4.1 BACKGROUND

Today all the Constitutional systems in the world 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. It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executives, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

The legitimacy of an ‘active judiciary’ is closely connected with the constitutional limits enshrined in the constitution which are based on a broad division of powers among the three organs of the state. In this set up, each organ is earmarked with certain specific functions any usurpation of such earmarked functions by other organs raises certain serious questions relating to the harmonious working of the Constitution. For these reasons, the primary objection that outs the concept of ‘Judicial Activism’ is the doctrine of ‘Separation of Powers’.

Since early times, it has been a prime concern of most of the political thinkers to devise methods that can best stand as a bulwark against the arbitrary exercise of governmental powers. To this effect, it has often been many a time suggested that there should be no concentration of power in a single man or a body of men and the
government should be that of a government of law and not of men. The frank
acknowledgement of the role of government in a society linked with a determination to
bring it under control by placing limits on its power has influenced the minds of myriad
political thinkers as well as the advocates of constitutionalism who from time to time
have come up with distinct theories to grapple with the burgeoning problem.

As a solution to this dilemma, the doctrine of separation of powers has always
stood alongside other theories, as a fundamental political maxim, surmounted with the
intellectual propositions of many philosophers who in some way or the other,
developed and perceived it as per their own apprehensions and understandings. A
close analysis of the literature available on the doctrine goes on to suggest that even for
people most closely associated with the doctrine, only concerned themselves himself
with the demonstration of its adoption and its application in the constitution of United
States. 262 Further, the unanimous disagreement amongst the authorities on
Montesqueu’s attempt of defining the doctrine also illustrates the point. 263

By no stretch of imagination is the doctrine a simple and an immediately
recognizable, unambiguous set of concept. It rather represents an area of political
thought where there has been an extraordinary confusion in defining and the use of its
attributes. Interestingly, standing alone as a theory of government, the doctrine has
uniformly failed to provide an adequate basis for an effective and a stable political
system. 264 Nevertheless, having made all the necessary qualifications, the essential and
vital ideas behind the doctrine still remain of utmost importance in various political
systems in the world over today. An examination of the history of the past centuries
reveals that despite all inadequacies, there has always been a stubborn quality about the
doctrine that it persistently has re-appeared in different forms often in the very work of
those who saw themselves as its most bitter critics. 265 This per se is recognition of the
fact that the very idea of division of power and separation of functions, has always
prevailed persistently in the past so as to give effect to a just system of governance and
avoid any concentration of power in a single body of men.

263 Ibid.
265 Ibid.
4.2 MEANING OF SEPERATION OF POWERS

Understanding that a government's role is to protect individual rights, but acknowledging that governments have historically been the major violators of these rights, a number of measures have been devised to reduce this likelihood. The concept of Separation of Powers is one such measure. The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse.

It is generally accepted that there are three main categories of governmental functions – (i) the legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State i.e. legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.\(^{266}\)

As the concept of ‘Separation of Powers’ explained by Wade and Philips,\(^{267}\) it means three different things:–

i. That the same persons should not form part of more than one of the three organs of Government, e.g. the Ministers should not sit in Parliament;

ii. That one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and

iii. That one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.

\(^{267}\) Constitutional Law (1960) pp. 22-34.
4.3 IMPORTANCE OF THE DOCTRINE

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons of why it is not strictly accepted by a large number of countries in the world. The main object, as per Montesquieu - Doctrine of separation of power is that there should be government of law rather than having willed and whims of the official. Also another most important feature of this doctrine is that there should be independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly. The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power do plays a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is independence of judiciary. Also the importance of the above said doctrine can be traced back to as early as 1789 where the constituent Assembly of France in 1789 was of the view that “there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted”.

4.4 ORIGIN OF ‘SEPARATION OF POWERS’

The concept of separation of powers grew out of centuries of political and philosophical development. Its origins can be traced to 4th century B.C., when Aristotle, in his treatise entitled Politics, described the three agencies of the government viz. the General Assembly, the Public Officials, and the Judiciary.268 In republican Rome, there was a somewhat similar system consisting of public assemblies, the senate and the public officials, all operating on the principle of checks and balances.269 Following the fall of the Roman Empire, Europe became fragmented into nation states, and from the end of the middle ages until the 18th century, the dominant governmental structure consisted of a concentrated power residing in the

268 Aristotle also described three elements in every constitution as the deliberative element, the element of magistracies, and the judicial element. See generally Robinson, “The Division of Governmental Power in Ancient Greece” 18 Pol.Sci.Q.614 (1903).
hereditary ruler, the sole exception being the development of English Parliament in the 17th century.\footnote{Fairlee, The Separation of Powers 21 \textit{Mich.L.Rev} 393 (1922)}

