A COMPARATIVE STUDY OF SEPARATION OF POWERS – AN ASPECT OF CONSTITUTIONALISM

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Abstract

According to the principle of separation of powers, there shall be division of power into legislative, executive and judicial branches, in order to protect political freedom. The power of these three bodies shall be restricted to their own specific boundaries and thus, no overlap is allowed. The onset of the 21st century has witnessed the problem of draconian legislations in most of the nations. Lots of questions are asked by citizens of such nations regarding the right to equality, freedom of speech and expression and the right to dissent. The interference of judiciary has become the essence of time to protect individual liberty and ensure the rule of law.

Constitutionalism is one such principle which protects constitutional values by restricting the power of the state. The power of legislature is limited by the judiciary, which tests the validity of laws on touchstone of constitution. In some circumstances, the judiciary also breaches the compartment of separation of powers and lays down guidelines in form of laws which originally is the function of the legislature. This paper discusses such circumstances where it has become vital for the judiciary to keep a balance between the separation of powers and the principle of checks and balances. Also, such practices ensure constitutionalism in the nations.

Keywords: *Separation of Powers; Rule of Law; Constitutionalism; Legislature; Executive; Judiciary; Judicial Review*

I. The evolution of separation of powers

The foundation of the doctrine of separation of powers can be traced to the ancient world where the aspects of governmental functions and theories of mixed government evolved. In the 17th century England, the doctrine was set out as the "grand secret of liberty and good government". The 18th century marked the interaction of this doctrine with other dominant constitutional theories. During this period, the pure

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form of the doctrine was dominant[3]. As per the pure definition of separation of powers, the state apparatus must be broken into legislative, executive and judicial branches in order to protect political freedom. The power of these three bodies shall be restricted to their own specific boundaries and thus, no overlap was allowed[4]. However, with the onset of the 19th century, opposition to the pure form of the doctrine grew widely. The criticism arose due to the emerging importance of parliamentary government which required separation of organs, but on concepts of balanced governance based on constitutional theory[5].

The name of Montesquieu is most associated with the doctrine of separated powers. While endorsing Lockean theory, he remarks that every government must consist of three organs, that are the legislative, the executive for matters other than law and the executive for civil law[6]. He further states that when the legislative and executive powers are in the same hands, there is no scope for liberty. Similar is the case if we unite the judicial powers with the rest of the organs. If judicial power is united with the executive, then it would expose the life and liberty of the subjects to arbitrary exploitation. On the other hand, if judicial power is combined with the executive, the judge may act violently or oppressively[7]. He began with the pure doctrine of the separated powers; however, it is revealed later that he combined these principles with the idea of mixed government and the doctrine of checks and balances[8].

The doctrine of separation of powers also developed as an element of the philosophy of French Revolution. Rousseau stressed on the idea of associating unlimited sovereignty with people rather than any single entity such as the monarch. He recognized two basic powers – the legislative power and the executive power. As per him, the legislative power shall reside with people and the executive wing shall be managed by the government[9].

The justification of separated powers can also be traced from the notions of self-determination and democratic legitimacy. The idea of self-determination in the model of separated powers flows from republican-Rousseau ideals and liberal-individualistic models. The recognition of both these political ideas as equal and mutually reinforcing shall form the core of the theory of separation of powers. The theory of self-determination in turn grants legitimacy to various institutions[10].

The legislature asserts its legitimacy by the articulation and reflection of autonomous democratic self-determination. It begins and manages the process of democratic

[3] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1st ed. OUP).

[4] P. Mikuli, *Separation of Powers*, in *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, 2018.

[5] Cf. Vile (n. 3).

[6] *Ibidem*.

[7] Ch. de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Prometheus Books, 2002).

[8] Cf. Vile (n. 3).

[9] J.A. Fairlie, *The Separation of Powers*, 21(4) *Michigan Law Review* (1923), pp. 393-436, *https://www.jstor.org/stable/pdf/1277683.pdf*, accessed on July 19, 2021.

[10] Ch. Mollers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013).

decision-making that controls future decisions[11]. A key function served by the legislative process is the voicing of alternatives to the proposed course of action and, in the process, also records various minority opinions. However, in order to ensure deference to democratic will, even the law-making body shall be subjected to certain rules. In other words, the rules that design the legislative process must also be enforced against itself to ensure compliance. However, such a requirement can be dispensed with, if there are conventions that mandate compliance, which are already in place similar to the Westminster position. The supremacy of constitutional law is maintained by ensuring protection of the legislative process from itself[12].

