INSEPARATE POWERS & DE FACTO OFFICES OF PROFIT: THE CONTORTED REALITY OF CONSTITUTIONAL IDEALS

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Abstract

The Indian Constitution's purported subscription to the 'Separation of Powers' doctrine has been amongst the most contentious of our constitutional ideals. Inextricably linked to the doctrine, is the concept of 'Office of Profit' as a ground for parliamentary disqualification. Previous analyses of the practicalities of these concepts have focused solely on their manifestation in the topmost strata of the constitutional hierarchy. India's initial choice of the Parliamentary Executive system militated against strict power separation. Yet, judicial pronouncements contrarily insisted on the doctrine as manifest in our 'Basic Structure'. Preliminarily, the paper answers the question – 'What level of power-separation does the Constitution envisage?' Subsequently, the paper analyzes the State hierarchy at the grassroots-level, highlighting derogation from these principles in administrative practice. The 'Halqa In-Charge' system in Punjab is an

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instance of the general trend towards the hijacking of local executive power by non-ministerial legislators. MLAs have been elevated to virtual heads of the ground-level executive, becoming the locus of legislative and executive power at the same time. Through this subversion of the constitutional ideal of separate powers, legislators assume de facto 'offices of profit' without any legal implications. The Punjab case study presents blatant deviation from the power-division envisaged by the Constitution. Conclusively, the paper sets the tone for striking a middle ground between legislative oversight and executive autonomy at the grassroots.

I. INTRODUCTION

During the deliberations of the Constituent Assembly, Prof. K.T. Shah, a staunch advocate of the Presidential System, moved the motion for expressly incorporating the doctrine of 'Separation of Powers' ("**the Doctrine**") into the Constitution.[1] The proposal was met with opposition, predominantly on the ground that the Doctrine was incompatible with the Parliamentary Executive system, which had already been selected over the Presidential system. The Parliamentary Executive model, by its very nature, required assimilation of legislative and executive powers in the hands of

[1]*Constituent Assembly of India Debates, Volume VII*, ¶7.71.10, CONSTITUTION OF INDIA (Feb. 3, 2020), https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-10?paragraph_number=27#7.71.27.

ministers. The adoption of this system nullified any possibility of incorporating a strict separation of powers.

Therefore, when Justice Beg proclaimed the Doctrine to be part of the Basic Structure of the Constitution,[2] the statement was bound to be ridden with qualifications. The only way of reconciling these diametrically opposite notions was to infer that the Constitution accepts the Doctrine in essence, subject to the exceptions that the system of Parliamentary Executive necessitates.

The history of the Doctrine is marked with numerous instances of disparagement, at the hands of renowned scholars such as Munro, De Smith, O.H. Phillips, etc. The Doctrine, in its stricter sense, was declared a 'constitutional myth',[3] 'possible neither in theory nor in practice',[4] and was relegated, by Western scholars, to the inconsequential columns of legal history.[5] However, when ground-breaking cases such as *Keshavananda Bharati*[6] ("***Keshvananda***") shifted the focus to safeguarding, in theory and practice, the principles of constitutional law, the Doctrine rose almost like a phoenix from the ashes, securing its place within the 'Basic Structure'. Although concepts such as judicial review, delegated legislation and, administrative adjudication, which technically militate against the Doctrine, grew with considerable force, the Doctrine was, in essence, appreciated by the judiciary in numerous cases.[7]

[2]Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[3]O. Hood Phillips, *A Constitutional Myth: Separation of Powers*, 93 Q. L. REV. 11 (1977).
[4]A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 8 (14th ed., 2007).
[5]A.K. Ganguly, *Separation of Powers and Judicial Activism*, 9 SCC J. 38, 40 (2013).
[6]Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.
[7]Indira Gandhi Nehru v. Raj Narain, (1975) 2 SCC 159; Namit Sharma v. Union of India, (2013) 1 SCC 74; State of T.N. v. State of Kerala, (2014) 12 SCC 696.

II. THE CONSTITUTIONALLY EXPECTED EXTENT OF POWER-SEPARATION

The position of the Doctrine within India's constitutional fabric is itself a point of contention. However, a fairly accurate proposition would be that the Doctrine's underlying idea- ensuring accountability by preventing power concentration- is of undeniable significance in answering questions of constitutional import.

In the succeeding sections of the paper, it will be averred that the current power arrangements, at the ground level, are tantamount to an absolute disregard of the constitutional expectation that the powers of the State vest in separate entities. However, before such a conclusion is reached, it becomes imperative to discover exactly the extent of power-separation that the Constitution envisaged. How strictly should the Doctrine be applied while analysing the present division of powers is the query that necessarily requires resolution before concluding that the said division violates the Doctrine.