With the birth of the Parliament, the theory of the three branches of government reappeared, this time in John Locke’s Two Treatise of Government (1689), where these powers were defined as ‘legislative’, ‘executive’, and ‘federative’.\footnote{See G.B.Gwyn, \textit{The Meaning of Separation of Powers} 3 (1963).} Locke, however did not consider the three branches to be co-equal, and nor considered them as designed to operate independently.\footnote{\textit{Ibid.}} He considered the legislative branch to be supreme, while the executive and federative functions as internal and external affairs respectively, which were left within the control of the monarch, a scheme which obviously corresponded with the dual form of government prevailing in England at that time, that is, The Parliament and The King.\footnote{\textit{Supra note}. 269 at 396.}

During those times, in England the term ‘executive’ had a much broader connotation in contrast to how it is understood today. What we now call executive and judicial functions were then simply known as ‘Executive Power’. The King was considered as the repository of all executive and judicial powers and was believed to be the sole protector of the laws of nature. However, the need for the independence of the judiciary from the hands of the king and his other servants was a long felt demand since early times which was further influenced by the writings of Fortescue, a political thinker of that time.\footnote{\textit{Ibid}} On similar lines, Chief Justice Coke in 1607 went a step further and said that judicial matters were “not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain cognizance of it.”\footnote{\textit{Supra note}. 270 at 6.} Nonetheless, it was much clear in the minds of people that the only part that the king played in administration of justice was that of the appointment of judges.

Having felt that judiciary should be separate and independent from the clutches of the King, another theory that aimed at the separation of legislative and executive

\footnote{Fairlee, The Separation of Powers 21 \textit{Mich.L.Rev} 393 (1922)}
(including judicial) functions grew autonomously by the influence of the writings of several other political writers of that time. Throughout the 17th and 18th centuries, English writers endeavoured to expound one theory of separation in the absence of the other. It was not until Baron-de-Montesquieu that a really influential synthesis of the duo appeared.

4.5 **MONTESQUIEU’S THEORY OF SEPARATION OF POWERS**

Baron-de-Montesquieu was a French philosopher who is aptly known, criticisms apart, for the theorization of the concept of separation of powers into a profoundly systematic and scientific doctrine in his book De L’ Espirit des Lois (The Spirit of Laws), published in the year 1748. He based his theory on his understanding of the English system which since the time of Locke had generated a more independent judiciary and a tendency towards a greater distinction amongst the three branches.

Apart from ‘natural liberty’, Montesquieu laid greater emphasis on ‘political liberty’ of a citizen. He defined ‘political liberty’ as “peace of mind that arises from the opinion each person has of his security” and said that” in order to have such liberty, it is necessary that the government be such that one citizen need not fear another”.\(^\text{276}\) He further observed that liberty is constantly endangered by the tendency of men to abuse governmental power and that to prevent such abuse it is necessary to construct a government where power would check power.\(^\text{277}\) This suggests that Montesquieu perceived a separation with an adroit admixture of checks and balances. In discussing the importance of delineations of power among the three branches, he wrote:\(^\text{278}\)

“When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of


\(^{277}\) *Ibid* at 101.

everything, where the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.”

To discover the constitutional principles which best promoted political liberty, Montesquieu looked to the English Constitution which in his belief, the only one was having liberty as its chief object. Though the English Constitution classified political power primarily in terms of ‘legislative’ and ‘executive’ functions and further subdivided the latter to take into account Lock’s distinction between ‘executive’ and ‘federative’ functions, he decided to call the conduct of foreign affairs as ‘executive power’ and the execution of domestic law as ‘judicial power’. 279

Based on this broad classification, he divided the governmental power into legislative, executive and judicial functions. He apprehended ‘legislative power’ as an activity of declaring the general will of the state, of informing the people through general rules of their obligations toward one another and opined that such power should reside in the body of people, for in a free state, he believed, every man who is supposed to be a free agent ought to be governed by himself. Further, he understood ‘executive power’ as that of executing the public resolutions embodying the general will of State and ‘judicial power’ as the power of deciding civil and criminal cases. 280 Of the trio, he considered judicial power as the most frightening power since in his opinion executive could not harm a subject’s life, liberty, or property until after a judicial decision. 281

Though Montesquieu deserves accreditation for such a theorization, and is indeed given so in some quarters, however his conception is not free from criticisms for some. As Professor Ullman says that “he looked across the foggy England from his sunny vineyard in Paris and completely misconstrued what he saw”. 282 This is however evident from the fact that in U.K., the principle of separation of powers has neither been accorded a constitutional status, nor even has it been theoretically enshrined.

279 The conduct of foreign relations was thought of as being executive in sense that it executed the law of the nations. Ibid.

280 Id. at 102.

281 Ibid.

Montesquieu Stated the Doctrine of Separation of Powers in the Following Words-

“They 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”.

Through his doctrine Montesquieu tried to explain that the union of the executive and the legislative power would lead to the despotism of the executive for it could get whatever laws it wanted to have, whenever it wanted them. Similarly the union of the legislative power and the judiciary would provide no defence for the individual against the state. The importance of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons.