The function of judiciary is to adjudicate upon individual disputes and to render decisions that are justified by individual claim to self-determination. Therefore, the judicial decisions are based on the initiative and the intention of the individual as the judiciary is not capable of any institutional will. The judiciary is intended to be independent from the political process, however, the sole basis of any judicial decisions remains to be the law[13]. The individualization in judicial proceedings is intended for the protection of individual rights. This can be clearly stated in the domain of criminal law. It is a misconception to assume the role of criminal procedure to protect the interests of the state or the victims of the crime[14]. These interests could be protected at best without any judicial proceedings and just by purely administrative setup. In real terms, the role of criminal procedure is the protection of the rights of the accused and establishment of guilt is the purest form of individualization. The legislative activity of courts, also known as interpretive activism, is understood as a violation of the concept of separated powers. However, the idea of separation of powers is a procedural one, and it does not provide any prescribed standard for statutory interpretation[15].

The executive power assumes the central position in this model. It aims to bridge the gaps in regulatory domain and the temporal orientation. Since the late 19th century, the administrative wing or the executive branch has been justified on grounds of expertise. Two features that make the executive branch open to the use of expertise are: (1) capability of developing internal specialization by the creation of departmental structure, (2) administration is also competent to act on its own initiative and thus, can create expertise[16]. The issues concerning expertise are further dealt with under section III of the paper. The primary mission of the executive branch is to mediate between the other two wings. This is made possible by huge discretionary powers, independent decision-making and a scope for judgment not determined by law. This is

[11] *Ibidem.*
[12] *Ibidem.*
[13] *Ibidem.*
[14] *Ibidem.*
[15] *Ibidem.*
[16] *Ibidem.*

justified by their temporal and factual proximity to the issue at hand. In this way, the executive wing acts as a point of mediation between the democratic and individual self-determination[17].

II. Contemporary practice of the doctrine of separation of powers

1. United States

The framers of the Constitution of the United States of America strived to maintain separation; however, the system of checks also diluted the strict or pure form of doctrine substantially. The framers were also aware that a strict separation could be counterproductive and may end up in legislative supremacy[18]. The aim behind adopting the doctrine of Separation of Powers, as revealed in the Federalist Papers, was to prevent usurpation of government by individual interests. This led to the adoption of a system that allowed for the creation of various institutions through different mechanisms and each institution keeping a check on others. This is known as *checks and balances* and the doctrine as functioning in the USA is based on this premise[19]. The US Constitution does not have any distributing clause; however, the classification of powers is recognized and it also provides for separate branches for government. Thus, it provides:

Article 1 – Section 1 – "*All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives*"[20].

Article 2 – Section 1 – "*The executive Power shall be vested in a President of the United States of America*"[21].

Article 3 – Section 1 – "*The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish*"[22].

Both the chambers/houses of the Congress and the President are elected into power through different procedures and by different constituencies. The members of the Senate serve for a period of six years; however, every two years the Senate is replenished almost by one-third. In this manner, the Senate represents the federal political interests and functions on a regular decision-making, by focusing on long terms of office and regular replenishment of the house[23]. *Per contra*, the two-year

[17] *Ibidem*.

[18] J. Madison, *Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention*, *The New York Packet* (The Federalist No. 49/1788).

[19] Cf. Mollers (n. 10).

[20] US Constitution, art. I, § 1.

[21] US Constitution, art. II, § 1.

[22] US Constitution, art. III, § 1.

[23] J.G. Wilson, *Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom*, 18 Hastings Constitutional Law Quarterly 125 (1990).

term of Representatives keeps the house – an arena for everyday politics and a regular site for electoral campaigns. The President is directly elected by the people of the federal nation every four years. He acts as a head of the state as well as chief executive. He also appoints executive officers and Secretaries of State, who enjoy the office at the pleasure of the President. Since neither the President nor any executive member is a part of the Senate, the separation of powers is maintained[24].

The system of checks is essentially controlled by the Congress and it is aimed to control Presidential powers. By virtue of this, the Senate can review appointments of officials, ratify treaties or try officials for impeachment. The Congress also used to exercise a legislative *veto* over executive rule-making, however, this was held as *ultra vires* in *Immigration and Naturalization Service v. Chada*[25]. On the other hand, a presidential *veto* generally sends back any proposed bill for reconsideration; however, if pocket *veto* is exercised it can be struck down totally. The position of the Supreme Court is significantly strengthened by the institution of judicial review. It can hold any Act passed by the Congress as unconstitutional. Although the US Constitution was primarily built on strict separation of powers, in practice, a liberal doctrine that allows delegation of function is presented[26]. Thus, in *Panama Refining Company v. Ryan*, it was held that: "*The separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety*"[27].

Now, for a very long time, the academic discussions have largely focused on the inconsistencies between the formalistic understanding of the text of the US Constitution and the functional interpretation that provides for comparatively more flexibility and higher degree of discretion to divert from the models adopted by the founding fathers of America. Gradually, the American model is shifting towards granting more powers to the executive branch. As many suggested, the executive branch is trying to detach itself from political and judicial controls or checks[28]. For instance, strong presidents like Abraham Lincoln and Franklin Roosevelt are seen as bolstering the executive branch in a manner that goes against the constitutional spirit or court rulings. Similar assertive stand was taken up by President Bush when he surpassed the Detainee Treatment Act in 2005, by declaring his authority as commander in chief[29].