Theoretically, and in a strict sense, the Doctrine requires the three branches of the government to be virtually independent of each other.[8] However, in its strictest sense, Montesquieu's formula becomes unworkable, leading to frequent constitutional deadlocks.[9] The obvious shortcomings of the strict application of this has led many a scholar to conclude that even Montesquieu himself did not advocate the complete separation of powers.[10] He roughly sought to pre-empt three possible combinations of powers – judicial and executive, legislative and judicial, legislative and executive.

[8]M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1st ed., 1967).
[9]H. BARNETT, CONSTITUTION AND ADMINISTRATIVE LAW 94 (6th ed., 2006).
[10]IVOR JENNINGS, LAW AND THE CONSTITUTION 23 (1st ed., 1933).

From the perspective of the framers of the Constitution, the Doctrine retained significance to the extent that it pre-empted the first two combinations, ensuring an independent judiciary, free from any intrusions of either the executive or the legislature.[11] However, the fear of a subjugated judiciary had already been allayed by the incorporation of Article 50 and its accompanying debates.[12] Therefore, even discounting the Doctrine's presence, the framers had already ensured, by other constitutional provisions, the insulation of the judicial wing from the other two wings.

Thus, the only doctrinal requirement which remained to be considered was that of separating the combination of legislative and executive power. However, since this combination was a sine qua non of the Parliamentary Executive system, the framers dismissed this aspect of the Doctrine as being inapplicable in India.[13] The President/Governor, the executive head, was to be a handmaid of the Council of Ministers, who introduced and voted on legislation in the Parliament/Legislative Assemblies. This fundamental arrangement was antithetical to the third separation proposed by the Doctrine. The Council of Ministers, at the top of the constitutional hierarchy, was required to be possessed with a combination of two powers- legislative and executive. Therefore, the framers' consideration of the third separation was restricted to the topmost layer of the constitutional hierarchy, in which the said separation was clearly impossible. This resulted into the framers being dismissive of the third separation.

In their zeal to reject the Doctrine's third separation, because of its incompatibility with the topmost level of power-division (between the Council of Ministers and the President/Governor), the framers overlooked the possibility of the third separation being violated at the grassroots level. Although ministers were constitutionally ordained to

[11] *Supra* note 1, at ¶7.71.45.
[12] *Supra* note 1, at ¶7.60.44.
[13] *Supra* note 1, at ¶7.71.27.

wield executive and legislative power, the possibility of non-ministerial legislators intruding into the executive's sphere was overlooked by the framers. Ignorant of such possibilities, the framers dismissed the Doctrine from our Constitution except to the extent that it called for a separation of the judicial wing from the executive.

The deficiencies of this hasty dismissal came to the fore during Indira Gandhi's era. The powers of the judicial wing were sought to be constricted by a Parliament clearly on the offensive. As the Legislature and Judiciary wrestled for authority, umpteen instances were observed where legislation was enacted specifically to override the judicial verdict. It was then, firstly, that scholars and judges employed the Doctrine to bolster the cause of the judiciary, that has the final say in constitutional interpretation, unimpeded by Legislative counterattacks.[14] As the fog of the constitutional conflict cleared, it became clear that the Doctrine was of much greater import than was initially acceded by the framers. This realization culminated into the Doctrine's inclusion in the 'Basic Structure', per the *Keshavananda* ruling.

Affronts to the finality of judicial verdicts by legislative nullification have been recurrent in recent times. As recently as 2014, Kerala's state legislature sought to nullify the Supreme Court's verdict respecting the prescribed water storage level in the Mullaperiyar Dam.[15] When a legislation was passed, substantially aimed at nullifying the Court's earlier verdict, the Court aptly highlighted the instance as a blatant violation of the Doctrine (and therefore, the Basic Structure). The legislation was equated to an attempt by the Legislature to assume judicial power, a phenomenon which is constitutionally proscribed.

[14]V.G. Ramachandran, *The Reshaping of the Supreme Court*, 1 SCC J. 79 (1970).
[15]State of T.N. v. State of Kerala, (2014) 12 SCC 696.

As the Doctrine presently stands within India's constitutional ethos, it mainly serves as a bulwark against non-accountability. This stance is best captured in the Supreme Court's own words in various rulings - "*The Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity*",[16] but has done so "*in a broad sense*",[17] with the aim to "*achieve the maximum extent of accountability of each branch of the Government*."[18] Thus, "*till this principle of accountability is preserved, there is no violation of separation of powers*."[19]

In short, the Constitution broadly demarcates the remit of the three branches, allowing minor overlaps where accountability is not compromised. The unexceptionable expectation of the Constitution is that the three powers vest in distinct entities, and neither transgress into another's sphere, barring emergent situations, so as to affect a strict regime of accountability of all entities.