The same was expounded by James Madison of U.S.A. as-

“The accumulation of all powers, legislative, executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny”.

Therefore, separation of powers doctrine acts as a check against tyrannical rule. The purpose underlying the separation doctrine is to diffuse governmental authority so as to prevent absolutism and guard against arbitrary and tyrannical powers of the state, and to allocate each function to the institution best suited to discharge it.

The Missing Judiciary in Locke’s Separation of Powers:

Judicial independence is a cornerstone in modern liberal democracies. We can easily regard it as a *sine qua non* of constitutional Government, or a regime structured to avoid the oppression of those who do not control the state. The rule of law seems more than just unlikely, but rather indefinable, without a separate system, one that neither makes nor executes the law. We are predictable surprised, then, to see that John Locke did not treat judging as a separate power in the Two Treatises of Government. Here, the three different aspects of political power are instead the legislative, executive, and federative powers; we can begin to appreciate what is going on by looking to Montesquieu’s Spirit of the Laws.
Montesquieu makes explicit what was only implicit in Locke’s account:

Each power differs from the others in its relation to laws of various sorts. The legislative power is the source of positive law. The Executive power employs the force of the community according to that positive law. The federative Power addresses those without obligations to positive law, consequently applies what Locke calls the law of nature in dealing with them. Montesquieu calls the two non-legislative powers the “executive power over the things depending on civil right” and the “executive power over the things depending on the right of nations,” respectively. While two things are named “executive power”, he is clear that what is essential is the law according to which they are exercised, more than the fact that they are applications of force: they are, as he says, different “sorts of power”. Montesquieu further distinguishes the executive power regarding civil right into the punishment of crimes and the judging of disputes between individuals. This split seems to track the difference between criminal and civil law, with Montesquieu deciding that the former will be referred to as “simply the executive power of the state” and the latter “the power of judging”. Yet his subsequent discussion reveals that this is instead our familiar distinction between the executive and judicial powers, regardless of whether the latter are involved in public law or private. This separation is justified because it tends to preserve that “tranquillity of spirit” which is definitive of political liberty. This is to say that Montesquieu, agreeing with Locke that the executive and judicial powers are essentially the same in their relation to civil right, says that they must be treated as if distinct for the sake of political liberty. Perhaps Montesquieu considers all crimes to be disputes between individuals.

4.6 SEPARATION OF POWERS: THE TRUE PRECEPT

Being normative in nature, the doctrine, in euphemistic parlance, can be understood as being clearly committed to the achievement of political liberty, an essential part of which is the restraint on governmental power, and that this can best be achieved by setting up divisions within the government to prevent the concentration of such power in the hands of a single body of men. However, it must be admitted in this regard that the recognition of the need for government action to provide necessary

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283 Characteristically, the doctrine is normative in nature prescribing certain governmental arrangements which should be created or perpetuated in order to achieve certain desirable ends. See Supra note. 270 at 5.
environment for individual growth is complementary to, and not incompatible with the view which vehemently reiterates that restraints upon the government are in essential part of a theory.

A major problem in an approach to the literature on the doctrine of the separation of powers is that a few writers define exactly what they mean by it, what its essential tenets are, and how it relates to the other ideas. For this reason generally, one can find much confusion and chaos in discussions relating to its origin as the exact nature of the claims being made for one thinker or the other are not measured against any clear definition. One such attempt; is nonetheless made by Professor Vile in his book Constitutionalism and Separation of Powers. He puts it as a ‘pure theory of separation of powers’ and defines it thus.284

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

From an analysis of this ‘ideal type’ or ‘benchmark’ definition put forth by Professor Vile, one can imply that the first element of the ‘pure doctrine’ is the assertion of a division of the agencies of the government into three categories: The Legislature, The Executive, and The Judiciary. In contrast with the earlier versions, it can be said that though they were in fact based on a twofold division of governmental

284 See M.J.C Vile, Constitutionalism and Separation of Powers 13 (1967). Prof.Vile admits that though it is true that the doctrine has rarely been held in this extreme from, and even more rarely been put into practice, but it represents a ‘benchmark’ or an ‘ideal type’ that enables the understanding of the doctrine with all its changing developments and ramifications. Also see E.C.S Wade & G.G Philip, Constitutional law 22-34 (1960).
powers, however, since the mid 18th century the three fold division has generally been accepted as the basic necessity for a constitutional government.\footnote{As far as the actual institutional development is concerned, of course, the basis of the three fold structure had been laid in England by 13\textsuperscript{th} Century. For details see F.W.Maitland, \textit{The Constitutional History of England} 20 (1961).}

The second element of the doctrine suggests that there are three specific functions of the government. Unlike the first element which recommends that there should be three branches of government, this element of the doctrine suggests a sociological truth that there are, in all governmental situations, three necessary functions to be performed, whether or not they are in fact all performed by one person or group, or whether there is a division of these functions among two or more agencies of government.

