

CHAPTER VI

SEPARATION OF POWERS AND CHECKS AND BALANCES

The Constitution makers have meticulously defined the functions of various organs of the State. The Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution and no organ can usurp the functions assigned to another. The Constitution trusts these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, two facets of the People's will, have all powers including that of finance; judiciary has no power over sword or the purse; nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitutional limitations. Judicial review is the powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. Article 50 plainly reveals that the judiciary shall be separated from the Executive control or interference.¹

The Constitution of India is federal modeled on the pattern with a strong basis in favour of the Centre. It has armed the judiciary to test the validity of the legislative and executive actions on the touchstone of the constitutional provisions. The Indian Constitution has gone a step forward than the Bill of rights

¹ *Union of India v. Sankalchand Himatlal Sheth*, AIR 1977 SC 2328.

incorporated in the Constitution of U.S.A. A thirteen-judge Bench (then full court) of the Supreme Court in *Keshavanada Bharati*,² held that the separation of power between legislature, executive and the judiciary is also basic feature of the Constitution.

The notion that centralized power is dangerous, that power must be a check on power, reached maturity in the eighteenth century, and its first real application was to be found in the Constitutional Convention held in Philadelphia in 1787 to draft the first written Constitution of the modern world, the United States of America. The writings of Montesquieu, John Locke and others had an immense impact over the first exercise of drafting a Constitution on the basis of which the government would discharge its obligation in day to day administration. In this exercise, the primary question was how to tame the government and at the same time how to protect the inherent rights of man.

By specifically quoting Montesquieu and Locke, the framers of the U.S Constitution supported the idea 'that political power, in order to be safe, had to be divided'. They were seeking to provide ways and means within the Constitution to tame that political power and make it purposive. At the same time, they were also envisaging the techniques through which power would be a check to other powers, thereby maintaining a constitutional equilibrium in between elections. One among the framers of that Constitution, Thomas Jefferson had observed that 'all the powers of government, legislative, executive, and judiciary, result to the legislative body. Concentrating these powers in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one'.

Karl Lowenstein had argued in favour of providing some irreducible minimum requirements for any formalized constitutional order. According to him, the following elements are relevant for consideration:³

- (1) there should be a differentiation of the various state functions and their assignment to different state organs or power holders, to avoid concentration of power in the hands of a single autocratic power holder;
- (2) there should be a planned mechanism for the co-operation of the

² AIR 1973 SC 1461.

³ Karl Lowenstein, *Political Power and the Governmental Process*, 2nd ed., University of Chicago Press, Chicago, U.S.A, 1965 at 127.

several power holders. These arrangements - the 'checks and balances' familiar to American and French constitutional theory - imply the sharing and, being shared, the limitations of the exercise of political power; (3) there should be a mechanism, likewise planned in advance, for avoiding deadlocks between the several autonomous power holders to prevent to prevent one among them, when the constitutionally required co-operation of the others is not forthcoming, from solving the impasse on his own terms and, thereby, subjecting the power process to autocratic direction. When, under the impact of the democratic ideology of popular sovereignty, constitutionalism had reached the point where the role of the ultimate arbiter of conflicts between the instituted power holders was assigned to the sovereign electorate, the original concept of liberal constitutionalism had been perfected as democratic constitutionalism; (4) there should be a method, also planned in advance, for peaceably adjusting the fundamental order to changing sociopolitical conditions - the rational method of constitutional amendment - in order to avoid the resort to illegality, violence, and revolution; (5) finally, and this occurred at an early date in the evolution of constitutionalism and indicates its specific liberal *telos*, the fundamental law should also contain the explicit recognition of certain areas of individual self-determination - the individual rights and fundamental liberties - and their protection against encroachment by any and all power holders. Next to the principle of shared and, therefore, limited power these areas inaccessible to political power have become the code of the substantive Constitution'.

The containment of political power by the containment of the power holders is the crux of what in political history, ancient and modern, appears as constitutionalism. The purpose for which such containment is required has been explained in his observation that 'the authority of the power holder is indispensable for carrying out the purposes of the state society, on the one hand; the liberty under authority of power addressees is equally indispensable, on the other. The establishment of a harmonious equilibrium between these two basic values presents in a nutshell the eternal quest of man in society.'⁴

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, fundamental rights of people, federalism, and decentralization of power are some of the principles and norms which promote constitutionalism in a country.⁵ The separation of powers doctrine seems to be inseparable part of any modern Constitution, be it presidential or parliamentary. India is no exception to this rule.