The Doctrine, in its modern sense, has become the 'doctrine of functional separation', explicated in 'The New Separation of Powers - A Theory for the Modern State' by Eoin Carolan,[20] and by P.A. Gerangelos in 'The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations'.[21] The modern Doctrine also, essentially, aims at preventing the concentration of power.[22] Therefore, a combination of the quintessential functions of any of the legislative, executive or judicial

[16]Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225.
[17]Indira Gandhi Nehru v. Raj Narain, (1975) 2 SCC 159.
[18]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[19]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[20]EOIN CAROLAN, THE NEW SEPARATION OF POWERS - A THEORY FOR THE MODERN STATE (2009).
[21]PETER A. GERANGELOS, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS, CONSTITUTIONAL PRINCIPLES AND LIMITATIONS(2nd ed., 2009).
[22]Ashwani Kumar v. Union of India, (2019) SCC OnLine SC 1144.

branch would be inadmissible even under the modern version of the Doctrine.

III. EXECUTIVE LEGISLATORS AND THE IMPOSSIBILITY OF ACCOUNTABILITY

Under the Indian Constitution, the executive heads of the government (the ministers) are supposed to be accountable to the legislature. The ground-level executive, which comprises of the District Magistrates, the Sub-Divisional Magistrates, Municipal Authorities, etc. are answerable only to the concerned ministers which head their respective departments. The ministers have the final say in executive decisions. Their power is sufficiently checked by their answerability. However, nowhere does the Constitution envisage a delegation of executive power to non-ministerial legislators. A legislator who does not head a ministry, theoretically and ideally, must wield no direct power over the executive's functioning.

If the non-ministerial legislator was allowed the usurpation of executive power, such a phenomenon would strike at the core of the notion of parliamentary accountability. The parliamentarian, who was theoretically supposed to hold the executive to account, would be partaking in the exercise of executive power himself, thus leaving no entity for scrutiny. The legislator goes from being the sentinel to the malfeasant himself. Any possibility of accountability evaporates for the simple reason that those who partake in the exercise of a power cannot scrutinize that exercise themselves. This, in essence, is the conundrum which gives rise to the Doctrine's underlying rationale.

The conundrum also shifts the light of enquiry to a closely-linked concept of parliamentary disqualification based on the occupation of

'office of profit'. The concept owes its inception to the Act of Settlement, 1701.[23] The underlying rationale of the disqualification, firstly, is that if legislators are beholden to the executive for being conferred profitable positions, it impairs their ability to legislate without fear or favor.[24] More importantly, the disqualification aims at ensuring adherence to the Doctrine. The Doctrine and the 'Office of Profit' are interlinked concepts.[25] When a legislator is bestowed with executive power, he, by default, transgresses the demarcation of powers under the Constitution. He also, thereby, occupies an 'Office of Profit', whether de jure or de facto. Exercise of executive power necessarily implies repercussions respecting the impartiality and independence of the legislator.[26]

This phenomenon entered the limelight with the introduction of the MPLAD and MLALAD Schemes. Under these schemes, each MP/MLA has the choice to suggest developmental works of his choice to the tune of a certain pecuniary limit per annum.[27] The funds are allocated from within the State treasury.[28] The deficiencies of these schemes soon came to the fore, with Bihar becoming the first

[23]Act of Settlement (1701), 12 & 13 WILL III, C. 2.
[24]SECOND ADMINISTRATIVE REFORMS COMMISSION, FOURTH REPORT- ETHICS IN GOVERNANCE REPORT (2007), p. 37 (Feb. 3, 2020), https://darpg.gov.in/sites/default/files/ethics4.pdf.
[25]*Office of Profit under the Crown (Research Paper Series, 2017–18*), DEPARTMENT OF PARLIAMENTARY SERVICES (PARLIAMENT OF AUSTRALIA), p. 16 (Feb. 3, 2020), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/6025866/upload_binary/6025866.pdf;fileType=application/pdf.
[26]Act of Settlement (1701), 12 & 13 WILL III, C. 2, p. 23.
[27]MEMBERS OF PARLIAMENT LOCAL AREA DEVELOPMENT SCHEME (MPLADS) (Feb. 3, 2020), https://www.mplads.gov.in/mplads/Default.aspx.
[28]Kaushiki, *Do We Need the MPLAD Scheme*, PRS INDIA (Feb. 3, 2020), https://prsindia.org/hi/theprsblog/do-we-need-mplad-scheme?page=64.

state to scrap the MLALAD Scheme.[29] The Schemes faced flak on numerous corners.

