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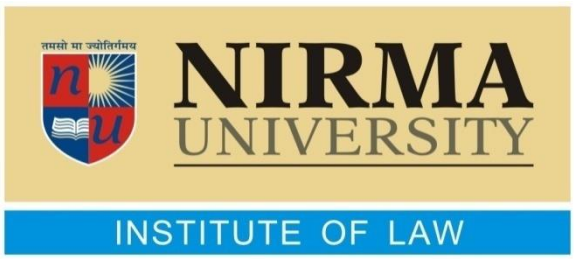

DISSERTATION

INSTITUTE OF LAW, NIRMA UNIVERSITY, AHMEDABAD AS A PARTIAL FULFILLMENT OF REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS (LL.M)

TOPIC: AN ANALYTICAL STUDY OF EFFECT OF JUDICIAL TREND ON DOCTINE OF SEPARATION OF POWER

FOR ACADEMIC YEAR 2019-20

UNDER THE GUIDANCE OF

Prof. Dr. Tarkesh Moliya

SUMBITTED BY:

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19ML010

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DECLARATION

I, Gunjan Kanunga, bearing roll no. 19ML010, do hereby declare that the dissertation submitted is original and is the outcome of the independent investigations/ research carried out by me and contains no plagiarism. The dissertation is leading to the discovery of new facts/ techniques/ correlation of scientific facts already known. This work has not been submitted to any other University or body in quest of a degree, diploma or any other kind of academic award.

I do hereby further declare that the text, diagrams or any other material taken from other sources including [but not limited to books, journals and web] have been acknowledged, referred and cited to the best of my knowledge and understanding.

Date: 02/08/2020

Name: Gunjan Kanunga

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CERTIFICATE

This is to certify that the dissertation entitled "An Analytical Study of Effect of Judicial Trend on Doctine of Separation of Power." has been prepared by Gunjan Kanunga under my supervision and guidance. The dissertation is carried out by her after careful research and investigation. The work of the dissertation is of the standard expected of a candidate for Master of Laws [LLM] in Constitutional Law and I recommend it be sent for evaluation.

Date:

_____

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This is a heartfelt Acknowledgement to all those who have helped me in successful Completion of this Dissertation.

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LIST OF ABBREVIATIONS

1. AIR : All India Reporter
2. e.g. : Exampli Gratia
3. Ed/ed - Edition
4. HC : High Court
5. Hon ble : Honorable
6. html : Hyper Text Markup Language
7. http : Hyper Text Transfer Protocol
8. i.e. : that is
9. MLA – Member of Legislative Assembly
10. MANU – Manupatra
11. No. : Number
12. NJAC – National Judicial Appointment Commission
13. Org : Organisation
14. Ors : Others
15. po. : Page
16. Para : Paragraph
17. PC : Privy Council
18. S : Section
19. SC : Supreme Court
20. SCC – Supreme Court Cases
21. SOP – Statement of Purpose
22. Supp – Supplementary
23. UK – United Kingdom
24. U S A – United States of America
25. Vol. : Volume
26. v. : Versus

Serial No	Name of Case	Citation
1	Ram Jawaya Kapur v. State of Punjab	AIR 1955 SC 549
2	Kesavananda Bharti v. State of Kerala	AIR 1973 SC 1461
3	In re Delhi Laws Act case	AIR 1951 SC 332
4	Indira Nehru Gandhi v. Raj Narain	AIR 1975 SC 2299
5	Golaknath v. State of Punjab	AIR 1967 SC 1643
6	Bandhuva Mukti Morcha v. Union of India	AIR 1984 SC 802
7	Mallikarjuna v. State of Andhra Pradesh	AIR 1990 SC 1251
8	I.R. Coelho v. State of Tamil Nadu	AIR 2007 SC 861
9	Company v. Ryan	(1935)293 U.S. 388(400)

10	Duport Steels Ltd. v. Sirs	1980
11	Marbury v. Madison	5 U.S. 137 (1803)
12	Golaknath v. State of Punjab	AIR 1967 SC 1643
13	Paramjit Kaur v. State of Punjab	1999 (2) SCC 131
14	Tika Ram and Others v. State of UP & Others	2009 (8) SC J 37
15	Avdesh v. Union of India	1994 Supp. (1) SCC 733
16	English Medium Students v. State of Karnataka	AIR 1994 SC 1702
17	Venkatachalam v. Rabri Devi	(1997) 5 SCALE 632
18	Bhutnath v. State of W.B	AIR 1974 SC 806
19	Peerless General Insurance v. RBI	AIR 1992 SC 1033
20	Sitaram Sugar v. Union	AIR 1990 SC 1277

	of India	
21	Om Prakash v. Delhi Stock Exchange	(1994) 2 SCC 117
22	Bhandara Dist. Co-op. Bank v. State of Maharashtra	AIR 1993 SC 59
23	Pay Commission Vasudeva Nair v. Union of India	1991 Supp. (2) SCC 134
24	Vishaka v. State of Rajasthan	AIR 1997 SC 3011
25	Union Carbide Corpn. v. Union of India	AIR 1992 SC 248
26	Mehta MC v. Union of India	(1999)6 SCC 12
27	Satish Chandra v. State of U.P	1992 Supp (2) SCC 94
28	T. N. Godarvanman v. Union of India	(1999) 9 SCC 151
29	Workmen Birla Textiles v. K. K. Birla	(1999) 3 SCC 475

30	Indian Council of Social Welfare v. State of A.P	(1999) 6 SCC 365
31	Sakshi v. Union of India	(1999) 6 SCC 591
32	Mehta M. C. v. State of T.N	AIR 1991 SC 417
33	Advocates on Record Association v. Union of In India	MANU/SC/0073/1994
34	State of West Bengal and other v. The Committee for Protection of Democratic Rights, West Bengal and Others	AIR 2010 SC 1476
35	State of U.P. and Other. v. Jeet S. Bisht and Anr	MANU/SC/7702/2007 6 SCC 586
36	University of Kerala v. Council, Principals', Colleges, Kerala and Other	Civil Appeal No. 887 of 2009 with S.L.P. decided on 11.11.2009
37	Divisional Manager, Aravali Golf Club and	MANU/SC/4463/2007

	Anr. v. Chander Hass and Another	
38	Common Cause v. Union of India	MANU/SC/7480/2008, (2008) 5 SCC 511
39	Asif Hameed v. State of Jainmu and Kashmir	MANU/SC/0036/l989 ; AIR \Jl989 SC 1899
40	Bandhua Mukti Morcha v. Union of India	MANU/SC/O05l/1983 ; (1984) 3 SCC 161
41	Common Cause (A Regd. Society) v. Union of India and Others	Writ Petition Civil No. 580 of 2003 decided on 11.04.2008.
42	Union of India v. R. Gandhi, President, Madras Bar Association	MANU/SC/0378/2010' (2010) 11 SCC
43	Union of India v. Sankal Chand Himatlal Sheth	MANU/SC/OO65/l977 ; 1977 (4) SCC
44	Supreme Court Advocates-on-Record Association and Ors. v. Union of India	MANU/SC/OO73/l994 ; (1993) 4 SCC 441
45	Chandra Mohan v. State	AIR 1966 SC 1987

	of UP	
46	Indira Nehru Gandhi v. Raj Narain	MANU/SC/O304/1975 ; 1975 Supp SCC 1
47	National Legal Service Authority v. Union of India and Others	Writ Petition Civil no. 400 of 2012 decided on 15.04.2014
48	Shamnad Basheer v. Union of India	W.P. No. 1256 of 2011 decided on 10-03-2015.
49	Madras Bar Association v. Union of India	(2014) 10 SCC 1
50	Union of India v. Madras Bar Association	(2010) 11 SCC 1
51	All India Central Universities Officers Confederation and Others v. Union of India and Others	W.P. (C) Nos. 3034/1999. decided on 2-3-2015
52	Keshav Singh v. State of Punjab and Others	AIR 1965 SC 745
53	P. Sudhirkumar v. The Speaker, A.P.	1989 (2) SCALE 611

	Legislative Assembly	
54	Krishan Kumar v. Union of India	1990 (4) SCC 207.
55	Employee's Welfare Association v. Union of India	AIR 1990 SC 334
56	Union Carbide Corpn. v. Union of India	(1991) 4 SCC 584
57	Minerva Mills Ltd. v. Union of India	AIR 1980 SC 1789
58	S.P. Sampath Kumar v. Union of India	AIR 1987 SC 386
59	Subhash Sharma v. Union of India	AIR 1991 SC 631
60	Smt. Indira Nehru Gandhi v. Raj Narain,	AIR 1975 SC 2299

CHAPTER-1: INTRODUCTION

The Indian Constitution in order to keep away the conferment of complete power in any one agency of the government has established effectively and enshrined the mechanism of check and balances with the object to ensure transparency and efficiency[1]. There are different activities divided in three parts in all the governments which express the people's will. These different departments are named as the executive, legislative, and judicial function of the government. Subsequent to the 3 functions are the three different organs, which are the legislature, the judiciary and the executive. The formulation of law is done by the legislative organ, the executive enforce the same and the judiciary apply these laws to the cases where the breach of law has taken place. Every organ tends to come in the way while staging the activities in the working of another functionary because in their dealings with the general public a stringent demarcation of functions is not possible. Hence, overlapping of functions tend to come into the sight even when acting in range of their own power amongst these organs[2].

An analysis into the given government three agencies and the relationship between the same should be done with the understanding in various other states alongside with India that would provide us a lucid view concerning the scheme of separation of power and its significance in various other Constitutions. India is a quasi-federal structure it has an over-lapping check and balance mechanism but does not have separation of powers in absolute sense. Today each and every system might not opt for the separation of powers in strict sense because that is unwanted as well as not

[1] M.P. Jain, "Indian Constitutional Law", Wadhwa and Company, Nagpur, Fifth Edition, 2005.

[2] Massey, Ip., 'Administrative Law', Easternbook Company, Lucknow, Sixth Eition, 2005.

viable but inference of this notion can be witness in most of the countries in the diluted form.

Change has been witnessed in the regime of Separation of power with the development of PIL and emerging Activism of Judiciary and environmental litigation alongside the practice of judicial review as the fundamental basis and number of amendments in the Indian charter in the combat by each organ in creation of supremacy.

The current paper is with the objective to points stages of change in the scheme of separation like given in Indian charter and as watered down & transformed all the way through exercise and precedent in the Indian history. Its objects to put commentary & reflect on the ongoing tradition and on the practicability & efficacy of the principle of separation of power in force in the today's scenario and comparing the same with consequences the American constitution faced.

1.1. LITREATURE REVIEW

1.1.1. **"M.S. Phiroza Anklasaria, "*Judicial Law Making- Its Strength and Weaknesses*", AIR 2012 Journal. 83"**

Abovementioned piece of writing is taken to recognize the question regarding the weakness & strong point of judicial legislation and its legality, requirement and outcomes.

1.1.2. "Massey, I.P., "*Administrative Law*", Eastern book Company, Luckhnow, 6th Ed., 2005"

The reference to abovementioned book is made here as it gives detail analysis and understanding of scheme of separation of power including its significance and origin in India.

1.1.3. **"Commentary: Jain M.P & S.N Jain, "*Principles of Administrative Law*", Wadhva & Company, Nagpur, 2007."**

This book gives understanding about the jurisdiction, powers and reach of action of all the organs of the administration under the Constitution.