There are two distinct models of Separation of Powers. The first one is the 'Water tight model'; and the other is the 'Over-lapping model'. Under the first one, all the three organs of the government are given powers and functions that are strictly compartmentalized and this model does not provide for any co-ordination among these three branches. Such a model is seldom used in any Constitution as such arrangement is not conducive to democracy or constitutional governance. Under the second model, although powers and functions are demarcated clearly, yet there is always the scope available for working through interaction among the three branches. This model facilitates the doctrine of 'checks and

⁴ *ibid.*, at 9.

⁵ M. P. Jain, *Indian Constitutional Law*, 5th ed., Wadhwa and Company, New Delhi, 2005, at 6.

balances' while the first model does not. By and large, many of the democratic Constitutions of the world today follow the second model, thus paving way for working through coordination among the three branches of government.

The political philosophies as well as the experiences of many states had contributed immensely in the drafting of the Indian constitution as well and that in the working of the Constitution, a very deep impact of the British Constitution could very well be seen in its working during the past 55 years. One specific illustration for this observation is the treatment of the doctrine of separation of powers by the courts in India almost similar to the British constitutional developments, in spite of written provisions of the Indian Constitution to the contrary. Probably, this was due to the fact that the initial stages of the Republic, many of the judges were British common law trained and were not able to deviate from their understanding of the Constitution. Added to that was the need for giving unlimited power to the Indian Parliament to make necessary laws to keep the federal feature of the new state under complete control.

A cursory look at the various provisions of the Constitution may be necessary here to illustrate the presence of the doctrine of

separation of powers and functions more elaborately than in the American Constitution. Similarly, a plethora of provisions of the Indian Constitution also provide for the dependent doctrine of 'checks and balances'. Although the framers of the Indian Constitution specifically wanted to incorporate the British Parliamentary form of government, yet in approving the draft Constitution they failed to provide for clear form of government. Answering to a series of questions on the powers conferred on the President by the draft Constitution, Dr. B. R. Ambedkar referred to the proposed adoption of an 'instrument of instruction' that would completely bind the President by the council of ministers in the functions of the government. However, the fact remains that such an instrument of instructions was never adopted by the Constituent Assembly.⁶

Dr. B. R. Ambedkar, speaking about the choice of the form of government in the Constituent Assembly observed that 'the choice between the systems is not very easy. A democratic executive must fulfil two conditions: (i) it must be a stable executive; and (ii) that it must be a responsible executive. The American system gives more stability but less responsibility. The British system gives more

⁶ P.B.Mukherji, *The Critical Problem of the Indian Constitution*, University of Bombay, Bombay, 1967, at

responsibility but less stability.⁷ Provision relating to collective responsibility was incorporated under Article 75 (3) of the Constitution that was to be exercised by the Parliament. This provision itself proves that the control is exercised by the legislature over the executive, whatever is the nature of such executive.

A survey based on the following three questions would clearly reveal the nature of the written Constitution for the presence of the doctrines of Separation of powers and checks and balances. The three questions are:

- (i) What are the specific powers and functions provided under the Indian Constitution?
- (ii) What are the limitations provided under the Indian Constitution on those powers of the three different branches of the government, both at the centre and at states?; and

⁷ Constituent Assembly Debates, Vol VII, at 986.

- (iii) What are the checks that can be exercised by one branch over the other two whenever any one of the branches violates the constitutional limits?

These questions would provide a comprehensive analysis of the various provisions of the Constitution to indicate the presence of both the doctrines of 'separation of powers' as well as 'checks and balances'.

Accordingly, the executive power of the Union is vested in the President.⁸ Similarly, the executive power is vested in the Governor in so far as the executive power of the State is concerned (emphasis added).⁹ In terms of the executive powers and functions of both the Union and States, Articles 72, 73, 76, 77, 111, 117, 123, 124, 143, 144, 155, 156, 216, 223, 224, 162, 163 (2), 165, 166, 174, 176, 192, 200, 207, 213, 239, 239AB, 239B, 240, 263, 280, 292, 293, 316, 318, 331, 333, 339, 340, 341, 342, 344, 350B, 352, 353, 354, 355, 356, 357, 358, 359, 360, 372A, 373, 392 and many other provisions of the Indian Constitution provide for the same. These provisions pave way for a series of executive powers

⁸ Article 53- 'The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution'.

