Chapter - III

CONCEPT OF SEPARATION OF POWERS IN INTERNATIONAL PERSPECTIVE

3.1 Introduction

Although this study is mainly aimed to examine separation of powers, law and practice in India yet a brief reference to the other federation (U.S.A., Canada, and Australia) shall be useful, because the framers of the Indian Constitution learnt many lessons from the experiences of the problems faced and solutions attempted in the federation of the U.S.A., Canada and Australia.

Firstly, each of the three federations, in varying degrees, has exhibited the tendency of having a strong Centre\(^{101}\) and therefore, inter alia, it provides a justification for the strong Centre in India.

Secondly, the constitutional frameworks of the three federations have proved to be extremely rigid.

Thirdly, the Courts play very important role as the balance-wheel of federal system by affecting necessary, adjustments in the federal system in response to the changing needs, though their role is becoming somewhat less important now than that what it used to be earlier.\(^{102}\) Lastly, “the accent in each country presently is on cooperative federalism”.\(^{103}\)

"Separation of powers" refers to the idea that the major institutions of state should be functionally independent and that no individual should have powers that span these offices. The principal institutions are usually taken to be the executive, the legislature and the judiciary. In early accounts, such as Montesquieu's *The Spirit of the Laws*, the separation of powers is intended to guard against tyranny and preserve liberty. It was held that the major institutions should be divided and dependent upon each other so that one powers would not be able to exceed that of the other two. Today, the separation of powers is more often suggested as a way to foster a system of checks and balances necessary for good government.


In the United States and other Presidential system, a strict separation is often a fundamental constitutional principle. In the United Kingdom and other common law jurisdictions, however, the theory of separation has enjoyed much less prominence. In the UK, the major offices and institutions have evolved to achieve balance between the Crown (and more recently the Government) and Parliament. The system resembles a balance of powers more than a formal separation of the three branches, or what Walter Bagehot called a "fusion of powers" in The English Constitution. In the last decade the concept of a separation of powers has evident in a number of policy initiatives. The previous Government suggested that, in its reforms of the judiciary in the Constitutional Reform Act, 2005, it was moving toward a more formal separation of powers. The creation of an independent Supreme Court and dismantling of the many-faceted office of Lord Chancellor have unpicked some aspects of the fusion of powers. Matters have also been complicated by the Human Rights Act, 1998 and its requirement for judges to consider the European Convention on Human Rights and the decisions of the European Court of Human Rights in Strasbourg. More recently, the proposed change in the number of Members of Parliament, use of parliamentary privilege and Members' involvement in super injunctions have again raised issues of the interaction of the institutions of state.

This Standard Note considers the extent to which

1) the executive and legislature
2) the executive and judiciary
3) the judiciary and legislature now overlap and interact.

3.2 Separation of Powers in the United States of America

In the U.S.A. the federation came into existence as a result of the voluntary compact between 13 sovereign States. These States surrendered a part of their sovereign powers to a federal entity and retained with themselves the unsurrendered residue. The Constitution of the United States of America was brought into being in 1787. It is, therefore, the oldest and the most respected member of the family of modern federal Constitution and is regarded as a precursor of the modern federalism.

The U.S. Constitution adopts a very simple method for Centre-State distribution of powers. It has only one List specifically enumerating the powers of the Centre. A few enumerated and specified powers have thus been allocated to the Centre, and the unremunerated residue of powers have been left to the States.
The powers entrusted to the federal Government are thus specific and fall under eighteen heads but Central powers have expanded a great deal over time through judicial creativity and activism, so much so that, in words of U.S. Supreme Court as early as 1920, “it is not lightly to be assumed that in every civilized government is not to be found”. Moreover, “even constitutional powers may be established by usage.” The Congress is given powers to make all laws which may be ‘necessary and proper’ to give effect to its enumerated powers.

In America, the doctrine of separation of powers forms the foundation on which the entire structure of the Constitution is based. This system of "checks and balances" prevents any organ from becoming supreme. Thus, the executive powers is vested in the President, the legislative powers in the Congress and the judicial powers in the Supreme Court. The American Constitution in this way provides for a system of 'checks and balances' in the sense that the powers vested in one organ of the government cannot be exercised by any other organ. The theory is that no one organ of the government can trench upon or encroach upon the powers of the other. In America, the separation doctrine has the following characteristic features:

3.2.1 Presidential form of Government

The doctrine of separation of powers has produced in the United States a presidential form of government which is based on a dichotomy of the executive and the legislature. The President is head of state and the government. He is neither a member of the congress nor dependent for his tenure upon the confidence of the congress in him.

3.2.2 Relaxation of rigours

In course of time with the growth of administrative process, the rigours of the doctrine of separation of powers have been relaxed. The President now exercises legislative functions by sending messages to the congress and by the exercise of the right of veto. The Congress has powers to exercise judicial function of impeachment to remove the President. Senate discharges executive functions regarding treaties and in the making of certain appointments. The Congress has delegated legislative powers to numerous administrative agencies and these bodies exercise all types of functions.

106 Article II Section I of the U.S. Constitution.
107 Article I Section I Ibid.
108 Article III Section I Ibid.
The Supreme Court has never held that the combination of all the powers in one agency is unconstitutional.

### 3.2.3 Pragmatic aspect of the separation doctrine

Justice Cardozo has rightly observed in *Panama Refining Company v. Ryan*[^109] that the doctrine of "separation of powers is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response the practical necessities of government which cannot foresee today the development of tomorrow in their nearly infinite variety."

The position in America is that despite the theory that the legislature cannot delegate its powers to the Executive a host of rules and regulations are passed by non-legislative bodies, which have been judicially recognised as valid.[^110]

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Art. I vests the legislative powers in the Congress; Art. II vests executive powers in the President and Art. III vests judicial powers 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 powers. Accordingly they intended that the balance of powers 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 powers. Also treaty making powers is with the President but it's not effective till approved by the Senate. It was the exercise of executive powers of the senate due to which U.S. couldn't become a member to League of Nations. The Supreme Court has the powers 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.

[^10]: Mukherjee, J. *In Delhi Laws Act, 1912, Re, AIR 1951 S C 332 (394).*
This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the powers. 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. The Constitution contains no provision explicating declaring that the powers of the three branches of the federal government shall be separated. James Madison, in his original draft of what would become the Bill of Rights, included a proposed amendment that would make the separation of powers explicit, but his proposal was rejected, largely because his fellow members of Congress thought the separation of powers principle to be implicit in the structure of government under the Constitution. Madison's proposed amendment, they concluded, would be a redundancy.\textsuperscript{111}

The first Article of the Constitution says "All legislative powers...shall be vested in a Congress." The second article vests "the executive powers...in a President." The third article places the "judicial powers of the United States in one Supreme Court" and "in such inferior Courts as the Congress...may establish." Separation of powers serves several goals. Separation prevents concentration of powers (seen as the root of tyranny) and provides each branch with weapons to fight off encroachment by the other two branches,\textsuperscript{112} "Ambition must be made to counteract ambition." Clearly, our system of separated powers is not designed to maximize efficiency; it is designed to maximize freedom.

During the Age of Enlightenment, several philosophers, such as James Harrington, advocated the principle in their writings, whereas others, such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of separating the legislature, the executive and the judiciary. His writings considerably influenced the opinions of the framers of the United States Constitution. Strict separation of powers did not operate in Britain, a country whose political structure served in most instances as a model for the government created by the U.S. Constitution. Under the British Westminster system, based on parliamentary sovereignty and responsible government, Parliament consisting of the Sovereign (King-in-Parliament), House of Lords and House of Commons - was the supreme lawmaking authority. The executive branch acted in the name of the King ("His Majesty's Government") as did the judiciary. The King's Ministers were in most cases

\textsuperscript{111} American Constitutional law by Bernard Schwartz.
\textsuperscript{112} As James Madison argued in the Federalist Papers (No. 51)
members of one of the two Houses of Parliament, and the Government needed to sustain a majority in the House of Commons. One minister, the Lord Chancellor, was at the same time the sole judge in the Court of Chancery and the presiding officer in the House of Lords. Thus, one may conclude that the three branches of British government often violated the strict principle of separation of powers, even though there were many occasions when the different branches of the government disagreed with each other.113

Some U.S. states did not observe a strict separation of powers in the 18th century. In New Jersey, the Governor also functioned as a member of the state's highest court and as the presiding officer of one house of the New Jersey Legislature. The President of Delaware was a member of the Court of Appeals; the presiding officers of the two houses of the state legislature also served in the executive department as Vice Presidents. In both Delaware and Pennsylvania, members of the executive council served at the same time as judges. On the other hand, many southern states explicitly required separation of powers. Maryland, Virginia, North Carolina and Georgia all kept the branches of government "separate and distinct.

The theory of Separation of Powers; as it was originally enunciated, aimed at personal separation of powers. This is the sense in which Montesquieu,114 the modern exponent of the doctrine, asserted -

"When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial powers is not separated from the legislative and executive powers. Where it joined with the legislative powers, 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 powers, the Judge might behave with violence and oppression. There would be an end of everything was the same man or the same body to exercise these three powers..."

whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

According to a strict interpretation of the separation of powers, none of the three branches may exercise the powers of the other, nor should any person be a member of any two of the branches. Instead, the independent action of the separate institutions should create a system of checks and balances between them. The United States Constitution adheres closely to the separation of powers. Article I grants powers to the legislature; article II gives executive powers to the President; and article III creates an independent judiciary. Congress is elected separately from the President, who does not sit as part of the legislature. The Supreme Court can declare the acts of both Congress and President to be unconstitutional.

In practice, however, many countries do not aim for a strict separation of powers, but opt for a compromise, where some functions are shared between the institutions of state. In the UK, the powers of Parliament, Government and courts are closely intertwined. In fact, the executive and legislature are seen as a "close union, nearly complete fusion of the executive and legislative powers," which Walter Baghot viewed as the "efficient secret of the English constitution".115

Globally, the separation of powers has enjoyed very different degrees of implementation. Parliamentary systems of government have usually united legislature and executive for the sake of expediency.116 By contrast, presidential systems tend to be strictly separated.

3.2.4 The Constitutional Provisions

The framers of the United States Constitution identified three competing divisions or branches of government and the powers of each of these:

- Legislative powers — the powers to make law
- Executive powers — the powers to enforce law
- Judicial powers — the powers to interpret law

In the first three articles of the Constitution, the framers defined the three branches of government that continue to share powers in the United States

115. Bagehot. The English Constitution, 1867, p 67-68
government today. The term “checks” refers to the ability, right and responsibility of each branch to monitor the activities of the others; “balances” refers to the ability of each branch to use its constitutional authority to limit or restrain the powers of the others.

Legislative Power: Congress

Article I of the United States Constitution places the sole powers to legislate in the United States Congress. Congress is bicameral, meaning it is composed of two houses” the House of Representatives and the Senate. Currently, there are 435 members of the House of Representatives (determined by population) and 100 Senators (2 for each state). Both houses must agree upon a bill for it to become law.

The Constitution gives Congress powers of the United States budget, including powers to raise taxes, borrow and spend money, declare war and raise and support military forces. Congress also has the powers to regulate immigration, the mail, patents and copyrights, and commerce between the states and the federal government and other countries. Finally, Congress has the powers to establish federal

117. wikipedia, the free-encyclopedia
courts below the United States Supreme Court. Most familiar, is Congress’s powers to pass laws that are “necessary and proper” to give effect to its powers.

Congress’s powers is limited in various ways as a part of the Constitutional doctrine of checks and balances. The President is able to check Congress’s powers by exercising the presidential veto. If the President vetoes a bill, that bill will not become law unless two-thirds of the members of both the House and the Senate agree to override the veto. The Constitution also created an independent judiciary with the powers to hear “all cases and controversies” arising under the constitution. The judiciary has used this powers to declare laws enacted by Congress unconstitutional.