1.1.4. **"Jain, M.P., "*Indian Constitutional Law"*, Wadhwa and company, Nagpur, Fifth Edition, 2005"**

The abovementioned book is used as a reference to help the research of Constitutional structure in regard to Separation of Power in comparison of USA and UKA with India

1.1.5. **"M.C. Jain Kagzi., "*The Indian Administrative Law*", University Of Law Publishing Co. Pvt. Ltd., 2002".**

The abovementioned book is used as a reference to comprehend the jurisdiction, powers, scope of all the agencies of state in India and how the administrative section in context of Separation of Power works in India.

1.1.6. **"Parpworth Neil, "*Constitutional & Administrative Law*", Oxford University Press United Kingdom, 2012."**

The abovementioned book has taken into consideration by the researcher to recognize the link between the system of check and balance, its consequential effects and vitality existing amongst the agencies of the government in India.

1.1.7. **"Subash C. Jain, "*The Constitution of India Select Issue and Perception*" (2000)."**

This book is used as a reference by the researcher to comprehend the question of "power scuffle" between the judicial and legislatives and also to understand mechanism of checks and balances under the Constitutional law.

1.1.8. **"Jain, M.P., "*Indian Constitutional Law*", Wadhwa and company, Nagpur, Fifth Edition, 2005"**

This book is used as a reference to help the research of Constitutional structure in regard to Separation of Power in comparison of USA and UKA with India

1.1.9. "Nidhi Singh, Anurah Vijay., *"Separation of Powers: Constitutional Plan and Practice"*, International Journal of Scientific and Research Publications, Volume 3, Issue 11, November 2013"

This commentary is used as reference by the researcher to comprehend the principle of scheme of separation of Power foreseen in the Constitution of India and the problems seen by the different departments of the government in force even as executing the provision of the Constitution in letter and spirit

1.2. STATEMENT OF PROBLEM

It is of importance that there is a smooth functioning of government to run a democratic country and this can be done by protecting the liberty of individual and avoid the conflict between the legislative, executive and judiciary. Separation of power is highly needed in form of checks and balances so that there is no trespassing of the area defined under each government department. But separation of power in absolute sense is not possible. Absolute Separation of power will give birth to arbitrariness. In a rigid sense it is impossible to keep check and balances which will eliminate the idea of democratic system and the constitutionalism would be in jeopardy.

The doctrine is without any stretch of imagination is an unambiguous set of concept. It is a field of political thoughts and there has been confusion in use and defining of the attributes. Stand alone on the theory of government basis, the Doctrine has been unsuccessful to provide an effective and stable political system. Nevertheless, the history reveals that the basic principles and vital ideology of the Doctrine has always had a hold on the system

Active judiciary and its legitimacy are adjoined with the constitutional limits based on a broad division of powers which are enshrined in the constitution. The prime objection that outs the notion of Judicial Activism is the Doctrine of Separation of power as every organ has a specific function and usurpation of such function by any other organ is questionable on account of harmonious working of the constitution. One of the prime concerns of the political thinkers since the inception has been to devise best method against the gathering of arbitrary power

between among the governmental agencies. Many a times it has been suggested that the government should be law and not of the men. Numerous times the conflict of limited utility of judicial review in legislative-executive has been demonstrated. "There is a need of changes keeping in view the changing dynamics of the political system, reasonable restrictions are to be placed upon the executive, legislative and judiciary in a compartment form but not in watertight compartment form."[3]

1.3. CONCEPTUAL FRAMEWORK

Separation of Power: The Scheme of Separation of Power is a process of controlling the accumulation of forces in a particular department of the government, making it harder to misuse. AS per the principle of Separation of Power the three powers i.e. the executive, judiciary and legislative must be kept separate for a free democracy and must be practiced by different organs of the government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

Judicial Review: As a vital component of rule of law, the judicial review has in itself the concept of separation of power, which is a basic feature of the Indian Constitution. On anvil of rule of law every action of the State is being tested and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The power of Judicial Review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the

[3] Shriya Singh and Mukund Sarda, *"A Study On The Doctrine Of Separtion Of Powerof Montesquie In Refrence To Current Plans And Practices"* Department of Law, New Law College, Pune, Volume 8, Issue 1, June, 2017

judiciary in India has come to control by judicial review every aspect of governmental and public functions.

1.4. OBJECTIVES

1.4.1. To study the implementation of Doctrine of Separation of Power in India

1.4.2. To study the practice of Separation of Power in India in comparison to U.K and American Constitution

1.4.3. To comprehend the factors affecting Scheme of Separating of Power in India

1.4.4. To find out whether Judicial Trends is affecting the practice of Separation of Power in India

1.5. SIGNIFICANCE OF STUDY

The study will help in understanding the working of Separation of Power in India. It will analyse the effect of judicial trends on the scheme of separation of power with a slight comparison to the ideology of doctrine is U.S and U.K.

1.6. SCOPE OF THE STUDY

The researcher restricts its research to the borders of India concerning the issue of trend analysis in context to the Doctrine of Separation of Power by the Indian Judiciary. A slight reference has been made to the US and UK Constitution for purpose of comparison for understanding the philosophy of the Separation of Power as enshrined under the Indian Constitution.

The author has connected the jurisprudential notion of scheme of Separation of Power while mapping the Indian Judiciary trend over the operation of the doctrine of separation of power.

1.7. HYPOTHESIS

1.7.1. Judicial trends are leading to dilation of Scheme of Separating of Power

1.7.2. Separation of power is not strictly complied in India

1.8. RESAERCH QUESTIONS

1.8.1. Whether India practice absolute Scheme of Separating of Power

1.8.2. Whether the force of judicial review is a hindrance in practice of scheme of separation?

1.8.3. Whether the power of judicial review misused to get more power over the other departments of the government?

1.8.4. Why is Separation of Power not followed strictly in India?

1.9. RESEARCH METHODOLOGY

The study will be doctrinal in nature. It will be a qualitative research. It will also be analytical and explanatory to some extent.

The literary survey undertaken for this research is principally based on secondary data available in the University library which includes various books and periodical available in the library as well as various online available sources. The researcher has also used various data from legislatures, literature and precedents on the said topic.

1.10. CHAPTERIZATION

1.10.1. Introduction

1.10.2. Separation of power in India

1.10.3. Constitutional Provision

1.10.4. Separation of Power in USA and U.K.

1.10.5. Judicial Activism and Judicial trends

1.10.6. Limits of judiciary

1.10.7. Conclusion

CHAPTER-2: SEPARATION OF POWER: CONCEPTUAL FRAMEWORK

The historical concept of principle of separation of power has been broad-sized bringing into existence the wider framework, the concept referred to as *historical gloss*[4]. There are some arguments among the critics that the historical concept is not given appropriate amount of recognition.

To understand the one in practice, it is necessary to gain complete understanding of the historical evolution of the concept. Man has been looking for devices to build up efficient control mechanism, to hold the oppression and authoritarianism forces. One such device to be conceived was "Separation of Powers"[5]. It might be hard to state precisely the origin of the doctrine of separation of powers.

The first to formulate the concept of doctrine of separation of power was Montesquieu in his book having the political and individual liberty as the subject area. Montesquieu made the observation that "political liberty" could only be achieved when one single person or single department is not vested with all the power[6]. He further believed that power should be such that it creates the scenario of checks and balances on other powers. He divided powers into 'public resolution execution' 'enacting laws' and

[4] Bradely. CA., Morrsion, T.W. "Historical Gloss and the Separation Of Powers, Harvard Law Review, Volume 126, Issue 2" at pp. 411.

[5] Jaiin M.P. and SN Jaiin, "Principles of Administrative Law", Wadhva & Companies, Nagpurr, 2007, p 31 And 32.

[6] Calabresi S.G., Breghausen ME, Albertson S, "*The Rise And Fall Of The Separation Of Power* 2012, Northwestern University Law Review, Volume 106, Issue 2" at pp. 527.

"trying the causes of individuals"[7]. In literature, "De L'Esprit des Lois[8], Montesquieu":

"*When legislative power is united with executive power in a single person or in a single body of the magistrates, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will executive them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals".*[9]

Aritotle, among various other philosophers have also advocated the scheme of separation. The conjecture given by Montesquieu highlights particularly the meaning of judiciary's independence. [10]. He as well pointed that if judges are to perform their functions judicial independence is of essence.

The Greek philosopher Aristotle remarked that:

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[7] Manning J.F. 1939, '*Separation of Power as Ordinary Interpretation',* Harvard law Review, Volume 124, pp. 1994.

[8] The Spirit of Laws, 1748.

[9] Neil Parpeworth , "*Constitutional & Administrative Law,* Oxford University Press United Kingdom, 2012, pp 20-22".

[10] Cooray JAL., 1973, "*Constitutional and Administrative Law of Sri Lanka*, Colombo" at p. 108.

"There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. The three are, first the deliberative, which discusses everything of common importance; second, the officials . . .; and third, the judicial element."[11]

John Locke, primarily recognized the seperate hands of the government into executive, legislative and judiciary. In Locke's observation, the administrative force was beyond compare and even though the administrative and federative power were particular, the worry was about the carrying out of household legislation in the boundaries of the state and the other with a the outer relation's of the state and its security, he was of the opinion that, they are fundamentally dependently coupled collectively in the hands of similar people. Moreover, the most ideal practice of these forces is cultivated not via detachment however instead on the reason of trust. Thus, Locke's perception doesn't, completely, sumup to the Scheme of Separation of Power.

The principle did see the total growth under the Baron de Montesquieu aka Charles Louis de second. It was observed by him that the authentic foundation of oppressive Tudors and absolutist Stuarts, set up that chance was not protected, if powers were held in the like hands of the administrative forces and officials. His thought of Doctrine of Separation of power was derived from his interpretation of relations among the Parliament and the Stuart King.

[11] Neil Parpeworth "*Constitutional and Administrative Law* 9th Edition, Oxford University Press, 2009, p 19-20".

"He was of the view that the Parliament definitely cannot be self-assertive, and the foreswearing of authoritative energy to the King alone could make the lead by extemporary pronouncements unthinkable"[12].

Montesquieu encountered the tyranny in the monarchical France, probably would have observed the situation on another side of the Channel with jealousy. Another portion of the 17th century, he did not let it go not witnessed that the Englishmen took the shelter under the warm sunshine of the Magna Carta. The English Kingman was left with no right as his power of administration and evaluation forces were taken away. The laws then were established by the Parliament. Moreover, instipe of the fact no organised basis was created for His Majesty's Government were managing the laws the Parliament passed. Prior over the period the judges, likewise to the "Great Coke", could not be disposed off by the Emperor at his force, in the light of the fact that the "Act of Settlement" provided them with occupancy during fine performance as differentiate from term at the His Highness's pleasure. Montesquieu guessed separate and utilitarian autonomy of the three different departments from each other of the Government was the mystery of freedom of Englishmen[13].

[12] J. Goldworthy, 2010, "*Parliamentary Sovereignty, Contemporary Debates*, Cambridge University Press."

[13] Jain Kagzi "M.C.,*The Indian Administrative Law*, University Law Publishing Co. Pvt. Ltd., 2002", p 15 and 16.

