what amounts to an excess, was the basis for action in the landmark Kesavananda Bharti case. The question placed before the Supreme Court in this case was in regard to the extent of the powers of the legislature to amend the Constitution as provided for under the Constitution itself. It was argued that Parliament was “supreme” and represented the sovereign will of the people. As such, if the people’s representatives in Parliament decided to change a particular law to curb individual freedom or limit the scope of judicial scrutiny, the judiciary had no right to question whether it was Constitutional or not. However, the Court did not allow this argument and instead found in favour of the appellant on the grounds that the doctrine of separation of powers was a part of the “basic structure” of our Constitution. As per this ruling, there was no longer any need for ambiguity as the doctrine was expressly recognized as a part of the Indian Constitution, unalterable even by an Act of Parliament. Thus, the doctrine of separation of powers has been incorporated, in its essence, into the Indian laws. The doctrine of separation of powers was further expressly recognized to be a part of the Constitution in the case of Ram Jawaya.

44. AIR 1973 SC 1325
Kapur v. State of Punjab\textsuperscript{45}, where the Court held that though the doctrine of separation of powers is not expressly mentioned in the Constitution it stands to be violated when the functions of one organ of Government are performed by another.

However, it was after the landmark case of Indira Nehru Gandhi v. Raj Narain\textsuperscript{46} that the place of this doctrine in the Indian context was made clearer. In the said case where the dispute regarding P.M. election was pending before the Supreme Court, it was held that adjudication of a specific dispute is a judicial function which parliament, even under Constitutional amending powers, cannot exercise. So, the main ground on which the amendment was held ultravires was that when the constituent body declared that the election of P.M. won’t be void, it discharged a judicial function which according to the principle of separation it shouldn’t have done. The place of this doctrine in Indian context was made a bit clearer after this judgment.

Though in India strict separation of powers like in American sense is not followed but, the principle of ‘checks and balances’, a part of this doctrine is. Therefore, none of the three organs can usurp the essential functions of the other organs, which constitute a part of ‘basic structure’ doctrine so much so that, not even by amending the Constitution and if any such amendment is made, the court will strike it down as un Constitutional.

The issue of the relative jurisdictional boundaries of the organs of the State has acquired a new momentum in the recent period in the context of coalition politics at the center and in states. This can be seen in the instances such as those that occurred in some states in the State elections of 2005, particularly in Jharkhand, Goa and Bihar, where no party or coalition of parties had a clear majority. The situation was further complicated by the fact that neither the Governors of these states (who had the final powers to appoint a government) nor the presiding officers of the legislatures (who had the powers to conduct the proceedings of the House where the majority claimed by the new government was to be tested) were considered to be impartial in their decisions.

In Jharkhand, after the elections in March 2005, the Governor conducted the swearing-in of a government headed by a member of the Union Cabinet, who however, did not seem to have a clear majority. He was given a fixed number of days

\textsuperscript{45.} AIR 1955 SC 549  
\textsuperscript{46.} AIR 1975 SC 2299
to prove his majority on the floor of the House. The opposition parties, who claimed to have a majority, were not in favour of such a grace period being granted and hence filed a writ petition in the Supreme Court challenging the decision of the Governor. On March 9, 2005 the Court passed an order, which *inter alia* gave directions to the Speaker to extend the Assembly session by a day and conduct a floor test between the contending political alliances. In the light of Court’s decision, the earlier government formed by the Union minister decided to tender its resignation on the advice of the central government. An alternative government was then formed by a combination of other parties which was able to prove its majority on the floor of the House.

There has been considerable debate about whether the Court was right in taking cognizance of such a matter, as it might be considered an intrusion into the duties of the executive. However, in light of the fact that the executive was functioning in a biased manner, there were no other avenues available for redress apart from the decree of the Court. Hence, it had to be accepted as a valid action, in consonance with its Constitutional powers.

Finally all the three organs of the government are coordinate and drive their functions and powers from the Constitution of India. The Constitution of the India is the supreme law of the land and no organ can overwrite the Constitutional provision. Although the judiciary is the protector and guardian of the Constitution but even the judiciary is bound to follow the Constitutional mandate. In the recent year it has been observed that the judiciary has interfered into some areas where it should like the internal domain of the legislative and policy making area of the executive. In the present study all these recent trends and developments will be examined critically.

