

## SEPARATION OF POWERS: A COMPARATIVE STUDY OF INDIA, USA, UK AND FRANCE

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### I. RELEVANCE OF THE DOCTRINE IN INDIA

#### *A. Relevant constitutional provisions*

In India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50, which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.<sup>1</sup> In fact, there are several constitutional provisions, which go on to say that the Indian Constitution does not purport strict separation of powers. There is no provision in the Indian Constitution vesting the legislative and judicial powers in any particular organ.

Article 53(1) confers the executive power on the President of India. Article 246 confers legislative power on the Parliament exclusively. However, Article 79 speaks that the Parliament shall consist of the President apart from the two Houses, the Council of States and the House of the People. On reading Articles 53(1) and 79 together a safe conclusion as to the non-existence of a strict separation of powers in India can be drawn. Same is the scenario in the state level where the executive powers are vested with the Governor (Article 154) who is also a part of the state legislature by virtue of Article 168(1). Moreover, Chapter III of Part V of the Constitution of India reads “*Legislative Powers of the President.*” Article 123(1) confers powers

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<sup>1</sup>Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment*, 4 IJCL (2010); (1974) 1 SCC (Jour) 45.

on the President to promulgate ordinances during recess of Parliament. A similar power is conferred on the Governors of the States by virtue of Article 213. Article 309 confers rule-making power on the President for service related matters. He also exercises this rule making power under Articles 240, 318, 146(1), 77(2), 77(3), 148(5), 101(2), 118(3), 98(2). The Governor exercises his rule making power under Articles 166(2), 166(3), 208(3), 187(3) and under the proviso to Article 229(1). Article 357 grants the exercise of legislative powers to the President under Proclamation issued under Article 356. The important role played by the President as well as the Governor of the States with regard to bills introduced in the legislature cannot be ignored. Thus the executive is bestowed with law making powers.

President also exercises judicial powers by virtue of Article 103 which says that the decision of the President shall be final with regard to the disqualification of members of the House. Similar power rests with the Governor of States under Article 192(1). Under Article 72 the President and under Article 161 the Governor has the power to grant pardons, reprieves, respites etc. in certain cases.

The legislature in India performs judicial function by virtue of Articles 61(1), 124(4), 124(5) with regard to removal of President and Judges. The legislature also performs executive functions when it comes to imposition of surcharge under Article 274, formation of new states, alteration of areas, boundaries, names of existing states under Article 3.

The Judiciary frames rules for the various Courts under Article 227(2) (b) and Article 145. The Supreme Court appoints subordinate staff under Article 146. Similarly, High Courts appoint subordinate staff under Article 229. Thus the judiciary is also involved in legislative and executive functions. These are some of the provisions in the Constitution of India, which reflect the intention of the framers of the Constitution. In the Constitutional Assembly Debates, the proposal made to include specific provisions in the Constitution of India with

regard to separation of powers was rejected by the majority. This again goes on to emphasize the intention of the Constitution makers, which was never in favor of having strict separation of powers in India. One can go on listing such examples yet the list would not be exhaustive.

### ***B. Judicial pronouncements***

It has been settled that if the Legislature delegates its essential power to another branch of the government or usurps the essential functions belonging to the latter, such legislative act shall be unconstitutional and void.<sup>2</sup> The Supreme Court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution. The power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the Constitution.<sup>3</sup> Such principles and policies are settled after landmark judicial pronouncements in the best interest of the nation and its citizens.

The Constitution has invested the constitutional courts with the power to invalidate laws made by Parliament and State Legislature transgressing constitutional limitations. In a situation where an Act made by the legislature is invalidated by the courts on the ground of legislative incompetence, the legislature cannot enact a law declaring that the judgment of the court shall not operate; it cannot overrule the decision of the court. But this does not mean that the legislature, which is competent to enact that law cannot re-enact the law. Similarly, it is open to a legislature to alter the basis of the judgment.