2.1. DOCTRINE OF SEPARATION OF POWER IN INDIA

In India, the Doctrine of Separation of Powers has not been recognition in the Indian Constitution. Though, Article 50 of the Indian constitution gives the hint of the concept. It states that "the state should take steps to separate judiciary from the executive in the public services of the State"[14]. When compared to other constitution it is an interesting provision as it attempts to create a clears demarcation between the judicial and executive authority of government which is a step forward towards the democracy in a stricter sense. There is a specific need to establish such provisions, as general assumption is there that judicial powers could be usurped or curbed by the executive and to prevent the executive and to prevent the executive interference it an important step to be taken. One of the reason as why India is fortunate to witness activist judges is the addition of this provision. In the case of K. Veeraswamy v. Union of India and Other[15], the Justice Krishna Iyer stated that "*independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government pleasure*"[16]. In this case in relation to impeachment of the President, the problem of interference of executive into the sphere of judiciary was taken up.

[14] "The Constitution of Sovereign Socialist Secular Democratic Republic of India- 1949".

[15][1991] 3 SCR 189.

[16] Citedin "*K. Veeraswamy v. Union of India and Others"* supra.

2.1.1. CONSTITUTIONAL PROVISIONS

The doctrine of Separation of power is important mostly in the area of judicial independence. Article 162 of the Indian Constitution provides the guarantee of restricting the power of executive. The Article might at first instance seem tilted towards the executive, it may construe that the executive has power to interfere in any matter over which the legislature have power but this power has been curbed by the proviso that states that the executive powers are also limited to parliamentary rules and subject to provisions of constitution.

A guarantee is being provided by the constitution through these provisions that executive is prevented from acting *ultra vires.* President can be impeached under Article56 for violation of Constitution. Under Article 53 the powers which are executive power of the union are bestow upon the President and under Article 154 the Governor is entrusted with execution powers but they do exercise their forces with the aid and advice of the members of Council at the Centre[17] and at the State. Both Governor and President performing legislative functions exercise the ordinance making power under the constitution. President establishes legislation for State, after the dissolution of State Legislature, following the burden of the President's Rule[18]. Under Article 103, President has the authority to debar any member of the house. The President appoints the judges of the Supreme Court, while the power of impeachment of Judges is entrusted upon the parliament. The President is entrusted with the

[17] Art. 74, The Indian Constitution.

[18] Art. 356, The Indian Constitution.

power to decide a disputed issue of the age of a judge of Supreme Court or any High Court for purpose of set restrain from the judicial service.

The Union Council of Ministers is answerable to the Lok Sabha[19]. The house has the powers to commence impeachment proceedings against the President[20] and the judges of the Supreme Court. Under Article 75(5), the members of Council of Ministers would be the members of Parliament of either house meaning there will be overlap of personnel also. In some aspects the Parliament's judicial capacity is extensively generous. Parliament can take into consideration any problem of breach privilege that Parliament holds; and for a situation where charge is established they have force to penalize for their disdain.

The Executive are vested with the role of legislation in the shelter of Delegated Legislation in India. For the sake of administrative adjudication of the right of individual citizens, the administrative agency that is statutory tribunals and domestic tribunals has been established to perform judicial function.[21]

The High Courts under some trivial areas carry out functions of administrative nature rather than judicial. Article 227 gives the authority of supervision on the other subordinate courts is nothing less of the administrative nature than

[19] Art. 75, The Indian Constitution

[20] Article 61, The Constitution of India.

[21] Jain Kagzi MC., *"The Indian Administrative Law*, University Law Publishing Co. Pvt. Ltd., 2002", p 19 & 20.

judicial one. Article 228 gives the power to transfer the cases and this they implement over the State local Courts and the forces of administrative control as well. The legislative forces of the H.C. and the Supreme Court include the authority to establish rules and thus giving it fairly wide outlook of powers.

2.1.2. SCHEME 0F SEPARATION OF POWERS – JUDICIAL OPINION

There are various countries whose constitution allows the president to be directly or indirectly involved in the process of appointment of judges. This tends to be as hindrance on independency of judiciary. When conceptualizing independence of judiciary various types of independence can be drawn out from it. In *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee & Others* it was stated *"The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices."*

There has been quite some landmark judgments that has transformed the scheme of principle of separation of powers in the Country. These are spoken off under this section. The Judicial faces of India have been seen in a wider range in context to alteration, acceptance, and practice of Scheme of Separation of Power by the Judges. The major legality of scheme of separation of forces is in the context that an agency ought not to anticipate the principle

essentials of the other organ. This observation was made in Supreme Court in Ram Jawaaya Kapur versus. State of Punjab[22]

"…Constitution has not recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different branches or parts of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by part of the state or one organ, of functions that essentially belong to another."[23]

Since after the Kesavananda Bharti v. State of Kerala[24], and the judicial expression of the doctrine of basic structure and vital features of the Constitution therein, the separation of powers is spoken as a structural basis of the frame work of the constitution and cannot be destroyed by any amendment[25]. The doctrine seeks to effect increasingly functional division and puts less and less emphasis on organizational pattern. In re Delhi Laws Act case[26], Hon'ble Kania, CJ., observed that.

"Although in the Constitution of India. . . . . there is no expressed separation of power, it is apparent that a legislature is formed by the Constitution and detailed provisions are made for making that legislature pass laws. Is it too much to say then that under the Constitution the duty to make laws, the duty to

[22] All India Reporter 1955 SC 549.

[23] Massey IP., *"Administrative Law,* Eastern Book Company, Lucknow, 2012", p 45.

[24] Kesavananda Bharti v. State of Kerala, All India Reporter 1973 SC 1461.

[25] Supra 20.

[26] All India Reporter 1951 SC 332.

exercise its own wisdom, judgment and patriotism in making law is chiefly cast on Legislature? Does it not imply that if not it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?"[27]

Therefore, the functions of various different organs are clearly earmark so that one organ does not usurp the functions of other organs.

In Indira Nehru Gandhi v. Raj Narain[28], Ray CJ., also observed that there is separation of powers in Indian Constitution in broad sense. The observation was made by Beg, J., that basic structure also embodies the doctrine of separation of powers and even under Article 368 none of the pillars of the Indian Republic can take over the other functions.

One many giving a look at the Indian Constitution's provision, may say that the Indian Constitution have accept the scheme of broad division of the power of the departments.

In "Bandhuva Mukti Morcha v. Union of India" [29], Pathak J., observed:

"*The Constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the division is not precisely demarcated, there is general acknowledgment of its limits. The limits*

[27] Supra note 4.

[28] Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299.

[29] Bandhuva Mukti Morcha v. Union of India, All India Reporter 1984 SC 802.

can be gathered from the written text of the Constitution, from conventions and constitutional practice, and from an entire array of judicial decisions."[30]

In "Golaknath v. State of Punjab"[31], Subba Rao, CJ.,observed:

"*The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them."*[32]

The court defined necessary functions in Mallikaarjuna versus State of Andhra Pradesh[33], the direction to State Government was given by the Andhra Pradesh Administrative Tribunal "to evolve proper and rational method of determination of seniority among the veterinary surgeons in the matters of promotions to next higher rank of Assistant Director of Veterinary Surgeons". The Supreme Court under Article 309 of the Constitution established that the power to make the rules under the legislative forces to be exercised which has to be taken out by the Governors of the states or President and quashed the aforementioned direction. A mandate cannot be issued by the Administrative Tribunals or the High Court to the State administration to legislate in any matter. Like this the theory of restraints

[30] Upadhaya JJR,., "*Administrative La*', Central Law Agency, 2006", p 40.

[31] Golaknath v. State of Punjab, AIR 1967 SC 1643.

[32] Id.

[33] Mallikaarjuna v. State of Andhra Pradesh, AIR 1990 SC 1251.

stops the organs of the Government from becoming superior to another or others in action.

Also Supreme Court in I.R. Coelho v. State of Tamil Nadu case took the viewpoint stated in Kesavananada Bhaarati case concerning to the scheme of basic structure, stated that the Ninth Schedule is violative of the scheme and thus the Ninth Schedule would be open to amendments to judicial review and will also form part of the theory of basic structure. From the few above mentioned case laws right from Ram Jawaya v. State of Punjab[34] in 1955 to I.R. Coelho v. State of Tamil Nadu[35], there has been an extensive change of opinion as in the beginning the court was of the view that as such there is no Doctrine of Separation of Power in the constitution of India but then as the times passed the opinion of the Supreme Court has also changed and now it is of the view that Doctrine of separation of power is included in the basic feature of the Indian constitution. The proponents of procedural democracy take into consideration the possibility of unjust outcomes of the decision-making process, but they consider these cases as extremely unlikely and as exceptional side-effects. They state that imposing substantive limits on democracy would necessarily lead to the preference of one interpretation of justice to the other, such as the substantive concept of the separation of powers. Preferring the justice of one to the other methodically limits equal treatment is taken to equal account when operating the state. The state as such without procedural equality cannot be justified[36].

[34] "Ram Jawaya v. State of Punjab", All India Reporter 1995 SC 549.

[35] "I.R. Coelho v. State of Tamil Nadu" , All India Reporter 2007 SC 861.

[36] Supra note 11.

2.2. DOCTRINE OF SEPARATION OF POWERS IN UK

It is necessary to study the constitutional setup of the country to which India has been a colony and have taken the idea of from government to run the country. U.K. follows a parliamentary form of government where the actual legislative actions are carried by the Parliament like India and where the crown is the nominal head. Doctrine of Separation of power is completely refuted by the existence of cabinet system. In this instead of Crown, Cabinet is the real head.

Bagehot quotes Cabinet as "hyphen that joins, the buckle that binds the executive and legislative departments together."[37] Membership of parliament, legislative initiative, and its leadership and collective responsibility sums up the eminent features of Cabinet in England. Therefore there is no distinction in the political system of England in the jurisdiction of the legislature, judiciary and executive.

2.2.1. FORM OF GOVERNMENT

In England, separation of power has historical relevance only. Daniel Ullman says, "U.K. is not the classic home of the separation of powers. Each power there has taken on a attribute of its own, while at the same time preserving the features of the others." The U.K. has a hint of scheme of separation of powers, except it is more of informal unlike United States. The concept of Mixed Government by Black Stones with mechanism of checks and balances is more appropriate to the U.K.. Scheme of Separation of powers is not a predominant or an supreme feature

[37] Ibid.

of the U.K. Constitution. The 3 branches continue to have significant overlap as they are not formally separated from each other.

The U.K. is becoming more and more concerned with the Separation of powers, predominantly because of Article 6 of the European Convention on Human Rights which protects the right to fair trial. The Constitutional Reforms Act, 2005 brought the reforms that the office of the Law Lords and the Lord Chancellor will stop being in the legislature. The establishment of Supreme Court of United Kingdom is provided under Section 23 of the Act. The Supreme Court whose powers have been differentiated from that of Parliament has become functional since October, 2009. Section 61 of Constitutional Reforms Act, 2005 provides for Constitution of Judicial Appointments Commission, for appointments of Judges in the Supreme Court as well as the court of appeal. Hence, large independence of Judiciary has been ensured by the Constitutional Reforms Act, 2005[38].

On various occasions, senior judges have articulated the view that the U.K. Constitution is base on a separation of powers. Thus in Duport Steels Ltd. v. Sirs, Lord Diplock stated that:

"At a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasized that the British Constitution,

[38] M.P. Jain & S.N. Jain, "*Principles of Administrative Law*", 2007, Wadhva & Compan, Nagpur, p 25.

though largely unwritten, is firmly based in the separation of powers; Parliament makes the laws, the judiciary interprets them."[39]

2.3. DOCTRINE OF SEPARATION OF POWER IN USA

U.S. is the birthplace of doctrine of separation of power. It is an important principle in the constitution that powers given to a department should stringently be exercised by that department without encroaching upon the powers given to others. The American constitutional framers held that the principle of separation of powers will help in preventing too much exercise by single group which might lead to the rise of tyrannical government.[40] Hence, the American government was intended with distinct separation of power in order to keep government leaders accountable to the citizen they represent and to each other. Therefore, they intended that the balance of power between separate organs of the government should be attained by checks and balances.