Consequently, three distinct but contradictory thoughts could be expressed with respect to the American notion of Separation of Powers. First, the idea of democratic

[24] *Ibidem*.
[25] 462 US 919 (1983).
[26] Cf. Mollers (n. 10).
[27] 293 US 388 (1935).
[28] Cf. Mollers (n. 10).
[29] American Bar Association, *ABA Legal Fact Check: What protections exist to maintain the "separation of powers?"* (December 2019), *https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/what-legal-protections-exist-to-maintain-the-separation-of-power/*.

constitution; second, the notion to protect private property from political interference and third, the federalism. It is argued in this context that although this doctrine may prevent government capture by special interests, it can also lead to the government taking no action at all. The concept of judicial review arose in issues of federal jurisdictions; however, its foundation and basis remain questionable. Moreover, there are no constitutional rules to solve the jurisdictional questions between Congress and President on certain issues. For instance, the war powers remain a zone of contestation between Congress and the executive wing. Similarly, former President Trump has challenged the efforts of the House of Representatives to look into his business dealings and official conduct, as a move against the enshrined separation of powers[30]. Moreover, in the Trump regime, federal courts have intervened and stopped various changes in immigration laws, which ultimately prompted the White House to issue an official statement with a title – "*Activist Judicial Rulings Block the Administration From Enforcing Our Nation's Immigration Laws*"[31].

2. India

India adopts a third model of separation of powers as opposed to prevalent two models that are parliamentary sovereignty and rigid separation of powers. In other words, the Indian Constitution recognizes the three branches of state apparatus – the executive wing, the legislative wing and the judicial wing – however, it does not vest powers in these organs explicitly as was done under the US Constitution[32]. Contrary to the Westminster Model, the Indian Parliament is neither supreme, nor does it possess a sovereign character. The powers veiled by the Parliament are restricted by the Indian Constitution. Moreover, the separation of powers between the three wings is not equal and the executive branch holds a dominant position in relation to the other two branches[33]. The Constituent Assembly primarily emphasized on the separation of executive and judiciary. Prof. K.T. Shah elaborately described the rationale behind this, in the following words: "*If contact or connection is maintained between the Judiciary and the Executive organs of the State, there is also the possibility of undue influence, of misleading, of misdirecting and mis-influencing those who are appointed to interpret the Constitution, those who are appointed to be guardians of Civil Liberties, those who have to administer justice*"[34]. This was also necessary due to the outcome of British experience wherein the executive was exercising excessive control over the subordinate judiciary.

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[30] M. Ketchell, *Separation of powers: An invitation to struggle* (*The Conversation*, January 2019), *https://theconversation.com/separation-of-powers-an-invitation-to-struggle-110476*.

[31] Cf. ABA (n. 29).

[32] In Re Delhi Laws Act, 1951 AIR 332.

[33] *R. Pal, Separation of Powers,* in *The Oxford Handbook of the Indian Constitution*, S. Choudhry, M. Khosla, P. Bhanu Mehta eds (2016).

[34] Constituent Assembly of India Debates (Proceedings), Volume 7, December 10, 1948, *https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-10*.

On the other hand, the executive and legislative wing are fused to some extent, as those who enjoy a majority in the legislative assembly, ultimately, govern the nation. B.R. Ambedkar was of the opinion that even the Americans were dissatisfied with their model of complete separation between legislative and executive[35]. Therefore, a fusion must be adopted, because the functions of legislature are too complicated to be undertaken in segregation and they are intricately interlinked with the executive's job and hence, "*...until the Members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature*"[36].

Consequently, Article 50 of the Indian Constitution mandates the State to take proper steps to ensure the separation of judiciary from the executive in the public services carried out by the State.

A brief and concise description of Indian model was observed in *Ram Jawaya v. State of Punjab*, wherein the court held that the Indian Constitution does not recognize the doctrine in its absolute and rigid form, however the functions of various organs "have been sufficiently differentiated" to prevent encroachment of powers[37]. Despite these, there are many overlaps in the exercise of functions by the three organs.

The legislative wing performs judicial functions when Speakers/Chairman act as tribunals, while discharging their duties under Schedule 10. More importantly, it can nullify any judicial decision by altering or removing the basis upon which the judgment was based. The legislature can delegate its functions to the executive for subordinate rule-making, also known as delegated legislation[38]. The Supreme Court, while observing the trend of delegated legislation once remarked – "*with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion*"[39]. Similarly, the Constitution recognizes executive law-making under Article 123 and Article 213, which empowers the President, and the Governor respectively, to issue an ordinance when the legislature is not in session. Emergency Provisions are another set of executive law-making powers recognized by the Constitution[40].

Similarly, the executive wing can determine rights and liabilities, thus can perform judicial functions, when they operate in the form of tribunals. In another form, Article 311 recognizes judicial power of the executive wing, by allowing it to hold an inquiry into the allegations levied against any individual holding a civil post, and consequently it allows awarding punishment if found guilty[41].