The third element in the doctrine and the one which sets the separation of powers wide apart from those who subscribe to the general themes set out above, is what, for the want of better phrase, can be referred to as the ‘separation of persons’. This is the recommendation that the three branches of government should be composed of quite separate and distinct groups of people with no overlapping membership.

On the touchstone of this ‘ideal type’ conception, it is worth to recall the sayings of scholars and eminent jurists who have commented, from time to time, on the utility and desirability of having the doctrine in its rigid or flexible form thereby giving effect to it in its true letter and spirit. According to Friedman, “Strict separation is a theoretical absurdity and a practical impossibility. However there is no liberty if the judicial power be not separated from the legislative and executive.”\footnote{Friedman, \textit{Law in a Changing Society} 382 (1966).} For Jaffe and Nathan, “Separation of Power is undesirable in strict sense nevertheless; its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous power of the executive. The object of the doctrine is to have a government of law rather than of official will or whim.”\footnote{Jaffe, L.L & Nathan N.L., \textit{Administrative Law} (1961).}

Having examined the doctrine from its history and origin to its “ideal” precept along with the conceptions of Montesquieu and his contemporary counterparts on the subject, our discussion grows matured enough to test the doctrine as it stands imbibed
in the Constitution of India since it takes the form of a primary objection in governance and the role of judges whenever ‘Judicial Activism’ is brooded about.

4.7 SEPARATION OF POWERS IN USA AND UK

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.

4.7.1 U.S.A.

The doctrine of Separation of Powers forms the foundation on which the whole structure of the Constitution is based. It has been accepted and strictly adopted in U.S.A. Article I; Section 1 vests all legislative powers in the Congress. Article II; Section 1 vest all executive powers in the President and Article III; Section 1 vests all judicial powers in the Supreme Court.

Jefferson quoted, “The concentration of legislative, executive and judicial powers in the same hands in precisely the definition of despotic Government.” On the basis of this theory, the Supreme Courts was not given power to decide political questions so that there was not interference in the exercise of power of the executive branch of government. Also overriding power of judicial review is not given to the Supreme Court. The President interferes with the exercise of powers by the Congress through his veto power. He also exercises the law-making power in exercise of his treaty-making power. He also interferes in the functioning of the Supreme Court by appointing judges.

The judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It can be said that the Supreme Court has made more amendments to the American Constitution than the Congress. To prevent one branch from becoming supreme, protect the "opulent minority" from the majority, and to induce the branches to cooperate, governance systems that employ a separation of powers need a way to balance each of the branches. Typically this was accomplished through a system of "checks and balances", the origin of which, like separation of powers itself, is specifically credited to Montesquieu. Checks and balances allow for a system based regulation that allows one branch to limit another,
such as the power of Congress to alter the composition and jurisdiction of the federal courts.

1. **Legislative Power**

   Congress has the sole power to legislate for the United States. Under the non-delegation doctrine, Congress may not delegate its lawmaking responsibilities to any other agency. In this vein, the Supreme Court held in the 1998 case Clinton v. City of New York that Congress could not delegate a "line-item veto" to the President, by which he was empowered to selectively nullify certain provisions of a bill before signing it. The Constitution Article I, Section 8; says to give all the power to Congress. Congress has the exclusive power to legislate, to make laws and in addition to the enumerated powers it has all other powers vested in the government by the Constitution. Where Congress does not make great and sweeping delegations of its authority, the Supreme Court has been less stringent. One of the earliest cases involving the exact limits of non-delegation was Wayman v. Southard (1825). Congress had delegated to the courts the power to prescribe judicial procedure; it was contended that Congress had thereby unconstitutionally clothed the judiciary with legislative powers.

2. **Executive Power**

   Executive power is vested, with exceptions and qualifications, in the president by Article II, Section 1, of the Constitution. By law the president becomes the Commander in Chief of the Army and Navy, Militia of several states when called into service, has power to make treaties and appointments to office -- "...with the Advice and Consent of the Senate"-- receive Ambassadors and Public Ministers, and "...take care that the laws be faithfully executed" (Section 3.) By using these words, the Constitution does not require the president to personally enforce the law; rather, officers subordinate to the president may perform such duties. The Constitution empowers the president to ensure the faithful execution of the laws made by Congress. Congress may itself terminate such appointments, by impeachment, and restrict the president. The president's responsibility is to execute whatever instructions he is given by the Congress. Congress often writes legislation to restrain executive officials to the performance of their duties, as authorized by the laws Congress passes. In *INS v.*
Chadha (1983), the Supreme Court decided (a) The prescription for legislative action in Article I, Section 1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and Section 7—requiring every bill passed by the House and Senate, before becoming law, to be presented to the president, and, if he disapproves, to be repassed by two-thirds of the Senate and House—represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers. Further rulings clarified the case; even both Houses acting together cannot override Executive veto’s without a 2/3 majority. Legislation may always prescribe regulations governing executive officers.