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<sup>2</sup>*Re Delhi Laws Act*, (1951) S.C.R. 747(India); *State of Bombay v. Narottandas*, (1951) S.C.R. 51; *HJarishankar v. State of M.P.* A.I.R. 1954 SC 465(India); *Rajnarain v. Patna Administration* A.I.R. 1954 SC 569(India); *Edward Mills v. State of Ajmer* (1955) 1 S.C.R. 735(India), *Vasanlal v. State of Bombay* A.I.R. 1961 SC 4(India), *Kesavananda Bharti v. State of Kerala* A.I.R. 1973 SC 1461(India).

<sup>3</sup>*Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225(India): A.I.R. 1973 SC 1461(India).

The new law or the amended law so made can be challenged on other grounds but not on the ground that it seeks to in effectuate or circumvent the decision of the court. This is what is meant by "*check and balance*" inherent in a system of government incorporating separation of powers.<sup>4</sup>

a) **In re-delhi laws act**

The Supreme Court, in the *Delhi Laws Act case*,<sup>5</sup> noticed that our Constitution does not vest the legislative and judicial powers in the Legislature and the Judiciary in so many words, the majority, in effect, imported the essence of the modern doctrine of Separation of Powers, applying the doctrines of constitutional limitation and trust.<sup>6</sup> None of the organs of government under the Constitution can, therefore, usurp the functions or powers, which are assigned to another organ by the Constitution, expressly, or by necessary implication. On the same principle, none of the organs can divest itself of the essential functions, which belong to it under the Constitution.

It was pointed out that though the functions (other than the executive) were not *vested* in particular bodies, the Constitution, being a written one, the powers and functions of each must be found from the Constitution itself. Thus, subject to exceptional provisions like Arts. 123 and 213 and Art. 357 it is evident that the Constitution intends that powers of legislation shall be exercised exclusively by the Legislature created by the Constitution, i.e.; by Parliament as observed by Kania, C.J.:

*"Although in the Constitution of India there is no express separation of powers, it is clear that a Legislature is created by the Constitution and detailed provisions are made for making that Legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to*

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<sup>4</sup>P. Kannadasan v. State of T. N., (1996) 5 S.C.C 670(India).

<sup>5</sup>Re Delhi Laws Act, 1951 S.C.R. 747(India).

<sup>6</sup>*Id.*

*exercise its own wisdom, judgment and patriotism in making laws is primarily cast on the Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?"*<sup>7</sup>

The same thing was expressed by Mahajan, J., as regards the judicial power thus:

*"...the Constitution trusts to the judgment of the body constituted in the manner indicated in the Constitution and to the exercise of its discretion by following the procedure prescribed therein. On the same principle the Judges are not to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate ancillary powers to others, for instance, in a suit for accounts and in a dissolution of partnership, commissioners can be entrusted with powers authorizing them to give decision on points of difference between parties as to items of account."*<sup>8</sup>

However, the majority decision in this case clearly held that separation of powers is not a part of the Constitution of India. The power of delegation is ancillary to the power of legislation; however, essential legislative functions should not be delegated to the executive. The Supreme Court by 5:2 held that the power to extend a law to other territory is valid. The same Court, in the same case, by 4:3 has held that the power to repeal and amend laws is an essential legislative function and therefore, cannot be delegated.

***b) Ram Jawaya Kapur v. State Of Punjab***

The question regarding the scope of the executive power has been elaborately discussed by the Supreme Court in *Ram Jawaya Kapur v.*

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<sup>7</sup>*Id.*

<sup>8</sup>Gupta v. Union of India, A.I.R. 1982 SC 149(India).

