CHAPTER – 1

INTRODUCTION

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INTRODUCTION

The doctrine of separation of powers is the best guardian to protect the government from the tyranny. The doctrine is an integral part of the governmental structure. It formulates each branch of the government that is the executive, the legislature and the judiciary, not to encroach on the sphere of the other.

In an early seminal article, James Madison in 1788 described the concept of separation of powers within the framework of checks and balances in United States of America. He stated that it was expedient to maintain the necessary partition of power among the several departments, as laid down in the American Constitution in such a manner that by their mutual relations, they would be the means of keeping each other in their proper places.1

The concept of the separation of powers has often attempted to differentiate the legislative, the executive and the judicial functions and propose that one branch should not exercise on the function of the other branch. The rationale behind the doctrine of separation of powers is to avoid tyranny.

Professors Colin Munro, Eric Barendt and TRS Allan2 regard the doctrine of separation of powers as a fundamental underlying constitution principle which informs the whole British Constitutional structure. Munro states that the doctrine has shaped, and continues to shape, the constitutional arrangements and thinking in the United Kingdom in a number of important ways.3 Barendt structures his analysis of British Constitutional Law around the separation of powers but has conceded that 'the

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Available at: books.google.co.in/books=1438770391 (last visited on November 20, 2016)
constitution in England does not strictly observe the separation of powers in either version pure or modified of the theory.⁴

The term “separation of powers” refers to the separation of powers and functions of the three branches of government; the legislative, executive and judicial branches. The three branches work separately and have their own individual powers. Each branch “checks” the other two branches by balancing the powers given to each branch.

The Greek philosopher, *Aristotle* wrote that the fairest political system would be the one in which power was shared among the monarchy, the aristocracy, and the common people. *John Locke* described a kind of a more modern proposition: the government should be divided between an executive and a legislative branch. The role of the executive would be to govern the country and implement law, while the legislature would be responsible for creating and managing the law itself. The underline problem with Locke's political system is that there is nothing to prevent one branch of the government.

According to *Montesquieu* the doctrine of separation of powers (des pouvoirs) means that no one person or body should be vested with all three types of powers. *Montesquieu* in the following words stated the Doctrine of Separation of Powers:

“There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

*Clinton Rossiter*, described the separation of powers:

“There can be no liberty where the legislative and executive powers are united in the same person… (or) if the power of judging be not separated from the legislative and executive powers.”

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The doctrine of separation of powers was supported by the British jurist Blackstone and the founding fathers of the American constitution, especially, Madison, Hamilton and Jefferson. They looked upon the doctrine of separation of powers as a most important facet in protecting the liberty of the people.

The doctrine of Separation of Powers is of ancient origin. The origin of the doctrine is traceable to the Greek Philosopher, Aristotle. At the most, political philosophers such as Aristotle, Plato, Polybius, Cicero, Jean Bodin, Thomas Hobbes, John Locke, and many more stressed the need for separation of powers within the government.

However, the credit of the formulation and development of the doctrine of separation of powers goes to the French social and political philosopher, Charles-Louis de Secondat, Baron de Montesquieu. The doctrine was systematically and scientifically formulated by Montesquieu for the first time in his masterpiece work of ‘De l’espirit des lois’ (The spirit of the laws), 1748. Montesquieu coined the term ‘trias politica’ that stipulates the political authority of the state which has to be divided into the legislature, the executive and the judiciary. He emphasized that these three powers must be separated and to act independently for the promotion of liberty of the nation. The doctrine of separation of powers serves as the democratic ideals of the nation as it guards against government tyranny and prevents arbitrary government. It accomplishes certain valuable purposes in a moderate democracy.