**Executive Power: The President**

The powers of the executive branch are defined in Article II of the United States Constitution. Executive powers are vested in the President. The principal responsibility of the President is to “take care that the laws be faithfully executed.” The executive powers include oversight of the federal agencies that implement laws passed by Congress. The President is Commander in Chief of the nation’s armed forces. The President has the powers, subject to the advice and consent of the Senate, to make treaties, nominate judges to the judiciary, and appoint officers of the government. The President also has the powers to pardon individuals convicted of federal crimes.

Checks and balances on the executive powers include several provisions that give Congress and the judiciary oversight of executive actions. The House of Representatives, by simple majority, has the powers to indict the President on charges of impeachment; if indicted, the Senate tries and can remove the President from office if convicted by a two-thirds majority. The Senate has the powers to reject treaties negotiated by the President and to reject presidential nominated to the federal judiciary and other government offices. Finally, the judiciary has the powers to declare executive actions unconstitutional if those actions are challenged in court.\(^{118}\)

**Judicial Power: The Courts**

Article III of the Constitution establishes the Supreme Court of the United States and “such inferior courts as the Congress may from time to time ordain and establish.” Today, those “inferior” courts include the United States District Courts, which are located throughout the United States and where most federal cases are tried.

\(^{118}\) Ibid.
and the Circuit Courts of Appeal, which review the decisions of the District Courts. The Supreme Court is the court of last resort within the federal judiciary on questions of federal law and the Constitution.

The Constitution protects the federal judiciary’s independence from the other two branches by providing that federal judges are secure in their positions and are not subject to removal “during good behavior,” thus they serve for life. The Constitution also give the judiciary the powers to hear all “cases and controversies” arising under the Constitution, federal law, treaties with other nations, and other specialized cases, such as controversies between two or more states.

Both Congress and the President have powers that serve to check and balance the powers of the judiciary. One limitation is that Congress has control over the judiciary’s overall budget. Congress can also act to amend the Constitution if it disagrees with the Supreme Court’s interpretation of the document. Constitutional amendments are difficult and the process mandates approval by two-thirds majority of both houses of Congress and the approval of three-fourths of the states. Finally, Congress has the powers to impeach and try federal judges for misconduct in office.

The President’s powers to nominate all federal judges gives the executive branch control over the individuals named to serve in the courts. This powers is shared by the Senate via the Constitutional right of advice and consent in the nomination process. A majority of the Senate must consent to the President’s judicial nominations.

Additional limitations to the judiciary’s powers include the fact that judges can only decide the cases that are brought to them. They cannot declare a law or government action unconstitutional unless they are asked to do so by an affected party. Moreover, the appellate review process ensures that virtually all decisions of individual judges are subject to review by other judges. Even at the Supreme Court, a justice must convince a majority of his or her colleagues to agree to a decision.

The framers of the American Constitution vested the legislative, executive and judicial powers in three distinct authorities, by the express letters of the Constitution. Thus,

*Article I, Section 7:*

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it
become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.... If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.\textsuperscript{119}

The form of government, characterized as presidential, is based on the theory of separation between the executive and the legislature. The executive powers is vested in the President, the legislative powers in the Congress and the judicial powers in a hierarchy of courts with the Supreme Court at the apex. It is on the basis of this theory of separation of powers that the Supreme Court of the United States has not been given powers to decide political questions, so that the Court may not interfere with the exercise of powers of the executive branch of the government. The Constitution of America has also not given overriding powers of judicial review to the Supreme Court. It is a queer fact of American constitutional history that the powers of judicial review has been usurped by the Court.\textsuperscript{120}

The President is both the head of the state as well as its chief executive. He appoints and dismisses other executive officers and thus controls the policies and actions of government departments. The persons in charge of the various departments, designated as the Secretaries of State, hold office at his pleasure, are responsible to him and are more like his personal advisers. The President is not bound to accept the advice of a Secretary and the ultimate decision rests with the President. Neither the President nor any member of the executive is a member of the Congress and a separation is maintained between the legislative and executive organs. The cabinet is collectively responsible to the Parliament and holds office so long as it enjoys the confidence of the majority there.

\textsuperscript{119} American Constitutional law by Bernarrd Schwartz.
\textsuperscript{120} I.P. Massey, Administrative Law 40 (7th Ed., 2008)
3.2.5 The Practical Scenario

The President of the United States however, in practicality interferes with the exercise of powers by the Congress through the exercise of his veto powers. He also exercises the law-making powers in exercise of his treaty-making powers. The President also interferes with the functioning of the Supreme Court through the exercise of his powers to appoint judges. In fact, President Roosevelt did, interfere with the functions of the Court when he threatened to pack the Court in order to get the Court's support for his New Deal legislation. In the same manner Congress interferes with the powers of the President through vote on budget, approval of appointments by the Senate and the ratification of treaty. Congress also interferes with the exercise of powers by the courts by passing procedural laws, creating special courts and by approving the appointment of judges. In it turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its powers of judicial review. It is correct to say that the Supreme Court of the United States has made more amendments to the American Constitution than the Congress itself.121

The impossibility of having a rigid personal separation of powers has, however, been illustrated by the American Constitution under which the President has got legislative powers in his right to send messages to Congress122 and the right to, veto,123 while Congress has the judicial powers of trying impeachments124 and the Senate participates in the executive powers of treaty making and making appointments.

In modern practice, therefore, the theory of Separation of Powers has come to mean an organic separation or a separation of functions, viz., that one organ of government should not usurp125 or combine126 functions belonging to another organ.

3.2.6 Judicial Pronouncements

The American Supreme Court observed in 1881 in the case of Kilbourn v. Thompson:127

"It is essential to the successful working of this system that the persons entrusted with powers in anyone 'of these branches shall not be permitted to encroach upon the powers confided to

\[\text{\textsuperscript{121}}\text{Ibid.}\]
\[\text{\textsuperscript{122}}\text{Art. II, Sec. 3, Constitution of the U.S.A.}\]
\[\text{\textsuperscript{123}}\text{Art. I, Sec. 7(2), Constitution of the U.S.A.}\]
\[\text{\textsuperscript{124}}\text{Schwartz. Constitution of the United States 115 (Vol. 1 1963).}\]
\[\text{\textsuperscript{125}}\text{Kilbourn v. Thompson, (1881) 103 U.S. 168 (190); Satingery. Philippine Islallds, (1928) 103 US 168 (192)}\]
\[\text{\textsuperscript{126}}\text{A.G. of Australia v. Boilermakers Society, (1957) 2 All E.R., 5 (F.C).}\]
\[\text{\textsuperscript{127}}\text{Kilbourn v. Thompson (1881) 103 U.S. 168 (190).}\]
the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and not other ... It may be stated ... as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial powers; the executive cannot exercise either legislative or judicial powers; the judiciary cannot exercise either executive or legislative powers."

An eminent authority illustrated this interaction among the different organs with reference to modern conditions thus:

"Functions have' been allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By this means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, 'calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modern government impossible."\(^{128}\)

The most glaring violation of the strict theory of separation of powers is to be found in the administrative agencies in the American system of government today. Most of these administrative bodies combine in themselves the legislative function of subordinate legislation; the executive function of investigation and prevention of complaints against breaches of the statute which it has to administer as well as of the rules and regulations made by itself;\(^ {129}\) and the judicial function of adjudicating disputes and complaints\(^ {130}\) arising under such statute and subordinate legislation.\(^ {131}\) The American Supreme Court has upheld such concentration of functions by resorting to some quibbles:

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1) It has said that the functions of subordinate legislation and administrative adjudication are not essentially legislative or judicial functions, but only quasi-legislative and quasi-judicial.\textsuperscript{132}

2) The Court has also said that it is necessary for effectuating the policy of the Legislature in a matter requiring administrative determination, the subject being not fit for determination by a court of law.\textsuperscript{133} Even the charge of bias against an administrative tribunal because of its having preconceived views on the subject-matter of adjudication has been brushed aside on the same ground.

Marbury v. Madison\textsuperscript{134} is often cited as the case that established the powers of the Courts to invalidate legislation.\textsuperscript{135} The case effectively settled the issue of whether judicial review of some sort may legitimately be exercised. By ruling that Congress could not expand the Supreme Court's original jurisdiction, Chief Justice Marshall invalidated a piece of legislation.

*It was stated in the case of Satinger v. Philippine Islands\textsuperscript{136} that: "It may be stated ...,as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial powers, the executive cannot exercise either legislative or judicial powers, the judiciary cannot exercise either executive or legislative powers.*

It needs to be emphasized that although the separation doctrine has been very much diluted over the years because of the emergence of administrative process, the doctrine at times manifests itself with all its force in judicial decisions. One instance of this is found in Buckley v. Valeo\textsuperscript{137} where the Supreme Court held a congressional act to be unconstitutional because it breached the separation doctrine in so far as the Congress sought to claim the administrative powers of making appointments to a federal body, viz., the Federal Election Commission.

\textsuperscript{134} (1803) 1 Cranch 137 (United States).
\textsuperscript{135} Robert P. George, Great Cases in Constitutional Law 5 (1"ed., 2001
\textsuperscript{136} (1928) 103 U.S. 168(192)
\textsuperscript{137} 424 U.S. 1 (1917).
The Supreme Court has also applied the separation doctrine in Immigration and Naturalization Service v. Jagdish Rai Chadha. Section 244(c)(2) of the Immigration and Nationality Act, authorizes either House of Congress by resolution to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the attorney general, to allow a particular deportable alien to remain in the United States. The Attorney General suspended the deportation order passed on Chadha. Thereafter, the House of Representatives passed a resolution pursuant to Section 244(c)(2) vetoing the suspension. The Immigration judge consequently reopened the proceedings. Chadha moved to terminate the proceedings on the ground that Section 224(c)(2) was unconstitutional. The matter ultimately reached the Supreme Court which ruled that the Congressional veto provision in Section 244(c)(2) was unconstitutional.

This pronouncement may have far-reaching repercussions on the fabric of administrative process in the U.S.A., particularly, on the question of Congressional supervision and control over the actions of the Administration. Congress confers broad powers on administrative bodies and then imposes veto either by one House or both Houses over the exercise of those powers. It is regarded as an essential check on the expanding powers of the agencies, as they engage in exercising authority delegated by Congress.

Thus, even in the United States of America, the position is that one organ or department of government should not usurp the functions, which essentially belong to another organ. Thus, the formulation of legislative policy or the general principles of law is an essential function of the Legislature and cannot be usurped by another organ, say, the Executive. It also includes the converse of this proposition, namely, that no organ can abdicate its essential functions.

In order to function efficiently, each department must exercise some incidental powers which may be said to be strictly of a different character than its essential functions. For example, the Courts must, in order to function efficiently possess the powers of making rules for maintaining discipline or regulating procedure, even though that powers may be of the nature of a legislative powers. The powers of

making rules of procedure in the Courts is not regarded as of the essence of the functions of the Legislature.\textsuperscript{141} Again, in interpreting laws and in formulating case laws, the Courts do, in fact, perform a function analogous to law making. In particular, in dealing with new problems where authority is lacking, the Courts have to create the law, even though under colour of interpretation of and deduction from the existing law. Similarly, the ascertainment of a state of facts upon the testimony of witnesses may be incidental to some executive action and is not confined to the judicial powers.\textsuperscript{142}

In the case \textit{Department of Transportation Et Al. Petitioners v. Association of American Rail Roads}\textsuperscript{143} the court held that exercise of governmental powers must be consistent with Constitution, including those provisions relating to the Separation of Power. At issue in this case is the proper division between legislative and executive powers and examination of the history of those powers reveals how far our modern Separation of Powers Jurisprudence has departed from the original meaning of the Constitution.

In another case \textit{State of Kansas, Plaintiff v. States of Nebraska and Colorado Judgement}\textsuperscript{144} the hon'able Supreme Court held that the use of unbounded equitable powers against state similarly threatens "to violate principles of state sovereignty and of the Separation of Powers".