*State of Punjab*.<sup>9</sup> The decision in this case was greatly influenced by the decision in the *Delhi Laws case*. The recognized schools in Punjab used only such textbooks as were prescribed by the education department. In 1950, the Government embarked upon the policy of nationalizing textbooks, and, thus, took over the work of printing and publishing them. The author of the book selected by the government for the purpose by contract vested the copyright of the book in the government in lieu of royalty. The scheme was challenged on the ground, inter alia that the executive could not engage in any trade or business activity without any law being passed for the purpose. The Supreme court negated the contention saying that the government required no additional power to carry on the business as whatever was necessary for that purpose, it could secure by entering into contracts with authors and other people. In the circumstances, the carrying on of the business of publishing textbooks without a specific law sanctioning the same was not beyond the competence of the Executive.<sup>10</sup> The Court specifically held:

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

Any account of the application of the doctrine of Separation of Powers in India would be incomplete without mentioning that it has been since the case of *Indira v. Rajnarain*<sup>11</sup> elevated even to the constituent sphere, i.e., of amending the Constitution, in exercise of the constituent power conferred by Art. 368. Mrs. Gandhi's election to the House of the People was challenged before the Allahabad High

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<sup>9</sup>A.I.R. 1955 SC 549(India).

<sup>10</sup>Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh, A.I.R. 1981 SC 2030(India); Bishambar v. State of Uttar Pradesh A.I.R. 1982 SC 33(India).

<sup>11</sup>Indira Gandhi v. Rajnarain, A.I.R. 1975 SC 2299(India).

Court. After the High Court, by its decision of June 1975, set aside the election, finding that Mrs. Gandhi had been guilty of 'corrupt practice', she, who was, by that time, the Prime Minister, obtained from Parliament the Constitution (39<sup>th</sup> Amendment) Act, 1975 because of which the finding and decision of the High Court was directly superseded. It has been held therein<sup>12</sup> that though the doctrine of rigid separation of powers in the American sense does not obtain in India, the principle of 'checks and balances' underlying that doctrine does, in the sense that none of the three organs of Government can usurp the essential functions of the other organs, constitute a part of the 'basic structure' of the Constitution or one of its '*basic features*' which cannot be impaired even by amending the Constitution; if any such amendment of the Constitution is made, the Court would strike it down as unconstitutional and invalid.<sup>13</sup>

c) **Indira Nehru Gandhi v. Raj Narain**

In *Indira Nehru Gandhi v. Raj Narain*,<sup>14</sup> Ray, C.J. also observed that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution, does not apply to India, however, the court held that though the constituent power is independent of the doctrine of separation of powers to implant the theory of basic structure as developed in the case of *Kesavananda Bharati v. State of Kerala*<sup>15</sup> on the ordinary legislative powers will be an encroachment on the theory of separation of powers.<sup>16</sup> Nevertheless, Beg, J. added that separation of powers is a part of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This scheme of the Constitution cannot be changed even by resorting to

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<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>A.I.R. 1975 SC 2299(India).

<sup>15</sup>A.I.R. 1973 SC 1461(India).

<sup>16</sup>1975 supp S.C.C. 161 para 136(India).

Article 368 of the Constitution.<sup>17</sup> The Supreme Court held that adjudication of a specific dispute is a judicial function which Parliament, even acting under a constitutional amending power, cannot exercise.

On scrutinizing all these judgments, the position becomes clear that India recognizes no doctrine of separation between the executive and the legislative wings of the government. Apart from the difficulties inherent in the enforcement of any strict doctrine of separation of powers in the functioning of a modern government, there is also the inherent difficulty in defining in workable terms the division of powers into legislative, executive and judicial.<sup>18</sup> As the Supreme Court has stated, there may be in India a differentiation and demarcation of functions between the legislature and the executive and generally speaking the Constitution does not contemplate that one organ should assume the functions belonging essentially to the other organ, yet, nevertheless, there is no separation between them in its absolute rigidity.<sup>19</sup>

## II. SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

The theory of Separation of Powers; as it was originally enunciated, aimed at a *personal* separation of powers. This is the sense in which Montesquieu,<sup>20</sup> 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 power is not separated from the legislative and executive powers. Where it*

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<sup>17</sup>*Id.* para 555, at 210.