The National Commission to Review the Working of the Constitution,[30] Era Sezhiyan in her publication 'MPLADS – Concept, Confusion and Contradictions',[31] and the Second Administrative Reforms Commission's report on 'Ethics in Governance',[32] all denounced the LAD schemes. Amongst the foremost reasons behind such conclusions was the fact that these schemes conferred executive power upon legislators, thereby violating the fundamental requirement of functional differentiation under the Doctrine.

The 'Ethics in Governance' Report also equated privileges under the LAD Schemes with offices of profit. This equation was substantiated by reason of "*the conflict of interest that arises when legislators take up executive roles*."[33] Quite naturally, the partisanship that mars Indian politics, when combined with control over State resources, is bound to have undemocratic results. An MLA is, due to reasons entrenched in human nature itself, unlikely to direct resources under such schemes towards areas which do not show possibility of electoral gain. As an agent of a competing political party, he can be safely assumed to consider prime the party's best interest, which naturally lies in ensuring that the electoral strongholds of the opposite parties should be disfavoured while making developmental decisions.

[29]Santosh Singh, *Nitish scraps MLA fund, turns to engineers to implement schemes*, INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/news-archive/web/nitish-scraps-mla-fund-turns-to-engineers-to-implement-schemes/.
[30]National Commission to Review the Working of the Constitution, *Volume I, Parliament and State Legislatures (2002)* (Feb. 3, 2020), http://legalaffairs.gov.in/sites/default/files/chapter%205.pdf.
[31]ERA SEZHIYAN, MPLADS – CONCEPT, CONFUSION AND CONTRADICTIONS (2005).
[32]Act of Settlement (1701), 12 & 13 WILL III, C. 2.
[33]Act of Settlement (1701), 12 & 13 WILL III, C. 2, p. 39.

The schemes were challenged as being unconstitutional in *Bhim Singh v. Union of India*,[34] with a violation of the Doctrine being one amongst the numerous grounds presented by the petitioner. The Supreme Court ultimately ruled in favour of the scheme's constitutionality, albeit erroneously, it is submitted. While deliberating upon the scheme's status vis-à-vis the Doctrine, the Court operated on the utopian premise that "*all Members of Parliament be it a Member of Lok Sabha or Rajya Sabha or a nominated Member of Parliament are only seeking to advance public interest and public purpose*." Proceeding on this unrealistic premise, the Court applied overly relaxed standards of functional differentiation, and ruled out any possible violations of the Doctrine.

The problem of the scheme creating offices of profit occupied by the legislators was never considered by the Court, even though the Second Administrative Reforms Committee had previously highlighted the issue.[35] The Committee also recommended that the Courts expressly interpret 'office of profit' as including the privileges under such schemes, because these schemes conferred decision-making powers respecting public funds, a power which the Legislator could naturally profit from.

The ambiguity surrounding the word 'profit' has also been considered as a reason for overlooked violations of the Doctrine. It has long been suggested that 'profit' must be widely taken to include any executive influence which the legislator gains at the expense of State resources.[36] A purposive interpretation of the term 'profit' would indicate that offices 'of possible profit or influence' warrant disqualification. Although the Supreme Court has broadly interpreted the term so that even the possibility of profit has been taken to entail

[34]Bhim Singh v. Union of India, (2010) 5 SCC 538.
[35]*Supra* note 25.
[36]*Supra* note 24, at 15.

disqualification,[37] the term's meaning requires further expansion. Regard must be had to precluding such situations where no legal appointment is made, but the legislator wields *de facto* influence, at the executive government's behest, which can provide him an unfair advantage over his peers, or can compromise his impartiality and integrity as a legislator. The MPLAD and MLALAD Schemes, when seen in such light, qualify as offices of possible influence, even if a direct profit can be ruled out by procedural safeguards.[38]

The phenomenon which will be explicated in the following section is another instance of an 'off the record' arrangement between the government and non-ministerial legislators, by which the latter are accorded *de facto* influence over the executive branch.

IV. THE HALQA IN-CHARGE: THE ONE-MAN ADMINISTRATION IN PUNJAB'S DISTRICTS

A. Hijacking of Executive Power: A Pan-India Phenomenon

The idea that the MLA's seat, of course, comes with the license to partake in executive decision-making at the ground level, has crystallized into a normal proposition.[39] That such influence has no legal or constitutional backing has become an oft-ignored platitude, detached from the 'realities of governance.' Non-ministerial state legislators, as a matter of right, issue diktats to executive officials such as District Commissioners ("**DC/DM**"), Sub-Divisional Magistrates ("**SDM**"), etc., even though the Constitution from which

[37]Jaya Bachchan v. Union of India, (2006) 5 SCC 266.
[38]*Supra* note 25, at 41.
[39]F. G. Bailey, *Traditional Society and Representation; A case study in Orissa*, 1.1 EUR. J. OF SOCIOLOGY 121 (1960).

they draw their powers and privileges provides for no such interference.