\textbf{3.2.7 Super-Injunctions}

In 2011, the question of separation of powers has arisen in relation to the use of injunctions. An injunction is a court order that requires a party to do or refrain from doing certain acts. For example, it may order that certain identifies, facts or allegations may not be disclosed. Standard Note 5978 Privacy provides background as to the development of a new type of injunction whose very existence may not be disclosed. In some cases, known as "super injunctions", the court has provided for anonymity and a prohibition on publishing or disclosing the very existence of the order. Restrictions may also be placed on access to documents on the court.

\textsuperscript{141} Wayman v. Southward, (1825) 10 Wh. 1 (42).
\textsuperscript{143} No. 13-1080 Decided on 09-3-2015.
\textsuperscript{144} No. 126, orig. Decided on 24-2-2015.
file.\textsuperscript{145} Professor Zuckerman has argued that super-injunctions created a new kind of procedure for an "entire legal process [...] conducted out of the public view" of which the very existence is "kept permanently secret under pain of contempt".\textsuperscript{146}

In April 2011, David Cameron said that he felt "uneasy" about super-injunctions and that judges were developing a privacy law without Parliamentary approval.\textsuperscript{147} The Human Rights Act, 1998 imposed a duty on the judges to interpret legislation "as far as possible" in a manner to make it compatible with the European Convention on Human Rights. Article 8 of the Convention sets out respect for privacy and family life, which the courts have developed as part of the common law in the absence of statutory privacy laws in the UK. Those developments have led some to argue that the courts have gone beyond their powers to develop common law to introduce a right of privacy into English law.\textsuperscript{148} Others have suggested that the enactment of the Human Rights Act, effectively created the right of privacy, so the foundations were, in fact, laid by Parliament.\textsuperscript{149}

Parliamentarians have criticized the judiciary for their use of a novel legal instrument. MPs have used parliamentary privilege to circumvent the injunctions, naming recipients in the House.\textsuperscript{150} On the other hand, members of the judiciary have argued that Parliamentarians have used privilege to defy the law and that this could undermine the role of judges. Lord Judges suggested that it may not be advisable for MPs to "flout a court order" even if they did not agree with it. He insisted that "there has never been any question, in any of these orders, not in any single one of them, of the court challenging the sovereignty of parliament [...] We are following the Law, as best we understand it.\textsuperscript{151}

Some MPs have criticised the use of privilege to name those protected by injunction. Chuka Ummana said that "if MPs and peers use parliamentary privilege to..."
flout Court injunctions that is a serious breach of the separation of powers". Mr. Speaker has said that he strongly deprecated "the abuse of parliamentary privilege to flout an order or score a particular point." The Attorney General announced on 23 May 2011 that a joint committee of both Houses would be established to examine the issues privacy and the use of anonymity injunctions.

3.2.8 Recent changes

One of the most important aspects of the executive's control over the legislature is the allocation of time for debates. The Government usually has almost complete control over the agenda of the legislature. The Backbench Business Committee was created in 2010 as a way of granting the legislature more operational independence from the executive. The Wright Committee believed that the Backbench Business Committee would give MPs more control and ownership of the Parliamentary agenda, make debates more relevant for the public and strengthen the scrutiny role of Select Committees, which would be able to apply for time on the floor of the House through the Backbench Business Committee. The Coalition Government's Programme for Government committed the Government to introducing a Business Committee for all forms of business by the third year of Government.

3.3 Separation of Powers in UK

Before we discuss the position in 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. United Kingdom 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 refuse 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 powers 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.

152. Ibid.
153. John Hemming HC Deb 23 May 2011 c653
155. The Coalition: Our Programme for Government May 2011
Three branches; the executive, the legislature and the judiciary, should be SEPARATE, UNIQUE and EQUAL. There should be a clear separation between the people and functions of the legislature, executive and judiciary, otherwise Montesquieu said there will be "tyranny". However this does not mean that the bodies should have no powers over each other, Blackstone argued that what is required is a "check and balance" system between them, this is referred to as the theory of mixed government. If the branches were completely separate it would be unworkable, particularly as the Parliament is Supreme. There should be sufficient interplay between the branches, for example, the executive proposes legislation, Parliament debates and passes the law, and the judiciary upholds the Act of Parliament.

In the United States there is a formal separation of powers, with a deliberate system of checks and balances. In the UK the separation of powers is informal, but the three branches are identifiable. In the UK the powers and people are mostly but not completely separate. In fact, both the Queen and the Lord Chancellor are in all three branches.

- The Queen appoints government ministers (the executive)
- The Queen appoints judges, and justice is dispensed in the name of the Queen.
- The Queen formally summons Parliament (the legislature) and must give the Royal Assent to a Bill to make it into Law.
- The Lord Chancellor is a senior judge and head of the judiciary. As a member of the HL appellate committee and Privy Council he will participate in decisions which affect both common law and statutory interpretation. The requirements of judicial impartiality have been questioned in McGonnell case.¹⁵⁶
- He is also chair/speaker of the House of Lords (legislature)
- He is a member of the Government (executive) and appointed by the Prime Minister.

The position of the Lord Chancellor has been widely criticized. The Constitutional Reform Act, 2005 provided for the abolition of the post but this has not happened yet. The position of Secretary of State for Constitutional Affairs has already been created and will assume many of the Lord Chancellor's duties when it is abolished, but the current Lord Chancellor remains in all three branches. However the

¹⁵⁶ McGonnell v. UK 80 (2000)
post has been defended, particularly by previous Lord Chancellors. Lord Hailsham
said that the independence of the judiciary and the rule of law should be defended
from inside the Cabinet as well as inside Parliament.

"In the British Constitution there is no such thing as the absolute separation of
legislative, executive and judicial powers; in practice it is inevitable that they should
overlap"

In England, the theory of separation of powers was opposed in the 18th
century by the doctrine of the mixed or balanced constitution in which monarchial,
aristocratic and democratic elements were joined and held in equilibrium rather than
strictly separated. Accordingly, the system of Parliamentary government that evolved
in the UK in the 19th century was evidently not based on the theory of separation of
powers. In fact, the modern Constitution of the UK is less conformable to the theory
as traditionally understood. While we may concede that the British Constitution is not
based on separation of powers, however, this does not mean to say that the separation
of powers is of no relevance to the British Constitution.

This model of government is quite different from that seen in the US. The
British idea of mixed government is based on the belief that the degree of connection,
rather than separation is what provides checks and balances in the governmental
system. Nevertheless, even this system must use the language of separation of powers
to illuminate some of its crucial features such as the executive's dominance over
Parliament. The doctrine was expressly recognized as a part of the British
constitutional system in the 1930 report of the Donoughmore Committee. This
committee created to inquire into matters of delegated legislation and administrative
adjudication submitted a report the provisions of which were justified on the basis of
the doctrine of separation of powers.

The doctrine has also been expressly recognized by the British Courts in their
judicial pronouncements made from time to time. In cases where controversial
political and social issues were made the subjects of judicial purview, the Courts in
order to avoid conflict between the judicial and political machinery have claimed a
lack of jurisdiction on the basis of the doctrine of separation of powers. Especially in
matters of statutory interpretation, they employ the language of separation of powers
to explain and justify their decisions, a case in point being the steel strike case of
1980.

In the said case, Lord Diplock pointed out that:
"At a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers: parliament makes the laws, the judiciary interprets them ...it is parliament's opinion on these matters that is paramount."

Thus it is seen, that in the British scenario, though the doctrine is not expressly recognized in the constitutional plan, it does exist, albeit not in its absolute form, in the practice of the organs of the Government.

3.3.1 Classification of Powers

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

(i) The same person should not form part of more than one of the three organs of the government. For example ministers should not sit in Parliament.

(ii) One organ of the government should not interfere with any other organ of the government.

(iii) One organ of the government should not exercise the functions assigned to any other organ.157

It may be pointed out that in none of these senses does a separation of powers exist in England. The King, though an executive head, is also an integral part of the legislature and all his ministers are also members of one or other of the Houses of Parliament. Furthermore, the Lord Chancellor is at the same time a member of the House of Lords, a member of the government, and the senior most member of the judiciary. Therefore, in England the concept of "parliamentary executive" is a clear negation of the first formulation that the same person should not form part of more than one of the three organs of the government.158

As regards the second formulation, it is clear that the House of Commons ultimately controls the executive. The judiciary is independent but the judges of the superior courts can be removed on an address from both Houses of Parliament. As to the exercise by one organ of the functions of the other organs, no separation exists in England. The House of Lords combines judicial and legislative functions. The whole House of Lords constitutes, in theory, the highest Court of the country; in practice,

158. Ibid.
however, by constitutional convention, judicial functions are exercised by specially appointed Law Lords and other Lords who have held judicial office. Again, legislative and adjudicatory powers are being increasingly delegated to the executive. This also distracts from any effective separation of powers.

3.3.2 The Independence of the Judiciary

The Lord Chancellor appoints senior judges, but the Constitutional Reform Act, 2005 recommends a Judicial Appointments commission. Judges hold office during good behavior, and are removable only by the Queen on an address to both Houses of Parliament. Judicial salaries are relatively high to ensure an adequate supply of candidates of sufficient caliber. He cannot be a Member of Parliament and Cannot adjudicate on cases where he has an interest (Dr Bonham's Case, Dimes v Grand Junction) or bias (Re Pinochet Ugarte 1998) Immunity from legal action in relation to their judicial functions.

3.3.3 Separation of executive and legislature

In the UK, and other common law jurisdictions, the executive and legislature are closely entwined. The Prime Minister and a majority of his or her ministers are Members of Parliament and sit in the House of Commons. The executive is therefore present at the heart of Parliament. By contrast, in the USA, the President may not be a member of the legislature (Congress), and is elected separately from congressional elections. This may result in the President being a member of a different political party from the majority of members of Congress.

The UK's integration of executive and legislature is said to provide stability and efficiency in the operation of government. It has been described as "a system that intentionally promotes efficiency over abstract concerns about tyranny".159 For example, the Prime Minister 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. Additionally, Parliament may delegate law-making powers to the Government through powers to draft secondary or delegated legislation. This can liberate Parliament from the need to scrutinize small technical details, while maintaining the safeguard of Parliamentary approval.

In this way, in the UK legislature and executive are far from separate powers. On the other hand, the executive presence in Parliament may actually facilitate scrutiny provided that the necessary procedures are in place.

Where a government has a large majority of seats in the Commons, the crucial issue is whether the government can dominate Parliament and ensure that its proposed legislation is enacted, or whether there are sufficient procedures in place to ensure that proposals are sufficiently scrutinized and either endorsed or rejected by Parliament.

In order to prevent the executive from controlling Parliament the House of Commons (Disqualification) Act, 1975 created limits on the number of salaried ministers who sit in the Commons. Additionally, the legislative branch of government retains the formal powers to dismiss executive officers from office. The convention of ministerial responsibility establishes the accountability of government to Parliament.

Following the decision to cut the number of MPs in the House of Commons from 650 to 600, enacted in the Parliamentary Voting System and Constituencies Act, 2011, the Public Administration Select Committee examined the role and responsibilities of ministers to see if there was scope for reductions there too. About 20% of MPs are currently on the "payroll vote" as ministers or their Parliamentary aides and are obliged to vote with the Government or resign their position. If this number remains static at the same time as MPs are cut, it could effectively increase the payroll vote, further strengthening the Executive relative to Parliament. Section 14 of the Parliamentary Voting System and Constituencies Act, 2011 requires a review to be established to examine the effects of the reduction in the number of MPs after the next general election, expected to be in 2015.

The members of the government must be drawn entirely from the Houses of Parliament. To put it another way, the executive is completely made up of people who are already members of the legislature. Government Ministers continue to sit as "normal" members of the legislature in addition to their ministerial responsibilities.