### 1.5 World wide Acceptance

Constitutions with a high degree of separation of powers are found worldwide. The UK system is distinguished by a particular entwining of powers. The U.S.A. form of separation of powers is associated with a system of checks and balances. Australia, Germany, Costa Rica, China, Russia also follows this principle. Countries with little separation of powers include New Zealand and Canada. Canada makes limited use of separation of powers in practice, although in theory it distinguishes between branches of government.47

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In Italy the powers are completely separated, even if council of Ministers need the vote of confidence from both chambers of Parliament, that’s however formed by a wide number of members (almost 1,000).

Strict separation of powers did not operate in Britain, a country whose political structure served in most instances as a model for the government created by the U.S. Constitution. Under the British Westminster system, based on parliamentary sovereignty and responsible government, Parliament (consisting of the Sovereign (King-in-Parliament), House of Lords and House of Commons - was the supreme lawmaking authority. The executive branch acted in the name of the King (“His Majesty’s Government”) as did the judiciary. The King’s Ministers were in most cases members of one of the two Houses of Parliament, and the Government needed to sustain a majority in the House of commons. One minister, the Lord Chancellor, was at the same time the sole judge in the Court of Chancery and the presiding officer in the House of Lords. Thus, one may conclude that the three branches of British government often violated the strict principle of separation of powers, even though there were many occasions when the different branches of the government disagreed with each other.

Complete separation-of-powers systems are almost always presidential, although theoretically this need not be the case. There are a few historical exceptions, such as the Directoire system of revolutionary France. Switzerland offers an example of non-Presidential separation of powers today: It is run by a seven-member executive branch, the Federal Council. However, some might argue that Switzerland does not have a strong separation of powers system as the Federal Council is appointed - by parliament (but not dependent on parliament), and the judiciary has no powers of review.48

Some U.S. states did not observe a strict separation of powers in the 18th century. In New Jersey, the Governor also functioned as a member of the state’s highest court and as the presiding officer of one house of the New Jersey Legislature. The President of Delaware was a member of the Court of Appeals; the presiding officers of the two houses of the state legislature also served in the executive department as Vice Presidents. In both Delaware and Pennsylvania, members of the executive council served at the same time as judges. On the other hand, many

48. Ibid.
southern states explicitly required separation of powers. Maryland, Virginia, North Carolina and Georgia all kept the-branches of government “Separate and distinct.”

1.6 Opposition as Fusion of Powers

The opposite of separation of powers is the fusion of powers, often a feature of parliamentary democracies. In this form, the executive, which often consists of a president and cabinet ("government"), is drawn from the legislature (parliament). This is the principle of responsible government. Although the legislative and executive branches are connected in parliamentary systems, there is often an independent judiciary. Also, the government’s role in the parliament does not give them unlimited legislative influence.

In democratic systems of governance, a continuum exists between “Presidential government” and “Parliamentary government”. “Separation of powers” is a feature more inherent to presidential systems, whereas “fusion of powers” is characteristic of parliamentary ones. “Mixed systems” fall somewhere in between, usually near the midpoint; the most notable example of a mixed system is France’s (current) Fifth Republic.

In fusion of powers, one government (invariably the elected legislature) is supreme, and the other estates are subservient to it. In separation of powers, each estate is largely (although not necessarily entirely) independent of the others. Independent in this context means either that selection of each estate happens independently of the other estates or at least that each estate is not beholden to any of the others for its continued existence.

Accordingly, in a fusion of powers system such as that of the United Kingdom, first described as such by Walter Bagehot, the people elect the legislature, which in turn “creates” the executive. As Professor Cheryl Saunders writes, “...the intermixture of institutions [in the UK] is such that it is almost impossible to describe it as a separation of powers.” In a separation of powers, the national legislature does not select the person or persons of the executive; instead, the executive is chosen by other means (direct popular election, Electoral College selection, etc.) In a parliamentary system, when the term of the legislature ends, so too may the tenure of the executive selected by that legislature. Although in a presidential system the executive’s term may or may not coincide with the legislatures, their selection is technically independent of the legislature. However, when the executive’s party controls the legislature, the executive often reaps the benefits of what is, in effect, a
“fusion of powers”. Such situations may thwart the Constitutional goal or normal popular perception that the legislature is the more democratic branch or the one “closer to the people”, reducing it to a virtual “consultative assembly”, politically or procedurally unable—or unwilling—to hold the executive accountable in the event of blatant, even boldly admitted, “high crimes and misdemeanors.”