Reports of such interferences have become a common occurrence, often backed by express or implied consequences for the non-conforming bureaucrat. From deciding the recipients of government grants, to choosing the beneficiaries of crop insurance schemes,[40] to picking out postings for related officials,[41] the MLA is practically empowered to do it all. To paint the MLA's bureaucratic counterparts in an entirely holy light would also be a misstatement. Executive officials, often out of choice, willingly submit to the MLA's partisan diktats, to curry favour with political overlords and secure 'better' appointments.[42]

Such political attachments find mention in the writings of reputed bureaucrats themselves. Mr. Bhaskar Ghose, a veteran civil servant, enumerated three types of bureaucrats — "*the 'wives' (those who are attached to one party), the 'nuns' (officers who remain unattached to any party), and the 'prostitutes' (who attach themselves to whichever party is in power and switch when there is a change of Government)*."[43] In his plea against 'politisation' of the executive, Mr. R.S. Agarwal, a former IAS officer, called for "*Members of the Legislative Assembly and Members of Parliament [to] not be allowed to interfere in the affairs of transfers and postings and day-to-day administration*."[44] The aforementioned author's writings also bore testimony to the existence of the apocryphal notion that the

[40]Deeksha Bharadwaj, *IAS Association hits out after viral video shows BJP MLA threatening civil servant*, THE PRINT (Feb. 3, 2020), https://theprint.in/india/governance/ias-association-hits-out-after-viral-video-shows-bjp-mla-threatening-civil-servant/165477/.
[41]*Influence Peddling*, SENTINEL ASSAM (Feb. 3, 2020), https://www.sentinelassam.com/editorial/influence-peddling/.
[42]BHASKAR GHOSE, THE SERVICE OF THE STATE: THE IAS RECONSIDERED 155 (2011).
[43]*Id.*
[44]RADHEY SHYAM AGARWAL, INSIDE STORY OF BUREAUCRACY 124 (2009).

politician's interference in the executive's functioning is legitimate.[45] Drawing on this baseless notion, Punjab's ruling elite have meticulously constructed the institution of the Halqa In-Charge.

B. The Punjabi Arrangement

The word 'Halqa' literally denotes an assembly constituency,[46] or as the word has transformed with colloquial use, the area over which the MLA or the MLA-aspirant exercises power. The roots of this system can be traced back to the second term of the Akali Dal government, after the party barely managed a majority in the State Legislative Assembly in the 2012 elections.[47] Although the MLA's influence over the local executive has grown to become a pan-India phenomenon,[48] the Akali Dal pioneered the formal institutionalization of this *de facto* control, with the succeeding (present) government building upon their predecessor's creature and further bolstering this control.

In a bid to 'accommodate' its defeated MLA candidates, the winning party conferred them with obscurely-named ranks of Halqa in-Charges, whose authority became co-extensive with the authority of Akali Dal MLAs in constituencies where they had won the elections. The motivation behind these appointments was to create a scenario where regardless of the fact that the elected MLA of a Halqa belongs to Congress, the Akali Dal's candidate (even if defeated in the Assembly Elections) wielded the actual power. As parties tussled for this *de facto* influence, hardly any thought was given to the constitutionality or the legality of this influence. The unofficial

[45]D.P. Singh, *Sovereignty, Judicial Review and Separation of Power*, 7 SCC J. 1, 12 (2012).
[46]M. Rajshekhar, *What we talk about when we talk about Punjab,* SCROLL.IN (Feb. 3, 2020), https://scroll.in/article/805883/what-we-talk-about-when-we-talk-about-punjab.
[47]*Punjab assembly elections 2012: List of winners,* INDIA TODAY (Feb. 3, 2020), https://www.indiatoday.in/assembly-elections-2012/punjab/story/punjab-assembly-eletions-2012-winners-95199-2012-03-06.
[48]*Supra* note 38.

influence, which had existed before, saw its firm entrenchment within the institution of governance, due to the Halqa system. As legislators reached out into the executive's remit, little heed was paid to the Doctrine, which calls for functional differentiation. This influence was backed not only by the threat of transfer of executive officials but even the possibility of bodily harm to the inconvenient official.[49]

The rule of the Akali Dal marked a period of great adversity for the State, whether judged by economic or social metrics.[50] Responsible, in no small part, for this adversity, was the partisan nature of the local administration which, in its bid to placate the MLAs and the Halqa in-Charges, became a proxy for effecting the legislator's machinations. To establish complete control of the MLAs and the Halqa In-Charges, jurisdictions of Police Stations were rearranged to coincide exactly with the Assembly constituencies.[51] Thus, law and order situations were expected to be handled as per the MLA's/ Halqa in-Charge's convenience.