161. For further information see. Library Standard Note 5929 Constituency boundaries: the sixth general review
This is a very clear example of there being no formal separation of powers. By convention the PM must be a member of the House of Commons. The British electoral system combined with the Party system produces a dominant executive that actually sits within the legislature. The legislature has delegated powers to Ministers to create statutory instruments (delegated legislation). Therefore individual members of the executive can themselves actually legislate. However this is subject to Parliamentary scrutiny. In ex parte Fire Brigade [1995] the court held that it was unlawful for the Home Secretary to introduce changes to a scheme which were incompatible with an Act of Parliament.

Many of the Queen's prerogative powers are now actually used by her Ministers. Ministers can use their prerogative powers to legislate without the consent of Parliament. However to some extent this is limited by judicial review. Despite the lack of separation of people, many people who are already members of the "executive" such as civil servants, the police and members of the armed forces (as well as members of the judiciary) are barred from becoming an MP and joining the legislature by the House of Commons Disqualification Act, [1975]. This Act, also limits the number of MPs that can become ministers as a check on executive powers.  

Checks on Executive by Legislature

To hold the executive to account there are several "checks" on executive powers, every government is dependent upon parliament for its survival in office - no matter how big the majority the government has, if they lose a vote of confidence convention forces the government to resign and a general election to be called as in the Callaghan Government of 1979. Parliamentary procedures are designed to scrutinize legislative proposals and the government will not always get its own way, PACE 1984 was substantially altered clue to pressure from MPs from all sides. Question Time, debates and select committees all ensure the accountability of government to Parliament. The opposition gets several days per Parliamentary session to hold debates on subjects of their choosing. The House of Lords can amend and delay most Bills for up to a year before the Parliament Act, 1911 & 1949 take effect (bypassing the Lords and going straight to the Queen for the Royal Assent). Rather than have its proposals delayed the government may prefer to compromise its

proposals or accept amendments made by the House of Lords. This shows the legislature holding the executive to account.

### 3.3.4 Legislature and judiciary

The second element of the separation of powers is separation between legislature and judiciary. In the UK, judges are prohibited from standing for election to Parliament under the House of Commons (Disqualification) Act, 1975. Judges are expected to interpret legislation in line with the intention of Parliament and are also responsible for the development of the common law (judge-made law).

Judges in the higher courts have life tenure, which protects their independence, and a resolution of both Houses is needed to remove a High Court judge from office, while judges at the lower levels can only be removed after disciplinary proceedings. Judges are also protected by immunity from legal action in relation to their judicial functions and absolute privilege in relation to court proceedings.

Lord Phillips of Worth Maltravers, President of the UK Supreme Court, explained that:

> The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the powers of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected.

Constitutionally, judges are subordinate to Parliament and may not challenge the validity of Act, of Parliament. However, there remains a some leeway for judges to interpret statute and this raises the question of whether the judges are able to "make law". There is an element of judicial law-making in the evolution of common law. In *Magar and St. Mellons Rural District Council v. Newport Corporation*, the House of Lords rejected the approach of Lord Denning who had stated that, where

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164. For example, *R (on the application of Morgan Grenfell & Co.) v. Special Commissioner of Income Tax [2003]*
gaps were apparent in legislation, the courts should fill those gaps. Lord Simons commented that this amounted to a "naked usurpation of the legislative function under the guise of interpretation". Later, however, in his lecture, The Judge as Lawmaker, Lord Reid said that while it was once "thought almost indecent" to suggest that judges make law, the notions that judges only declare the law was outdated. Lord Scarman argued a middle course, suggesting that "the objective of judges is the formulation of principles; policy is the prerogative of Parliament".

The Jackson case in 2005 on the application of the Parliament Act, to the Hunting Act, 2004 prompted obits (remarks) from the House of Lords which questioned the relationship between parliamentary sovereignty and the rule of law in a novel manner, suggesting that there were limits to sovereignty where constitutional fundamentals were at risk.

The cooperation between judiciary and legislature has been described as a "constitutional partnership" as Parliament may give tacit approval to judge-made law by not interfering with it. Lord Woolf, for example, has argued that "the crown's relationship with the courts does not depend on coercion", but on a state a trust. Professor Bogdanor has argued, for example, that the Human Rights Act, necessitated a compromise between two doctrines—the sovereignty of Parliament and the rule of law—and that the compromise "depends upon a sense of restraint on the part of both the judges and of Parliament".

A further complication has been the incorporation of European Community law into UK domestic law. In Factortame (no 2) 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

169. Lord Reid, 'The Judge as Lawmaker' (197) 12 Journal of the Society of Public Teachers of Law 22
sovereignty. 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.

As stated above judges cannot become members of the House of Commons under the House of Commons Disqualification Act, [1975]. The Law Lords (the members of the highest court in the land), sit in the House of Lords which is part of the legislature, but by convention they do not participate in party political disputes. Sub Judicial rule - MPs cannot raise court proceedings in debate. The legislature cannot tell the judiciary how to decide a case. To protect their independence it is extremely difficult for the legislature to dismiss a judge. SI 1 (3) Supreme Court Act, [1981] judges of the High Court and above who hold office during good behaviour are subject to a powers of removal by the queen on an address presented by both houses of Parliament. The judiciary accept the supremacy of Parliament - that Parliament can make any law it wants, but it insists that it has the right to interpret its meaning. It is said that judges legislate when they decide cases and create precedent. Also the doctrine of precedent, expressed in the words stare, limits the discretion of the court as they have to apply the rulings of the higher courts. In Shaw v. DPP, it was said that judges interpret and apply the law they do not create it. Unlike in the USA, the judiciary cannot declare primary legislation (Act, of Parliament) unconstitutional, but they can review secondary (delegated) legislation.

3.3.5 The Executive and the Judiciary

The third element of separation is between the executive and the judiciary.

The judicial scrutiny function with regard to the executive is to ensure that any delegated legislation is consistent with the scope of powers granted by Parliament and to ensure the legality of government action and the actions of other public bodies.

On the application of an individual, judicial review is a procedure through which the

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177. By contrast, following the principle of parliamentary supremacy, primary legislation is not usually subject to judicial review.
courts may question lawfulness of actions by public bodies.\textsuperscript{178} This requires judges to be independent of government and Parliamentary influence.

The judges have traditionally exercised self-restraint or "deference" in the areas of powers 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. For an example of this traditional view see the case of Council of Civil Service Unions v Minister for the Civil Service\textsuperscript{179}.

More recently, in \textit{A v. Secretary of State for Home Department}, concerning the detention without charge of suspected international terrorists in Belmarsh prison, the Attorney General argued in 2004 that "these were matters of a political character calling for an exercise of political and not judicial judgment" and that "it was not for the courts to usurp authority properly belonging elsewhere". However, Lord Bingham, who gave the leading judgement, rejected this argument, concluding that "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal function of the modern democratic state" and that the Attorney General was "wrong to stigmatize judicial decision-making as in some way undemocratic".\textsuperscript{180}

Most prerogative powers are exercised by the government in the name of the crown. In \textit{CCSU v. Minister of state for Civil Service}\textsuperscript{181} (the GCHQ case) the House of Lords ruled that executive powers can be judicially reviewed even if it comes from a royal prerogative, but there are many subjects which judges should not review as it is for the democratically elected executive to decide. For example judges will not review the decision to go to war. There is a convention that members of the executive should not criticize judges. This is often ignored – Mrs. Thatcher criticized the light sentence given to a child molester. Also this rule only applies to members of the executive, not normal MPs. Also judge who said a rape victim was guilty of contributory negligence was criticized in Parliament.

Judges are not chosen on party political grounds. The pay of judges is set independently - to preserve judicial independence. Judicial Review is designed to

\textsuperscript{177}. Judiciary of England and Wales, 'Judicial review', \url{http://www.judiciary.gov.uk/you-and-the-judiciary/Judicial-review}.
\textsuperscript{178}. 1985\textsuperscript{[2]} AC 374.
\textsuperscript{179}. 1985\textsuperscript{[2]} AC 374.
\textsuperscript{180}. \textit{A and others v. Secretary of State for the Home Department} [2004] UKHL 56
\textsuperscript{181}. 1983 AC 374.
keep those people or bodies that have had powers delegated to them within those powers. So if a minister or a local authority exceeds the powers that Parliament has given it, the courts will nullify the decision and require that the decision maker makes a decision according to the correct procedure. As judicial review is concerned with the process of taking the decision rather than the merits of the decision itself, it could be said that the judiciary are upholding the will of Parliament in controlling the powers it has delegated. Judicial review is paradoxical, because it could be said that the judiciary are upholding both the Rule of Law and the Supremacy of Parliament, but at the same time they are acting as a check on executive powers, arguably infringing the Separation of Powers for example if Parliament gives powers to a Minister to "act as he sees fit" to what extent is it proper for a court to question his decision-making powers? In *R v. SSHD exparte Anderson* [2002] it was held that the Home Secretary exercising judicial functions in fixing the sentence of a murderer was a breach of Article 6 ECHR. Judges are often appointed by the executive to chair official enquiries, such as into the death of David Kelly. Judicial enquiries leave judges open to criticism.

### 3.3.6 Parliamentary privilege

Article 9 of the Bill of Rights 1689 set out the principle of privilege of Parliament freedom of speech and debate. According to Lord Neuberger, Master of the Rolls, it is "an absolute privilege and is of the highest constitutional importance." Any attempt by the courts to contravene Parliamentary privilege would be unconstitutional. No court restricts or prohibit Parliamentary debate or proceedings. On the other side of the coin, there is a convention that Members of Parliament will not criticize judicial decisions. This is complemented by the Sub judice rule that guards against Parliamentary interference in cases currently before the courts.

*Sub Judice*

The sub judice rule is intended to defend the rule of law and citizens' right to fair trial. Where an issue is awaiting determination by the courts, that issue should...

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183. Ibid, p. vii. conclusion 9 (i).
184. Ibid, P vi
not be discussed in the House in any motion, debate or question in case that should affect decisions in court.

However, the sub judice rules are not absolute: the Chair of proceedings of the House of Commons enjoys the discretion to permit such matters to be discussed. Moreover, sub judice does not affect the right of Parliament to legislate on any matter.185

The 1999 Joint Committee on Parliamentary Privilege explained that sub judice rules are intended "to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases". It went on to explain that the rules strike the balance between Parliament's constitutional duty and role and the constitutional role of the courts.186

The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work [...] Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.187

3.3.7 Recent Development

The House of Lords has served as the highest court in the UK for over 130 years. Since 2009 a new UK Supreme Court has taken over its judicial functions, closing the doors on one of the most influential legal institutions in the world, and a major chapter in the history of the UK legal system. This brought about a fundamental change to the work and role of the House of Lords. The new Supreme Court has

186. Master of the Rolls, Report of the Committee on Super-Injunctions: super-injunctions, anonymised injunctions and open justice, section 5.3
separated the judicial function from the Parliament from 1st October 2009. It now has an exclusive jurisdiction over civil and criminal cases.\textsuperscript{188}

It is a paradox that the theory of Montesquieu was inspired by the political system as it obtained in England in the 18th century; the concentration of powers in an absolute monarch had been replaced by legislative function being exercised by Parliament and judicial powers being exercised by the Courts. But the emergence of the Cabinet system of government presented a standing refutation to the doctrine of separation of powers because the Cabinet, as Bagehot observed, "is a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State".\textsuperscript{189} In personnel, it is virtually a committee of the Legislature, but it is the real head of the executive powers of the State, the Crown being only a constitutional or nominal head. On the other hand, the Cabinet initiates legislation and controls the Legislature, wielding even the powers to dissolve the Legislature. There is thus a complete 'fusion' in spite of a separation of the legislative and executive powers in the same hands.

So far as the Judiciary is concerned, however, there is a shared of opinion that the Judiciary in England is independent of any control by the Executive, so that the doctrine of separation of powers has its relic in England, in the share of independence of the Judiciary,\textsuperscript{190} in its function of administration of justice.