To ensure effective checks over the two branches of the state, judiciary is entrusted with the powers of judicial reviews. Even the Supreme Court once opined that "*...The range*

[35] Cf. Pal (n. 33).
[36] *Ibidem*.
[37] *Rai Sahib Ram Jawaya Kapur & Ors. v. State of Punjab*, AIR 1955 SC 549.
[38] Cf. Pal (n. 33).
[39] *Union of India v. Cynamide India Ltd* (1987) 2 SCC 720.
[40] Cf. Pal (n. 33).
[41] *Ibidem*.

of judicial review recognized in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law"[42]. Part III of the Constitution prohibits the making of any law that contravenes the fundamental rights stated in that Part. The right to approach the Supreme Court in case of any infringement of fundamental rights is itself a fundamental right. It can order the executive to implement statutory or constitutional policy measures and can also supervise the implementation of such directions[43].

Despite all the ideal aims, in recent times, the doctrine is diluted substantially in favor of executive supremacy in India. The accountability of the executive towards the people is ensured through free and fair elections[44]. However, in the recent past, this has been undermined by the move towards simultaneous elections, campaign financing and disproportionate voting systems. Similarly, the executive accountability that is owed to the other state organs and to the fourth branch institutions is substantially diluted[45]. This has been as a result of various tactical strategies, such as the weakening of political opposition by non-appointment of leaders of opposition, undermining bicameralism by overriding the upper house's veto and abusing governor's power to attack federalism. Other instances include: executive interference in judicial appointments, capturing the fourth branch institutions and abusing police powers and violence to silence the discursive institutions. Similarly, launching of schemes, such as the electoral bond scheme, is further undermining the democratic will[46].

3. United Kingdom

John Locke's conception of separated powers stems from his experience with the political crisis in the 17th century England, which was primarily focused on the relations between the monarchic executive and the parliament[47]. The doctrine of separated powers is not part of the classic doctrine of English Constitutional law as designed by Albert Venn Dicey[48]. In fact, the dominant organizational principle of the classical English law was sovereignty of the monarch in the Parliament and later it shifted towards the sovereignty of the Parliament. To ensure effective exercise of this sovereignty, it was imminent that both houses of parliament and the monarch united. Consequently, the three powers came together to form the part of Westminster. A Prime Minister is chosen by the House of Commons among itself. The Judicial Committee comprises the members of the House of Lords. The establishment of the Supreme Court, on paper, suggests personal independence of the judges from politics; however, they still cannot strike any parliamentary statute down. The Court has no power to direct the Parliament to take any

[42] *Union of India v. Raghubir Singh* (1989) 2 SCC 754.

[43] Cf. Pal (n. 33).

[44] T. Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India* (April 6, 2019), *Law and Ethics of Human Rights (Forthcoming)*, available at SSRN: *https://ssrn.com/abstract=3367266*.

[45] *Ibidem*.

[46] *Ibidem*.

[47] J. Locke, *Two Treatises of Government* (London: Black Swan, 1698), II, 143.

[48] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th ed., 1920).

actions, if it does, these are mere formal suggestions with no binding force[49]. However, the sovereignty of the current Parliament cannot bind future Parliaments. It remains accountable to its voters; therefore, people effectively retain sovereignty in political terms. In the words of A.V. Dicey, the Parliament asserts legal sovereignty, *i.e.* it can exercise legal powers to pass laws, including the law to reconstitute itself. However, the right to elect members of the House of Commons, and the right to disobey or resist any parliamentary statute are exercised by the citizens. In this manner, they retain and exercise political sovereignty[50].

The House of Commons, being the only elected branch, dominates over the House of Lords, the Crown and the judiciary. This ensures a certain degree of accountability and legitimacy in the functioning of the government. For instance, if the Crown exercises *veto* over any bill, this can turn out a breach of constitutional convention and the government may make the dissolution of the Crown a part of its next agenda[51].

The House of Lords is an unelected body and it exercises coordinated legislative powers except in issues concerning money matters. The House of Lords is subordinate to the House of Commons in yet another respect as the Prime Minister has the power to appoint any number of Lords in the house. As a convention, the Crown appoints the Prime Minister as a person to form and maintain the majority in the House of Commons[52]. The Prime Minister can then choose its members of Cabinet and other officials for the House of Commons and, to some extent, for the House of Lords. The members of the government, then, have to maintain full loyalty towards the policies of the government under the conventional "collective responsibility". The most contrasting aspect to the doctrine of separation of powers that is present in English model is that the government officials can retain their seat in Parliament while discharging their cabinet duties. In other words, the legislature and executive are fused to some extent in this model, thus rejecting the absolute separated powers present in the US model[53].

The dominance of government is enhanced by the convention that mandates the rest of the Members of Parliament to abide by their party leaders' wishes. However, they can go against the leaders in a no-confidence motion or in annual elections[54].