With the coming into power of the Congress, it was expected that the deplorable practice of executive legislators and Halqa in-Charges would see its end. Adequate lip service was paid to the cause by a Congress government anxious to provide preliminary assurances to voters.[52] Even on paper, an end was put only to the system of Halqa in-Charges (defeated MLA candidates), without any mention of the issue of elected MLAs intervening in day-to-day administration. The ground reality remained that both elected and defeated MLA

[49]M. Rajshekhar, *How the Badals spread their control over Punjab (and why it is eroding)*, SCROLL.IN (Feb. 3, 2020), https://scroll.in/article/804076/how-the-badals-spread-their-control-over-punjab-and-why-it-is-eroding.
[50]Vinay Sharma, *Poor Government but Rich Punjabis*, ECONOMIC TIMES (Feb. 3, 2020), https://economictimes.indiatimes.com/news/politics-and-nation/poor-punjab-government-but-rich-punjabis/articleshow/56424577.cms?from=mdr.
[51]Bailey, *supra* note 49.
[52]*CM Amarinder Singh orders scrapping of halqa in-charge system*,INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/cities/chandigarh/cm-amarinder-singh-orders-scrapping-of-halqa-in-charge-system-4613698/.

candidates of the ruling party continued their unimpeded command over the local executive.[53]

The continuance of these practices became evident upon protests by minority party MLAs.[54] Halqa in-Charges were expressly appointed by the top brass of the Congress.[55] More recently, a defeated MLA candidate of the Congress was observed 'allocating' state grants at a private meeting.[56] The influence of MLAs and Halqa in-Charges has but grown stronger, and pervades each and every facet of administration.

C. A Thousand Possibilities of Abuse

The preceding paragraphs evince the continued presence of the system of MLAs and MLA candidates exercising executive power at the ground level. The implications of this system require to be delved deeper into, as will be done in the following paragraphs. What kinds of consequences can this system theoretically lead to? How deleterious an effect can the system have on local administration? Does the system's violation of the Doctrine have any practical bearing on the executive's functioning?

The system, as it stands today, provides the local legislator an open arena. The legislator's powers are, quite literally, limited only by his imagination. His authority coincides with the powers of the local police, the DC/SDM, and every other local authority. Of particular

[53]*Congress has taken over Akali halka in-charge system says AAP*, INDIAN EXPRESS (Feb. 3, 2020), https://indianexpress.com/article/cities/chandigarh/congress-has-taken-over-akali-halka-in-charge-system-says-aap-4659631/.
[54]*AAP stages walkout over 'halqa in charge' system run by 'defeated' candidates*, PUNJAB UPDATE (Feb. 3, 2020), https://punjabupdate.com/aap-stages-walkout-over-halqa-in-charge-system-run-by-defeated-candidates.html.
[55]Surjit Singh, *Congress appoints Ramanjit Sikki as 'halqa in-charge' of Sukhpal Khaira's home turf,* HINDUSTAN TIMES (Feb. 3, 2020), https://www.hindustantimes.com/punjab/congress-appoints-ramanjit-sikki-as-halqa-in-charge-of-sukhpal-khaira-s-home-turf/story-1AHFYLJ9YeXmokizm2T2IP.html.
[56]Bailey, *supra* note 39.

significance are the powers of the SDMs and DC/DMs, which they wield in perfect accord with the wishes of the local legislator. These two posts are the actual interface between the citizenry and State machinery. From revenue to law and order, the Magistrate presides over a vast range of functions,[57] almost any of which can now be (and have been) misappropriated with by the legislator.

Some of these powers are of particular utility for a legislator seeking to forward his personal/party agenda within his constituency. Firstly, and most importantly, the DC/SDMs directly supervise the elections to the Panchayati Raj institutions within their jurisdiction.[58] MLAs, through their *de facto* control over SDMs, tailor electoral circumstances for achieving illegitimate results. That the Panchayati Raj in Punjab has been entirely hijacked by ruling party MLAs, finds credence in the writings of Nicolas Martin.[59] The ideal of local self-governance is ridden roughshod over by compromised executive officials.[60] Inevitably, Panchayat candidates affiliated with the ruling party MLAs become the only 'real' contenders for local representation, thanks to the misappropriation of executive power by partisan legislators. The situation epitomizes the self-perpetuating power of Indian politicians.