Governmental powers and responsibilities are too complex, intentionally overlap and are interrelated to be neatly compartmentalised. Hence, there is an innate measure of conflict and competition among the branches of States. There also has

[39] Parpeworth Neil, "*Constitutional & Administrative Law,* 2012, Oxford University Press United Kingdom", , p 26-27.

[40] Seervai H.M, "*Constitutional Law of India",* fourth[th] edition., Universal Law publication, Volume 3, 1996, pg 2251.

been flow and ebb throughout American history of pre-eminence among the government branches. The experience suggests that a part of an evolutionary process resides in the power[41]. This alternative system existing prevents any organ to become supreme with the separation doctrine[42].

The basis of American constitutional structure is formed by doctrine of separation. Articles I, II and III entrust and seperate the powers and demonstrate the theory of separation. Article I entrusts parliamentary power in the Congress; Article. II assures executive power in President and Article. III vets power of judiciary in the Supreme Court[43].The model of separation of power, both practical and personnel are yet concealed. It is said therein, that-

"The legislative division should never practice the executive or judicial forces, or both of them; the executive might never practice the legislative and judicial powers, or both of them; the judiciary should never practice the executive or legislative powers, or both of them; to the end it might be a government of law and not of men"[44]

[41] http://www.nscl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx last accessed 3/07/2020.

[42] http://www.legalserviceindia.com/article/116-Separation-of-Powers.html last accessed 3/07/2020.

[43] Supra note 4.

[44] Ibid pg - 32

2.3.1. FORM OF GOVERNMENT

The outline of government in United States propounds on the concept of separation between the executive and the legislative and characterized as presidential. The President is the chief executive as well as the head of the state as well as. He wheels the policies and procedures of government departments and employ and dismiss other administrative officials. The persons in power of the different departments, who is elected as the Secretaries, embrace the office at the President's pleasure, and are accountable to him and are more of his personal counsellors. The President isn't obligated or mandated to agree to the counsel of a Secretary and the concluding decision lies with the President. Any member of the executive or the President is not a Congress member and thus a differentiation is kept between the executive and legislative organs. This arrangement of the government is essentially different from the parliamentary system that prevails in our Country[45]. In India the cabinet is communally accountable to the Parliament whereas in U.S.A., the President is not in conjecture accountable to the Congress. The President do not depends on widely held support in the Congress and has a prearranged tenure of office. Prior to the expiry of his term, only through extreme cumbersome process of impeachment he can be removed. Nor can the congress be dissolved by the President though in India, the power is granted to the Prime Minister of seeking dissolution of the same. Thus, effective leadership cannot be provided by the executive to the legislature and not all the time it is that the Congress will accept the policy and the programme

[45] Supra38.

designed by the executive. The "Independence of the Supreme Court" is guaranteed[46].

2.3.2. STRICT SEPARATION OF POWER

The U.S constitution may reflect on absolute separation of power but it in-builds' some exceptions to the scheme of division with the aim to establish the mechanism of check and balances. As a result, the American constitution is said to have "Strict Separation of Power".

For example, the President may veto a bill passed by the Congress and, to this extent it may be said that legislative function is been practiced down by the President. Furthermore, recruitment of certain higher level officials is question matter to the endorsement of the Senate. Also, treaty formulated by the Presidents until acknowledged by the Senate are not said to be effective; to this extent; therefore, the Senate can be said to as practicing the executive functions. The Congress has the power to tax and sanction money for governmental operations and continuously through its various committees probes into executive functioning. The Supreme Court holds the power to declare the Acts passed by the Congress unconstitutional. But the judges of the Supreme Court are appointed with the consent of the Senate by the President. This practice of the function of one organ by an organ of the other is justified on the base of the theory of checks and balances. It means that the functioning

[46] Ibid

of the organ is measured and checked by the other organ so that no organ run amok with its powers and misuses them[47].

In the case of Panama Refining Company v. Ryan[48], commenting on the practicality of the doctrine J. Cardozo said:

"*The convention of "Separation of Powers" is not an inflexible idea to be made utilization of with pompous thoroughness. There must be sensible guess, there must be flexibility of modification accordingly the pragmatic necessities of government which can't predict today the improvement of tomorrow in their almost limitless assortment*".[49]

2.3.3. GROWTH OF ADMINISTARTION AND DELEGATED LEGISLATION

Doctrine of separation of power and administrative law are somewhere irreconcilable, for contemporary executive procedure envisage mingled functions of many types at the executive level. If the separation of power had been put in application firmly in the America, the establishment of contemporary government may have turn impracticable as development of administrative procedure would have been tremendously tricky. Therefore, for realistic reasons the separation of power has to be

[47] Ibid.

[48] 1935 293 U.S. 388(400).

[49] http://www.ijsrp.org/research-paper-1113/ijsrp-p2337.pdf last accessed: 3/07/2020

watered down to some extent to accommodate the development of administrative process.[50]

The Administrative Law of America has some specific elements which are a consequence of distribution regulation. A vast split of the theory happened and scheme of delegated legislation came in trend at the point where the courts yield the executive authorities could be empowered by the legislative power. Regardless, in a proposal to put up the aloofness precept, it is put out by the courts that the Congress cannot show a boundary less parliamentary force on an executive, that the Congress ought not renounce its spot of vital official and that the Congress for that reason put out the understanding which the pass on is to take after, while creating the principles[51]

[50] Supra note 28.

[51] Ibid .

CHAPTER-3: THE LEGAL STANDINGS AND CONSTRAINTS: JUDICIAL DELINEATION

The Judiciary, the legislature and the Executive are the three separate agencies or organs of the State assigned with the absolute powers of governance by rule of law to the state-meaning, beneath and in connivance with the Constitution of India as by law recognized and laws established there under are in accordance therewith. Since, though, the work of governance of the State by rule of law is not entrusted entirely to one organ or agency absolutely - but it is a many-sided task entrusted to all the three organs or agencies of the State mandated to function in co-operation with each other – under currents of conflict are likely to be seen when the function of one agency or organ intrudes on that of the other or the way of performance and perceptions vary. Since in justice both administration and legislation – as well as its enforcement are the main components of rule of law and directly concern the governance of the country, the possibility of a conflict, in particular, in the field of law-making may be more distinct in the area of "judicial review", under Art 141, a function entirely entrusted by the Constitution to the judiciary, to test the legality of legislation on the touchstone of the Constitution and declare it as valid or invalid. In doing so the judiciary interprets the legislation in the view point of the provisions of which it is challenged under the Constitution and proceeds to formulate pronounce and lay down its own statement of law, on the subject in the form of a judicial pronouncement. Judicial review established way back in 1903 by Chief Justice John Marshall, it is thus the most important instrument of governance of the State by administration of justice, who stated the principle that legislative enactments be subservient to the Constitution and it was

the function of the Court itself to ponder upon whether the legislature was applicable or invalid as held in "Marbury v. Madison"[52]. As a result a crucial query that arose to ponder upon is the spirit which department of the state is a legislation authority, if Act enacted by the legislation has to beat the test of judicial review, than can the judges' suo motto enact laws? Shall the judicial put themselves in such procedure or they shall hold themselves limit to the interpretation of legislation made by the Parliament?[53]

3.1. POWER OF JUDICIARY

By the common meaning of law enclosed in the judicial dictionaries – "Judicial law or judge made law is law[54] refers to law as combined of legal principles and legislation judicial precedents". Roscoe Pound in his literatures mentions that "there are two kinds of law- first being an crucial rule laid down of a politically controlled society by a law making organ deriving its force from the power of the sovereign and the second, being a ethical or rational idea of the rule of right or justice, deriving authority from its reasonableness - that is recognized as law, though not established by the sovereign"[55]. According to the Blackstone's explanation, civil conduct is the rule of law, prescribed by the S.C. powers,

[52] 5 U.S.,137(18O3).

[53] M.S. Phiroza Anlasaria, "*Judicial Law Making- Its Strength and Weakness",* All India Reporter 2012 Journal. 83

[54] M.P. Jain, "*Indian Constitutional Law*, Nagpur, Wadwa, p 563".

[55] Ibid.

ordering what is right and wrong is been prohibited[56]. To its generalization, expression of principles of justice equity and good conscience is law[57]. While in some system of law, judicial law is just evidence under the law but not a law, but under the Indian legal system, judicial law/judge made law – is law. The point, to be taken into consideration about judge made law made beside legislation established by the Legislature, is that – the authority to make law under the legislature is expressly circumscribed and defined by the Constitution[58]; such restriction is not explicitly made in judicial law making. Under Article 32 the Supreme Court can pass all such orders in the facts of the case as may be essential to grant relief against infringement of Part III of the Constitution containing the fundamental rights and/or pass between the parties such other orders under Article 142 as it "deems fit to do complete justice". Thus for example, in Gloaknath v. State of Punjab[59] under the combined powers of Arts. 32 and I4 the doctrine of "prospective overruling" was innovated by the Supreme Court - so that its past precedents on the similar subject remains unaltered by the potential change in law: while the Supreme Court in Paramjit Kaur v. State of Punjab[60] conferred powers on the Human Rights Authority far away from the scope of the powers sanctioned by the Human Rights Act. 1993 itself, under which the said body is established. Inherent faith and trust is placed by the Constitution over judicial law making. Judicial Law made by the judge during the trial good or bad is added in the statute book of law as enforceable and binding until corrected or changed. Exercise by

[56] Ibid.

[57] "Dalima Cement v. Union of India 1996 (10) SCC 104".

[58] Articles 245 and 246, rw Seventh Schedule.

[59] Gloaknath v. State of Punjab, All India Reporter 1967 SC 1643.

[60] All India Reporter 1999 2 SCC 131.

the judiciary of wide-ranging forces and circumspection require a strong and mature quality demonstrated by a best sense of humanity, righteousness, impartial judgment and accountability so that the device of review of judiciary can be twisted inwardly and used when required in opposition of the judiciary as well and not used only to correct the legislature alone, especially the time where judicial law making wrong interpretation on essential provision of the Indian Charter.

In "Tika Ram and Others v. State of UP & Others"[61] the Courts was of the opinion that Legislature has no authority to overrule the decision once declared by the court when this Court had stated a particular law to be not valid. Nevertheless, it has the power to appropriately amend the legislation by employ of appropriate phrasing removing the defect the Court stated out and by making amendments in the law not coherent with the declared law of the Court in order that the defects those were set out were not in the statute for application as legislations. Such a use of forces of amending the law isn't an invasion on the forces of judiciary but as a legislative practice on the constituent force to rightfully change the legislation and to legalize those invalid acts those have been so stated.[62] Courts have known the reality that authority to the Parliament to make law has been given by the Constitution[63] and Government can't be engaged to make on any subject matter the legislation depending and proliferating the Constitutionalism theory. Hence the Supreme Court in Mahaarishi Avdesh versus Union of India[64], disagreed to

[61] Paragraph 10, 2009(8) SC J 37.

[62] "Doctrine of Eclipse under Constitutional law. PK Majumdar & RP Kataria, *Commentary on the Constitution of India*, 10 th Edition, 2009".

[63] Article 245 and 246, read with Seventh ScheduleArts.

[64] 1994 (1) SCC 733.

order a writ ordering to make a rights regarding Muslim Women or a Common Code as well as for the Muslims.