Given this scenario, we could say that Britain's system is characterized by limited checks and balances, and partial separation of powers. The Prime Minister must continue to maintain a majority in the House of Commons to hold his position. Appointments of judges are for life and they have the power to strike down any action of the government if it is *ultra vires*. Some degree of checks is also exercised by the House of Lords and the Crown on abusive policy or legislation.

[49] Cf. Mollers (n. 10).
[50] Cf. Dicey (n. 48).
[51] Cf. Mollers (n. 10).
[52] Cf. Wilson (n. 23).
[53] *Ibidem*.
[54] *Ibidem*.

Keeping the structure aside, the benefit of flexibility often translates into the burden of unchecked discretion[55]. On a regular level, the Prime Minister is powerful, whereas the legal Parliament is supreme. The judiciary is kept separated; however, it is subordinated to the Parliament in effective terms. This centralized model is quite costly as it increases the risk of tyranny. Moreover, the role of opposition is confined to the right to criticize and merely question the government. Courts have failed in formulating a constitution, as well as in protecting individual rights. The judiciary relies on the imperfect tradition of common law to protect the individual rights and civil liberties. Courts have often deferred to the executive will, especially when concerns of national security are cited[56]. For instance, in *Liversidge v. Anderson*, the Court upheld oppressive and arbitrary detention on account of affidavits which cited security concerns[57].

The English model of separated powers seems to be more institutional than juridical. The accountability of government towards parliament became a model for the adoption of various other constitutional states. Thus, the institutional proximity between the government and the parliament, as well as the parliamentary vote for the Prime Minister are viewed not as separation, but as the core of the Westminster model[58]. As Walter Bagehot argues, "*The English system, therefore, is not an absorption of the executive power by the legislative power; it is a fusion of the two*". However, these institutional developments were not accompanied by any juridical discussion[59]. Thus, any model of judicial review over political organs is not known to the English system. Therefore, the political system is required to solve its issues without any judicial intervention. This is precisely because the model of separated powers in England is aimed to ensure the independence of courts from the executive[60].

4. France

France is related to the doctrine of separated powers in two distinct, but ironic ways – firstly, by the publication of Montesquieu's *Spirit of Laws* and secondly, by the French Revolution. Montesquieu's approach towards the doctrine is old liberal, as it intends to protect individual liberties in a traditional feudal model[61].

The Constitution of 1791 began by abolishing all the privileges and orders of nobility or other social distinctions. It granted exclusive sovereignty in the hands of the people and added that the nation shall function through the representatives – the National Assembly, the King and the elected judiciary – who will exercise the delegated powers entrusted to them by the people. The Assembly is unicameral, *i.e.* with one house and is elected once in every two years. The King had no power to dissolve

[55] *Ibidem*.
[56] *Ibidem*.
[57] 1942 AC 206.
[58] Cf. Mollers (n. 10).
[59] W. Bagehot, *The English Constitution* [1867] (Ithaca: Cornell University Press, 1966), 69.
[60] Cf. Mollers (n. 10).
[61] Cf. Vile (n. 3).

the house[62]. The King was given a suspensive *veto*; however, he had no power to initiate legislation. Members of the National Assembly were prohibited from getting appointed in any ministerial position or at any executive seat during their membership of the House and for two years henceforth. In other words, their executive and legislative wings were totally separated and divided. However, ministers were allowed to present their views in the Assembly and to listen to the debates[63]. With respect to the judicial power, American model was accepted, which allowed the "judicial power" to exercise the same level of equality as the legislature and the executive. The Constitution prohibited the Assembly and the King to undertake any judicial functions. It was intended that the appointment of judges through popular election would turn them independent to other two branches of the state apparatus[64].

The modern French constitutional law began with a constitutional review that took place in the late 20th century. In the Constitution of the Fifth French Republic, the idea of separated powers was not incorporated explicitly[65]. However, this doctrine finds reference in the *Declaration of the Rights of Man and of the Citizen*, which is a part of the French Constitution, if taken in a substantive sense. Article 16 of this declaration reads as follows: "*[a]ny society in which the guarantee of the rights is not secured, nor the separation of powers determined, has no Constitution*"[66]. As stated earlier, the French model of the separation of powers was conventionally related to the separation of courts from the executive and the legislature. This model was closely related to that of Montesquieu, in which the judiciary, as separated from the other two branches, was not recognized as power *per se* as its task was limited to the application of laws. However, later on, the Constitutional Council invoked the concept of separated powers to confirm the independence of administrative justice[67]. The 1958 French Constitution introduced a unique separation of competencies among the organs of the state apparatus, by enshrining a semi-presidential form of government. The President is directly elected for a fixed tenure of seven years. On the other hand, the Assembly renews every five years. This form of staggered election determines the relationship between the President and Premier based on the recent elections[68]. The role of the President in this respect is defined in the following terms:

Article 5 – *The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State*[69].