Secondly, the magisterial powers of the SDM/DC provide ample opportunity for the legislator to execute political vendettas. In addition to the SDM's executive power, the consequential quantum of judicial powers wielded by him also become subject to the MLA's control. The Code of Criminal Procedure ("**CrPC**") contains various

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[57]*Roles of District Administration*, PUNJAB GOVERNMENT (Feb. 3, 2020), https://barnala.gov.in/about-district/organisation-chart/.
[58]The Punjab State Election Commission Act, No. 19 of 1994 (India).
[59]Nicholas Martin, *Rural Elites and the Limits of Scheduled Caste Assertiveness in Rural Malwa, Punjab*, 52 REV. OF RURAL AFFAIRS 50 (2015).
[60]Manjeet Sehgal, *Punjab panchayat polls marred by violence, booth capturing***,** INDIA TODAY (Feb. 3, 2020**),** https://www.indiatoday.in/india/story/punjab-panchayat-polls-marred-by-violence-booth-capturing-1420117-2018-12-30.

provisions conferring powers on the SDM to maintain law and order. The notoriously wide ambit of powers under Sec. 144, CrPC,[61] allows the SDM/DC, and consequently, the MLA, to prohibit nearly any assembly which he deems inconvenient. The SDM's powers of preventive detention under Sec. 107, 150 and 151, CrPC, employed with a partisan objective, are potent tools for political repression. Powers under Sec. 133, CrPC, are also subject to the Magistrate's discretion, which realistically translates into the MLA's/Halqa in-Charge's discretion. The aforesaid powers constitute the judicial authority which the MLA or the Halqa in-Charge can wield de facto, under the present system.

Thirdly, the onerous task of identifying legitimate beneficiaries of all flagship schemes/social welfare schemes also rests with the SDM. Illegitimate beneficiaries need hardly make the MLA's reference to elbow their way to subsidies and concessions. What ensues is a direct correlation between affiliation with the ruling party's MLA or Halqa in-Charge and access to state funds.

Against the core of this festering problem, stands the simple rationale of the Doctrine, which seems to have been obliviated within the shady labyrinths of administration. Montesquieu presaged, "*constant experience shows us that every man interested with power is apt to abuse it, and to carry his authority as far it will go*."[62] The modern version of the Doctrine, in order to reconcile the Doctrine's 'pure' separation with the 'institutional realities of the modern State',[63] moulded the Doctrine to connote an 'institutional division of roles'.[64]

While assessing this division, regard must be had to the characteristics of each institution to ensure its aptness for handling the

[61]Babulal Parate v. State of Maharashtra, (1961) AIR 884.
[62]*Supra* note 7, at78.
[63]M. E. Magill, *The Real Separation in the Separation of Powers*,86 VA. L. REV. 1127, 1136 (2000).
[64]J. RAZ, THE AUTHORITY OF LAW, 78 (1st ed., 1979).

specific kind of power involved.[65] Legislators, more so per contemporary standards of political behaviour, are bound to fiercely forward their partisan interests. The powers of the ground-level executive, by their very nature, require to be exercised by a neutral party, resistant to political bias. The mismatch between the natural tendencies of the Indian legislator and the nature of executive power renders the current system antithetical to the objective of the Doctrine.

Modern governance necessarily is a joint exercise.[66] This integrated operation requires an 'inter-institutional comity',[67] founded in mutual respect for each institution's jurisdiction and essential role.[68] Legislators, in as much as they represent the people's will, are competent to lay down laws and general policies. Yet, no argument invoking the rhetoric of 'participatory democracy' can justify the aggressive encroachment of MLAs and Halqa in-Charges into the executive's remit. Far from respecting the executive's jurisdiction, as inter-institutional comity requires, legislators gnaw away at the much-required boundaries between political actors and civil servants.

Critics of the Doctrine may rebut its importance in a State of combined functions,[69] where one institution may apparently exercise the power of another. However, the significance of the Doctrine becomes more appealing when it is viewed as a prescription for institutions to not "*stray beyond their proper constitutional roles*."[70]

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[65]D. Kyritsis, *Constitutional Review in a Representative Democracy*, (2012) 32 OXF. J. LEG. STUD 297 (2012).
[66]D. Kyritsis, *What is Good about Legal Conventionalism*, 14 LEGAL THEORY 135, 154 (2008).
[67]S. King, *Institutional Approaches to Judicial Restraint*, 28 OXF. J. LEG. STUD. 409, 428 (2008).
[68]A. Kavanaugh, *The Constitutional Separation of Powers*, 17OKLA. L. REV. 1223, 1278 (2014).
[69]L. Claus, *Montesquieu's Mistakes and the True Meaning of Separation of Powers*, 25 OXF. J. LEG. STUD 419, 426(2005).
[70]*Supra* note 7, at 238.

The situation highlighted in the paper showcases the institutionalization of the legislator's intrusion into the executive's sphere, in absolute non-conformity with the role that the Constitution prescribed for legislators.