The doctrine of separation of powers is a universal attribute of a contemporary political system. The doctrine has different relevance in U.K., USA and India. Accordingly, the three nation states viz., United Kingdom, United States of America and India follow the doctrine of separation of powers consistent with their constitutional theory as it is concerned with the notion of the rule of law and the system of checks and balances.
Foremost, in Britain, the legislature (Parliament) accommodates supreme power. The Parliament being supreme holds full control over the Executive. The Prime Minister is chosen by members of the legislature from among their own number and in practice is the leader of the majority party in the legislature. The cabinet members also belong to the legislature. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are entwined. The Judiciary is separated and independent from the legislature and the executive to ensure the rule of law.

Originally, the office of the Lord Chancellor had all the powers of the three organs. He played the role as a Cabinet Minister, a member of the House of Lords and a head of the Judiciary. However, the Constitutional Reform Act (CRA), 2005 took away the fused powers from the Lord Chancellor by making the Lord Chief Justice as a head of the judiciary. The Act also abolished the system of Law Lords sitting in the House of Lords. It made for the creation of the Supreme Court and established a new Judicial Appointments Commission in 2006. The establishment of the Judicial Appointments Commission has put in place a more transparent process than previously existed. In 2007, the Ministry of Justice was created.

The separation of powers is enhanced as a result of CRA through the dilution of the previous considerable influence of the Lord Chancellor. The institutional separation of judicial branch has enhanced for independence of judiciary. The Ministers seek to uphold judicial independence by not seeking to influence particular judicial decisions through any special access to the judiciary. But, the formal interaction between the court and the legislature remains as that the future members of the Supreme Court and members of the supplementary panel of judges may be Members of the House of Lords prior to their appointment to the Supreme Court. Hence, the complete institutional separation of court from the legislature is therefore not achieved by the provisions of the CRA. However, the CRA provides for the structural separation of the judicial branch from the legislature and the executive and upholds the impartial and independence of
judiciary (Davidson v. The Scottish Ministers\(^5\) and R v. Secretary of State for the Home Department, ex parte Al-Hasan\(^6\)).\(^7\)

Lord Hailsham argued that all Lord Chancellors should be measured by their success in defending and preserving judicial independence. He said ‘if he does it well, he is a good Lord Chancellor whatever his other defects. If he doesn’t do it well, whatever his other qualities, he is not’. The Lord Chancellor should be working constructively with the judiciary to bring about reform.\(^8\)

In Factortame\(^9\), Lord Bridge interpreted the European Communities Act, 1972 to mean that UK statute would not apply where it conflicted with European law, a significant departure from the principle of Parliamentary sovereignty.\(^10\) Further, under section 4 of the Human Rights Act 1998, a court can declare a statute to be incompatible with the European Convention on Human Rights and the Government is then obliged by the Convention to rectify the inconsistency.\(^11\)

The judges have traditionally exercised self-restraint or “deference” in the areas of power that they regard themselves as competent to review. Some uses of the royal prerogative, for example, involve issues of “high policy”, such as the appointment of ministers, the allocation of financial resources, national security, signing of treaties and defence matters and judges would not usually interfere in these matters.\(^12\)

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\(^5\) (2004) U.K. HL 34
\(^6\) [2005] U.K. HL 13
\(^7\) Roger Masterman (2011)
\(^9\) R (Factortame Ltd) v Secretary of State for Transport (No 2) [1991] 1 AC 693
\(^10\) R v Secretary of State for Transport ex parte Factortame Ltd (No 2) [1990] 2 AC 85
\(^12\) Richard Benwell and Onnagh Gay, The Separation of Powers (2011) Available at: www.parliament.uk/briefing-papers/sn06053.pdf (last visited on August 10, 2016)
Functionally, the boundaries between executive, legislative and judicial activities have traditionally displayed the flexibility that is characteristic of the U.K. Constitution. Even the dominant characteristic of constitution - the legislative supremacy of the Parliament - has shown itself to be sufficiently fluid to accommodate the delegation of legislative power to the executive branch. This dilution of Parliament’s legislative monopoly has been compounded by the general dominance of the House of Commons by the executive, while legal principle may hold that Parliament remains the sovereign, the suggestion that the executive commands both the principle and the detail of the statute is perhaps closure to the truth. Equally acting judges may be seen to exercise ‘legislative’ functions both overtly, as a result of the Law Lords’ ability to contribute to the legislative process as members of the House of Lords. Historically, the Parliament has been seen to usurp the judicial function of trying criminal cases by passing Acts of Attainder, judicial and executive functions are blurred in the activities of administrative tribunals, members of executive have exercised the ‘classic judicial function of determining the length of sentence to be served by convicted offenders, and so on. Functional overlap among the three branches has been in many respects.13