The UK is becoming increasingly concerned with the Separation of Powers, particularly with Article 6 of the ECHR -.The Constitutional Reform Act, 2005 reforms the office of Lord Chancellor and the Law Lords will stop being in the legislature and have their own Supreme Court away from Parliament. It is trying to ensure the independence of the judiciary. But a full separation of powers is very unlikely as that would require an executive completely separate from the legislature and a new way of electing a Prime Minister, the UK is not ready for that.

The UK does have a kind of Separation of Powers, but unlike the United States it is informal. Blackstone's theory of "mixed government" with checks and balances is more relevant to the UK. It could be said that Judicial Review is the Separation of Powers working at its best - The Judiciary ensure that the Executive do


\textsuperscript{189} Bageho, English Constitution (1967); World's Classic 12 (1963).

not exceed the powers that Parliament has given them, thereby upholding the will of the Legislature. The separation of powers is not an absolute or predominant feature of the UK constitution. The three branches are not formally separated and continue to have significant overlap. However it is a concept firmly rooted in constitutional thought. It allows the judiciary to remain independent and to refrain from matters more appropriately left to the executive or legislature. Especially relating to prerogative powers and Parliamentary privilege. While the doctrine is not always respected it remains an influential body of thought that ought not to be "lightly dismissed" (Munro).

Though it may still be possible to acknowledge that the functions of government are divisible into three categories it is impossible, in a modern State, to assign these functions exclusively to the three organs i.e., the Legislature, the Executive and the Judiciary. In practice, most constitutions put in place a system of checks and balances characterized by a partial separation of powers. This is essentially because the problems and working of the government in a present day scenario are interdependent. Therefore, it is not possible or practical to create watertight compartments and define the functions of the three organs with mathematical precision and say that the business of the Legislature is to make the law, of the Executive, to execute it, and of the Judiciary to interpret and apply the law to particular cases.

It is precisely for the same reason that although the Constitution of the United States recognizes the existence of separation of powers clearly and explicitly, yet strict separation of powers is not practiced in the United States in reality. The President of the United States exercises both legislative and judicial powers, which is sanctioned by the Constitution itself. The Congress interferes into the executive domain by virtue of its powers under the Budget and Accounts Act, to make changes in the budget passed by the executive. The Congress also exercises judicial function with regard to punishing and expelling the members of the Senate and the House of Representatives. Moreover, impeachment of judges is instituted before the Senate. This also, to an extent, gives judicial powers to the Congress.

The Indian Constitution does not differentiate the legislative, executive and judicial functions of the government at all. If there are provisions, which provides for separation of powers, there are also provisions, which clearly goes against the concept of separation of powers. It has been laid down in Supreme Court cases that there
exists to strict separation of powers in India. Thus, it can be safely concluded that strict separation of powers does not exist in India. The principle laid down by Montesquieu is clearly not applicable in the Indian context.

In the United Kingdom, there exists no separation of powers. However, with the recent constitution of the Supreme Court in October 2009, a separation of powers has been attempted between the judiciary and the other institutions of the Government. Until October 2009 the house of Lords served as the court of last resort. Until then there existed no separation of powers at all in the United Kingdom. The establishment of the Supreme Court goes on to highlight the importance of separation of powers, which has been recognized by the United Kingdom. However, there remains a fusion of legislative and executive powers.

3.4 The Constitutional Reform Act, 2005

In the Constitutional Reform Act, 2005, the Government and Parliament reformed some of the areas where, in the UK, the "powers" had been least separated. The Minister responsible for the bill in the Commons, Christopher Leslie, told the House that "we want to ensure that we clearly define the separation of powers, where it is appropriate, but that is not incompatible with having a partnership between the different branches of the state". 191

The Act, created a separate Supreme Court and the Lord Chief Justice replaced the Lord Chancellor as head of the Judiciary in England and Wales. It also placed a statutory duty on Ministers to uphold judicial independence. 192 The Bill was referred to a select committee in the Lords. 193 The Select Committee on the Constitutional Reform Bill produced its report in June 2004 and this contains background information on the arguments over separation of powers. 194 The Commons Constitutional Affairs Select Committee report of 2004-5 is also relevant. 195

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191 John Hemming, HC Deb 26 Jan 2004 : c27
The Lord Chancellor

Before 2005, the office of Lord Chancellor was a bridge between the institutions of the state. He was head of the judiciary with responsibility for the appointment of judges, a member of the Cabinet and Speaker of the House of Lords. In *McGonnell v. United Kingdom*, the then Lord Chancellor, Lord Irvine, clarified that "the Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged".

The Constitutional Reform Act, 2005 removed the judicial functions of the Lord Chancellor and his former role as head of the judiciary is now filled by the Lord Chief Justice. The Lord Chancellor no longer sits as Speaker of the House of Lords, which now elects its own Speaker. This was intended to create a more formal separation of powers. However, others saw the Lord Chancellor as a voice for the judiciary in Parliament and argued that the Lord Chancellor could ease tensions between the branches of state. The House of Lords Constitution Committee's reported in 2007 on relations between the executive, the judiciary and Parliament and contains useful background.\(^1\)

3.5 Judicial Appointments

Before the Constitutional Reform Act, 2005 judicial appointments were made on the recommendation of the Lord Chancellor who was a Government Minister. The legislation established an independent Judicial Appointments Commission for England and Wales. Judges are represented on the Commission, but do not hold a majority and the Commission has to have a lay Chair. The Commission recommends candidates to the Lord Chancellor, who has a very limited powers of veto. The Act, gives the Commission a specific statutory duty to "encourage diversity in the range of persons available for selection for appointments".\(^2\) Separate procedures apply to the

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\(^1\) House of Lord Constitution Sixth Report 2006-07 Relations between the executive, judiciary and parliament

appointment of Supreme Court judges, which take account of the fact that the Court has a UK wide remit.\footnote{198}

Since enactment, concerns have been raised that the Constitutional Reform Act, had actually reduced the diversity of new appointments to the senior judiciary compared to the old informal system, which sought out candidates rather than depending upon selection from applicants. The new process has also been criticized for being slow and involving the President and the Deputy President of the Supreme Court in the selection of their own successors.\footnote{199} A research project at the Constitution Unit, University College London is examining these issues.

The length of time that the new process takes was also criticized, as was the involvement that the current system currently gives to the President and Deputy President of the Supreme Court in the process of selecting their own successors, a feature of the appointment process which, it was pointed out, is almost unique to Britain.\footnote{200} In the US, the Senate is involved in appointments to the Supreme Court and some have suggested that in Britain a parliamentary committee might be involved in pre-appointment hearings. However, others expressed concern that such proceedings could be influenced by the media.

The Supreme Court

Until 2009, the Lords of Appeal in Ordinary (the Law Lords) sat in the legislature as well as acting as the highest appeal court in the UK. However, the Constitutional Reform Act, created a separate Supreme Court, separating out the judicial role from the upper House. During the passage of the legislation, Lord Falconer told the House that "the time has come for the UK's highest court to move out from under the shadow of the legislature the key objective is to achieve a full and transparent separation between the judiciary and the legislature, the Supreme Court will be administered as a distinct constitutional entity. Special arrangements will apply to its budgetary and financial arrangements in order to reflect its unique status."\footnote{201}
However, there was considerable opposition to the Government proposals. Lord McCluskey was not convinced by the arguments in favour of a separate Supreme Court. He commented that "a good deal of nonsense is spoken about the separation of powers for 135 years or so, serving judges have always played an important part in the deliberations of this House. They seldom vote". Nevertheless, the legal function of the House of Lords was separated from the legislative function and the Supreme Court was fully established in October 2009.

Since the creation of the Supreme Court, concerns have been raised that the judiciary is still dependent on the executive in the form of the Ministry of Justice for its funding. Lord Phillips of Worth Maltravers commented that "the Court Service of England and Wales has not been able to provide us with their contribution and we had to call upon the Lord Chancellor to make up the difference" and argued that "this arrangement clearly does not provide the security of funding which had been envisaged by Parliament and risks the Court being subject to the kind of annual negotiations the arrangements were intended to avoid." He suggested that this financial dependence was "already leading to a tendency on the part of the Ministry of Justice to try to gain the Supreme Court as an outlying part of its empire". Independence, he urged, was even more important since "Over 50 per cent of that workload now consists of public law cases which involve challenges to the legality of executive action".

3.6 The Doctrine in Canada

The scheme of distribution of powers in Canada between the Centre and the Provinces makes a threefold enumeration of powers. The Centre in empowered by S. 91 of the British North America Act, 1867 to make laws for the ‘Peace, order, and good government of Canada with respect to subjects not exclusively assigned to the provinces’; but ‘for greater certainty’, and not ‘so as to restrict the generality’ of the foregoing Provision, 30 specific heads of powers have been mentioned in the section itself; it is further laid down that whatever falls within this enumeration cannot be regarded as coming within the subjects falling in the provincial list. Some of these

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202. John Hemming, HC Deb 7 March 2004 c 1030
203. Lord Phillips of Worth Maltravers, 'Judicial independence and accountability: a view from the Supreme Court', 8 February 2011, p. 15
204. Ibid, P 16
head are: defence, postal service, currency and coinage, taxation, criminal law, regulation of trade and commerce, unemployment insurance. S. 92 empowers the provinces to legislate exclusively with respect to sixteen subjects. One of the heads in the provincial list is ‘property and civil rights’. ‘Education’ is an exclusive Provincial matter. Under Sec. 94A, 95 ‘old age pension’, ‘Agriculture’ and ‘immigration’ are concurrent subjects, with supremacy in favours of the Centre in case of conflict between a Central and a Provincial Law.

The Centre has been denied powers to regulate the supply and price of necessities of life. In Att Gen. for British Columbia v. Att. Gen. for Canada, while invalidating the Central agricultural marketing legislation, the Privy Council declared that ‘regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province.

3.7 The Doctrine in France

The pattern of mixed government and the separation of powers in the seventeenth and eighteenth centuries closely reflected the institutional developments of England and America, reacting to the problems those countries faced, providing the ideological materials with which they formulated solutions to those problems. The institutional development of France, however, had followed very different lines, drawing inspiration from a different set of ideas about institutions. These conflicting English and French approaches to constitutional structure were reflected in the work of Montesquieu, who attempted to integrate them into a single theoretical framework. The latter part of the eighteenth century in France presents, therefore, a strangely confused picture in relation to Montesquieu and his thought. On the one hand, he is in many ways more important in France than in England and America, for he represents a turning-point in the whole approach to the problems of government and their solution; on the other hand, the specific solutions he offers in his description of the constitution of liberty seem inappropriate to French conditions and the current of French thought. This dilemma is clearly portrayed in the difficulties his disciples faced in 1789, when the proposals they made, based upon the mixed and balanced constitution, were rejected as alien and irrelevant to the New France.

The separation of powers, however, upon which Montesquieu had placed so much stress, became an essential article of faith with the men of 1789, so that, in a

208. 1937 A.C 377
different way from that of America, the process of rejecting mixed government and of
turning instead to the separation of powers as the basis of a free constitution was
followed in France, with a vital difference. In 1789 in France, both doctrines, the
balanced constitution and the separation of powers, were rejected or accepted as
theoretical principles which had little or no institutional reality in pre-revolutionary
experience, whereas in America the doctrines were regarded as the evolution of and
the reformulation of, a system of institutions that had been operated, had become
obsolete, and were to be modernized. It is in this respect that the institutional changes
in France were truly revolutionary, in a way that those of America were not.