<sup>18</sup>UPENDRA BAXI, DEVELOPMENTS IN INDIAN ADMINISTRATIVE LAW IN PUBLIC LAW IN INDIA 136 (1982).

<sup>19</sup>Ram Jawaya Kappor v. State of Punjab, A.I.R. 1955 SC 549(India).

<sup>20</sup>Montesquieu, *De L'Esprit des Lois* (1748).



*joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end of everything was the same man or the same body to exercise these three powers...*”

It is in this sense that the framers of the American Constitution imported the doctrine in framing that Constitution. Thus, Madison<sup>21</sup> said- *“The accumulation of all powers, legislative, executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”*

#### ***A. The constitutional provisions***

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,

Art. I states- *“All legislative powers herein granted shall be vested in a Congress.”*

Art. II states- *“The executive power shall be vested in a President.”*

Art. III, similarly, states- *“The judicial power...shall be vested in one Supreme Court...”*

The form of government, characterized as presidential, is based on the theory of separation between the executive and the legislature. The executive power is vested in the President, the legislative power in the Congress and the judicial power 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 power to decide political questions, so that the Court may not interfere with the exercise of power of the executive branch of the government. The Constitution of America has also not given overriding power of judicial review to the Supreme Court. It is a

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<sup>21</sup>James Madison, *The Federalist* (No. 47).

queer fact of American constitutional history that the power of judicial review has been usurped by the Court.<sup>22</sup>

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.

### ***B. 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 power. He also exercises the law-making power in exercise of his treaty-making power. The President also interferes with the functioning of the Supreme Court through the exercise of his power 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 its turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It is correct to say that the Supreme Court of the United States has made more

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<sup>22</sup>I.P. MASSEY, ADMINISTRATIVE LAW 40 (7<sup>th</sup> ed. 2008).

amendments to the American Constitution than the Congress itself.<sup>23</sup> 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 Congress<sup>24</sup> and the right to, veto,<sup>25</sup> while Congress has the judicial power of trying impeachments<sup>26</sup> and the Senate participates in the executive power 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 usurp<sup>27</sup> or combine<sup>28</sup> functions belonging to another organ.

### C. *Judicial pronouncements*

The American Supreme Court observed in 1881 in the case of *Kilbourn v. Thompson*:<sup>29</sup>

*"It is essential to the successful working of this system that the persons entrusted with power in anyone 'of these branches shall not be permitted to encroach upon the powers confided to 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 power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."*

An eminent authority illustrated this interaction among the different

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<sup>23</sup>*Id.* at 41.

<sup>24</sup>U.S. CONST. art. II §3.

<sup>25</sup>U.S. CONST. art. I §7(2).

<sup>26</sup>1 SCHWARTZ, CONSTITUTION OF THE UNITED STATES 115 (1963).

<sup>27</sup>*Kilbourn v. Thompson*, (1881) 103 U.S. 168 (190); *Satinger v. Philippine Islands*, (1928) 103 U.S. 168 (192).

<sup>28</sup>*A.G. of Australia v. Boilermakers Society*, (1957) 2 All E.R. 45 (P.C.).

<sup>29</sup>*Kilbourn v. Thompson*, (1881) 103 U.S. 168 (190).

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."*<sup>30</sup>

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.<sup>31</sup> 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;<sup>32</sup> and the judicial function of adjudicating disputes and complaints<sup>33</sup> arising under such statute and subordinate legislation.<sup>34</sup> The American Supreme Court has upheld such concentration of functions by resorting to some quibbles:

- 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*.<sup>35</sup>
- 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.<sup>36</sup> Even the charge of bias against an administrative tribunal

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<sup>30</sup>Frankfurter, *The Public and its Government*, IN SCHWARTZ(ED), AMERICAN CONSTITUTIONAL LAW 286 (1955).

<sup>31</sup>*Id.* at 25.