In *DPP of Jamaica v. Mollison*14, Lord Bingham observed:

“whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separations, based on the rule of law, was recently described … as ‘a characteristic feature of democracies’.15

In 20th century the situations has changed and has paved way for voting rights allowing to *parliamentary democracy*. Subsequently, U.K. conjugates the *European Community* in 1973 as effected by the European Communities Act 1972 and consequently, becomes bounded to European Community law, which is the most significant constitutional development. This statute is entrenched as a matter of

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13 Roger Masterman, pg. 17-18 (2011)
14 [2003] 2 WLR 1160
‘political reality’: because of the UK’s status as a Member State, English law is subject to the laws of the institutions of the European Union and the UK is a participant in, and a recipient of, social, economic and political policies. The constitutional writer, Wade, has argued that this marks a ‘constitutional revolution’ in that Parliament did, in impact, bind its successors back in 1972. The failure of legislatures to exercise adequate controls over the administration furthermore, led to attempts by the judiciary to fill this gap.

The canon of checks and balances are followed to the extent whereby, Parliament acts as a check on the Government, through debates and by amending, delaying and sometimes even defeating Government proposals. Judges act as a check on the Government by hearing challenges to Government decisions in judicial review cases, on the basis that the decisions have been made unreasonably or exceed the legal powers. Judges also consider whether the Government, or Parliament, has acted in a manner compatible with the European Convention on Human Rights.

In United States of America, the theory of the doctrine of separation of powers was firmly adopted in the making of the Constitution. The framers adopted the doctrine as propounded by Baron de Montesquieu. They followed the practice of the functioning of the government under the three branches: the legislative, the executive and the judiciary. The legislative power is vested in congress, the executive power in the president and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. Though in theory, it is accepted fact that, the United States followed the theory of the doctrine of separation of powers absolutely, but, in practice, however, they provided for a system in which some powers should be shared, such as, congress may pass laws, but the president can veto them; the president nominates certain public officials, but Congress must consent the appointments; and the laws passed by the Congress as well as the executive actions are

subject to judicial review. Thus the system of checks and balances are followed by the US Constitution.

However, in practice, the American Constitution does not firmly adhere to the doctrine of separation of powers, as the three organs of the government - Congress, the president, and the courts - have some overlap in their constitutionally entrusted functions. Although Congress is charged with the legislative power, a bill does not become law until the president affixes his signature, and the president may veto the legislation, which can be overridden only by a two-thirds vote of the House and Senate. Likewise, the courts exercises with the power of judicial review by which they may declare laws or executive acts of the government to be null and void. The Congress holds the power of impeachment and put on trial, the office of the executive and judicial organs for misconduct. In case, if they found guilty, they are removed from the office. Presidential appointments to the judiciary or to the cabinet are made only on the approval of a majority vote in the Senate. Similarly, treaties negotiated by the President need a two-thirds Senate majority. These are made under the fame of "checks and balances" within the Constitution that prevents the exercise of arbitrary power by each of the organs.

Judicial Review under the constitutional system of U.S.A. is a significant innovation created by the judiciary. The power of judicial review was clearly established in the decision of Marbury’s case17, where Chief Justice John Marshall declared that it is the duty of the courts "to say what the law is." In the decision of Cohens’ case18, it was made clear that the federal courts also have to review and invalidate state laws that violate the Constitution as well.