Furthermore, the role played by the separation of powers was different in
France and America. In France the pure doctrine was held fiercely as an explicit
ideological position, whereas in America it had been more a matter of the logic of the
revolutionary situation than a conviction of the necessity of the pure doctrine which
had dominated events. When in America the political situation enabled a resurgence
of the older ideas, these had quickly returned to modify the extremes of the doctrine
of the separation of powers. In France, however, the pure doctrine of the separation of
powers took hold of men's minds with intensity, and durability, not paralleled in
America. Part of the explanation of this lies, as will be seen, in the complexity and
intractability of the political situation, but part of the explanation must be sought
further back in the past, in the particular form in which the men of 1789 came to look
upon the separation of powers as a result of the development of thought after 1748.
This part of the explanation of the intensity and persistence of the theory must be
sought in the way in which the thought of Jean-Jacques Rousseau was overlaid upon
that of Montesquieu, modified it, and gave a new direction and force to the theory of
the separation of powers.

It is difficult to exaggerate Rousseau's importance in determining the
particular form that the separation of powers took in France. He was himself bitterly
critical of the doctrine in the form in which Montesquieu developed it, and he was
supremely unconcerned with the problems most of the writers on the separation of
powers had considered vitally important. Yet the form in which he cast his theory, and
the vocabulary he used, when adapted to the needs of the more practical men of the
late eighteenth century, combined with that part of Montesquieu's thought which
seemed to them to be relevant, produced a theory of the separation of powers very
different from that of England or America. Rousseau's central position in the Social
Contract, first published in 1762, was that law can only emanate from the general will of the community; the legislative powers is the exercise of the sovereign will of the people. This powers cannot be alienated or delegated; any attempt to create generally applicable rules from any other source represents a usurpation of popular sovereignty and cannot result in law. Rousseau's emphatic denial of the divisibility of sovereignty was aimed at all those political theorists who in the past had divided up the sovereign powers among different persons or branches of government. Such writers, he wrote, make of the sovereign "a fantastic creature, composed of bits and pieces." Like a Japanese conjuror dismembering the body of a child and reassembling it by throwing it into the air these writers dismember the social body and reassemble the pieces "without our knowing how." For Rousseau the idea of the division of sovereignty was the central fallacy of political thought, from which flowed most of the obscurities in writings on the State. "Whenever we think we see sovereignty divided, we are mistaken ... the rights which are taken for parts of sovereignty are all subordinate to it." Rousseau had, then, a boundless contempt for the theories of equilibrium and balance that invested the parts of the State with an independent powers to check each other. It was this-belief in the indivisible sovereignty of the people, adopted in the Revolution that made the constitutional theory of Montesquieu unacceptable, except in relation to the separation of powers in its starkest form.

The legislative powers can belong only to the people, but by definition this powers can be concerned only with generalities, whereas the powers to act can be concerned only with particular cases. The executive powers cannot, therefore, be placed in the hands of the sovereign, whose province is the law, and whose acts can consist only of laws. It is a mistake to identify the government with the sovereign, for which the former is merely the agent or minister.

In the report of the Committee on the Constitution presented by Lally-Tollendal there was set out a system of divided powers linked by the checks and balances of the English Constitution. Rally's presentation was not merely a regurgitation of Montesquieu, but drew also upon Blackstone and de Lolme, and appeal for support was also made to John Adams's Defense of the Constitutions of the United States. Although the idea of a hereditary Second Chamber was rejected in

210. Ibid.
favor of a Senate appointed for life by the King, Lally developed the virtues of a system of perfect equilibrium, in which the three branches of the legislature would combine all the advantages of the three simple forms of government without their disadvantages. The executive powers united in the hands of the King would have a veto to defend itself against encroachments by the legislature. With the powers of prorogation and dissolution granted to the King and the powers of impeachment vested in the Senate the structure of a free constitution was completed. Thus the doctrine of the balanced constitution formed the basis of the first concrete proposal submitted to the Constituent Assembly.

Abbe Emmanuel Sieyes. Sieyes' thought was based upon a hatred of aristocracy and privilege that led him inevitably to reject the balanced constitution. He was as committed to the unity of the sovereign powers as was Rousseau. In his Qu'est-ce que le Tiers Etat? published in January 1789 Sieyes had emphasized the unity and sovereignty of the nation, from which all powers is derived, which establishes the constitution and determines the functions of the parts of the State. This unity precludes all privilege. The third estate is the nation; "Qu'est-ce que le Tiers'?' he asked, and gave the answer "Tout." A single chamber is the only form of legislature which can represent this unity. At the same time, Sieyes, in 1789 at least, saw the monarchy also as a manifestation of the unity of the nation, and supported it for this reason. Thus we are presented with the simple bipolarity of a single-chamber legislature and a royal executive.

In France, situation could not arise, for the authority of the branches of government being drawn directly from the people, they need not fear each other, and no checks to the encroachment of one branch upon another are needed. Provided that the powers of government are divided with care, and are made independent of each other, they are then in an equally advantageous position. No veto is required, nor does the powers to withhold supplies, for if any part of the State should exceed its authority the people in Convention will intervene and resume the powers which it have delegated.

The most important difference between the ideas of the two periods in relation to the separation of powers was the determination in France to enforce strictly the

212. Archives parlementaires, Ist Series, Vol. 8,
separation of the personnel of government between its branches. This aspect of the doctrine, which had recently been so important to the American constitution-makers, dominated the minds of the men of the Revolution. It led to the defeat of any attempt at a parliamentary system, and it persisted well into the period of the Convention.

The Constitution of 1791 began with a sweeping abolition of all privileges, orders of nobility, and feudal or other social distinctions. It proclaimed the indivisible, inalienable sovereignty of the people, but hurriedly added that the nation could only exercise its powers by-delegation through its representatives, the National Assembly, the King, and the elected judiciary. The unicameral Assembly was a permanent body, elected every two years, over which the King had no powers of dissolution. The King could not initiate legislation, but he was given a suspensive veto. The idea of ministerial responsibility was rejected in favour of a process of impeachment before a National High Court. Members of the National Assembly were to be incapable of appointment to ministerial office, or of accepting any place or pension in the gift of the executive, during their membership of the Assembly and for two years afterwards. Thus the legislative and executive branches were strictly divided, although ministers were allowed to speak in the Assembly and to listen to the debates. The Constitution raised "the judicial powers" to a level of equality with the legislature and the executive.

The Assembly and the King were expressly forbidden to exercise any judicial function, and the judges were intended to be independent of the either two branches by virtue of their popular election. Indeed the Constituent Assembly inserted in the Constitution a specific denial of the right of judicial review; the courts were forbidden to interfere with the exercise of the legislative powers or to suspend the execution of the laws. Nor were they to entertain actions against officials in respect of their administrative activities, so that the courts were prevented from exercising authority over executive or administrative, as well as legislative, actions. Thus the Assembly laid the basis for the vitally important distinction in French law between the judicial and the administrative jurisdictions. In the Constituent Assembly this was justified by the separation of powers theory, but its roots went back to the practice of the ancient regime.215 The deputies of the National Convention found themselves exercising a supreme, unlimited powers over every type of government task, yet the extraordinary

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importance which they attached to the idea of the separation of powers can be seen in the way they adhered to a formal separation of persons between the "executive" and the "legislature." The Convention decreed on the 25 September 1792 that the exercise of any function of public office was incompatible with membership of the Convention.²¹⁶ It rejected the argument that with the end of royal powers there was no further need for a feeling of suspicion towards the executive, and that ministers might therefore now be chosen from the Convention. It even refused to allow members of the Convention to be appointed to office if they resigned their seats, because of the possibilities for corruption that this practice would open up. Lecointe-Puyraveau carried the Convention with him when he insisted that the most important argument against the choice of ministers from within the Convention was that the deputies had been sent there to make laws for the people. If they removed a man from the Convention to the executive, would not the people be able to say "I have sent this citizen to make the laws, not to execute them."²¹⁷

Finally, on the 1 April 1794 the Convention acknowledged reality and abolished the six ministerial posts, setting up twelve executive commissions, each consisting of three members, closely subordinated to the Committee of Public Safety. Carnot, in urging the Convention to take this step, developed a theory of revolutionary government. An executive council, he alleged, was an instrument of royal despotism, intended to maintain privilege and social distinctions: how then could it become an instrument of a representative government devoted to the principle of equality "Government is nothing more, properly speaking, than the council of the people."²¹⁸ The people's sovereignty must be guarded by dividing up the instruments of government and restraining them within the closest limits, to prevent the accumulation of powers; at the same time the closest subordination of the active agents of government to the National Assembly must be maintained.²¹⁹ This is the pure theory of government assemblée the complete rejection of the separation of powers or any other theory which sets any sort of limit to the powers of the legislature.

Whilst engaged upon a practical exercise of powers which showed little concern for the spirit of the separation of powers, the Convention was also busy with

²¹⁹. Ibid.
schemes for the re-establishment of constitutional government. The de facto acceptance of convention government did not mean, however, that the separation of powers played no part in the thoughts of the deputies when they turned to constitution-making. Several of the projects submitted to the Convention made the doctrine the cornerstone of their proposals. Boissy d'Anglas, later to play an important role in the writing of the Constitution of 1795, rejected the idea that popular sovereignty demanded a single channel of government action as "un blasphème politique."

The existing structure of government, necessary in the circumstances, was itself evidence of the way in which, a single all-powerful Assembly could subject the people to the oppressive acts of their own representatives. A constitutional monarchy has the great advantage of creating a "neutral powers" in the hands of the King; this powers is to be used to maintain harmony between the other three branches of government. The legislative, executive, and judicial powers need to co-operate, each taking part in its own way in the general operations of government; but if instead they are at cross purposes then the King must step in to restore harmony. The means of doing this lies in the King's prerogatives of veto, of dissolution, of dismissal of ministers, and of pardon. These prerogatives cannot be placed in the hands of one of the potential contestants, but must remain in the hands of one who has an interest only in maintaining an equilibrium between the powers of government. While insisting on the need to separate the powers of government, Constant reiterated the American argument that separation itself was not enough, barriers must be placed between them, in particular to prevent the legislature from exceeding its powers, but at the same time he stressed the necessity of linking the legislature and the executive by allowing ministers to be members of the legislature. "By reuniting individuals, whilst still distinguishing powers, a harmonious government is constituted, instead of creating two armed camps."

France recognizes separation of powers in its Constitution. French Administrative Law is unique and different in the sense that it provides for two sets of courts—one for civil disputes and the other for administrative disputes. This, in a way, ensures separation of powers since the administrative disputes will remain within the administrative domain and not perpetrate outside its domain. This also reduces the

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222. Ibid.
223. Ibid.
burden of the civil courts and ensures speedy justice. Laws are framed in the Parliament.

Therefore, in any government, one institution of the government cannot exercise the powers essentially belonging to another institution but it can exercise some of the incidental powers of another organ without violating the principle of separation of powers in its strict sense. If the doctrine of separation of powers in its classical sense cannot be applied to any modern government, it does not mean that that the doctrine has no relevance in the present day world. The logic behind this doctrine is sound and valid as it seeks to ensure that the centre of authority must remain dispersed to avoid absolutism and the idea is not to create rigid classifications, bereft of even limited flexibility. The fulfillment of this logic is absolutely necessary for the smooth functioning of any government.

3.8 The Doctrine in Australia

Prof. Darry Lumb observed:

“The coexistence of six colonies on the Australian Continent independent of each other in local policies, although united by common law, nationality and similar institutions of government, could not be the basis for a permanent constitutional system.”

The Commonwealth of Australia joined the family of federation in 1900 when the British Parliament enacted the Commonwealth of Australia Constitution Act. It follows the American model to the extent of giving only specific powers to the Centre but, there are some interesting differences between Australia and America in the scheme of distribution of powers between the Centre and the States.

Following the same, Section 51 of the commonwealth act enumerates 40 heads with respect to which the Central Parliament has powers to legislate.’ S. 51 does not make the powers of the Centre exclusive and the States are also authorized to legislate in this area concurrently. But some heads either by their nature or by virtue of other constitutional provisions, are such that only the Central Parliament can make laws with respect to them, as for example, borrowing money on the public credit of the Commonwealth, defence, external affairs, etc.