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[62] *Ibidem*.
[63] *Ibidem*.
[64] *Ibidem*.
[65] Cf. Mollers (n. 10).
[66] Article 16, Declaration of the Rights of Man and of the Citizen.
[67] Cf. Mollers (n. 10).
[68] B. Ackerman, *The New Separation of Powers*, 113(3) *The Harvard Law Review Association* (2000), pp. 633-729.
[69] Article 5, Constitution.

On the other hand, the executive is implicitly endowed with legislative powers at the expense of the Parliament. This is a serious disruption of balance between the organizational and functional division of competencies. However, the 2008 Constitutional reform was intended to ensure balancing of institutions of the state, especially by strengthening the parliamentary competencies. The doctrine of separated powers has also been observed by the Constitutional courts and it is often linked with judicial independence and impartiality[70].

Prior to the 20th century, the Constitutional Council was more in the form of an advisory council than a court. However, with the constitutional reform, the image of the Council is turning towards a court-like institution, as now it can review the questions posed to it by the two high courts. But it is also quite similar to the parliament in the ancient regime, as it could still intervene in the legislative process before the public enactment of any law[71]. The original role that was assigned to the Council was the "guardian of presidential power against the Parliament"; however, post-1971, it has acknowledged the legislative commitment towards the fundamental rights. The Constitution has also set up a special court to try members of the government for alleged offences. The increased significance of fundamental rights, especially through the European Convention of Human Rights, has strengthened the judicial wing in relation to other political institutions[72]. However, the scope of the individual rights and liberties also requires definition in the prevalent democratic process as a part of republic tradition. This also poses a question of legitimacy of the court and judicial institutions with respect to other democratically accountable bodies[73].

Upon comparison with the American counterparts, the French model of separated powers is relatively weak. On the political side, there remains an attitude of hostility between the President and the National Assembly. On the judicial side, though the Constitutional Council has been quite daring in challenging and strike down various presidential initiatives, the tenure of its members is just for three years, thus making it a less formidable source of resistance[74].

III. Emerging threats to the traditional doctrine

1. Executive overreach

Since 1900 and post-Industrial Revolution, legislative intervention has steadily grown into the novel fields of economic and social relations, so much that it has

[70] Cf. Mikuli (n. 4).
[71] Cf. Mollers (n. 10).
[72] *Ibidem*.
[73] *Ibidem*.
[74] Cf. Ackerman (n. 68).

threatened the operational doctrine of separation of powers. This has led to the reformulation of the doctrine, as well as the accommodation of new functions of state within the tripartite model[75]. Consequently, the doctrine has transformed its role from the prescription of separation of powers to description of the division of functions[76]. In response, all of this has led to the rise and growth of the administrative arm. The newly wielded powers to the executive branch are essentially residual, as they were included in the executive domain due to functional and institutional limitations of the other two organs of the state apparatus[77]. Therefore, "*administrative function has developed within the space left, under the modern exigencies, by the three traditionally separated powers. Also, though the administration subverts of the tripartite system, it does so only by becoming a distinct kind of focus of power, necessary to maintain the system in new circumstances*". This is not just leading to various instances of executive overreach around the world, but also to reducing the level of executive accountability that was owed to the other two organs[78].

The limitations on legislative and judicial wings to assume the role in newly emerging areas were (i) time constraints, (ii) inadequate specialized knowledge and (iii) non-availability for continued supervision[79].

Matters of legal intervention that were emerging required knowledge beyond the general awareness into the under aspects of the issue in context. For instance, the legislatures may not have full knowledge of the new problems that arose due to the emergence of any social activity, such as the problem of congestion on roads[80]. Other issues in legislative non-competency arose due to inability to exercise continued supervisions over the new areas of legal intervention. For instance, the dynamic movement in the science and technology field requires control, but the inability to design control hinders the supervision. As a result, often delegated powers are going beyond the determination of goals, to reach even the final goals. Therefore, entrustment of such issues to the administrative body seems to be the only solution that could prevent continued frustration over "appropriate" means[81].

The increasing scope of power for the executive branch is also limiting the exercise of legislative and judicial control of administration. For instance, the US Constitution explicitly vests legislative power to the Congress, this implies that the Congress must give some guidance to the executive decision-making[82]. However, in practice, nothing of this sort takes place, the vague indeterminacy of standards such as "public interest"

[75] J. Stone, *The Twentieth Century Administrative Explosion and After*, 52(3) *California Law Review*, pp. 513-542.
[76] *Ibidem*.
[77] *Ibidem*.
[78] *Ibidem*.
[79] *Ibidem*.
[80] *Ibidem*.
[81] *Ibidem*.
[82] *Ibidem*.

and "national security" allow for unfettered discretion. The issue of ensuring compliance towards legislative consensus in executive decision-making has largely remained unsolved. The regular process of tabling of bills before Parliament is also inadequate in this regard. In the long run, the shortfalls in legislative aptitudes are reflected in these processes too[83]. An effective parliamentary control requires prompt publication and access to rules and regulations; however, this rarely happens. Judicial review as a form of external check is inadequate too. The presumption of constitutionality often increases the cost of access to justice in case of infringement of rights[84].