In India, strict separation of powers like in American sense is not followed but, the principle of 'checks and balances', exists as a part of this doctrine. The Constitution of India provides for the separation of functions rather than Separation of powers. None

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17 Marbury v. Madison 5 U.S. 137 (1803)
18 Cohens v. Virginia 19 U.S. 264 (1821)
of the three organs can usurps the essential functions of the organs, which constitute a part of the ‘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 unconstitutional. The Governor shall not be a Member of Parliament or of a State Legislature and if such a Member is appointed as a Governor, he shall be deemed to have vacated his seat in the House when he enters upon his office as Governor. This is significant since it protects the Legislature from the Governor. The appointment of the Chief Minister of the State is made by the Governor and the appointment of other Ministers is made on the advice of the Chief Minister. The appointment of the Chief Minister is based on the postulate that he commands or is expected to dominate the support of a majority of Members of the Legislative Assembly. Therefore, it is not as if the Governor has discretion to nominate anyone to be the Chief Minister of a State. Similarly, if the Governor wishes to ‘withdraw his pleasure’ in respect of a Minister he must exercise his discretion with the knowledge of the Chief Minister only.

That the functions of the Governor are limited to matters of executive governance or executive issues and the Council of Ministers is made explicit which provides that all executive action of the Government shall be expressed to be taken in the name of the Governor, orders and instruments shall be executed in the name of the Governor and the Governor shall make rules for the more convenient transaction of business of the Government and allocation of business among the Ministers “in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.” The Constitution provides the duty of the Chief Minister of a State to communicate the decisions of the Council of Ministers to the Governor and furnish information to the Governor. The Constitution provides that the Governor shall summon the Legislative Assembly from time to time and may prorogue and dissolve the Legislative Assembly. The executive functions performed by the

19 Constitution of India, Art. 158  
20 Constitution of India, Art. 164  
21 Constitution of India, Art. 166  
22 Constitution of India, Art. 167  
23 Constitution of India, Art. 174
Governor on the aid and advice of the Council of Ministers. There are other executive functions that a Governor is required to perform with respect to the Legislature.

In India, the doctrine of separation of powers is not adopted in its strict sense. There is a fusion of powers in the functioning of organs in the government. The President is the head of the executive and he or she acts on the advice of the Council of Ministers. The executive is part of the legislature. He can be impeached by Parliament. The Council of Ministers is collectively responsible to the Lok Sabha, each minister works at the pleasure of the President. If the Council of Ministers loses the confidence of the House, it has to resign. Practically, the President's and the Governor’s assent is required for the central and state legislations respectfully. The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. So, the President or the Governor exercises the legislative power since an ordinance has the same status as that of a law enacted by the legislature. The President or the Governor exercises judicial power by granting pardon. The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege. However, the judiciary is separated by the executive under the Constitution. The judiciary enjoys independence and for instance, in making appointments, the opinion of the Chief justice of India shall have primacy. At the same time, the judges of the Supreme Court and the High Court cannot be removed except for misconduct or incapacity unless an address supported by two thirds of the members and absolute majority of the total membership of the House is passed in each House of Parliament and presented to the President. Concurrently, the salaries payable to the judges are provided in the Constitution. Accordingly, except judiciary, the other organs of the Government (i.e. the, Legislature and the Executive) are not separate in its strict sense. They work in co-ordination with each other and every organ is responsible for the other. Hence, the absolute demarcation of the functions of these organs of the Government is not possible in India.