⁹ Article 152 - 'The executive power of the State shall be vested in the Governor and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution'.

and functions to be performed by the President and the Governors under the Indian Constitution. The specific executive functions are also mentioned in Articles 85, 87, 103, 192 and 258A.

The legislative powers and functions of both the Union Parliament and State Legislatures are provided under Articles 241, 241A, 245, 246, 247, 248, 249, 250, 252, 253, 265, 267, 271, 275, 276, 286, 302, 303, 304, 307, 309, 312, 312A, 321, 323A, 323B, 327, 328, 345, 357, 368, 370, 371, 372 and many other provisions of the Indian Constitution. Similarly, the judicial powers and functions are also provided under Articles 124, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 214, 215, 216, 217, 220, 221, 222, 223, 224, 225, 226, 227, 229 and many other provisions of the Indian Constitution.

Apart from providing the powers and functions of the three branches of the government, both at the centre and at states, the Constitution also provides for a series of provisions to check the arbitrary exercise of such powers and functions by any one of these three branches. Thus the doctrine of 'checks and balances' that is derived from the existence of the doctrine of 'separation of powers' or 'separation of functions' is also present under the

Indian Constitution. Some of the provisions that seek to check the powers and functions of the three branches of the government whenever they transgress the constitutionally provided limits. They are Articles 117, 121, 122, 151, 207, 211, 212, 217, 222, 247, 262 (2), 274, 280, 281, 292, 323, 324, 329, 338, 352, 353, 354, 356, 357, 358, 360, 365 and other provisions of the Constitution. The presence of these elaborate checks and balances prove the existence of the doctrine of 'separation of powers' whether recognized or not.

An attempt is made here to explain these checks that are provided under the Indian Constitution. In the first place, mention must be made to Art. 146 that provides for the appointment of officers and servants of the Supreme Court by the Chief Justice of India or such other judge or officer of the court as he may direct. However, this power is conditioned by the proviso to Art. 146 (1). Accordingly, the proviso states that 'provided that the President may by rule require that in such cases as may be specified in the rule, no person not already attached to the court shall be appointed to any office connected with the court, save after consultation with the Union Public Service Commission'. Similarly, Art. 146 (2) also provides that 'subject to the provisions of any law made by Parliament, the conditions of service of officers and

servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other judge or officer of the court authorized by the Chief Justice of India to make rules for the purpose'. A close reading of this provision would indicate a clear built in arrangement for to check the power of one authority by another as well as the constitutional authorization of delegation of such powers.

In the second place, mention can be made about Arts. 117 and 207 that provide for special provisions as to financial Bills. Under these two Articles, no Bill or amendment shall be introduced without the recommendation of the President and the Governor respectively. It may be recalled that the President had not given such a recommendation to one of the amendment Bills introduced under Article 117 and such a Bill cannot go to the Council of States (Rajya Sabha) and the Prime Minister had to explain the developments in detail for obtaining such a recommendation from the President after the Bill was passed unanimously by the Lok Sabha. Similar provisions are also found in Art. 207. This also explains the check one organ may exercise over the other within the parameters of the Constitution.

In the third place, mention should be made to Arts. 121 and 122. According to Art. 121, no discussion shall take place in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or High Court in the discharge of his duties. Art. 122 imposes similar restriction on the courts not to inquire into the proceedings of the Legislature. Similar conditions are also imposed under Arts. 211 and 212.

Art. 262 (2) provides that 'notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1). This is one among the constitutional techniques of providing and limiting powers of the three organs of the government. As per this scheme, the Parliament enacted the Inter State River Water Disputes Act, 1956¹⁰ through which the jurisdiction of the courts was excluded under section 11 of the said Act. Without this authorization in Art. 262 (2), the courts would have set aside this section 11 of the Act as unconstitutional.

Similarly, the other provisions mentioned above provide for adequate checks and balances in the working of the three

¹⁰ Act 33 of 1956.

branches of the government. However, more pronounced checks and balances could be seen under Article 352, 356, 357, and 360. In all these provisions, the executive power has been specifically limited to facilitate the check to be exercised by the Parliament from time to time. If both these powers are to be vested with one individual or authority, Montesquieu's theory would have been proved right and the democratic values of the Constitution would vanish in thin air. As such, the framers of the Indian Constitution thought it fit enough to build adequate checks on each and every branch of the government so as to balance the power equations meaningfully to protect the democratic and republican norms enshrined in the Indian Constitution. Needless to say that these checks and balances cannot exist unless and otherwise there is a well planned separation of powers.