Besides, a few exclusive, powers have also been assigned to the Centre. All the rest of the functions lying beyond the concurrent and the Centre’s exclusive fields, fall within the exclusive State jurisdiction. The States thus have to look after such
functions as education, health, roads, railways and other various developmental activities. In case of an inconsistency between a Central law and a State law, the Central law prevails and the State law is invalid to the extent of inconsistency.

The Centre has found in its powers on ‘inter-State commerce’ and ‘arbitration of industrial disputes’ a great potential capacity to regulate economic affairs in the country because progressively trade and commerce is becoming more national in character and less confined within the limits of anyone State. However, in *Victoria v. Commonwealth & Hayden* by a majority, the High Court has sustained the liberal view of the spending powers and has ruled that Parliament can appropriate money for such purposes as it may determine.

A useful starting point for our investigation of the separation of powers doctrine in the Australian context is of course the federal government. It can serve as a useful guide for the States. Since federation the Commonwealth has taken priority over the States and continues to do so. The chapter establishes the advantages of the Commonwealth model over the States. The main advantage is the separation of powers entrenched in the Commonwealth Constitution. The Commonwealth Constitution cannot be amended without the approval of the people, unlike in the States. The State Constitutions are pieces of legislation that can be amended by State Parliaments and they do not include constitutionally entrenched separation of powers.

The High Court has interpreted the Commonwealth Constitution as providing separation of judicial powers and only courts properly constituted under Chapter III of the Constitution could exercise any part of the judicial powers of the Commonwealth. The High Court also held that the Parliament could delegate law-making powers to the executive. The chapter looks at the advantages and disadvantages of the federal model and also the importance of the Constitution, the Separation of Powers and judicial review in protecting citizens from the abuse of government powers. A lack of civil rights in the Constitution and the executive legislating away rights may require a remedy in the form of Bill of Rights.

The High Court has adopted a more limited separation of powers and a preference for British practice and theory (derived from Locke 1690 and Blackstone 1884) over the American practice and theory from the Federalist 1788 understanding.

226. *(1975)* 134 CLR 338.
of the separation of powers. The High Court has announced that it no longer declares the law and that in some sense it now makes the law and had always done so. This dislodged its jurisprudence from case-by-case adjudication to jurisprudence that pronounced on general principle. Mason's view that the court is making not just declaring law is problematic but is backed in the well developed literature in the critical legal studies movement.

The executive interference with the court (Murphy and Kirby) and problems with the separation of legislative and executive powers in a system characterized by responsible government suggest the Commonwealth model has its own problems. Disadvantages of the federal model include examples such as the political attack on the High Court by Rob Borbidge and Tim Fisher after the Wik (1996) Decision and the public battle between Gerard Brennan CJ and Darryl Williams over the role of the executive in defending the judiciary from Deistical attack (McGregor 1998; Patapan 2002: 247-9). The fairly recent conflict between Ruddock and the Federal Court over immigration matters was another critical example of a problem with the separation of powers at the federal level. In 1998, the replacement of Gerard Brennan with Murray Glees on as CJ of the High Court has endorsed a return to 'legalism' rather than the previous Mason and Brennan era of 'judicial activism'.

3.8.1 Legislative and executive powers

Section 64 of Commonwealth Constitution provides that federal Ministers - members of the executive - must sit in Parliament. The specific requirement for ministers to sit in Parliament established the connection between executive and legislative, effectively preventing an American-style separation of the two.

In Victorian Stevedoring & General Contracting Co Pvt. Ltd & Meakcs v. Dignan the High Court of Australia held that it was impossible, consistent with the British tradition, to insist upon a strict separation between legislative and executive powers. It was found that legislative powers may be delegated to the executive, and as a result upheld the validity of delegated legislation. By contrast, in its insistence on a strict separation of "judicial powers", the High Court has been less willing to compromise.

The executive is not only physically part of the legislature, but the legislature can also allocate it some of its powers, such as of the making of regulations under an

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Act, passed by Parliament. Similarly, the legislature could restrict or over-rule some powers held by the executive by passing new laws to that effect, though these could be subject to judicial review. The exceptionally strong party discipline in Australia, especially in the lower house, has had the effect of weakening scrutiny of the executive by the legislature since within the lower house, every member of the numerically larger party will almost always support the "executive and its propositions on all issues.

On the other hand, the Senate has had the effect of restraining the powers of the executive through its ability to query, amend and block government legislation. The result of the adoption of a proportional system of voting in 1949 has been that the Senate in recent decades has rarely been controlled by governments. Minor parties have gained greater representation and Senate majorities on votes come from a coalition of groups on a particular issue, usually after debate by the Opposition and Independents.

The Constitution does, moreover, provide for one form of physical separation of executive and legislature. Section 44, concerning the disqualifications applying to membership of Parliament, excludes from Parliament government employees (who hold "an office of profit under the crown") along with people in certain contractual arrangements with the Commonwealth. This was demonstrated in 1992 after Independent MP, Phil Cleary, had won the Victorian seat of Wills. Cleary, on leave without pay from the Victorian Education Department at the time of his election, was held in Sykes v Cleary to be holding an office of profit under the Crown and disqualified. The Court noted that that Section 44's intention was to separate executive influence from the legislature.

3.8.2 Separation of Legislative and Executive Power

The Westminster system blurs the separation between the personnel of the Parliament and of the Executive. Indeed, the personnel hold dual roles simultaneously. Section 64 of the Commonwealth Constitution gives effect to this position (Carney 1993: 8). The section indicates that the Governor-General appoints Ministers or officers to administer departments of State of the Commonwealth. The section also states that Ministers are to sit in Parliament, a Minister shall not hold office for a longer period than three months unless he or she becomes a Senator or a member of the House of Representatives. The practice has been for Ministerial appointments to be made from existing members of Parliament (Lumb and Moens:
The Prime Minister by convention comes from the House of Representatives.

The delegation of law-making powers to the executive is also permitted: *Victorian Stevedoring and General Contracting Co Pvt. Ltd v. Dignan.* The High Court has upheld extremely wide delegations of powers to the Governor-General or a Minister. For example, it permitted a powers to make regulations with respect to the employment of transport workers (Dignan's Case). It has also permitted the powers to prohibit the importation of goods (*Radio Corporation Pvt. Ltd v. Commonwealth*).

Importantly, the decision in Dignan overturned the rule against the delegation of unlimited law-making powers that lies at the foundation of modern constitutionalism.

In Dignan's Case, the High Court stated that the delegation of wide law-making powers was consistent with British constitutional practice. Ratnapala argues that the Court was clearly mistaken in surmising that British constitutional practice had discarded the rule against delegating primary legislative powers. The following year, the Committee on Ministers' Powers examined the whole issue of delegated powers and concluded that there was no such practice. This Committee found that the British Parliament rarely delegated powers to the executive to legislate in matters of principle; it did not delegate powers to legislate without limits or to impose taxes. It also found that when Parliament resorted to such delegations, it had been on account of 'the special subject matter and without intention of establishing a precedent.' There was a clear constitutional principle established by convention against the delegation of wide law-making powers to the executive.

### 3.8.3 High Court's interpretation of the Separation of Powers

The separation of powers in Australia has been fundamentally shaped and defined by the High Court which chose a Blackstonian ([1765-69] 1884) common law conception of the separation judicial powers, in preference to the principles elaborated in Hamilton, Madison & Jay [1788] The Federalist and articulated in the American Constitution (1788) (Patapan 1999: 391). The High Court's admission that

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228. (1931) 46 CLR 73
229. (1938.) 59 CLR 170
230. (1931) 46 CLR 73 at 101-2
231. (see Locke 1690 Second Treatise, sections 138-42)
233. Ratnapala 2002: 106
234. Sawer 1961; Vile 1967; Finnis 1967
it now 'makes the law'\footnote{Mason 1990; Kirby 1990, 1997; Marks 1994; Brennan 1998; Patapan 2000: 5, 31}, as discussed below, has presented unprecedented theoretical and political challenges. The Court has been compelled to reconcile its new role with the rule of law and to explain what law-making means for the judiciary. There are now challenges to the concept of the separation of judicial powers in Australia. This includes a transformation in the role of the Attorney-General, the creation of new institutions and a move towards an American conception of checks and balances (Patapan 1999).

The Australian Founding Fathers faced a choice between two major conceptions of the separation of powers: one derived from the American Constitution and The Federalist (Hamilton, Madison and Jay 1982 [1788]); the other from British constitutionalism and Blackstone (1765) (Patapan 1999: 39 I). The Australian Founding Fathers settled upon an amalgam of British responsible government and American federalism. The result has been described as 'a hybrid form of government' (Emy 1978: 181; Galligan 1995: 38). This amalgamated and mutated Australian system revealed the ambiguity of the terms settled upon in the Australian Constitution. It allowed the High Court to be the pre-eminent interpreter of the Constitution and to define the nature of the separation of powers in Australia.\footnote{Thompson 1980; Maddox 1991; Singleton, Aitkin, Jinks & Warhurst 1996; Patapan 1999; Patapan 2000: ISO.}

The High Court took up this opportunity and defined the separation of powers in Australia principally as a separation of the judicial powers from the other powers.\footnote{Alexander's Case (1918); Dignan Case (1931)} This had far reaching influence on the development of Australian constitutionalism until the court's recent admission in 1990 that it not only interprets the law but also 'makes' the law (Mason 1990). This declaration has exposed the court to political and scholarly criticism and raised profound questions concerning the tension between a lawmaking judiciary and the doctrine of separation of powers. This theoretical tension creates immediate political implications for the separation of powers doctrine in Australia; it makes the judiciary more vulnerable to political attack, it requires a new role for the Attorney-General, and it requires the creation of new mediating institutions. In 1995 Attorney-General Williams argued that there was no longer any reason to treat the High Court as an institution differently to other
policy-making bodies. All of these suggest a shift towards an American conception of institutional checks and balances.238

3.8.4 The High Court's rationale for the Separation of Powers Doctrine

The High Court has justified the existence and use of the separation of powers doctrine in its interpretation of the Australian Constitution in two ways: federalism and libertarianism. The first justification emphasises the importance of a separated and independent judiciary for the purpose of maintaining the federal character of the Constitution. Three main High Court cases that involve the federalism theme are: Alexander's Case (1918) 25 CLR 434, 469-70, 479; Boilermakers' Case (1956) 94 CLR 254, 276; and A-G Oil v R (1957) 95 CLR 529, 540-541. The second justification used by the High Court actually has two strands. The first strand indicates that, as part of the system of checks and balances, the dispersal of powers helps to protect individual liberty. The High Court's response to concerns, such as it has become a law-making court, has been the attempt by the court to justify the separation of powers by emphasising its importance for the protection of liberty.239 The second strand indicates that by securing judicial independence, the dispersal of powers protects liberty.

3.8.5 The Separation of Powers in the Commonwealth

Constitution the Commonwealth of Australian Constitution Act, (1900) sets out a type of separation of powers between the legislative powers (section I), executive powers (section 61) and judicial powers (section 71). This follows the Constitution of the United States America (1788) that set out a separation of powers and institutions. The US Constitution sets out the separation of powers (Article I, section I: the legislative powers is vested in Congress (Parliament); Article II, section I: the executive powers is vested in the President; and Article III, section I: the judicial powers is vested in the Supreme Court). The Australian Commonwealth Constitution sets out the SOP and institutions (Chapter I, Section I: the legislative powers is vested in a Federal Parliament; Chapter II, Section 61: the executive powers is vested in the Queen and is exercisable by the Governor-General (in practice the PM and Cabinet); Chapter III, Section 71: the judicial powers is vested in a Federal Supreme Court (the High Court and other Federal Courts).