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24 Constitution of India, Art. 176
25 Constitution of India, Art. 180
The system of checks and balances is followed by both Parliamentary (U.K. and India) and Presidential form (U.S.A.) of Governments. In U.K., the prime minister appears before the House of Commons and has to answer the questions put to him or her by the members of Parliament. At some occasion, the president of the United States is subject to similar questioning by members of Congress, as a way of encouraging closer interaction between president and Congress. If the president did so, however, it would be his or her choice, because, the president is elected directly by the people and is answerable to the voters rather than the legislature. Whereas the prime minister in a parliamentary government has no choice because he or she is a Member of Parliament and is directly accountable to that body. Herein, exist a very basic difference between the presidential system and parliamentary system of government wherein, the presidential system exists in the United States whereas, the parliamentary system subsists in Britain and India. The Prime Minister under Parliamentary government is usually both head of the executive branch and leader of the majority party in the legislature, which gives the executive branch much more freedom of action than a president usually enjoys in a presidential system of government.

The Supreme Court of India, with reference to the relationship between the Legislature and the Executive, acknowledged the supremacy of the Legislature over the Executive and held that, under the Indian Constitution, the Governor who exercises executive power is nevertheless a formal or constitutional head of the Executive, with the real executive power vested in the Council of Ministers.26 In *Nabam Rebia, and Ramang Felix v. Deputy Speaker and others*27, the court affirmed that:

“In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Minister with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been

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27 2016(6) Scale 506
made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, “a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part.” The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.”

In India, the judiciary plays a prime role in maintaining the rule of law when compared to United Kingdom and United States of America. Justice Khehar has justified judicial expansionism by affirming that the Constitution has to be interpreted in a manner that keeps the legislature and executive in check by laying down the instances. Firstly, Khehar J., asserted that the judicial power has been upheld by preserving the doctrine of basic structure theory where the Supreme Court in Supreme Court Advocates-on-Record - Association and another v. Union of India 28 struck down the National Judicial Appointments Commission that took away judicial primacy in appointment of judges as unconstitutional. Secondly, in its historic ruling, the Supreme Court in Nabam Rebia and Bamang Felix v. Deputy Speaker and others 29, a five-judge Bench, led by Justice Jagdish Singh Khehar held that, the actions of the Governor to be illegal and violative of the constitutional provisions. Accordingly, the court has restored

28 AIR 2015 (SCW) 5157
29 2016(6) Scale 506
the Congress Government in Arunachal Pradesh. The brief fact of the case goes like this that, the Governor called for an emergency session to take up the impeachment motion against Speaker Nabam Rebia. In the special session the impeachment motion was passed and Paul was elected as the Leader of the House. The same day, the Speaker disqualified 14 Congress MLAs. When the Congress protested the Governor’s action, the Centre went ahead and imposed President’s Rule in the State invoking Article 356. The President’s Rule in the State was challenged. The Centre justified the imposition of President’s Rule in the state citing complete breakdown of law and order. It also said the Congress government was in a minority there. The Supreme Court observed whether there were constitutional violations in the manner in which the Governor of Arunachal Pradesh issued orders that have eventually led to formation of a new government in the state. The court restored the Congress government in the state. The court said the Governor’s actions were ‘illegal’. The Court assumed that, that the Governor has the ‘constitutional power’ to summon the Assembly (and that it is not merely an executive function) the considerations at law become quite different. Undoubtedly, no power, constitutional or otherwise, can be exercised in an arbitrary manner though the exercise of power, in some situations is undoubtedly beyond judicial consideration or judicial review and at best an academic discussion, for example the legality of using the armed forces of the Union internationally. If the functions of the Governor were to be read as his power, and an untrammelled one at that (in view of Article 163 of the Constitution, as contended), then the Governor has the power to literally summon the Assembly to meet “at such time and place as he thinks fit” that is in any city and at any place other than the Legislative Assembly building and at any odd time. This is nothing but arbitrary and surely, an arbitrary exercise of power is not what our Constitution makers either contemplated in the hands of the Governor or imagined its wielding by any constitutional authority.