However, immediately after the commencement of the Constitution, in one of the first constitutional challenges based on the doctrine of Separation of Powers, *In re Delhi Laws Act*,¹¹ a seven judge bench of the Supreme Court held that the Indian Constitution does not provide for strict separation of powers. Justice Fazal Ali observed that 'the doctrine of separation of powers and the judicial interpretation it has received in America ever since the American

¹¹ AIR 1951 SC 332.

Constitution was framed, enables the American Courts to check undue and excessive delegation but the courts of this country, are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement". The court went to hold that:

'the Indian Constitution may be said to have been based on the American model, but this is far from making the principle of separation of powers, as interpreted by the American courts, an essential part of the Indian Constitution or making the Indian Legislatures the delegates of the people so as to attract the application of the maxim. As already stated, the historical background and the political environment which influenced the making of the American Constitution were entirely absent here, and beyond the creation of the three organs of the State to exercise their respective functions as a matter of convenient governmental mechanism, which is a common feature of most modern civilised governments, there is not the least indication that the framers of the Indian Constitution made the American doctrine of separation of powers, namely, that in their absolute separation and vesting in different hands lay the basis of liberty, an integral and basic feature of the Indian Constitution. On the contrary, by providing that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions and that the Council shall be collectively responsible to the House of the People, the Constitution following the British model has effected a fusion of legislative and executive powers which spells the negation of any clear cut division of Governmental power into three branches which is the basic doctrine of American Constitutional law. Without such a doctrine being incorporated in the Constitution and made its structural foundation, the maxim *delegatus non potest delegare* could have no constitutional status but could only have the force of a political precept to be acted upon by legislatures in a democratic polity consisting of elected representatives of the people in their function of making laws, but cannot be enforced by the court as a rule of constitutional law when such function is shirked or evaded. The American courts are able to enforce the maxim because it has been made by the process of judicial construction an integral part of the American Constitution as a necessary corollary of the doctrine of separation of powers. But the position in India, as pointed out above, is entirely different, and the courts in this country cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence, or, in other words, to exercise such power through its

appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent'.

In *In re Keshav Singh*,¹² a seven judge bench of the Supreme Court observed that 'there is another aspect of this matter which must also be mentioned; whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the Courts to determine the dispute and decide whether the law passed by the legislature is valid or not.

Just as the legislature are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative

authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country; and so, we feel no difficulty in holding that the decision about the construction of Article 194 (3) must ultimately rest exclusively with the Judicature of this country.

The court went to add that 'the Constitution is of course supreme and even if it was based on the principle of separation of powers, there was nothing to prevent the Constitution makers, if they, so liked, from conferring judicial powers on a legislative body. If they did so, it could not be said that the provision concerning it was bad as our Constitution was based on a division of powers. Such a contention would of course be absurd. The only question, therefore, is whether our Constitution makers have conferred the power to commit on the Legislatures. The question is not whether they had the power to do so, for there was no limit to their powers. What the Constitution makers had done can, however, be ascertained only from the words used by them in the Constitution that they made. If those words are plain, effect must be given to

¹² AIR 1965 SC 745.

them irrespective of whether our Constitution is based on a division of power or not.¹³

In *Chandra Mohan v. State of Uttar Pradesh*,¹⁴ a constitution bench had observed that 'before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the same whether one construes the provisions of the Constitution or an Act of Parliament namely, that the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, if, however, two constructions are possible then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States'.

Another constitution bench in *Minerva Mills Ltd. v. Union of India*,¹⁵ had observed that 'it is a fundamental principle of our constitutional scheme, that every organ of the State, every

¹³ *ibid.*, at para 156.

¹⁴ AIR 1966 SC 1987.

¹⁵ AIR 1980 SC 1789.

authority under the Constitution derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided, the Executive, the legislature and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable.¹⁶

Referring to an earlier decision,¹⁷ the Supreme Court held that ‘the reason for this broad separation of powers is that the concentration of powers in any one organ may by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged. Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question

¹⁶ *ibid.*, at para 95.

obviously cannot be left to the executive to decide and for two very good reasons. first, the decision of the question would depend upon the interpretation of the constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution’.