238. (Patapan 1999: 1-2)
3.8.6 Separation of Judicial and Non-Judicial Power

The High Court has given legal effect to the doctrine of Separation of Powers in relation to the judicial powers of the Commonwealth. It is in this respect that the position at the Commonwealth level differs markedly from that at the State level. The reasons given by the High Court have already been indirectly noted earlier: the constitutional entrenchment of the judicial powers in the High Court and the other federal courts (s. 71); the prescription of the content of the judicial powers in Chapter 111 of the Constitution, and the critical need to maintain judicial independence in a federal system (Carney 1993: 8).

Carney (1993: 7) argues that there are two related legal principles inferred by the High Court Item its interpretation of Chapter III of the Constitution, they were established forty years apart. First, judicial powers can only be vested in s. 71 courts (the High Court, federal courts and State courts) (New South Wales Commonwealth (the Wheat Case) (1915) 20 CLR 54 - Inter Stale Commission). Second, non-judicial powers cannot be vested in s. 71 courts no other body other than s. 71 courts may be vested with judicial powers, Attorney-General and others v. R; Ex parte Boilermakers' Society of Australia,240 the Boilermakers' Case.

The rule that judicial powers may be vested only in courts designated in s. 71 is important in determining which bodies may exercise judicial powers in the Commonwealth of Australia. Nevertheless it does not completely answer the question. Apart from the High Court, s. 71 permits judicial powers to be vested in 'such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. Ratnapala (2002: 146) argues that the High Court has time and again said that judicial powers can only be vested in a court in the strict sense of the term, Huddart Parker and Co Pvt. Ltd v. Moorehead,241 Walerside Workers Federation ql' Australia v. J W Alexander Ltd,242 British Imperial Oil Co Ltd Federal Commissioner ql' Taxation,243 R v. Davison244 Attol'ley-General (Cth) v. R; Ex parte Boilermakers' Society of Australia,245 R v. The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pvt. Ltd.246

240. (1956) 94 CLR 254
241. (1909) 8 CLR 330 at 355;
242. (1918) 25 CLR 434 at 467 and 480;
243. (1925) 35 CLR 422 at 432-3;
244. (1954) 90 CLR 353 at 366;
245. (1955-56) 94 CLR 254 at 270,289 and 296;
In regards to the separation of judicial and non-judicial powers, according to Ratnapala (1999: 2-10) the case law on judicial powers reveals four aspects of the High Court's treatment of the subject. First, it reveals the High Court's rationale of the separation of powers in Australia. An important question for the High Court is: Why does the Court think that judicial and non-judicial powers should be kept in different hands? Second, the case law reveals the High Court's rules that determine the extent to which judicial and non-judicial powers are separated. These rules are either prohibitory or permissive. Third, the case law reveals the High Court's definition of the concept of judicial powers, that is, the kind of powers that is almost exclusively vested in federal courts. Fourth, the case law reveals the High Court's expedient High Court decisions that have severely compromised the separation of powers doctrine. It is important to outline the High Court's rationale for the separation of powers doctrine.

### 3.8.7 Separation of Federal Judicial Power

As early as New South Wales v. Commonwealth, the High Court decided that the strict insulation of judicial powers was a fundamental principle of the Constitution. This also applies to tribunals and commissions set up by Federal Parliament which, unlike some of their equivalents in the states, can only recommend consequences. The Federal Parliament itself has the rarely used privilege of being able to act as a court in some circumstances, primarily where it may regard a non-member as acting "in contempt" of parliament.

The reasoning in the Wheat Case was taken further in Waterside Workers' Federation of Australia v. JW Alexander Ltd. A decisive distinction between judicial and arbitral functions was drawn. A consequence of the Australian version of the separation of powers is its role in encouraging judicial deference to the "political" arms of government. The normal propensity of the High Court is to recognise that separation of powers requires not only that the "political branches" should not interfere with judicial activity, but also that the judiciary should leave politicians and administrators alone. The importance of deference has been acknowledged in extra-judicial writings, and in decisions such as Drake (No 2).

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247. (Wheat Case) (1915)
248. (1918)
The doctrine of persona designata permits non-judicial functions to be conferred on judges in their personal capacity, as opposed to their judicial capacity.

3.8.8 Separation of Powers in the States

While there are strong textual and structural basis for the separation of powers in the Commonwealth Constitution, the same is not true of the State constitutions. At State level, separation of powers exists largely by virtue of convention. This has been shown in cases such as Clyne v. East\textsuperscript{249} for New South Wales and the doctrine extensively discussed in cases such as Kable v. The Director of Public Prosecutions. In these and other judgments it was noted that a subdued doctrine of separation of powers operating as accepted practice is taken for granted in the state. That the position is similar in other states has been confirmed in cases in Victoria, Western Australia and South Australia.

Parliamentary scrutiny of the executive and, in particular, by the NSW Upper House, was tested in the 1990s when Treasurer Michael Egan, on behalf of Cabinet, refused to table documents in the Legislative Council of which he is a member. The Council, determined to exercise its scrutiny of the executive, pressed the issues and eventually adjudged the Treasurer in contempt, suspending him from the house twice. The matters were disputed in three cases in the High Court and the Supreme Court of New South Wales. The results upheld that principle that the Legislative Council does have the powers to order the production of documents by a member of the House, including a minister, and can counter obstruction. However, the extent of the Legislative Council's powers in relation to Cabinet documents remains unclear and, should the question arise, will be subject to continued court interpretation.

3.9 Separation of Powers in China

Unlike the legal systems of continental Europe, Chinese law does not trace its roots to the private-law system of Rome or to any religious basis. Instead, traditional Chinese law centered on state concerns and dealt with private matters incidentally. While medieval European monarchs held themselves forth as providers of justice and sought legitimacy on those grounds, the Kang xi Emperor (r. 1662-1722) worried that lawsuits would tend to increase to a frightful amount, if people were not afraid of the
tribunals, and if they felt confident of always finding in them ready and perfect justice. ... I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.

3.9.1 Traditional Chinese Law

While Imperial China with its advanced bureaucracy produced a great deal of documents of a rule-like character, it had very few officials with the specialized function of interpreting and applying those rules, and their role was limited to the review of cases where a non-state actor was involved as a defendant. No institution existed that could apply law against the state, and original jurisdiction over cases involving individuals was with the local magistrate, an official whose responsibilities covered all aspects of government (and not simply legal matters) within his territorial jurisdiction.

In summary, the legacy of traditional Chinese law inherited by modern China is substantially different in many of its most basic principles from European legal systems. Law has no connection with religion; there is no special, differentiated institution ("court") before which disputing parties advance legal claims; and the legal system functions to serve state interests, not to protect individual rights or to resolve disputes among individuals (although it can sometimes be used to serve that purpose).

3.9.2 The Chinese Legal System

Any account of the legal system of the People's Republic of China must be prefaced by a warning of the need to distinguish between the formal system and what actually happens. Such a gap is of course present in some degree in all countries, but in many areas it is particularly broad in China. Thus, while it may often be possible to provide a reasonably complete account of Chinese law as it applies to a certain issue, that will not be the same as a reasonably complete account of how a certain issue is in fact treated in China.

The Chinese legal system is in form much closer to the legal systems of continental Europe than to the common law, but also contains substantial elements borrowed from the Soviet Union and inherited from traditional Chinese law. These elements, and the thinking behind them, are a major cause of the gap between form
and reality, and between how participants talk about the system and how they act within it.250

3.9.3 Modern China

In 1911, Imperial China came to an end with the overthrow of the Qing (Ch'ing) dynasty. After almost four decades of intermittent civil war and invasion, the People's Republic of China (PRC) was established in 1949 under the rule of the Communist Party of China. The legal history of the PRC begins with the abolition in 1949 of all the laws of the predecessor state, the Republic of China. This left a substantial legal vacuum that ultimately had to be filled by whatever authoritative materials decision makers had at hand, including Party newspaper, editorials, policy documents, and leaders' speeches. At the same time, there was for many years little need for a formal legal system in many areas of national life, since the economy was largely subject to state planning and conflicts could thus be resolved without reference to legal rights and duties.

Recurring political turmoil prevented any substantial development of the legal system for the first three decades of the PRC, but with the start of the post-Mao era of economic reform in 1979, a number of changes began to occur. Significant amounts of legislation were issued and the institutions of the legal system -- in particular, courts, judges, and lawyers - received more attention from the state. Indeed, the ideal of "rule according to law" was recently written into the national constitution, although the practical effect of adding these words is small.

The PRC is in form a unitary state; all powers flows from the central government, whose seat is in Beijing. Local governments have only such powers as the central government chooses to delegate to them. Naturally, it cannot avoid such delegation, and in many cases is unable to supervise effectively the exercise of local government powers, leading to substantial de facto autonomy for local governments in some areas of activity. As it rejects the notion of vertical separation of powers, the PRC also rejects the notion of horizontal separation of powers between different branches of government (for example, the traditional troika of legislative, executive, and judicial branches). A necessary separation of functions is acknowledged, but

250. As written in article by Donald C. Clarke (George Washington University Law School) on April 4, 2005.
constitutionally speaking the National People's Congress (in form, a legislature) sits at the apex of China's political powers structure. In reality, that position is occupied by the Standing Committee of the Politburo of the Chinese Communist Party, but both form and reality share the rejection of multiple powers centers.

Because the form of centralism, whether vertical or horizontal, does not match the reality of the need for delegation, the Chinese legal system does not deal with the problem of defining the limits of the rulemaking authority of subordinate bodies. To be sure, there are laws prescribing legislative hierarchies, but there are few institutional ways of making these rules meaningful.

As noted above, at the apex of China's formal constitutional structure of political powers is the National People's Congress (NPC), which has the authority to issue laws binding over all of China, and which also appoints the Premier (the head of the State Council, which might loosely be described as China's cabinet or executive branch) and the Presidents of the Supreme People's Court and the Supreme People's Procuracy (the prosecutorial agency). NPC delegates are not directly elected; they are chosen by the people's congresses below them, at the provincial level. Similarly, provincial people's congress delegates are chosen by people's congresses below them. Only the people's congresses at the lowest level have directly-elected delegates.

The day-to-day work of government is carried out by the State Council under the Premier. The State Council is divided into various functional ministries and commissions. This bifurcation between a people's congress on the one hand and a day-to-day government on the other hand is replicated several layers down into local government. In each case, the government organization is responsible not to government organization the next level up, but rather to the people's congress at the same level. Again, this is the formal structure. In practice, the Communist Party organization at any given level of government has a monopoly on political powers. This monopoly, of course, does not mean absolute powers to do whatever the Party organization wishes. There are always constraints on capacity, whether economic, political, or social.

There are four levels of courts in China: the Supreme People's Court at the center, the Higher Level People's Courts at the provincial level, and the Intermediate Level and Basic Level People's Courts further
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There are four levels of courts in China. Each level of court is essentially responsible to local political powers at the same level, a responsibility that is reinforced by local control over court finances. The Supreme People's Procuracy (also known as the procuratorate) has a similar structure. While efforts are being made to upgrade the quality of the judiciary, China's courts at present are marked by the low educational level of their judges and their low status in the hierarchy of powers. Unlike in many countries with a continental system, a judgeship in China is not a fully professionalized, civil service position.

All of the above organizations, at various levels, are capable of issuing documents and rules purporting to be binding on various parties to varying degrees. (Even the Supreme People's Court, despite the system's self-image as one in which
courts merely apply law and do not make it. regularly issues long documents, unconnected with any particular case, in which it spells out detailed legal rules.) Needless to say, such documents may frequently conflict, but there appears to be no institution with the will and the capacity to resolve such conflicts authoritatively.

The top-down view of law as an instrument of government, with citizens seen as the objects of legal regulation, remains influential in China today. Courts by and large do not welcome litigation, and often try to discourage it. The concept of the private attorney-general, in which the state seeks to enlist private citizen plaintiffs in pursuit of its goals, is (with the interesting exception of defective consumer products) by and large anathema. Far more than in many other systems, the Chinese legal system is willing to forgo the enforcement of rights when other pressing values seem to be at stake, to the point where it might be more accurate to say that the system recognizes interests more than rights.251