Similarly, in English Medium Student versus State of Karnataka[65] witnessed no violation of any fundamental right, the matter was entirely of a political kind like CM's appointment of a State through Venkatachalam versus Rabri Devi[66]or where the matter lies on the knowledge or information of the Government and its upliftment of the state of law and order like whether an emergency issued should be in continual or not. In Bhuthnath versus State of W.B.[67], Courts have conceded and treasured, it is not the Courts but the Government rules the country and the device of judicial review is accessible merely to preserve and safeguard the Constitution and not as to alternate the decision or view of the Government by that of the Courts. The courts respecting the very identical rationale have constantly refused to get in the way of economic policy instructions issued by the Peerless General Insurance v. RBI[68] or in the administration of the Stock Exchanges in Om Prakash v. Delhi Stock Exchange[69] or with price fixation Sitaram Sugar v. Union of India[70] or in the administration of Co-operative Societies in Bhandara Dist. Co-op. Bank v. State of Maharashtra[71]. The Supreme Court has also kept away from

[65] English Medium Student v. State of Karnataka, AIR 1994 SC 1702.

[66] Venkatachalam v. Rabri Devi (1997) 5 SCALE 632.

[67] Bhuthnath v. State of W.B. (AIR 1974 SC 806).

[68] AIR 1992 SC 1033.

[69] Om Prakash v. Delhi Stock Exchange (1994) 2 SCC 117.

[70] Sitaram Sugar v. Union of India AIR 1990 SC 1277.

[71] .Bhandara District Cooperative. Bank v. State of Maharashtra, All India Reporter 1993 SC 59.

investigation with or disturbing findings of expert committes like the Pay Commission Vasudeva Nair v. Union of India.[72]

3.2. ENACTMENT OF LAWS BY JUDICIARY

Judicial Law making is appreciable and evident not only in Constitutional matters but Judge made law is witnessed at its natural form when there is no procedural law or specific legislation of stare decisis, res judicata, precedents etc. Good examples of pure Judge made law are witnessed in the Cases of Torts and equity. In Cases like Vishaka v. State of Rajasthan[73], the Supreme Court issued guidelines against sexual harassment at work places for the working women in the non-presence of coherent legislation or legislatures that are yet to be enacted by the legislation. The S.C. in the case Union Carbid Corporation. Versus. Union of India[74] where the liability arose from the incident of gas leakage laid down the principle of "polluter pays"; the standards were laid down by the Supreme Court allowable for automobile emission in Mehta M.C. versus. Union of India[75]; the court lays down the principles in Satish Chandra v. State of UP[76] for plummeting atmospheric pollution; the principles for the protection and preservation of forests were laid down in T.N. Godarvaanman versus. Union of India[77]; the guidelines in

[72] Pay Commission Vaasudeva Naair v. Union of India, 1991 Supp. (2) SCC 134.

[73] Vishakha versus. State of Rajasthan All India Reporter 1997 SC 3011.

[74] Union Carbide Corporation. v. Union of India All India Reporter 1992 SC 248.

[75] MC Mehta versus. Union of India (19990 6 SCC 248.

[76] Satish Chandra versus. State of UP 1992 Supp(2) SCC 94.

[77] T.N. Godarvanman versus. Union of India (1999) 9 SCC 151.

Workmen Birla Textile versus. K.K. Birla[78] are set for closure and shifting of hazardous factories, the above mentioned are some illustrations of judicial legislation made in the area of ecological and social awareness. Various areas are witness which is totally untouched by the legislature as no specific laws are made in those areas and thus, the Supreme Court is said to be reasonable in principles and guidelines laid down to deal as part of its administrative responsibility of justice in the required cases. This is to ensure that same situation if arises in future does not go unnoticed by the law. Therefore, the Supreme Court in Sakshi v. Union of India[79] laid down the guidelines to prevent children from sexual abuse; the Supreme Court in MC. Mehta v. State of T.N.[80] forbids children's employment in hazardous factories. There are various cases in environmental and social fields and accusations of being "activists" or 'super administrators' on the Courts are often made. Judicial Law making doesn't not come in the way of legislature as no such legislations in these societal and environmental legislation body. Such laws made are completely authoritarian in nature and meaning to immediately deal with the circumstances on hand and strengthens the legal system. The states where there are no sufficient laws or no laws at all for particular situation or existing laws are not brought into force, it s a beneficent act to have Judiciary made law. Here the sole aim of the judiciary is justice and ensuring that justice is provided to all and nobody suffers because of unavailability or lack of already active legislated legislations.

[78] Workmen Birla Textiles versus. K.K. Birla (1999) 3 SCC 475.

[79] Sakshi versus. Union of India (1999) 6 SCC 591.

[80] MC. Mehta versus. State of T.N (1999) 6 SCC 417.

3.3. SHOULD JUDGE MADE LAW BE ENACTED

Comprised in the Statue- terse and cryptic are the bare tests of law. Substance and meaning are infused in it by Judicial Law making which or else not shown on the face. As long as the constitution is taken into the consideration, judge mad law are fundamentally interpretive in nature. Generally, judicial law making in other area is rein over by practicability, powerful common sense & the requirement to solve the problem and/or to provide effectual aid. Thus, judicial law making is about the interpretation as well as the applicability to the facts and hence, it is absolutely necessary and quite inevitable as a part of administration of justice.

In spite of all the efforts put into detachment and separation of the judicial law making and legislative functions, having considered to the same aim of both the organs, considerations of over encroachment and over stepping of the function over one another takes place due to the reason that the judiciary is to present good governance in accord with the Constitution. This situation should be handle with statesmanship and maturity forever carrying in minds that – "a system built on the discoveries of many great minds was always of more strength than what is produced by the workings of any one mind, which of itself can do little" jotted by Dr. Samul Jonson.

Thus, in the subject matter of the judicial law making integrity is just as much important as the intellectual calibre. At the superior judiciary level, something that should be unquestionable is integrity while calibre should be tested, tried and proved. The observations of the court are unfortunate that the additional judges

should be made permanent that are appointed to the High Court. Why such a discriminatory approach is has been practiced as when the members of superior judiciary are promoted from subordinate judiciary their work record is taken into account unlike in the situation of direct appointees from Bar. The Law made by the Constitutional Courts, the High Courts and the Supreme Court have obligatory effect on district courts, thus, when the judicial legislation posses such significance in the system, the qualitative approach and filtration of judges should also hold the same importance.

CHAPTER-4: SEPARATION OF POWER IN JUDICIAL REVIEW: AN OXYMORON RELATIONSHIP

An important question arose in West Bengal and other v. The Committee for Protection of Democratic Rights, West Bengal and Others[81] as whether the powers of Judicial Review were curtailed by the Doctrine of Separation of Power. In this case it was held by the Supreme Court that the interpreters and guardians of the Constitution whenever there arises an attempt the violation of Fundamental Rights provides with remedy under Article 226 and 32. On the touchstone of Doctrine of Separation of power, the act of violation of Fundamental Rights cannot be immunized from the judicial scrutiny in exercise of powers given by the Constitution under Article 32 and 226 of Supreme Court and High Court respectively. The upholding of Constitution and maintenance of Rule of Law cannot be said as violation of federal structure or either doctrine of separation of power. Though, it is the responsibility that such powers should be practiced with great caution, sparingly and in situation of exceptions. Thus, the principles of doctrine of separation of power cannot curtail the powers of the judicial review bestowed upon by the Constitution on the constitutional courts especially in the situations of violation of fundamental rights. In I.R. Coelho by LRs. v. State of

[81] "West Bengal and ors. versus. The Committee for Protection of Democratic Rights, West Bengal and Ors All India Reporter 2010 SC 1476".

Tamil Nadu[82], relying on the decision of the Bench of this court, said that basic feature of the Constitution itself includes the judicial review. Thus, even by the interference no restrictions can be placed or either by principle of legislative enforcement. Learned Counsel asserted that Court by using the powers either under Article 226 or 32 are merely discharging the duty of providing justice through the medium of judicial review and are not usurping the jurisdiction or overriding the Doctrine of Separation of Power. In support of the proposal of the jurisdiction conferred on the Supreme Court and High Court under Article 32 and 226 respectively of the Constitution is a vital and important part of the basic structure. State of U.P. and Other v. Jeet S. Bhist and Anr.[83] S.B. Sinha recently dealt with the topic of Separation of Power: Every organ of government in terms of constitutional design carry out one or the other functions which are enshrined on other department. Drafting of legislation and implementation is although the function of legislature and executive respectively one cannot say that day to day role of constitutional court's in the same is non-existence. Now throughout the world the judge made law is well recognised. If doctrine of power is put through rigidity it would have not been possible for any country developing or developed to create through interpretive process the new rights. If seen in one sense separation of power puts boundaries on active jurisdiction of each agency. But its more relevant and deeper purpose is to act as check and balances over the function of all the department of the government. Thus the active jurisdiction is not challenged of every organ but there are ways of prodding to communicate the short comings or excess in the duty of any institution. Dynamics of this

[82] I.R. Coelho by LRs. versus. State of Tamil Nadu All India Reporter 2007 SC 861.

[83] State of U.P. and Ors versus. Jeet S. Bhiist and Anr MANU/7702/2007 6 SCC 586.

communication is mandate by constitution between the organs of polity. Thus, the separation of power is suggested not to consider as operation in vacuum. In modern times the doctrine separation of power has been reinvented. The view that over the world is gathering the momentum in constitutional court is not just to bind the land of function in a non-positive sense, but to name least content of the demarcated realm of functioning. Subjective meaning of role and function entail the same; however which might be under question of appeal of financial restraint in certain cases. It is the essential duty in any event of short coming of the organ to recommend and advise the substitute in action, if needful. We ought to be ready to this extent to frame the answers to the problems. Traditionally if noticed the development of scheme of separation of power the dimension of check and balance is only linked with governmental violations and access. But in present era of positive rights, justified economic and social entitlements, private functions organs discharging public functions, urgency are created of performing the oversight functions and expand the checks and balances to include state in action. Part of this obligation is formed by social engineering and institutional engineering. After this argument of the width and scope of the doctrine of Separation of power, the question arises that the fundamental rights when, established under Part III of the Indian constitution, that possess the right to equity[84]; the freedom of speech[85] and the right of not being deprived of life and liberty[86], in this case can be violated or can the practice of breach be saved from judicial inspection on the base of scheme of separation of powers between the

[84] Article 14, The Indian Constitution.

[85]Article 19(1) (a), The Indian Constitution.

[86] Article 21, The Indian Constitution.

judiciary, legislature and executive. In simple terms, could the Scheme of separation of power restrain the forces of judicial review, conferred on the courts, even in the situation when the basic rights are being infringed on the base of that practice of such power will have negative effect upon the doctrine of separation of power? The debate after having seen the contentions in terms of Scheme of Constitution can be said as follows:

I. The basic rights are inherent rights established under Part III of the constitution cannot be made dead by any statutory or Constitutional provision. The basic structure would be said to be violated if any legislation abrogates or abridges such fundamental rights. While taking into consideration whether the basic structure is been hampered or not, the impact and affect of these rights guaranteed by the Part III.

II. Except under the procedure established by law, in Article 21 the Constitution seeks in wide perception to defend the right to live and personal liberty. The Article when taken into consideration with broad perspective not only enforces the right of the accused but also of the victims. The state is under the responsibility to implement the human rights given reasonable and neutral investigation to the citizens against any person claimed of committing any cognizable offence including their own officers. In situation where the witness to wrong may even seep for and should be provided security.