¹⁷ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

The court also referred to Dr. B. R. Ambedkar who had observed that 'the power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution...If I was asked to name any particular Article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other Article except this one (Article 32). It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance'.¹⁸ It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law." The power of judicial review is an

¹⁸ Constituent Assembly Debates, Vol. VII, p. 953.

integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, part of the basic structure of the Constitution.

In *L. Chandra Kumar v. Union of India*,¹⁹ a seven judge bench of the Supreme Court held that 'the essence of the power of judicial review is that it must always remain with the judiciary and must not be surrendered to the executive or the legislature. Since the impugned provisions save the jurisdiction of this Court under Article 136, thereby allowing the judiciary to have the final say in every form of adjudication, it cannot be said that the basic feature of judicial review been violated. The constitutional bar is against the conferment of judicial power on agencies outside the judiciary. However, if within the judicial setup, arrangements are made in the interests of better administration of justice to limit the jurisdiction under Articles 32 and 226 of the Constitution, there can be no grievance...So construed, the High Court would continue to have jurisdiction to decide the *vires* of an Act even in the area of

¹⁹ AIR 1997 SC 1125, at para 45.

service disputes and would, therefore, perform a supervisory role over Tribunals in respect of matters involving constitutional questions’.

Justice Gajendragadkar, the then Chief Justice of India made the following observations on behalf of a seven judge bench that ‘whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the Courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the Courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures

themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country',²⁰

It is even more interesting to appreciate the observations of Justices Shelat and Grover who in the same decision observed that 'there is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reasons of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution but it envisages such a separation...The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances',²¹

Justice Ray, the then Chief Justice, had observed that 'when the constituent power exercise powers the constituent power comprises legislative, executive and judicial powers. All powers flow from the constituent power through the Constitution to the various departments or heads. In the hands of the constituent

²⁰ *Special Reference No. 1 of 1964*, AIR 1965 SC 745.

authority there is no demarcation of powers. It is only when the constituent authority defines the authorities or demarcates the areas that separation of power is discussed. The constituent power is independent of the doctrine of separation of powers. The constituent power is sovereign. It is the power which creates the organs and distributes the powers'. Justice Beg expressed his opinion against this concept of separation of powers based on the notion of constituent power.²²

State of Bihar and another, Appelants v. Bal Mukund Sah and others, the majority of a constitution bench held that 'it is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4). The High Court can get consulted by the Governor for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally

²¹ *ibid.*, at para 577.

forbidden by the Constitutional Scheme, will also fall foul on the concept relating to separation of powers between the legislature, the executive and the judiciary as well as the fundamental concept of an 'independent judiciary'. Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme'.²³

In *Asif Hameed and others v. State of J & K and others*,²⁴ a three judge bench observed that 'although the doctrine of separation of powers has not been recognised under the Constitution in its absolute 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 usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly 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, they have all the powers including that of finance. Judiciary has no power over sword or the purse

²² *Indira Nehru Gandhi, Appellant v. Shri Raj Narain*, AIR 1975 SC 2299.

²³ AIR 2000 SC 1296, at para 32.

²⁴ AIR 1989 SC 1899, at para 17.

nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding 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 power is the self imposed discipline of judicial restraint’.

In *Subhesh Sharma v. Union of India*,²⁵ the Supreme Court held that ‘the constitutional Phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence consistent with the constitutional purpose and process’. The court went on to add that there is a need to review the earlier decision of the Supreme Court in *S.P.Gupta v. Union of India*.²⁶

The majority judgment in *Kesavananda Bharati v. State of Kerala*²⁷ case emphatically stated that the concept of separation of powers

²⁵ AIR 1991 SC 631.

²⁶ AIR 1982 SC 149.