V. THE DIRECTION OF REFORMS

The problem of a politicized executive has assumed such proportions as to render reforms possible only after extensive deliberation. A fine balance has to be maintained between insulating executive officials from non-ministerial legislators and appreciating the authority of ministers, who stand at the helm of the executive branch (given India's Parliamentary Executive system). Any imbalances might render the proposed reform untenable. Moreover, given the 'off-the-record' existence of the system, reforms will have to be designed to be insusceptible to negation in practice. Such comprehensive deliberation is beyond the scope of this paper's enquiry. What this section of the paper describes is a broad direction for possible reforms, the headings under which practical efforts require to be undertaken.

Firstly, a solution, which serves as a panacea for all problems which stem from political intrusion into the executive sphere, is to ensure the security of tenure for executive officials. The most potent threat that forces bureaucrats to be cowed down to unscrupulous politicians is the possibility of an inconvenient and premature transfer, at the local MLA's behest. In October 2013, the Supreme Court, in a PIL,[71] directed the Union and State governments to enact rules ensuring minimum tenure for bureaucrats. Although some states have enacted

[71]T.S.R. Subramanian v. Union of India, (2013) 15 SCC 732.

such rules/notifications on paper,[72] compliance with them is a rarity. Research pits the average tenure of an Indian IAS officer at 15 months in one post.[73] Instances of bulk transfers upon political realignments are common,[74] and evidence political parties' dependence on executive power to better their political standing.

Existing laws respecting minimum tenure require enforcement via the judicial channel, since political will to enforce the laws can be practically ruled out. Officers are unlikely to approach the Court against illegal transfers, anxious not to irk ruling politicians. The Court must adopt, as it aptly has in appropriate situations, a hands-on approach and take cognizance whenever *ex facie* indications exist of politically-motivated transfers effected before the minimum tenure period.

Secondly, the direction in which reform must be focused is towards the establishment of state-level Civil Service Boards, a proposal set out in the Subramaniam case,[75] previously endorsed by the 2nd Administrative Reforms Commission,[76] and the Hota Committee.[77] The Boards must act as sentinels against political intrusion and have a certain level of independence. Transfers must be effected only at the Boards' recommendations. The Boards must be headed by non-political actors. The intricacies of the establishment of such Boards are numerous, with the overarching concern of balancing between

[72]Personnel Policy (2nd Division), dated April 23, 2018, Personnel Branch, Punjab Government, 7/1/2014-3 P.P. 2 (1216986/1-2).
[73]Priyanka Prashar, *The good and bad news in bureaucrat transfers*, LIVE MINT (Feb. 3, 2020), https://www.livemint.com/news/india/the-good-and-bad-news-in-bureaucrat-transfers-1555928850522.html.
[74]*After Gorakhpur Bypoll loss, Yogi Adityanath-led UP govt transfers 37 IAS officers*, INDIA TODAY (Feb. 3, 2020), https://www.indiatoday.in/india/story/rejig-in-uttar-pradesh-37-ias-officers-transferred-1191502-2018-03-17.
[75]*Supra* note 70.
[76]*Supra* note 23, at 170.
[77]COMMITTEE ON CIVIL SERVICE REFORMS, REFORM REPORT (2004), p. 100 (Feb. 3, 2020), https://darpg.gov.in/sites/default/files/Hota_Commitee_Report.pdf.

depoliticizing the bureaucracy and maintaining the ruling government's due authority.

Thirdly, a proposal which hits the mark is to broaden the 'office of profit' disqualification to instances where the non-ministerial legislator is proved to wield *de facto* influence over executive decision-making.[78] Partaking in executive function, on or off the record, must warrant judicial interference. Such a tactic would effectively deter legislators from seeking to hijack executive power for fear of disqualification. Thus, the office of 'profit' must be translated to an office of 'profit or influence'.

Conclusively, the Doctrine, despite its superficial shortcomings, has been accepted as a quintessential feature of democracies.[79] A top-down scrutiny of the governmental structure is not the apt strategy for detecting violations of the Doctrine. The real affronts to constitutional ideals, such as the Doctrine, take effect at the grass-roots, away from the limelight. A bottom-up approach is bound to produce better results when it comes to safeguarding and effecting any constitutional principle. As the reality goes on to prove, the local MLA is much more likely than the President to become the *locus* of inseparate powers. The Doctrine, essentially and originally, sought to restrict the Executive from usurping excessive power. Quite paradoxically, the Doctrine today stands as the last defence of an enfeebled executive functioning at the whims of overbearing legislators.

[78]*Supra* note 23, at 40.
[79]COMMONWEALTH SECRETARIAT, THE COMMONWEALTH LATIMER HOUSE PRINCIPLES: PRACTITIONER'S HANDBOOK 1 (Jon Franksson ed., 2017).