The division of powers in the United States has often been criticized as promoting inefficiency; when different parties hold Congress and the Presidency, a lack of co-operation may deadlock the legislative process. English author Walter Bagehot famously criticized the U.S. system on these grounds in his 1867 book The English Constitution, specifically noting the events during the administration of Andrew Johnson. Several individuals have proposed that a parliamentary system—in which the same party or coalition of parties controls both the executive and the legislature—would function more efficiently. Advocates of a parliamentary system have included President Woodrow Wilson. In comparing the English parliamentary system with the American system, Bagehot wrote:

“The English Constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good: the American, upon the principle of having many sovereign authorities, and hoping that the multitude may atone for their inferiority.”

Many political scientists believe that separation of powers is a decisive factor in what they see as a limited degree of American exceptionalism. In particular, John Kingdon made this argument, claiming that separation of powers contributed to the development of a unique political structure in the United States. He attributes the unusually large number of interest groups active in the United States, in part, to the separation of powers; it gives groups more places to try to influence, and creates more potential group activity. He also cites its complexity as one of the reason for lower citizen participation.

1.7 Why Need Separation of Powers

Clement Walker, a member of the Long Parliament in 1648, saw distinctly enough the kind of arbitrary, tyrannical rule against which the governed had to be protected. The remedy, he thought (no. 1), lay in separation of governmental functions

49. The English Constitution, 1867, Bagehot, p. 59.
cast in terms of “the Governing powers,” “the Legislative powers,” and “the Judicative powers.”

For Marchamont Nedham, writing under Cromwell’s Protectorate in 1656 (no. 2), the required separation is that of legislative and executive powers into different “hands and persons.” As used by him, the distinction resembles the sharp dichotomy between the formation of policy and its administration favored by mid-twentieth-century American administrative theorists. Separation, for Nedham, is an indispensable means for locating responsibility and fixing accountability. An executive, unambiguously charged with executing a policy set by the “Law-makers,” can be held liable for its performance or nonperformance. Let that clear line of distinction and responsibility be blurred, and liberty and the people’s interest are alike in jeopardy.

Among Americans reflecting on new political arrangements in the latter half of the eighteenth century, no political authority was invoked more often than “the celebrated Montesquieu.” Thanks in some measure to those Americans themselves; the name of Montesquieu is firmly attached to the doctrine of the separation of powers. But like most teachings of that subtle mind, this one has its ambiguities and invites differing interpretations.

Although Montesquieu separated governmental functions and separated governmental powers, there is no clear one-to-one correspondence between the two because he did not insist on an absolute separation. Thus, although the executive is a separate branch, it properly partakes (through the veto, for example) in a legislative function. This blending or overlapping of functions is in part necessitated by Montesquieu’s intention that separation checks the excesses of one or the other branch. Separation of powers here reinforces or even merges into balanced government. Excesses may come from all or almost all sides. Thanks to bicameralism, the licentiousness of the many and the encroachments of the few are alike checked. The nobility mediate between a potentially overbearing lower house and the executive. The executive’s powers to convene and prorogue the legislature and to veto its enactments are forms of self-defense, while the legislature’s powers to impeach and
try the agents or ministers of the executive is necessary and sufficient to hold the executive accountable to examination without holding him hostage.  

If the goal is liberty—that is to say, individual safety—the model to follow (Montesquieu suggested) is that of the English Constitution portrayed in his pages. But one might pursue an alternative goal with more or less separation of powers and more or less happiness—like “the monarchies we are acquainted with.”