3. **Judicial power**

Judicial power — the power to decide cases and controversies — is vested in the Supreme Court and inferior courts established by Congress. The judges must be appointed by the president with the advice and consent of the Senate, hold office for life and receive compensations that may not be diminished during their continuance in office. If a court's judges do not have such attributes, the court may not exercise the judicial power of the United States. Courts exercising the judicial power are called "constitutional courts." Congress may establish "legislative courts," which do not take the form of judicial agencies or commissions, whose members do not have the same security of tenure or compensation as the constitutional court judges. Legislative courts may not exercise the judicial power of the United States. In Murray's Lessee v. Hoboken Land & Improvement Co. (1856), the Supreme Court held that a legislative court may not decide "a suit at the common law, or in equity, or admiralty," as such a suit is inherently judicial. Legislative courts may only adjudicate "public rights". Even though of above all, Separation of Powers is not accepted in America in its strict sense, only it has attracted the makers of most modern Constitution, especially during 19th Century.

**In a leading case:** *Marbury v. Madison*,\(^{288}\) is a landmark case in United States law. It formed the basis for the exercise of judicial review in the United States under Article

\(^{288}\) *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).
III of the Constitution. This case resulted from a petition to the Supreme Court by William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force Secretary of State James Madison to deliver the documents, but the court, with John Marshall as Chief Justice, denied Marbury's petition, holding that the part of the statute upon which he based his claim, the Judiciary Act of 1789, was unconstitutional.

*Marbury v. Madison* was the first time the Supreme Court declared something "unconstitutional", and established the concept of judicial review in the U.S. (the idea that courts may oversee and nullify the actions of another branch of government). The landmark decision helped define the "checks and balances" of the American form of government.

Separation of powers has again become a current issue of some controversy concerning debates about judicial independence and political efforts to increase the accountability of judges for the quality of their work, avoiding conflicts of interest, and charges that some judges allegedly disregard procedural rules, statutes, and higher court precedents.

It is said on one side of this debate that separation of powers means that powers are shared among different branches; no one branch may act unilaterally on issues, but must obtain some form of agreement across branches. That is, it is argued that "checks and balances" apply to the Judicial branch as well as to the other branches. It is said on the other side of this debate that separation of powers means that the Judiciary is independent and untouchable within the Judiciaries' sphere. In this view, separation of powers means that the Judiciary alone holds all powers relative to the Judicial function, and that the Legislative and Executive branches may not interfere in any aspect of the judicial branch.

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Article I vests the legislative power in the Congress; Article II vests executive power in the President and Article III vests judicial power in the Supreme Court. The framers of the American constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical
government by making it impossible for a single group of persons to exercise too much power. Accordingly they intended that the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation doctrine prevents any organ to become supreme.

Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but it’s not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldn’t become a member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organs doesn’t behold the powers absolutely.

This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore, the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

4.7.2 U.K.

Before we go to India, it’s important to know the constitutional setup of the country to which India was a colony and ultimately owes the existence of the form of government it has. U.K. follows a Parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the Cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature, it even holds the power to dissolve the assembly. The resting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.
4.8 SEPARATION OF POWERS & THE INDIAN CONSTITUTION

The Constitutional history of India reveals that the framers of the Indian Constitution had no sympathy with the doctrine. This is evident from its express rejection in spite of attempts being made. It even sheds no light to the application of the doctrine during the British Regime. The Constituent Assembly, while in the process of drafting the Constitution, had dwelt at length for incorporating the doctrine and ultimately rejected the idea in toto. Dr. B.R. A. Ambedkar, who was one among the members of the Constituent Assembly, while comparing the Parliamentary and Presidential systems of India and America respectively, remarked as thus.

Looking at it from the point of view of responsibility, a non-parliamentary executive, being independent of Parliament, tends to be less responsible to the legislature while a parliamentary system differs from a non-parliamentary system in as much as the former is more responsible than the latter but they also differ as to time and agency for assessment of their responsibility. Under the non-parliamentary system, such as the one exists in U.S.A. the assessment of the responsibility of the executive is periodic. It takes place once in two years. It is done by the electorate in England, where the Parliamentary system prevails; the assessment of responsibility is both periodic and daily. The daily assessment is done by the members of the Parliament through questions, resolutions, no confidence motions, adjournment motions and debates on address. Periodic assessment is done by the electorate at the time of the election which may take place every five years or earlier. The daily assessment of responsibility which is not available under the American system is, it is felt, far more effective than the periodic assessment and far more necessary in a country like India. The draft Constitution, in recommending the parliamentary system of government, has preferred more responsibility than stability.

The above view of Dr. Ambedkar thus substantiates that Indian Constitution does not make any absolute or rigid separation of powers of the three organs owing to its pro-responsibility approach rather than having stability at the centre stage. This has,
however been further supplemented and reiterated by the Indian Supreme Court in *Ram Jawaya Kapur v. State of Punjab*, the Court through Mukherjee J. held that.\(^{291}\)

The Indian Constitution has indeed not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another.