<sup>32</sup>*Boyce Motor Lines v. U.S.*, (1952) 342 U.S. 337.

<sup>33</sup>*Fed. Trade Commn. v. Cement Institute*, (1948) 333 U.S. 683.

<sup>34</sup>*Marcello v. Bonds*, (1955) 349 U.S. 302.

<sup>35</sup>*Humphrey's Executor v. U.S.*, (1935) 295 U.S. 602.

<sup>36</sup>*Marcello v. Bonds*, (1955) 349 U.S. 302.

because of its having preconceived views on the subject-matter of adjudication has been brushed aside on the same ground.

*Marbury v. Madison*<sup>37</sup> is often cited as the case that established the power of the Courts to invalidate legislation.<sup>38</sup> 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*<sup>39</sup> 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 power, the executive cannot exercise either legislative or judicial power, the judiciary cannot exercise either executive or legislative power."*

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*,<sup>40</sup> 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 power of making appointments to a federal body, viz, the Federal Election Commission.

The Supreme Court has also applied the separation doctrine in *Immigration and Naturalization Service v. Jagdish Rai Chadha*.<sup>41</sup> Section 244(c)(2) of the Immigration and Nationality Act authorizes either House of Congress by resolution to invalidate the decision of

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<sup>37</sup>(1803) 1 Cranch 137 (United States).

<sup>38</sup>ROBERT P. GEORGE, GREAT CASES IN CONSTITUTIONAL LAW 5 (1<sup>st</sup> ed. 2001).

<sup>39</sup>(1928) 103 U.S. 168(192).

<sup>40</sup>424 U.S. 1 (1977).

<sup>41</sup>462 U.S. 919 (1983).

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.<sup>42</sup>

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.<sup>43</sup> 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 power of making rules for

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<sup>42</sup>M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 34 (6<sup>th</sup> ed. 2007).

<sup>43</sup>Mutual Film Corporation v. Industrial Commission, (1915) 236 U.S. 230; Yakus v. U.S. (1943) 321 U.S. 414.

maintaining discipline or regulating procedure, even though that power may be of the nature of a legislative power. The power of making rules of procedure in the Courts is not regarded as of the *essence* of the functions of the Legislature.<sup>44</sup> 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 color 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.<sup>45</sup>

### III. SEPARATION OF POWERS IN THE UNITED KINGDOM

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.<sup>46</sup>

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 seniormost member of the judiciary. Therefore, in England the concept of "*parliamentary*

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<sup>44</sup>Wayman v. Southward, (1825) 10 Wh. 1 (42).

<sup>45</sup>D.D.BASU, ADMINISTRATIVE LAW 24 (6<sup>th</sup> ed. 2004).

<sup>46</sup>I.P. MASSEY, ADMINISTRATIVE LAW 38 (7<sup>th</sup> ed., 2008)

*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.<sup>47</sup>

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, 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 power.

#### *A. 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 separated the judicial function from the Parliament from 1<sup>st</sup> October 2009. It now has an exclusive jurisdiction over civil and criminal cases.<sup>48</sup>

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 power in an absolute monarch had been replaced by legislative function being exercised by Parliament and judicial powers

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<sup>47</sup>*Id.*

<sup>48</sup>(March, 20 2010) <http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court/>.



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.*"<sup>49</sup> In personnel, it is virtually a committee of the Legislature, but it is the real head of the executive power 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 power 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 shred 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,<sup>50</sup> in its function of administration of justice.<sup>51</sup>

#### IV. DROIT ADMINISTRATIF IN FRANCE

The constitution of France provides for a separation of powers between the executive, the legislature and the judiciary. In France there is a separate system of administrative courts which deal with administrative cases exclusively. As a result administrative law develops on its own independent line and is not enmeshed with the judicial system.<sup>52</sup> The judiciary is independent and is based on a civil law system which evolved from the Napoleonic codes.