There is a need to fix definite standards in administrative decision-making. Two things shall be noticed in this regard: (i) the degree of conflicts among the policy indications which the legislator has to accommodate, and (ii) to keep any eye on the dynamicity of facts in question for which policies are to be designed. In relation to executive judicial exercise, the principle of balancing of interests shall be followed. In other words, due process realism, that postulates that the decision is in the public interest, shall be the rule[85].

2. Judicial activism and the rise of judicial review

The period between 1980 and 2000 saw great tendency among the mature democracies to switch from the model of legislative supremacy to allowing judicial review of the legislations[86].

For instance, the United Kingdom came up with the Human Rights Act in 1998. This bill allowed for the right consistent interpretation of parliamentary statutes and also allowed judges to make formal declarations in case the statute was incompatible with the Bill of Rights. There is some sort of transfer of powers over legislative matters to judiciary, but it is yet to be seen if such a move can be reconciled with the notion of parliamentary sovereignty[87].

The explanations for such a trend are not common or unified; however, it has been argued that such a move is primarily on account of two factors – (1) due to operation of European Charter of Human Rights in the EU region, (2) due to heavy influence of common law traditions[88].

The growth of judicial review can partly be attributed to the failure of "political constitutionalism" or the model of legislative supremacy. Two lines of thoughts could be presented in this regard:

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[83] *Ibidem*.
[84] *Ibidem*.
[85] *Ibidem*.
[86] S. Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)*, *The American Journal of Comparative Law*, Volume 62(3), Summer 2014, pp. 613-640.
[87] *Ibidem*.
[88] *Ibidem*.

First, the growth and dominance of the newly emerging political party system. In the presidential system, the legislature acts as a check on executive power, however, this *veto* does not grant them the power to remove the President, as it lacks democratic legitimacy. In the parliamentary system, since the legislature is directly elected and therefore the executive's accountability is owed to those who they represent. Such new party politics has transformed the way the parliament used to work. Personal qualities or records of the Members of the Parliament have been replaced by party affiliation and political identity. The lack of parliamentary independence has strengthened the executive wing as it no longer fears the formal accountability, since it is practically impossible to exercise[89].

Second, post-World War II, there has been significant centralization of power in the executive itself. The formerly prevalent "cabinet government" has now given way to "prime ministerial government". The centralization within the executive has taken place in the office of the prime minister[90].

Both of these turns of events have led to the loss of (i) political accountability of the government towards the parliament and (ii) the collective executive decision-making within the cabinet[91].

The new double concentration of power, *i.e.* government *versus* parliament and cabinet *versus* prime minister, has created the problem of executive overreach. In order to seek a viable solution to this issue, the reconceptualization of the doctrine was imminent and hence judiciary was given extra role to disperse the power so concentrated[92].

However, this increased power of judiciary is turning into non-recognition of judicial restraints, particularly in India and the USA. While exercising its power, the judiciary is encroaching into the domains of other two organs by engaging in judicial legislation, as well as rule-making[93]. This may prove to be quite beneficial for the nation as a whole in some instances, but in the long run the legitimacy of courts *vis-a-vis* democratic will have become an issue.

If we take cases from India, there are ample instances. In *State of Tamil Nadu v. K. Balu*, the highest court of the land prohibited the setup of liquor shops within 500m of highways, which in turn was a legislative order[94]. In *Subhash Kashinath Mahajan v. The State of Maharashtra*[95], the Supreme Court of India amended the SC/ST Act, whereas, in *Justice K.S. Puttaswamy v. Union of India*[96] it created a new right to privacy within the Constitution. Instances of encroachment in executive domain include laying down

[89] *Ibidem*.
[90] *Ibidem*.
[91] *Ibidem*.
[92] *Ibidem*.
[93] M. Katju, A. Manubarwala, *The problem with judicial legislation* (*The Hindu*, May 2019).
[94] 2016 SCC Online SC 1487.
[95] AIR 2018 SC 1498.
[96] (2017) 10 SCC 1.

the regulations for BCCI, direction to interlink river and fixing timing for bursting of crackers[97].

Similarly, the US Supreme Court enacted a new right to privacy in the Constitution in *Griswold v. Connecticut*[98]. The original interpretation of the US Constitution would reveal that it permitted only selective judicial activism by balancing it with deference to the elected wings of the state. Therefore, the judicial review was mandated to be invoked in two scenarios: (i) when the government has disregarded the interests of minority or underrepresented groups, and (ii) when there was a risk of perpetuation of political power and stifling of critics[99].

The primary responsibility of courts shall be promotion of common good by thoughtful interpretation and application of the Constitution in a very principled manner[100].

IV. Proposals for reforms

The last section of the paper highlights the issues arising in the existing model of the separated powers. It ranges from inefficient control to waning of executive accountability and from contemporary issues of administrative discretion to judicial activism.