III. Under the system review of judge being an essential part of the fundamental structure, the Court's jurisdiction to Supreme Court and High Court under Article 32 and 226, any act of the Parliament cannot curtail or

exclude any power of enforcement of fundamental rights by the Constitutional Court. On the today's outlook of the situation of the country it is a power which is vital to give usable content to the objectives of Part III of the constitution. Moreover, the limitations on the legislative power in a federal constitution are already present due to division of forces between State Legislature and Parliament, thus this authority is necessary to ascertain whether such powers are used beyond the limitations. Judicial review act as the concluding authority not only to show the consequence of the distribution of law-making powers between the Parliament and State Legislature but also it is essential to show disobedience if any in any entity. Hence to justify the term Judicial review, in words of Lord Steyn, "judicial review id justified by the amalgamation of the principles of separation of power, rule of law, the principle of constitutionality and the reach of judicial review".

IV. If some legislative act infringes the federal structure, the courts by ensuring that it is acts as interpreters and guardian of the constitution protect the federal structure by providing remedy when there is a violation of these rights under Article 226 and Article 32. When the Supreme Court or High Court order any direction in such situation to maintain rule of law or to defend the constitution by the power under Article 32 and 226 cannot be said as the violation of the federal structure.

V. Restriction by the instrument of government on Parliament or constraint by the legislative body on administrative, does not amount to constraint on the Powers of the judges.

VI. Permission of investigation is included in the Seventh Schedule by any other department subject to consent by the concerned state under Entry 2 of List II and Entry 2A and Entry 80 of List 1, therefore, the court should not be precluded from the exercise of the same power which is been exercised by Union by the empowerment of Statue. As per my opinion, the constitutional courts exercising such power are not violative of the doctrine of separation of power. Otherwise, it would be said as failure of duty by the court if not done so.

4.1. WHETHER THE JUDICIARY HAS EXCEEDED THE LIMITS OF ITS FUNCTION?

The question of great importance was arisen in the case of University of Kerela v. Council Principals, Colleges Kerala and Others[87]

"*whether after getting the recommendations of some expert body by a court order, the Court itself can implement the said recommendations by passing a judicial order or whether the Court can only send it to the Legislature or its delegate to consider making a law for implementation of these recommendation"*[88]

The above mentioned query raises a huge constitutional controversy about law made by judge that is it at all permitted under the Indian Constitution and if yes, to what extent? The order of the Court which was an interim order dated on 22nd

[87] Uni. of Kerela versus. Counil Principals, College Kerla and Others Civil No. 887 with SLP on 11.112009.

[88] Ibid.

September 2006 amounts to judge made law as prima facie but the issue was put forward of its legality. The court in the case of Divisional Manager, Aravali Gold Club and Anr. v. Chander Hass and Another[89] held that judges can enforce the law which is already been made in the statue by the legislation but cannot create one and put it to force. As per the court, the separation of power is broad under our constitution, thus one organ cannot encroach upon the functions of other organ of the state. Therefore, the judiciary do not seek to perform executive or legislative functions.[90] A constitutional bench of this court in Ram Jawaya Kapur v. State of Punjab[91] observed: The Doctrine of separation of power is thus not recognised by the Indian Constitution in its full rigidity but there is an adequate differentiation in the roles and functions of the different branches and organs of the government. It can be said that Indian Constitution doesn't contemplate supposition by an organ or part of the state of function that belongs to another. Likewise, a three judge bench in Asif Hameed v. State of Jammu and Kashmir[92]observed: A fresh look should be given to inter se working of the three organs of democracy under Indian Constitution before directly adverting to the debate involved in these appeal. Though, under the Indian Constitution the doctrine of separation of power has not been documented in its absolute rigidity but various functions of the organ of the state are meticulously been defined by the constitutional makers. The constitution demarcates and determines the respective spheres of the functions of the legislature, executive and judiciary. No organ usurps the function of other. The

[89] Divisional Manager, Arvali Gold Club and Another. versus. Chander Hass and Another MANU/4463/2007.

[90] Common Caus versus. Union of India MANU/7480/2008:(2008) 5 SCC 511.

[91] Ram Jawya Kapur versus. State of Punjab MANU/0011/1955: All India Reporter 1955 SC 549.

[92] Asif Hamed versus. State of Jammu and Kashmir MANU/0036/1989; AIR 1989 SC 1899.

judgement of these organs of strictly following their procedure with discretion is trusted by the Constitution. The strength and independence are the pillars of the organs for right functioning of the democracy. Legislative and Executive are the two facets of the people's will are Legislative and Executive and thus they have all the powers including finance. Though, judiciary has no force over the pockets or the sword but it has power to keep the above two mentioned organs in line within the constitutional limits. It is the guard of democracy. Judicial Review is said to be a powerful weapon to hold down unconstitutional exercise of power by either of the other two organs. Judicial review with its expanding horizons has taken into the concept of economic and social justice. While the powers exercised by the legislative and executive are subject matter to judicial restraint, self imposed discipline is the only check on our own exercise of the power. At the outset, it may be said that the court do not have any power to provide any direction for amending the Act or the Statutory rules. The Act and rules are amended by the Parliament. It is established that no route contrary to the made Act and Rules can be given. There is no such defined or expressed insertion of Doctrine of separation of power in the Constitution, save and except Article 53(1) enshrines the executive power of the Union in the President and Article 154(3) enshrines the executive power in the Governor of the state. But no legislative or judicial powers so far are vested on any authority. The power to take apart the judiciary from executive in the public service of state is given under the directive principle under Article 50 but it doesn't have anything to do with the vesting of the powers. The executive under the Indian constitution are provided with legislative powers such as Ordinance marking power in Article 213 and Article 213. Certain judicial powers are also given in Article 103 and 192. Article 105 and

195 empowers the legislature with certain judicial power. The judiciary also possess a few legislative and executive powers under Article 146, 227 and 229. Under several statutory provisions considerable quasi-judicial powers are also practiced by executive whereby tribunals have been set up. Lis between the parties are determined by these tribunals with about the trapping of the courts. But the same is still subject to judicial review by writ under the court. In the case of impeachment of judges the Parliament, the legislative body of the highest level exercise qusai-judicial powers and also in respect of contempt of legislature[93]. These principles are explained by justice Pathak in Bandhua Mukti Morcha v. Union of India[94] , he states that:

"It is common place that while the Legislature enacts the law the Executive implements it and the Court interpret it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognized that in a certain sphere the Legislature is possessed of judicial powers, the executive possesses a measure of both legislative and judicial functions, and the Court, in its duty of interpreting the law, accomplishes in its perfected action a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State. In so far as judicial powers are concerned, no such limitation has been imposed under the Constitution. Rather the conferment of judicial powers under Articles 141, 142, 32 and 226 has been plenary and very wide and enable the Supreme Court to declare

[93] Art. 194(3), The Indian Constitution

[94] Pathak in Bandua Mukt Morcha versus. Union of India MANU/O051/1983; (1984) 3 SCC 161

the law which shall be binding on all the courts within the territories of India and Article 142 enables the Supreme Court to pass such order as is required to do complete justice in the case"[95]

By the above brief it could be said that the makers of the constitution didn't want to introduce the Separation of power so rigid to the extent of dividing them in to water-tight compartments. The question on whether the court can direct legislation was raised in the Common Cause (A Regd. Society) v. Union of India and others[96]. It was held in this case that the court cannot direct legislature. The taking over of the court over the legislative function has been justified as being a vital component; it has taken over it in overt manner and not in interstitial way.

In a harsh way these example of judicial excessivism fly in the face of scheme of separation of power. The scheme of power states that the law should be made by the legislature, executed by the executives and judiciary to settle dispute in accordance to the law. Generally, it means that an organ should not carry out the role another agency of the state. The making of the totally the new law is not lawful function of judicial, but making legislation through interpretation of the textured words and widening of meaning is legitimate judicial function. The validation known for the act of judicial activism clears out the lacuna on part of carrying out the function by the legislative and executive. Even if such condition arises the judiciary taking over the legislative function can be justified? As per me

[95] Id.

[96] Common Cause versus. Union of India and others, "Writ Petition Civil No. 580 of 2003 on 11.04.2008".

it doesn't, first because high constitutional principle of doctrine of separation of power would be violated. Secondly, the judiciary is not competent to take out the functions of the legislature; it does not hold the expertise to do so. It is for the people to use their power if the legislature or the executive is not exercising its duty by performing their franchise by lawful means like voting for better candidates, etc. A constitutional bench of the Court in Ram Jaway v. State of Punjab[97] observed: The doctrine of separation of power has not been recognised in the rigid form by the Indian constitution but there have always been differentiation between the functions of the different organs of the government and thus we can be state that Constitution doesn't mull over assumption by one organ or of functional belonging to other. Likewise, a three Judge Bench in Asif Hameed v. State of Jammu and Kashmir[98] observed:

"Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its complete rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can take over the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by rigorously following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, have

[97] MANU/SC/0011/1995.

[98] MANU/SC/OO361989.

all the powers including that of finance. Judiciary has no powers over sword or the purse nonetheless it has powers to ensure that the aforesaid two main organs of State function inside the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to hold back unconstitutional exercise of powers by the legislature and executive. The increasing horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of powers is the self imposed discipline of judicial restraint."

4.2. VIOLATION OF SCHEME OF SEPARATION OF POWER

The question of violation of separation of power arose in the case of Union of India v. R. Gandhi, President, Madras Bar Association[99], whether the transferring the entire jurisdiction of Company to National Company Law Tribunal is violation of independence of judiciary and doctrine of separation of power which are the main components of the basic structure of constitution. Supreme Court in this case held that which disputes will be decided by the court will be decided by the legislature and the rest by the tribunals subject to principle of rule of law, constitutional limits and separation of power. The institution of National Company Law Tribunal and National Company Law Appellate Tribunal and providing them the authority, jurisdiction and power carried out by the High Court in respect to company law matter are constitutional. With reference to specific enactments legislature has power to create tribunals but the condition is it should

[99] Union of India versus. R. Gandhi Madras Bar Association, MANU/0378/2010; (2010) SCC11.

not be violative of the constitution and should not hamper independence of judiciary. The hallmarks of the judiciary are impartiality, fairness, independence and rationality in decision making. Impartiality does not thrive without independence. Independence is the freedom of judicial thought and not to do what they wish to. It is a freedom that provides the judicial atmosphere free from pressure and intrusion, which helps in creating an atmosphere to work with absolute commitment to provide justice. The other thing that enables a Judge to be impartial is the behaviour, outlook and discipline in life. However, its existence depends upon several ordinary things like freedom from mundane monetary things, security in tenure, freedom from pressure and influences and not only on ethical, philosophical or moral aspect. A Constitution Bench in Union of India v. Sankal Chand Himatlal Sheth[100] explained the significance of independence of judiciary: The independence of judiciary is now fighting the faith of Indian Constitution. The cardinal creed of our founding document is fearless justice. It is thus the part of our years back tradition which has been generating great Judges all this while. In England, from where the India have taken the present system of administration of justice, independence of judiciary is valued as a basic value and it has become so inevitable and natural in the life of the people there and so ingrained it has become in the thought of the people that it has been taken granted. In Advocates-on-Record Association and Ors v. Union of India[101] J.S. Verma, J. On behalf of the majority, stated the characteristic of an independent judge:

[100] MANU/SC/OO65/1997: 1997(4) SCC

[101] MANU/SC/OO73/1994: (1993) 4 SCC 441

Those who combine the characteristic those are essential for making an autonomous, able and fearless only those people should be considered fit for the place of Judges. Combining such several attributes together constitute an ideal personality. Ability to handle cases, Legal expertise, ethical behaviour, proper personal conduct, fearlessness firmness is essential characteristics of a person ideal for appointment as a Superior Judge. Pandian J. in concurring opinion states that:

"..it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours."