31 Nabam Rebia, and Bamang Felix v. Deputy Speaker and others, 2016(6) Scale 506, para-139
The Supreme Court of India has affirmed that, the Constitution expects all constitutional authorities to act in harmony and there must be comity between them to further the constitutional vision of democracy in the larger interests of the nation. In other words, conflicts between them should be completely avoided but if there are any differences of opinion or perception, they should be narrowed to the maximum extent possible and ironed out through dialogue and discussion.\textsuperscript{32}

Another area of concerned for the research scholar is about the bypassing of the legislative power by the executive power by way of exercising the power of promulgating ordinance by the President of India, especially during the present regime of NDA Government which took power to govern on 26\textsuperscript{th} May, 2014.

The Research Scholar further refers to yet another ordinance issued by the President of India, subsequent to the judgment of the Supreme Court in \textit{Animal Welfare Board of India v. A. Nagaraja & Ors}\textsuperscript{33}. In the said case \textsuperscript{34}, a bench comprising of Justices Dipak Misra and N.V. Ramana, stayed a 7\textsuperscript{th} January, 2016 notification issued by the Centre allowing Jallikattu on Monday, despite the ban imposed by the court on the sport, which it had called “inherently cruel”. Promulgation of an ordinance defeats the very basis of the Supreme Court judgment. Delegated legislations in the nature of ordinance have no validity if they violate the legislative intent of an existing statute on the same subject, passed by the Parliament and reinforced the Supreme Court in a judgment.

The observation of Frankfurter is notable in this regard. According to him “Enforcement of a rigid conception of separation of powers would make Government impossible.”\textsuperscript{35} Each organ of the Government should exercise its power on the principle

\textsuperscript{32} ibid
\textsuperscript{33} (2014) 7 SCC 547
\textsuperscript{34} 2016 (12) Scale 240
of Checks and Balances signifying the fact that none of the organs of Government should usurp the essential functions of the other organs.
1.1 STATEMENT OF RESEARCH PROBLEM

The doctrine of the separation of powers, originated by Baron de Montesquieu, is a model for the governance of democratic states. The doctrine divides the institutions of government into three branches: legislative, executive and judiciary: the legislature makes the laws; the executive put the laws into operation, and the judiciary interprets the laws. The powers and functions of each are separate and carried out by separate personnel. No single agency is able to exercise complete authority, each being interdependent on the other. Thus, power divided should prevent absolutism or corruption arising from the opportunities that unchecked power offers.

The value of the doctrine lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. A problem between separation and concentration of powers will always exist, and the greatest danger will always lie with the executive arm – not judiciary or the legislatures- because in the executive lies the greatest potential and practice for power and for its corruption.

The purpose of separation of powers to retain the autonomy of the organs without compromising the functional zone of the other organs remains only in theory. Separation of powers, quite essential in a democratic country with a parliamentary form of government, has to be recognized and enforced in its true sense. The judiciary in exercise of judicial review and in the tag of judicial independence has on some occasions, diluted the doctrine.

One of the important facets of the doctrine of separation of powers is the Independence of the judiciary which gives teeth to the maintenance of rule of law. The independence of the judiciary has to be real and not apparent merely. In reality, the Courts invent its own laws and methods of implementation and gains control of bureaucracy. Under such situation, the question arises that whether the courts have arrogated vast and uncontrolled powers to themselves which undermine both democracy
and rule of law, including the powers exercised under the doctrine of separation of powers.

1.2 SCOPE OF THE STUDY

The scope of the present study is limited to evaluate the concept of the doctrine of separation of powers. In furtherance of the objectives of study, the researcher has undertaken a comparative study of the practical application of the doctrine of separation of powers within the written Constitution of U.S.A. and India. Comparison is also made by studying the working of the doctrine of separation of powers in U.K.

1.3 OBJECTIVES OF THE RESEARCH

1. To study the practical application of the doctrine of separation of powers in the present scenario of India.
2. To study the influence of activism of judiciary on the doctrine of separation of powers in India.
3. To examine the federal character of Constitution is protected by invoking the doctrine of separation of powers in India.
4. To analyze the working of three organs under the Constitution of U.K., U.S.A., and India.