A more refined and clarified view taken in *Ram Jawaya’s case* can be found in *Kartar Singh v. State of Punjab*, where Ramaswamy J. stated.\(^{292}\)

It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution.

The functional classification and sufficient demarcation, as is held by the Supreme Court, indeed does not suggest the application of the doctrine in its absolute terms. Rather it just gives a slight glimpse as to the character of the Indian Constitution which it shares with the ‘pure doctrine’ discussed above, that is, inter-alia the acceptance of the philosophy behind the doctrine pertaining to rigors of concentration of power and the avoidance of tyranny, of having a rule of law and not rule of men. The same can be substantiated through a detailed analysis of the provisions of the Constitution which is the next course of action this chapter attempts to take.

“Executive in India, like any other Westminster system\(^{293}\), is a subset of legislature and virtually there is a fusion between them, thus generally no friction arises between them.\(^{294}\) The Constitution of India has indeed adopted the British Parliamentary system, wherein the political executive controls the Parliament. In addition, the Cabinet or the Council of Ministers enjoys a majority in the legislatures

\(^{291}\) AIR 1955 SC 549.
\(^{292}\) AIR 1967 SC 1643: (1967) 2 SCR 762.
\(^{293}\) On the contrary, the theory of integration of powers has been adopted in the Westminster system. Lord Chancellor is the head of the judiciary, Chairman of the House of Lords (legislature), a member of the executive and often a member of the cabinet.
and virtually controls both, the legislature as well as the executive. Just like the British Cabinet, its Indian counterpart can be called as “a hyphen which joins a buckle which fastens the legislative part of the state to its executive part”.

Under the Indian Constitution, the executive powers are vested with the President and Governors for respective states. The President is, therefore, regarded as the Chief Executive of Indian Union who exercises his powers as per the constitutional mandate on the aid and advice of the council of ministers. The president is also empowered to promulgate ordinances in exercise of his extensive legislative powers which extend to all matters that are within the legislative competence of the Parliament. Such a power is co-extensive with the legislative power of the Parliament. Apart from ordinance making, he is also vested with powers to frame rules and regulations relating to the service matters. In the absence of Parliamentary enactments, these rules and regulations hold the field and regulate the entire course of public service under the Union and the States. Promulgation of emergency in emergent situations is yet another sphere of legislative power which the President is closed with. While exercising the power after the promulgation of emergency, he can make laws for a state after the dissolution of state legislature following the declaration of emergency in a particular state, on failure of the constitutional machinery.

Like the British Crown, the President of India is a part of the legislature though he is not a member of any house of the Parliament. No Bill for the formation of new states or alteration of boundaries etc. of the existing states, or affecting taxation in which States are interested or affecting the principles laid down for distributing money to the states or imposing a surcharge for the purposes of the Union and no Money

296 Art.53 (1) of the Constitution.
297 Art.154 (1) of the Constitution.
298 Art.74 (1). Also see Rao v. Indira AIR 1971 SC 1002.
299 Art. 123. Though such legislative powers can only be exercised vested with the President is no higher and no lower than that of the law making power of the Parliament. See Cooper v. Union of India AIR 1970 SC 564.
300 Art.309 of the Constitution of India.
301 Art.356 of the Constitution of India.
302 Art.79 of the Constitution of India.
303 Art.3 of the Constitution of India.
304 Art.274 of the Constitution of India.
Bill or Bill involving expenditure from the consolidated fund of India\textsuperscript{305} can be introduced for legislation except on the recommendation of the President. Besides this, he also has powers to grant pardons, reprieves respites or remissions of punishment or to suspend, remit or commute; the sentence of any person convicted any offence which is of judicial nature. He also performs similar judicial functions in deciding a dispute relating to the age of the judges of the constitutional courts for the purpose of their retirement from their judicial office.\textsuperscript{306}

In a similar manner, Parliament also exercises judicial functions. While performing judicial functions, it can decide the question of breach of its privilege and if proved, can punish the person concerned.\textsuperscript{307} While doing so, the Parliament is the sole judge and Courts cannot generally question the decision of the Houses on this point.\textsuperscript{308} Moreover, in case of impeachment of the President, one House of the Parliament acts as a prosecutor and the other House investigates the levelled charges and decides whether they substantiate or not.