There is a need to re-conceptualize the model of separated powers and to adopt a reformulated version of the same. Drawing from Bruce Ackerman's argument, it is submitted that both the Westminster and Washington systems are fallacious and, therefore, a model based on constrained parliamentarism shall be adopted in the future[101].

The Presidential model is not viable, because although it fosters the idea of an independent judiciary, the impact of the judiciary is not substantial on the executive wing. Gradually, the executive wing is turning into a foe of rule of law, due to constant struggle between the Senate, House and the Presidential wings to control the administrative apparatus. The Presidential model believes that a single electoral victory is not sufficient to grant plenary legislative authority. Often, when there is impasse between the President and the House, the President resolves it through unilateral decrees that often go beyond the constitutional scope[102]. However, the representatives, instead of protesting, feel relieved of the duty to make hard choices. This sets a bad precedent for future Presidents and later can easily be codified through amendments.

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[97] Cf. Katju (n. 93).

[98] 381 US 479 (1965).

[99] G.R. Stone, *The Supreme Court in the 21st Century*, *Journal of the American Academy of Arts & Sciences*, Spring 2013.

[100] *Ibidem.*

[101] Cf. Ackerman (n. 68).

[102] *Ibidem.*

This unilateral decision-making, by disregarding other interests, can be widely seen as happening in Argentina and Brazil. Here too, democratic will and public choice is undermined[103]. On the other hand, the proportionate representational model to select the members of the House in the parliamentary model allows for multiplicity of small parties in the Parliament. This led to unending changes in the cabinet as the economics of coalitional opportunities shifted. Further, such ceaseless shifts in the cabinet prevent long term perspective in any issue. The existing model also suffers from a cult of personality[104].

The personal character of the President not only plays a role in the relationship with the cabinet, but also in the legislative program. It is believed that the people choose the individual as a President and his political party just acts as a vehicle for projection of personality and ideals of the candidate[105]. However, in the Parliamentary model, the position of the Prime Minister is contingent upon the party support it receives in the Parliament. In other words, on one hand, the President is tempted to view his political party merely in instrumental terms, and on the other hand, a prime minister is obliged to consider its party as an enduring organization for the sustenance of its power. However, in the end, when it comes to the task of building the political parties to form a strong government, the parliamentary model is preferred due to its likely incentive for the leadership, as well as followership[106].

Constrained Parliamentarism is partly based on Westminster tradition of normal law-making authority and the legislative output on the other hand is regulated by substantive political principles that derive legitimacy through higher law-making process[107]. The model of constrained parliamentarism is based on the following elements:

1. *Bringing the people back in* – This is the fundamental block of this model and can also be referred to as a popular referendum. The referendum and plebiscite model shall not be overused or underutilized, but a means of these two extremes shall be adopted in practice. For instance, the constitution shall prohibit parliament from initiating more than one such initiative in its tenure or it could mandate special majority for carrying out such proposals. Such referendums shall not be used for short term gains[108]. Ackerman argues that a constitution shall take affirmative actions to improve the deliberative quality of public consideration. He further argues that instead of separating powers between the senate, house and president, a much more effective division would be between parliament and the people. In the latter, the parliament could be responsible for the management of regular affairs of the state and for

[103] *Ibidem.*
[104] *Ibidem.*
[105] *Ibidem.*
[106] *Ibidem.*
[107] *Ibidem.*
[108] *Ibidem.*

some special decisions, a carefully constructed process of referendum could take place[109].

2. *The Court as a constraint* – A Constitutional Court is required that could bring the aspirations of people, enacted as principles, into logical conclusions and operational realities. A strong constitutional court shall ensure that the marching orders to government representatives by the people are obeyed. Another issue in this aspect is the appointment and the tenure of judges[110]. The German model is quite laudable in this regard. The law requires that the nominations to the Constitutional Courts must obtain 2/3rd votes from the legislature. In addition to this, it grants *veto* powers to the rest of the minority parties. This prevents the possibility of the ruling party choosing their party loyalists to be on the bench. Since a notorious partisan judge's nomination can easily be ruled out due to *veto* power, there is incentive to vouch for judges with a reputation of impartiality. The larger separationist picture that evolves from such arrangement is: parliament + people + court[111].
3. *Practical Models* – Out of the three building blocks, the parliament is better presented in the model of Britain and Germany than France or the United States. Germany is the closest to the constrained parliamentarism model, as the German system grants broad legislative power to the elected Chancellor; however, this power is constrained by the strong constitutional court[112]. The element lacking in their model is that of the referendum. The Swiss Constitution teaches a lot on referenda practice. It adopts a model of serial referenda. It requires two separate votes from people – on fundamental issues or on equally contentious matters[113].

[109] *Ibidem.*
[110] *Ibidem.*
[111] *Ibidem.*
[112] *Ibidem.*
[113] *Ibidem.*