Further, he stated having a sovereign judiciary to uphold imperatives of the constitution, meet challenges unbending and unbending before all authorities, preserving the judicial veracity, such person to be in judiciary should be infatuated with the highest reputation for trustworthiness, independence, bear any burden, uncommitted to any prior matter, prepared under any situation, contingency to pay any price and wedded to the principle of Rule of law and Constitution all the time. The independency of the judiciary cannot be protected if the selectee bears a particular stamp for the reason of changing the cause of decision bowing down to his appointing authority, the independence is not saved notwithstanding the rights, guaranteed tenure of office, safeguards, privileges, immunity and condition of service. Although, to spin out the new principle is illogical that the key note is judiciary and not the judge especially when it said in the same breath, an irreplaceable damage will be inflicted on the faith of the community; irreparable damage would be caused in administration of justice if an erroneous appointment is made of an unsuitable person. The court thus explains the doctrine of separation

of power in the case of Rai Sahib Ram Jawaya Kapur v. The State of Punjab[102]: The doctrine of separation of power has not been recognised in the rigid form by the Indian constitution but there have always been differentiation between the functions of the different organs of the government and thus we can be state that Constitution doesn't mull over assumption by one organ or of functional belonging to other. The Court in Chandra Mohan v. Sate of U.P.[103] held: Though the Indian Constitution does not reflect strict doctrine of separation of power the independence of judiciary of the states is kept on the priority, this constitutes High Court of each state, institutional condition of services thereof are prescribe of the Judge, including the government in appropriate cases and gives to it the powers of superintendence over the courts and tribunal in that territory over which it has jurisdiction. But the famers of the constitution took no long to realise that "it is the subordinate Judiciary in India who brought most closely into contact with people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior judges". The constitution established a cluster of Articles in Chapter VI of Part VI under the subject "Subordinate Courts" to secure from the executive the independence of the judiciary. In most of the states at the time when constitution was made the executive had direct control over the magistracy. It has been witnessed that pre-independence in India there was a strong agitation of separating judiciary from executive and it was based upon the assumption that independence of lower level judiciary if not separated with executive be a mockery. Directive Principle of Policy under Article 50 of the Indian constitution states that the State

[102] MANU/SC/0011/1995

[103] Chandhra Mohan versus. Sate of U.P.(All India Reporter 1996 SC 1987)

shall take necessary steps to separate executive and judiciary in public services of the States. In simple terms it means that the judicial service should be free from the control of executive. The court in Indra Nehru Gandhi v. Raj Narain[104] stated that without being any rigid separation of power as under the Australian constitution and American constitution, the Indian constitution recognises the doctrine of separation of power in broad sense. The Court thus held: It is seen that nothing is expressly mentioned in the Indian Constitution about vesting the judicial powers to the judiciary as it is in American Constitution however; the separation of three main organs of the government is made under Indian Constitution. The judiciary is vested by the judicial power of the state, the executive and legislative, similarly, are vested with powers in their respective spheres. Even prior to the constitution the judicial power has lain in the hands of Judiciary and also since the constitution. The intention of sharing or passing of the judicial power to legislative or executive or that the power of the executive and legislative to be passed or shared with judiciary is not there. The basic structure of Constitution has always included the doctrine of separation of power on the highest level. To amend the Constitution, Parliament cannot be the judge of limitations of its own power. An independent organ thus should carry such function i.e. Judiciary. Supreme Court in the I.R. Coelho by LRs. v. State of Tamil Nadu and Others[105] held: The permission to legislature for amending the Ninth Schedule to grant law the protection in terms of Article 31 but is subject to rights of the citizen to assail it on enlarged judicial review concept. After the enunciation of the basic structure the legislature cannot exclude the Ninth Schedule from the

[104] Indra Gandhi versus. Raj Narin, Manu/O304/1975: 1975 Supp SCC 1.

[105] All India Reporter 2007 SC, 8617.

examination by the Court. Amendments of the constitution are subject to certain limitations and if the said limitations are to be set by the Parliament itself it gives law the complete immunity to enact impugned amendments, it would disturb the constitution on the terms of check and balances. The power to make a law and decide its limitation cannot be vested in the same organ. Only other independent agency like the judiciary can give validity of restriction on the rights mentioned in Part III and thus can be observed by the same. Fundamentally, it is the outcome which is significant of amendment rather than its form to decide constitutional validity of the Ninth Schedule on the benchmark of doctrine of fundamental structure to be judge by putting it to effect and impact test viz. Rights test. Supreme Court in another case of National Legal Service Authority v. Union of India and Others[106] held: it is the acknowledgment of harsh reality that no justification for democracy and no democracy is there without the protection for human rights. In current scenario, the judicial role while working with the realm of doctrine of separation of power to advocate the principle of rule of law and ensure that the marginalised section of society is provided justice. The Court in "Shamnad Basheer v. Union of India"[107] held: The Section 85(2)(b) provides qualification for Indian Legal Service for a member who held "the Grad I post of service or post higher at least 5 years to the Vice-Chairman post is declared unconstitutional, considering an affront to independence of judiciary, Doctrine of Separation of power and basic structure of the Indian Constitution". In another case of Madraas Bar Association versus. Union of India[108] could state that: A

[106] National Legall Authority versus. Union of India and Ors, Writ Petition no. 400 of 2012.

[107] Shamanad Basheer versus. Union of India,resulted on 10/3/2015.

[108] Madraas Bar Association versus. Union of India (2014) 10 SCC 1.

challenge on constitutional validity on National Tax Tribunal was made by the petitioner The Madras Bar Association. The basis of the challenge is the formation of the tribunal, validity of its constitution and the violation of basic structure qua the powers vested in High Court of judicial review. The creation of the Tribunal was held valid by majority judgement but not its composition as being repugnant of the fundamental structure of Constitution. The extensor notion of juduiciary's independence, the force of judicial review and basic structure of the constitution of India was once again dealt by the Supreme Court in this case and the pervious decision was referred to with approval in "Union of India v. Madras Bar Association"[109]. Its understanding of judgement was also recorded referred supra to the Stature of member of Tribunal, was made to displace the function of High Court. It was stated members discharging the judicial powers in tribunal can only be choose from those who own the attributes of knowledge in legislation and capable to practice judicial function. The function of a technological associate is to utilize the know-how in his field and not otherwise.

The Court in All India Universities Officers Confederation and Ors versus. Union of India and Others[110] stated that it is purely executive function to create and abolish the post or its regularisation. Thus, the post where none exists cannot be created by the Court. Also direction cannot be issued to absorb the respondent, pay the salaries of normal employees or continue them in service as all these are solely functions of executives. Also this court cannot bestow itself the power of

[109] Union of India versus. Madrsas Bar Association, All India Reporter (2010) 11 SCC 1.

[110] All India University Officer Confederation and Ors versus. Union of India and Ors W.P. No. 3O34/1999 resulted 2/3/2015.

legislative or executive. Under this constitution there is wide separation of power and the judiciary must know the limits.

4.3. HAS SEPARATION OF POWER CREATED COMMONTION OF POWER BETWEEN LEGILSATIVE AND JUDICIARY?

The brawl between the legislative and judiciary of power has often given grave concerns and anxiety to the Government at both the levels the Centre and the States. When the conflicts get resolved the executive heave a sigh of relief or after initial heat is over the subject is put in the icy storage on the powers of the state that each wing enjoys under the constitution subsides. The resistance between both has arwaken in various cases. The current case of Legislative Assembly of Tamil and the High Court off Madras in 1998 March where the relationship came under the strains between the judiciary and legislature, when it was reported that an AIADMK member have strike on the Minister of Agriculture on the flooring of the House. Similarly, in one more case likewise argument arose in which 3 petitions were filed by journalist in S. C. against the arrest warrant issued by the Speaker of the Legislative Assembly against summon to receive reprimand on suspected violation of privilege. The petition so filed by the S. Selvam was refused on the basis that he denied to offer an apology as suggested by the Court to the Speaker of the House. “A former correspondent of the Illustrated Weekly in India K.P. Sunil and S.K. Sunther, the Editor of Kovai Malai Murasu filed the

other two petitions against whom the arrest warrant was issued"[111]. Allegedly the article 'Tamil Nadu Assembly fast gaining notoriety" lowered the dignity of the House. The Privilege Committee Legislative Assembly on 17/12/1991 acknowledged the admission of guilt of Mr. Sunil and chose not to carry on further with the issue. Futher this verdict was established on 05/02/1992 but around 28/02/1992 the committee decided to reopen the case. As at the relevant time the Editor of Weekly was not the editor he was exonerated. Non-disturbing of the lament by Mr. Sunil in the Illustrated Weekly was the reason to reopen the matter. The solicitor then again assert that he never made the request of distributing the lament and that the reviving of the matter was with no fitting or respectable reason. As far as Mr. S.K. Sunther is taken into considertaion he asserted to submit contempt of Legislative Assembly by distributing a false report in Tamil Nadu Evening on 05/02/1992 expressing that a DMK Member of the assembly in the State assembly was assaulted by the member of AIADMK Member. Regardless of Mr. Sunther's composed demands, the Privilege Committee rejected to go through at the concerned 2 Participants of the Legislative Assembly. The MLA who supposedly was assaulted did not deny the report distributed by Mr. Sunther, he asserted. Mr. Sunther in the condition scrutinized the legality of action of the privileges of the house. Furthermore, the Board of trustee confirmed that the modus operandi that was taken after was not rational. The Supreme Court in both of the above mentioned cases remained the warrants of capture against the columnist. A notice has been issued in Mr. Sunil's case to the Secretary. The Speaker in a pronouncement on 27/04/1992 asked the

[111] "An Article *Tamil Nadu Assembly Fast Gaining Notoriety* of Illustrated Weekly Issue September 21-27, 1991."

Secretariat to reject any order issued by theS.C.. Likewise, the Speaker expressed that the Legislative Assembly wouldn't acquire responsiveness of the stay allowed by the S.C. as the legislative and judiciary are not dependent on each other and that the request was not official of the Supreme Court to the Legislative Assembly. Thereby, immediately issuance of proper headings to concerned experts by Mr. Sunil was made to the Supreme Court not to execute the arrest warrants. In the matter of interest it was contended that the speaker's Activity would knock down the very institution of legislation. Further, it was held that any breach of the court's demand was subject to be ignored by the exercise of the official forces by the Union of India. May 7th 1992, the court under Article 144 illuminated that all specialist, legal and common, in the domain of India were required to act in help of the Supreme Court and had no inspiration to protect that they would go out on limb of non-compliance of the Court's request. Any further bearing of the issue was not passed as the court didn't think it important enough. Though, the Court expected Mr. Sunil to show up before the House[112] to get reprimand and expected every expert in the State the Home Secretary, the Police Commissioner and the Director of General Public to follow its request staying warrants of capture.

In a case of M.S.M. Sharma v. Sri Krishna Sinha[113], the editor of "Searchlight" an English Daily was alleged to have publish the proceeding of the Legislative Assembly of Bihar which was then ordered to be expunged and a show-cause notice was issued to him as why no appropriate action should be recommended

[112]Subhash Jain, 2000, "The Constitution of India, Issue and perception", 150-154.