There is, however, a considerable institutional separation between the judiciary and other organs of the government.\textsuperscript{309} The Constitution confers wide powers however; a certain amount of executive control is vested in the higher judiciary with respect to subordinate judiciary. At the same time, the power of appointment of high courts and Supreme Court judges including the Chief Justice of India, vests partially with the executive, that is to say, the President of India who in turn exercises this power in consultation with the Governors of the concerned states and the Chief Justice of the concerned High Court in case of a high court judge and Chief justice of India in case of a Supreme Court judge. Moreover, the judges of constitutional courts cannot be removed except for proved misconduct or incapacity and 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 the Parliament and presented to the President.\textsuperscript{310}

\textsuperscript{305} Art.117 of the Constitution.
\textsuperscript{306} Arts.124 (2A) and 217 (3). See also Union of India v. Jyoti Prakesh Mitter AIR 1972 SC 1093.
\textsuperscript{307} Art. 105
\textsuperscript{308} However in Raja Ram Pal v. Hon. Speaker, Lok Sabha (2007) 3 SCC 184, the Apex Court has held that though deciding the breach of privileges and consequent power to punish is in general the exclusive prerogative of the Parliament, yet it is amenable to judicial review in case of gross illegality or the violation of constitutional provisions.
\textsuperscript{309} Art. 50 enjoin the State to take steps to separate the judiciary from the Executive. This provision is a Directive Principle enshrined in Part IV of the Constitution.
\textsuperscript{310} Art. 124 (3) of the Constitution of India.
Apart from exercising routine judicial functions, the superior constitutional courts also performs certain executive and administrative functions as well. High courts have supervisory powers over all subordinate courts and tribunals and also the power to transfer cases. In addition, the High Courts as well as the Supreme Court also have legislative powers by virtue of which they can frame rules regulating their own procedure for the conduct and disposal of cases.

The foregoing exercise establishes the proposition expounded by the Supreme Court in Ram Jaway’s Case. The analysis clearly shows that the concept of separation of powers, so far as the Indian Constitution is concerned, reveals and artistic blend and an adroit admixture of judicial, legislative and executive functions. Separation sought to be achieved by Indian Constitution is not in an absolute or literal sense. Despite being evident that the constitution nowhere expressly bows in line to the concept, albeit it remains an essential framework of the constitutional scheme. Agreeing on this premise, it has also been accorded the status of basic structure by the Supreme Court. Therefore, it can axiomatically be said that Indian Constitution does not contemplate separation as embodied in the ‘pure doctrine’, it rather perceives and accords to it in its central sense, that is to say, not in its literal sense, rather in its purposive sense, i.e. non conferment of unfettered powers in a single body of men and to motivate checks and balances.

Another point of concern which requires clarification is whether the three organs, though not rigidly separate, can usurp their powers or are they required by the constitution to work only within the respective area earmarked in a narrow-sense. To put it differently, whether the constitution mandates encroachment by one organ into the domain of another on the pretext of failure or inaction of the other organ is the next question that needs to be addressed in is context.

Though theoretically, this issue has been addressed by the Supreme Court, however, in has failed to cater an effective basis in practice which is evident from the

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311 Art.227 of the Constitution of India.
312 Arts. 145 & 225 of the Constitution.
growing amount of judicial encroachment in the domain of other organs. In *Asif Hameed v. State of J & K*, it has been held that\(^{314}\)

“Although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislative, Executive and Judiciary have to function within their respective spheres demarcated under the constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people’s will, have all the powers including that of finance. Judiciary has no power over sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits. It is the sentinel of democracy”.

The prime point of our concern here is whether the judicial organ of the State is conferred with a constitutional mandate so as to overstep its limits while discharging its main functions. That is to say whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so, or it cannot do so simply by virtue of the fact that the concept of separation of powers puts fetters on it. To answer these points, one needs to ascertain as to what status the judiciary has been accorded in the Indian Constitution. Is it supreme as compared to the other organs or is subordinate thereto?

Judiciary under Indian Constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and function within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the Constitution, had observed that\(^{315}\).

“The doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned”.

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\(^{314}\) AIR 1989 SC 1899.

\(^{315}\) Cited in Glanville Austin, *The Indian Constitution- Cornerstone of a Nation* 174 (1966).
It can thus very aptly be said that creation of judicial organ in India was not at all meant to give to it a supreme status as compared to the other co-ordinate organs. Rather, with powers and functions sufficiently distinguished and demarcated, what is expected out of judiciary is to act as a watchdog to oversee and prods to keep the other organs within the constitutional bounds. The essence of the Constitution is that it produces a system which is the result of amalgamation of the principle of separation of powers with the doctrine of parliamentary sovereignty in a manner to give effect to both, yet without the rigidity of the two systems. The Parliamentary democracy is cemented as the corner stone of constitutional edifice in preference to the Presidential system of governance.

4.9 SEPARATION OF POWERS AND JUDICIAL PRONOUNCEMENTS IN INDIA

In India, we follow a separation of functions and not of powers. And hence, we don’t abide by the principle in its rigidity. An example of it can be seen in the exercise of functions by the Cabinet ministers, who exercise both legislative and executive functions. Art.74 (1) wins them an upper hand over the executive by making their aid and advice mandatory for the formal head. The executive, thus, is derived from the legislature and is dependent on it, for its legitimacy, this was the observation made by the Hon’ble S.C. in Ram Jawaya v. Punjab.316

On the question that where the amending power of the Parliament does lies and whether Art.368 confers and unlimited amending power on Parliament, the S.C. in Keshavanand Bharti317 held that amending power was now subject to the basic features of the constitution. And hence, any amendment tapering these essential features will be struck down as unconstitutional. Beg. J. added that separation of powers is a part of the basic structure of constitution. None of the three separate organs of the republic can take over the functions assigned to the other. This scheme cannot be changed even by resorting to Art.368 of the constitution. There are attempts made to dilute the principle, to the level of usurpation of judicial power by the legislature.