1.4 RELEVANCE AND UTILITY OF THE STUDY

The doctrine of separation of powers finds its roots in the ancient time, where the concepts of governmental functions and the theories of mixed and balanced government are evolved. These are the essential elements in the development of the doctrine of the separation of powers. The relevance of the doctrine of separation of powers has remarkably increased over recent years. The structure of the governance by implementing the doctrine of separation of powers has experienced far-reaching changes. New levels of governance have emerged by voluntary submission to
internationally agreed institutions such as WTO which plays an increasingly important role. The trend towards transparency and accountability has led to the creation of a number of new players such as election commissions, anti-corruption commissions and alike. The direct participation of the citizens in political decisions is also tremendously increasing from past few decades.

The truth is that, today, the society face serious problems, both in political analysis and in matters of practical significance in the field of governmental functions and their division among the institutions of government, as well as in terms of the relationships between these institutions. Forthwith, there are practical problems of the control of government every bit as important and difficult as in the days of Montesquieu, a founding father of doctrine of separation of powers. The impact of bureaucracy, has led to dissatisfaction of the executive function. The legislative body has been not able to keep the leading position in its law-making process and corresponds to the demands of the democracy. The independence of the judiciary is prerequisite for ensuring a free and fair society under the rule of law. The doctrine of Separation of Powers which was brought into existence to draw upon the boundaries for the functioning of all the three organs of the state - the legislature, the executive and the judiciary, provides for a responsibility to the judiciary to act as a watchdog and to check whether the legislature and the executive are functioning within their limits under the constitution and not encroaching upon the functioning of each other.

The study emphasises on the significance of the doctrine of separation of powers and its comparison with U.K., U.S.A., and India since, the doctrine is essential for the establishment and maintenance of political liberty of the government.

The significance of the research lies in the aspect that separation of powers must place the government to be checked internally by the creation of autonomous centers of power that will develop an institutional interest.
The relevance and utility behind the study is to examine one great current of Constitutional thought, the doctrine of the separation of powers, together with its associated theories of mixed government and checks and balances.

1.5 HYPOTHESES

1. Practical implementation of the doctrine of separation of powers is difficult in India.
2. Co-operation and co-ordination between the three organs of the government is required for the public good in India.
3. The doctrine of separation of powers in U.S.A. is implementable when compared to U.K. and India.

1.6 RESEARCH METHODOLOGY

The present research is a Doctrinal Study. The approach to study is descriptive and analytical in nature. Further, since the topic requires a comparative study, the researcher has followed the comparative method of research.

The doctrinal research is based on the library reference that is the secondary source of data such as Books, Journals, Articles, News Paper, Case Laws, Internet Websites, Statutory Provisions and various other reports.

1.7 REVIEW OF LITERATURE

The research scholar has surveyed various books, articles, reports, papers presented at a seminars/conferences, magazines and material available on websites. Number of judgments delivered by Supreme Court as well as various High Courts have also been gone through by referring to the law journals relating to the theme of this
research. The websites of different departments and legal institutions in U.K., U.S.A. and India have been focused to the extent of examining the Constitution that provides for a scheme of checks and balances between the three organs of government.

A review of literature on the doctrine of Separation of Powers – A Comparative Study with Reference to U.K., U.S.A., and India focus on the following work of the authors viz.


The author was the Professor of Law at Banaras Hindu University, Delhi University and the University of Malaya. He was also actively involved with the Indian Law Institute, New Delhi. The author has given a coherent and integrated picture of the Constitution as a whole and of the working and practices of the government machinery.


The author has emphasized on the powers of each branch of the State, which is needful for better understanding the concept of separation of powers in India.


This book examines the constitutional principles governing the relationship between the legislatures and the courts. Because the doctrine of the separation of powers is a major source of principle, the book will examine in detail the jurisprudence of the United Kingdom and United States. The book examines how the relevant constitutional principles strive to maintain the primacy of the law-making role of the legislature in a representative democracy and yet afford the decisional independence of the judiciary.