Although maintaining that sovereignty resides in the king in Parliament, Blackstone draws heavily on elements of Montesquieu’s argument and adapts them to his peculiar purpose (no. 6). For all his insistence on three distinct powers—and they are now the familiar executive, legislative, and judicial powers, with the latter a recognizable judiciary with independent tenure of office—and for all his insistence on separation for the sake of warding off oppressive government, Blackstone seems less interested in separation than he is in balance. I-is mechanical image fits his point; balance is to be sought not in total separation but in the artful involvement and mutual interactions of the several branches of the civil polity: executive, nobility, and people. The separation of powers and balance of social orders are inextricably interwoven.

If the instructions of the Bostonians to their representatives in the Massachusetts provincial congress are any sign (no. 8), the reasons of Montesquieu and the others had become commonplace by 1776. No less effective in directing American thoughts to the separation of powers would have been the protracted, painful controversies between royal governors, councils, and colonial assemblies. The colonists’ experiences with what they saw as executive usurpations, corruption of elected officials, and manipulation of electoral processes focused their minds on suitable remedies. For the Bostonians the tripartite separation of powers, functions, and persons is a sine qua non if arbitrary powers is to be checked and liberty secured. A correlative of the separation of persons is the prohibition of plural office-holding; and in the democratic context that entails adequate salaries so that officials are “above the necessity of stooping.”

John Adams’s early Thoughts on Government (see ch. 4, no. 5) similarly confirms the high expectations held for the separation of powers and the broad spectrum of ills that it would guard against: passionate partiality, absurd judgments,

avaricious and ambitious self-serving behavior by governors, and the inefficient performance of functions.

The experiences under the early state Constitutions and the Articles of Confederation reinforced the belief in separation. Jefferson’s critique of the Virginia Constitution (no. 9) raised the familiar concerns with safety and efficiency; both to establish free principles and to preserve them once established required a division and balance that went beyond those embodied in existing arrangements. Despotism is no less despotic because ‘elective.”

The Philadelphia Convention usually discussed the adequacy and proper degree of the separation of powers in terms of the ends to be achieved: stability (Dickinson), defense (Gerry, Madison, G. Morris, Wilson), independence (King), and proper function (Gerry). No less worrisome, however, was whether the means available to the several branches of government to defend themselves against the others might not be excessive (Franklin).

1.8 Identification of Problem and Justification of Research on the Subject

Indian Constitution provides for a federal structure of polity with bias towards strong centre. In the sphere of legislative relations between union and the states, union is vested with overriding legislature powers over states. The founding father of Indian Constitution deliberately save a unitary bias to the federal system of government as they thought a strong centre was necessary to crub the danger poised by fissiparous tendencies and danger of disintegration with the passage of time. When different party rule come in centre and states, states have started alleging that there is encroachment on the autonomy of states and made demand for greater autonomy. This rising penal of regionalism there has created a conflict between union and states, which makes it imperative not only to recognize the problem but also, to find solutions at any early stage.

Therefore, the subject demands through study of Constitutional provisions and demands made by the states on the issue. The study which is proposed to be undertaken is thus justified.

The doctrine of separation of powers is followed in the United States of America in absolute terms but in our country is not followed in that sense. The Indian Constitution is the written Constitution having a federal structure of government with check’s and balances. The fundamental rights have been inserted in the Constitutional text by the founding fathers and the judiciary assigned the job to protect the
fundamental rights. Basically these fundamental rights are the limitations on the powers of the states and the states can not violate these fundamental rights. In case of violation of fundamental rights of citizen the judiciary can declare that law unConstitutional and void.

The doctrine of judicial review has become very strong in our country and it is going to touch the sky although the judiciary has protected the rule of law, Constitutionalism and democratic fabric of Constitution during the exercise of judicial review but it has been observed that sometimes during that process it has also encroached into the area of other organs which is not a good signal for our democracy.

In the recent study all these aspects of judicial review, judicial activism and separation powers will be discussed in the light of international development.

1.9 Objectives of the Study

In the light of the identified problem the main objectives of the study shall be:

1. To discuss the concept of separation of powers in India.
2. To examine the working system of the different organs of the government of India as per the Constitutional framework like as-
   (a) To analyse the Constitutional provisions of distribution of Legislative powers between union and states govt.
   (b) To clarify how the Constitution provides for a strong centre.
   (c) To identify the issues of conflict between union and states due to strong unitary bias.
3. To discuss the recent trends of judicial review, judicial activism in India.
4. To discuss the concept of separation of powers at the global level.
5. To provide suggestions to resolve these conflicts and to make union and state governments work in harmony with each other.