The Court of Cassation is the highest court in the French judiciary. Civil, commercial, social or criminal cases are first ruled upon by

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<sup>49</sup>BAGEHO, ENGLISH CONSTITUTION (1867); WORLD'S CLASSICS 12 (1963).

<sup>50</sup>1 HALSBURY, HALSBURY'S LAWS OF INDIA 5 (4th ed.); HOOD PHILLIPS, CONSTITUTIONAL & ADMINISTRATIVE LAW 31 (1978); WADE & PHILLIPS, ADMINISTRATIVE LAW 32 (1970).

<sup>51</sup>*Id.*

<sup>52</sup>H.W.R. WADE, ADMINISTRATIVE LAW 11 (9<sup>th</sup> ed. 2006).

courts of first instance or lower courts. Decisions rendered at last instance may be challenged in a court of appeal, where all aspects of them are re-examined, as to both facts and law.<sup>53</sup> The legislature (the Parliament) functions independently and frames laws.

*Droit Administratif* in France, as interpreted by French history, by French legislation, and by the decisions of French tribunals, means more or less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought to be independent of and to a great extent free from the jurisdiction of the ordinary courts.<sup>54</sup> The ordinary courts exercise no control over administrative functioning.<sup>55</sup> It essentially means organisation of public administration within the French legal system.<sup>56</sup>

In France, a person has no avenue for redress of grievances against the administration through the courts. This is the important point of deviance between the *Droit Administratif* and the British or the Common-law system of Administrative Law.<sup>57</sup> Autonomy of the Administration from judicial control does not however mean that it is free from all control. Administration has been able to develop its own tribunals to supervise it. It is another characteristic feature of *Droit Administratif* viz., that administrative tribunals supervise administrative functioning.<sup>58</sup>

The French *Droit Administratif* has sought to draw a balance between private rights and public benefit. On the one hand, it maintains and supports administrative powers; on the other, it has developed a mechanism for protecting individual rights and civil liberties against

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<sup>53</sup>(March 27, 2010) Retrieved from [http://www.courdecassation.fr/about\\_the\\_court\\_9256.html](http://www.courdecassation.fr/about_the_court_9256.html).

<sup>54</sup>A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 337 (10<sup>th</sup> ed. 2008).

<sup>55</sup>M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 25 (6<sup>th</sup> ed. 2007).

<sup>56</sup>A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 475 (10<sup>th</sup> ed. 2008).

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

possible attacks by public authorities. Although the prerogatives of public authorities are very extensive, they are not absolute.<sup>59</sup> In order to defend private citizens against the public corporations, the administrative courts have established two limitations on their activities: viz they must not act against the law and they must pay damages when they cause injuries. This system has now come to be regarded as providing better protection to individual rights against the despotism of public administration than the Common-law system provides at present.

The crucial test to determine the effective nature of Administrative Law is to determine how well Administration is controlled in exercising its powers and whether or not a citizen has an adequate redressal mechanism in case he is hurt by the Administration. From both these tests, *Droit Administratif* is found to be more satisfactory than the common-law system of Administrative Law.<sup>60</sup>

#### ***A. The Conseil d'Etat***

France has a large number of administrative tribunals, but the most significant of these is the *Conseil d'Etat*. It consists of judges of great professional expertise. There is a network of local tribunals of the first instance. While on the face of it, this body may not seem to be as independent and impartial as an ordinary court, but, as a matter of fact because of the emergence of certain practices and conventions, the *Conseil* is very independent in practice.<sup>61</sup> The *Conseil* is composed of the cream of the French Civil Service. It is an important administrative tribunal. It acts as the court of appeal from all other administrative tribunals. All tribunals whether specialized or not are subject to the *Conseil's* control, as all decisions of administrative tribunals are subject to review by the *Conseil* on points of law.

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<sup>59</sup>A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 486 (10<sup>th</sup> ed. 2008).

<sup>60</sup>M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 25 (6<sup>th</sup> Ed., 2007).

<sup>61</sup>A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 340 (10<sup>th</sup> ed. 2008).