The author traces the history of the doctrine from its rise during the English Civil War, through its development in the eighteenth century through subsequent political thought and constitution-making in Britain and the United States.


The author analyzes the judicial activism of the Supreme Court of India in the post 1980 era particularly. The book gives a lucid analysis of the concept of judicial activism, reasons therefore and the manifestations thereof. The author has rightly indicated that when each of the three organs of the state respects and appreciates the role of the other organs and functions within its own sphere and parameters, the harmony which would be the resultant product would go a long way in bringing about socio-economic changes in the country. However, when the political organs of the state fail to discharge their constitutional obligations effectively or if their indifference to certain constitutional objects, especially the object of rendering social, economic and political justice to the people at large, the judiciary can legitimately assert its judicial power, to meet the constitutional ends. The author further analyze that in the process, the judiciary may assume the role of a policy maker, legislator and even the role of a monitor to oversee the implementation of its directions, then its behaviour or attitude can be rightly summarised as judicial activism”.


This book is versatile for its magnificent in imparting a comparative perspective on the development of the legal theories of Constitutional Law, frequently quoting decisions from USA, UK, Australia and other common Law Jurisdiction.

Brij Kishore Sharma, *Introduction to the Constitution of India* (Prentice-Hall of
India Learning Pvt. Ltd., New Delhi, 7th edn., 2011)

The author exposes the constitutional system of government of India. The author also points out the functions of three branches of government and upholds the role of judiciary and the power of judicial review. The author incorporates the Supreme Court judgments, and curative petition. The Book incorporates all constitutional amendments up to the 94th amendment.


The book enhances in understanding of the provisions of the Constitution for the research purpose.

Several articles are reviewed by research scholar such as:

Professor (Dr.) Gurjeet Singh’s, “The Three Best Things about the Indian Legal System”, IALS Conference. (Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World), January 12, 2011;


All these articles deal with application of the doctrine under the Constitution of India. Further it also provides for checks and balances between the three organs of government by laying down few landmark decisions of the Supreme Court.

An article by Cheryl Saunders, Katherine Le Roy, The Rule of Law, The Federation Press, Sydney, 2003. The article focuses on the system of governance in U.K. It also highly focuses on the role of judiciary which helps the research scholar to better understanding of the judicial system in U.K.
1.8 PLAN OF THE STUDY

The researcher has framed seven chapters for the purpose of carrying out the research on the topic titled “Doctrine of Separation of Powers – A Comparative Study with reference to U.K., U.S.A., and India”.

The very First Chapter, an introductory one, is devoted to mention statement of research problem along with objective, methodology of research and hypotheses.

The Second Chapter namely Doctrine of Separation of Powers: Origin, Development And Contemporary Issues focuses by tracing the origin of doctrine of separation of powers from ancient to modern time. In this chapter the research scholar has discussed few contemporary issues pertaining to doctrine of separation of powers.

The Third Chapter titled Separation of Powers: Position in U.K. depicts the position of separation of powers in United Kingdom along with the recent developments in the doctrine of separation of powers.

The Fourth Chapter namely Separation of Powers: Position in U.S.A. discuss the working of the doctrine of separation of powers along with its practical application in United States of America.

The Fifth Chapter is fully devoted to focus the doctrine of separation of powers in India in view of changing socio-economic scenario.

The Sixth Chapter entitled Separation of Powers in U.K., U.S.A. and India: A Comparative Perspective makes an in-depth study by way of comparing the application and utility of doctrine of separation of powers in two developed countries namely the United Kingdom and the United States of America.
The Seventh Chapter is the main chapter which draws conclusions out of the research study made by the researcher. Further, chapter seven provide suggestions for proper application of doctrine of separation of powers for the benefit of maintaining balance between three organs of the government in order to have good governance.