In a subsequent case law, S.C. had occasion to apply the Keshavanand ruling regarding the non-amend ability of the basic features of the Constitution and strict

316 AIR 1955 SC 549.
317 AIR 1973 SC 1461.
adherence to doctrine of separation of powers can be seen. In *Indira Nehri Gandhi v. Raj Narain*, 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 power, 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 ‘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.

4.10 FINDINGS

The above discussion makes it axiomatic and well settled that Indian Constitution does not tilt in favour of ‘pure doctrine’ of separation of powers. Having rejected the structural separation, the Constitution has however adopted the principle in its broad sense coupled with the objective of securing checks and balances within the system. In principle, the doctrine bars the active jurisdiction of organs and in general contemplates no assumption by one organ, of functions pertaining to another organ.

It has been well said by Lord Action: “*Power corrupts and absolute Power tends to corrupt absolutely*”. Conferment of power in a single body leads to absolutism. But, even after distinguishing the functions, when an authority wields public power, then providing absolute and sole discretion to the body in the matters regarding its sphere of influence may also cause abuse of such power. Therefore, the doctrine of separation of powers is a theoretical concept and is impracticable to follow it absolutely.

The status of modern state is a lot more different than what it used to be. It has evolved a great deal from a minimal, non-interventionist state to an welfare state, wherein it has multifarious roles to play, like that of protector arbiter, controller, provider. This omnipresence of the state has rendered its functions becoming diverse

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318 AIR 1975 SC 2299.
and problems, interdependent and any serious attempt to define and separate those functions would cause inefficiency in government. Hence, a distinction is made between ‘essential’ and ‘incidental’ powers of an organ. According to this differentiation one organ can’t claim the powers essentially belonging to other organ because that would be a violation of the principle of separation of powers. But, it can claim the exercise of the incidental functions of another organ. This distinction prevents encroachment of an organ into the essential sphere of activity of the other.

It is the exercise of incidental powers only which has made executive grow everywhere in this social welfare state. It has assumed a vital role but, it has not usurped any role from any other wing. It just happened that the other two organs, namely, judiciary and legislature, became unsuitable for undertaking the functions of this welfare state and as a consequence the functions of the executive increased. As controller and provider, the judicial processes were very time consuming and the legislature was overburdened with work. Therefore, it was in natural scheme of things which made the administrators end up performing a variety of roles in the modern state including those of legislature and judiciary too, to an extent.

Further, the check of the adjudicators over functioning’s of the other two has been regarded as an ‘essential’ feature of the basic structure theory. The judicial review power is a preventive measure in a democratic country which prevents administrators and law-makers to exercise their whims and caprices on the lay man and turn it into a despotic regime. There have been cases where on the lay man and turn it into a despotic regime. There have been cases where the judiciary has dictated the ambit of their power to the implementers and the mode to exercise it. Not even the representatives of people are immune to the power of the courts. Two recent Supreme Court judgments-on the cash-for-query case and on the Ninth Schedule-have once again brought the powers and roles of the legislature and the judiciary into focus. In the case of the former, the court upheld the Lok Sabha’s decision to expel members of Parliament, who were caught on camera taking bribes, but clearly rejected the contention that it cannot review parliament’s power to expel MPs and claimed for itself the role of final arbiter on decisions taken by the legislature. The judgment on the Ninth Schedule has curtailed Parliament’s power to keep certain progressive laws outside judicial Review.
In the Second case, i.e., *IR. Coelho v. State of Tamil Nadu*, S.C. took the help of doctrine of basic structure as propounded in Keshavanand Bharti case and said that Ninth Schedule is violative of this doctrine and hence from now on the Ninth Schedule will be amenable to judicial review and the Golden triangle comprising of Art.14, 19 and 21, will now be the criterion in scrutiny of the Ninth Schedule.

In a democratic country goals are enshrined in the Constitution and the state machinery is then setup accordingly. And here it can be seen that constitutional provisions are made as such to support a parliamentary form of Government where the principle can’t be followed rigidly. The S.C. rulings also justify that the alternative system of checks and balances is the requirement, not the strict doctrine. A constitutionalism, the philosophical concept of the constitution also insists on limitations being placed upon governmental power to secure basic freedoms of the individual. Hence, the conclusion drawn out of the study is that there is no strict separation of powers but the functions of the different branches of the government have been sufficiently differentiated.

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319 2007 (1) SC 137.