1.10 Hypothesis of Study

In a doctrinal research like this, the task of framing and proving hypothesis is a very difficult one. Therefore, it be more practical and realistic to conduct research study through making research questions instead of making hypothesis. Therefore, some research questions hereunder have been made and through these questions the objective of study is expected to be fulfilled:

1. Do the Constitutional provisions in union and state legislative relations are sufficient or some amendment is necessary?
2. What are various doctrines evolved by judiciary to interpret the Constitutional provisions in union state relations?

3. Does the unitary bias of the federal system of government in India or a strong centre is justified?

4. What are the issues of conflicts between union and state governments due to existence of a strong centre? And what are the solutions for these conflicts.

5. Whether the doctrine of Separation of Power is recognized in rigid/absolute sense under the Constitution of India or not?

6. How the judiciary is saviour for the Separation of Power.

1.11 Research Methodology

The aim of present study is to understand the concept of separation of powers: Law and Practice in India. The research work seeks to examine either concept of Separation of Power is only theoretical or it is practical in India. The present study will be basically doctrinal study. In the study, the literature available on the topic will be surveyed and the cases decided by the Supreme Court of India and foreign courts will be examined and analysis critically.

Beside these the primary source may also be used and found necessary during the research. The primary sources are Constitution and statutes. The secondary sources which have been used are text book, internet, case laws by Supreme Court, High Court and Foreign Courts.

1.12 Review of Literature

In order to achieve the objective stated above, it is essential to examine the Constitutional provision on the topic, various memorandums made by states and reports of various commissions on the subject. An intrinsic view of available literature will be carried out as this researcher is fully aware of the need of study what has been written concerning the proposed profit till now.

1.13 Scheme of Chapterization

In Chapter – I of the study i.e. introduction an attempt has been made to analyse that what does the doctrine of Separation of Powers mean and why the need for introducing such concepts was felt. This chapter describes the division of legislative powers between Union and States and frame work of legislative relations in India. It has been discussed the origin and source of principal of Separation of
Powers. It has also been discussed the world-wide acceptance of the Principle of Separation of Powers.

In **Chapter – II** i.e. we have discussed about historical background of principle of Separation of Powers and what the ancient theory and with the development of society it has been changed. Then we read about modern theory and about the originator of principle of Separation of Powers that is Montesquieu. It has also been discussed the historical development of financial federal relations in India. In this chapter we have also discussed what is the present scenario of the principle of Separation of Powers.

In **Chapter – III** i.e. it has been discussed that Constitutions with a high degree of Separation of Powers are found worldwide. The UK system is distinguished by a particular entwining of powers. This U.S.A form of Separation of Powers is associated with a system of checks and balances. Australia, Germany, Costa Rica, China, Russia also follows this principle. Countries with little Separation of Powers include New Zealand and Canada.

In **Chapter – IV** i.e. an Analysis has been made of the principle of Separation of Powers under the Constitution of India, the detailed list of various features of the Indian Constitution is discussed. This chapter contains the analysis of the Constitutional provision and highlights how Indian Constitution provides for a strong centre. This chapter also deal with doctrines of evolved by judiciary for interpretation of Constitutional provisions regarding distribution of legislative powers between Union and States. This chapter provide also a perspective for issue of conflict in the union and state relation.

In **Chapter – V** i.e. it has been discussed the Recent Judicial trend of the principle of Separation of Powers. It has been also discussed the help of cases. How the principle of Separation of Powers is the part of basic structure.

We have also discussed the limits of the judicial legislation and conflict between judiciary and legislation and the conflict between judiciary and executive. In this chapter we have discussed theory of check and balances under Indian system with special reference to judicial pronouncement.

In **Chapter – VI** contains the Conclusion and Suggestions to the issues highlighted in the preceding chapters. In this chapter we have discussed the suggestion to make Separation of Powers more effective and then conclusion have been done on the basis of collected cases and materials.