Because the *Conseil* acts as the central appellate administrative tribunal, it has been possible to secure the unity of *Droit Administratif*, and also the tribunals in France have come to have a cohesion and autonomy unknown in common law countries where many tribunals function without any single general administrative appellate tribunal. The *Conseil* also acts as the court of first instance for cases for *recourse pour excess de pouvoir* against the decreets of the Administration. To further protect administrative tribunals from interference from the ordinary courts a separate *Tribunal des Conflicts* has been established which decides whether a matter should go before the ordinary courts or the tribunals. It has judges and civil servants in equal numbers with the Minister of Justice as the President but he rarely presides over it.<sup>62</sup> Only when members of the tribunal are equally divided it becomes necessary for him to use his veto.

The administrative tribunals have spelled out two principal limitations on administrative bodies. One, these bodies must not act against the law; two, they must pay damages when they cause injuries. If an administrative action is *ultra vires*, it can be nullified by the tribunal on an action brought by the affected private citizen. The scope of this action is very broad and it constitutes the best means to protect citizens against abuse of power. The *Conseil* can supervise the form and content of administrative decisions. It can also supervise the grounds on which administrative action is taken. As regards the action for damages, damages can be granted to an individual when he is injured by an administrative action not only when the state is at fault but also when not at fault. This gives significant protection to the individual against the wrongs of public administration. The *Conseil d'Etat* has been characterized as the "bulwark of civil liberties." and also as the "*guardian of administrative morality*."<sup>63</sup>

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<sup>62</sup>M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 25 (6<sup>th</sup> ed. 2007).

<sup>63</sup>*Id.*

### ***B. Criticism by dicey***

Dicey believed that administrative tribunals would be partial to the Administration. He regarded it as a prime virtue of the rule of law that all cases came before the ordinary courts, and that the same general rules applied to an action against the government official as applied to an action against private individual. But the truth is that the *Conseil d' Etat* in discharging its judicial and controlling functions has achieved a high degree of objectivity.<sup>64</sup> Even today English judges speak of *droit administratif* as a system for putting the executive above the law. However, in fact French administrative law has a system of compensation for the acts of public officers which in some respects is more generous than that of English law.

### ***C. The nature of droit administratif***

*Droit Administratif* is essentially judge made law, case law and it resembles the English law far more closely than does the codified civil law of France.<sup>65</sup> Generally the fundamental principles of *droit administratif* are not enacted; they flow from the decisions of the *Conseil d' Etat*.<sup>66</sup> Although it is case law, there exists a written *code administrative*. Moreover, there is now a trend towards the codification of *droit administratif*. However, these codifications are not the enactment of customs and general principles applied by the Courts, but merely either the grouping of the principle administrative laws and regulations or the methodical editing of the laws and regulations in force at the date of publication and governing some very definite subject matter, such as public health, mines and town

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<sup>64</sup>BROWN & GARNER, FRENCH ADMINISTRATIVE LAW (1983); MNCHELL, CONSTITUTIONAL LAW (1968); SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD (1954); CAROL HARLOW, REMEDIES IN FRENCH ADMINISTRATIVE LAW (1977).

<sup>65</sup>A.V.DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 486 (10<sup>th</sup> ed. 2008).

<sup>66</sup>*Id.*

planning.<sup>67</sup> As the rules of *Droit Administratif* are not written, they have flexibility which permits constant adaption to changes in the administrative life.

But the French system is not without its disadvantages. Its remedies are narrow in scope and are not always effective, and the division of jurisdictions between civil and administrative courts is the subject of technical rules which can cause much difficulty.<sup>68</sup>

## V. CONCLUSION

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 power 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

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<sup>67</sup>*Id.* at 487.

<sup>68</sup>H.W.R. WADE, ADMINISTRATIVE LAW 11 (9<sup>th</sup> ed., 2006).

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 power 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 power, 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 no 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 Montesquieue 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.

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 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.