[113] All India Reporter 1959 S.C. 895.

against him for the breach of privilege of Speaker of the Assembly. The Supreme Court of India was moved by the petitioner against the proposed action by the Privilege Committee alleging that it was in violation right of freedom of speech and expression of the petitioner's which is a fundamental right under Article 19(1)(a) and protection of his life and liberty under Article 21. In this case the Five- Judge Bench, Justice K. Subba Roa being a dissenting one stated that Article 19(1)(a) and Article 19(4)(3) of the Indian Constitution has to be reconciled and the only to reconcile it is by reading it with Article 19(1)(a) subject to latter part of Article 19(4)(3). Accordingly the petition was dismissed. However in a case later, the conflict was between Legislative Assembly of Uttar Pradesh and High Court of Allahabad, a reference of the Constitution made by the President under Article 143[114], in Keshav Singh Case[115], the Bench of Seven-Judge held that: a citizen contravened his fundamental rights under Article 21 moved to the court and complained, It is plainly the duty of the Court to examine the merits of the contentions and the inevitable raised the question whether the personal liberty of the citizen is been taken away in accordance with the procedure established by the law. Further, the court held that if in the given case the contention made by the citizen of being deprived of the liberty not is in accordance with the law, but for malafide and capricious reasons, the court will examine the validity of the stated allegation and issuing a warrant in such a case would be no answer against the citizen in general warrant. Therefore, in my opinion the force of the Fundamental Constitutional Right conferred Under Article 32 to the Indian Citizen and the construction of the latter part of Article 194(3) is decisively against the view

[114] Art. 143 of the Indian Constitution.

[115] All India Reporter 1965 S.C. 745.

though it may be inconsistent with Article 121, the house has the power or privilege to claim the same. It may be relevant to recall in this connection that the rules which are made by the House for regulating its procedure have to be subject to the provisions of Constitution under Article 208(1). Therefore the aforesaid view was expressed in the advisory capacity by the Court in reference to Article 143 of the Constitution. Further, in P. Sudhirkumar v. The Speaker, A.P. Legislative Assembly[116] this view has been reiterated. The Court in this case ordered a notice to be issued through the Secretary to the Speaker of the Assembly for showing cause as to why contempt proceedings shall not be initiated for violation of the Court's order against him. Therefore, when there is a scuffle between the fundamental rights and the legislature, judicial review is unlikely to be refused by the court of authorities concerned including the legislatures. In the pending proceedings the action of S.C. in staying the warrant against the journalist is also on its preceding judgments in reference to Article 143.

The judiciary and legislative has been witnessing power scuffle since long, where lone tries to ascertain supremacy on the other. This scuffle began with the argument relating to judicial power of the judiciary to the amendment of the charter, the widening of the fundamental structure of the constitution, the expanded control practiced by the virtue of review by judiciary, to manage by proliferation of NJAC over the judiciary for the appointment of judges by the government which was taken into review too and discarded by the judiciary for the sake of independence. Thus, the tussle of power as always been witness between the two organs of the government, then to the judge made laws and

[116] 1989 (2) SCALE 611.

directions and judicial enactments essentially hold a vital importance to meet the end of justice in the Indian scenario.

CHAPTER-5: CONCLUSIONS

Another understanding of convention today has been advanced. Utilitarian division of power is the point it tries to stress upon. The delegation of legislative function is not considered as to be inconsistent with the Doctrine of Separation of Power. No one agcy of government must raise as a superior one by expecting wider use of power and each and every part should exercise the check on another with the aim of that none of them surpasses the force entrusted in them by the charter. The actual cause for the principle is to offset the accumulation of power in any the agencies of the government and not to let them infringe upon others exercise so totalitarianism may not displace administer of law. Every organ should work in full harmonization with one another without interfering the functioning of other. If present importance is being considered of the tenet in the view point of the Indian Charter properly claim to articulate to it. J. Chandrachud,. when the witnessed that the political value of the guideline is widely perceived he had a similar view. Without the cognizant adherence to its fine governing rules no constitution can get by. Similarly the court should stay away from the issue political shrubbery. Likewise legislative body should adhere the say of the court and respect it. The doctrine of divison of power is a theory of control which has percept inherent in the cautiousness of self-preservation. That prudence is better part of valour[117]. The Supreme Court in the viewpoint of the above importance of principle of separation advanced in modern brought up the supremacy of both separation of power and constitution in Keshvanadan Bharti Case and stated them as constituent of the basic structure. In Smt. Indira Gandhi versus. Raj Narian Singh the view was reaffirmed by the Court. The Supreme Court in Asif Haamid versus. Province of

[117] AIR 1975 SC 2294

J&K., encapsulates that Judicial review is a successful weapon in controlling the unlawful exercise of powers by the Council and officials. The idea of social and monetary equity has been taken under the growing sky line of judicial review. The practice by the forces of the governing official and body is accountable to legal constraint the main eyes is to be kept on the self imposed discipline of judicial restraint.

The Supreme Court in I.R. Coelho by L.R.S's v. State of Tamil Nadu[118] observed that the constitution is rather a living document. Having regard to the march of time and the development of law the constitutional provisions have to be construed. Now, the principle of constitutionalism is a legal one, which requires control over the forces of the government to make sure that it doesn't ruin the democratic principles with the protection of fundamental rights included. Checks and balance model of separation of power is advocated by the principle of constitutionalism. The ideology of legality is underlined by the principle of constitutionalism which requires the court to construe legislation on the assumption that Parliament will not objectively legislate anything contrary to the basic structure or fundamental rights. It is impossible for the law to impliedly repeal the fundamental rights from the future statues; though it can restrict the fundamental rights. The main feature of common law constitutionalism is the protection of fundamental rights through common law. As per Lord Steyn, the best institution to protect fundamental rights is Judiciary, given the independency and also for the reason that it involves interpretation based on the assessment of values besides interpretation that is textual. Application of principle of law and justice is enabled by it. The principles of Checks and balances have to play an

[118] AIR 2007 SC 861

important role under controlled constitution. In England where the parliament is sovereign, Lord Steyn has noticed that the court may be forced to modify the principles of parliamentary sovereignty under certain circumstances.

Though the constitution of India does not identify the principle of separation of power in its absolute terms, the framers of the Indian Constitution have meticulously differentiated the functions between the agencies of the government. The doctrine of separation of power has been adopted with the principles of checks and balances in India. In respect of Separation of power the principle of "Checks and balances" plays an important role in our democracy. The Supreme Court of India has held the Separation of power as one of the basic feature which cannot be impaired by amending the Constitution[119]. Separation of judiciary from executive is defined under Article 50 of the Constitution. The importance and vitality of the principle of separation of power does not lie in any rigid separation of function, but in working of it with the judicial interpretation guaranteed. No words of limitation are there in Article 142 and thus has allows the court to intervene in many cases starting with Union Carbide Corpn v. Union of India[120], in which Supreme Court has made major strides to maintain the rule of law. To restrain any unconstitutional exercise of powers by the legislature and the executive judicial review is a powerful weapon. However, the one check on the exercise of power is the self-imposed discipline of judicial restraint. It is not permissible by the constitution that the court advice executive in matter of policy or to sermonise vis-a-vis on any matter lies under the constitution within the sphere provided the legislature and executive also do not transgress their statutory

[119] Kesvananda versus. State of Kerala, All India Reporter 1973 SC 1461

[120] 1991 (4) SC 584.

power or constitutional limit[121]. Through years it has been witnessed that there is a shift from the traditional judicial role to judicial activism, from passive role to creative one, the changing needs of the society are taken into consideration by the courts and to deal with public wrongs new tools are evolved. Based on the enlarge concept of *locus standi* Public Interest Litigation on account of judicial activism has been developed. A power taken birth on the primary principle of democracy's constitutionalism, Indian Judicial Review, now is a field of great promise of creation of the philosophy of rule of law. However, the real authority of the country is definitely the executive which is answerable to parliament.

In Conclusion, the research analysis proves hypothesis partially wrong. Under the umbrella of Rule of law, the judicial execssivism has been witnessed in the few circumstances, although the Judiciary never aim to establish supremacy or a disregard to the other organs of the government.

To render justice, under some circumstances the overlap of functions or activism was essential to render justice which is the main object of the judiciary and thus to proliferate the notion of the preamble and protect the rights and liberties, the judiciary had to overlap and act actively. However, this is an exceptional scenario; Judiciary in general has always restricted and refrained from interfering in jurisdiction of other organs.

Though judicial review is a vital function of check and balance mechanism, the judiciary should practice self restraint so that judicial activism does not result into judicial overreach. However, in the given times the judiciary has uplifted and respected the Scheme of Separation of power

[121] Asiif Harmed versus. State of J&K, All India Reporter 1989 SC 1899.

BIBLIOGRAPHY

6.1. STATUTES REFFERED

1) Constitution of India

2) The American Constitution

3) Constitution of United Kingdom

6.2. BOOKS REFERRED

1. Massey, I.P., "*Administrative Law"*, Eastern book Company, Lucknow, Sixth Edition, 2005

2. Jain, M.P., "*Indian Constitutional Law"*, Wadhwa and company, Nagpur, Fifth Edition, 2005

3. Dr. Durga Das Basu, "*Introduction to the Constitution of India*", 20th Edition, 2012.

4. Commentary: Jain M.P & S.N Jain, "*Principles of Administrative Law*", Wadhwa & Company Nagpur, 2007.

5. J. Goldsworthy: "*Parliamentary Sovereignty: Contemporary Debates"*, Cambridge University Press, 2010.

6. Jain Kagzi M.C., "*The Indian Administrative Law*", University Law Publishing Co. Pvt. Ltd., 2002.

7. Parpworth Neil, "*Constitutional & Administrative Law*", Oxford University Press United Kingdom, 2012.

8. Kumar Devinder, "*Administrative Law*", Allahabad Law Agency, Faridabad, 2007, p 19.

9. Kesari U.P.D, "*Lectures on Administrative Law*", Central Law Publications, Allahabad, 2005.

10. Upadhaya J.J.R, "*Administrative Law*", Central Law Agency, Allahabad, 2006, p 4

11. Jules Coleman , Scott Shapiro *The Oxford Handbook of Jurisprudence and Philosophy of Law 200.*

12. G W Paton *A textbook on Jurisprudence* , 4th Ed 1972 pg 91

13. Doctrine of Eclipse under constitutional law , P K Majmudar , R P Kataria *Commentary on the Constitution of India* , 10th Ed, 2009

14. Subash C. Jain, "*The Constitution of India Select Issue and Perception*" (2000).

15. Neil ParpWorth *"Constitutional and Administrative Law"* 9th Edition ,Oxford University Press, 2009.

6.3. ARTICLES REFERRED

1. An Article "*Tamil Nadu Assembly Fast gaining notoriety*" of Illustrated weekly, issue September 21–27, 1991.

2. M.S. Phiroza Anklasaria, "*Judicial Law Making- Its Strength and Weaknesses*", AIR 2012 Jour. 83

3.Shriya Singh and Mukund Sarda, *"A Study On The Doctrine Of Separtion Of Powerof Montesquie In Refrence To Current Plans And Practices"* Department of Law, New Law College, Pune, Volume 8, Issue 1, June, 2017

6.4. SOFTWARE ACCESSED

1. https://www.supremecourtcases.com/

2. http://www.the-laws.com/

3. http://www.manupatrafast.in/ipAccess.aspx

4. https://www.aironline.in/all-india-reporter-online.html