²⁷ AIR 1973 SC 1461.

is a basic feature of the Constitution. It, therefore, follows that the power of judicial review, which is a necessary concomitant of the independence of the judiciary, is also a basic feature of our Constitution. However, it does not follow that specific provisions such as Article 32 or Article 226 are by themselves part of the basic structure of the Constitution. In this regard, the history of Article 31, which contained Fundamental Right to Property and shifted from Part III to Chapter IV of Part XII, can be cited by way of an example. It is also pertinent to have a brief analysis of other important decisions of the Supreme Court on redefining the nature and scope of separation of powers under the Indian Constitution. A constitution bench of the court in *Union of India v. Rghubir Singh*²⁸ held that the 'power to review Acts of legislature is entrenched in the Constitution. Such a power flows from the Separation of Powers envisaged by the Constitution and the position in UK is different'. In a different tone and with the intention of not usurping the power of the other branch of the government, the Supreme Court in *Almitra Patel v. Union of India*²⁹ observed that 'under Separation of Powers, it is not for courts to tell the executive how to do its various jobs. The courts are only to direct it to use its powers when it is not doing so'. In *Dattaraj Nathuji Thaware v.*

²⁸ AIR 1989 SC 1933.

²⁹ AIR 2000 SC 1256.

State of Maharashtra,³⁰ the Supreme Court referred to Article 50 of the Indian Constitution and observed that there is a clear separation of powers and the wordings of that Article are so clear to pave way for an independent judiciary, free from executive interference.

In *Ram Jawaya Kapoor v. State of Punjab*,³¹ a constitution bench of the Supreme Court held that 'the Indian Constitution has not recognized the doctrine of Separation of Powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated'. In this regard, it is interesting to note that the court was using the phrases 'power' and 'function' synonymously, or it is possible for any one to construe that the court did not distinguish between these two phrases. However, a cursory look at Article 53 makes it amply clear that these two terms are used to mean two different aspects under the Indian Constitution. In support of this analysis, mention should also be made to Article 356 to draw the support for such a view. Article 356 (1) (a) provides that the President may by proclamation 'assume to himself all or any of the 'functions' of the State Government, or the 'powers' of the Governor, or any other

³⁰ (2005) 1 SCC 590.

body or authority in the state other than the Legislature of a State' (emphasis added). However, with the interpretation and law declared by the Supreme Court in *Samsher Singh v. State of Punjab*,³² this view, it is submitted would remain only of academic interest. This will continue till the Supreme Court is able to overrule this decision in the future.

In *E.T. Sunny v. C.A.S.S.S. Employees Association*,³³ a division bench of the Supreme Court held that 'the role of courts as watchdog in keeping Executive and Legislature in check' clearly brings out the concept of 'checks and balances' envisaged and interpreted by the court. In *State of Bihar v. Bal Mukund Shah*,³⁴ the court observed that 'in the context of independence of the judiciary, the Separation of Powers is the basic feature of the Constitution'. In *SCAORA v. Union of India* ³⁵ a nine judge bench held that 'when the concept of separation of judiciary from executive is assayed and assessed, the concept cannot be confined only to the subordinate judiciary. If such a narrow and pedantic or syllogistic approach is made and a constructed construction is given, it would lead to an anomalous position that the Constitution does not emphasize the separation of higher judiciary from the

³¹ AIR 1955 SC 549.

³² AIR 1974 SC 2192.

³³ (2004) 8 SCC 683.

executive. Justice Ahmadi went on to observe that ‘the concept of judicial independence is deeply ingrained in our Constitutional Scheme and Article 50 illuminates it. The degree of independence is near total after a person is appointed and inducted in to the judicial family.... but court has not strictly adhered to the doctrine of Separation of Powers but it does provide for distribution of powers to ensure that one organ of the government does not trench on the constitutional powers of other organs’. However, it may be observed here that the court did not over rule its earlier decision in *Samsher Singh*.³⁶

In *State of Bihar v. Bal Mukund Shah*,³⁷ a constitution bench had observed that ‘Separation of Powers’ and independent judiciary are now elevated to the level of basic structure of the Constitution and are at the very heart of Constitutional Scheme’. In *P. Kannadasan v. State of Tamil Nadu*,³⁸ the Supreme Court held that the Constitution of India recognizes and incorporates the doctrine of Separation of Powers. Even though the court has adopted past form of government where the dividing line between the legislature and executive becomes thin, the Separation of Powers is still valid

³⁴ (2000) 4 SCC 640 at 685.

³⁵ (1993) 4 SCC 441.

³⁶ AIR 1974 SC 2192.

³⁷ (2000) 4 SCC 640.

³⁸ (1996) 5 SCC 670.

and the state legislatures cannot make laws to annul judicial decisions. The amended law so made can be challenged but not on the ground that it seeks to in-effectuate or circumvent the decision of the court. This is what is meant by checks and balances inherent in a system of government incorporating the concept of Separation of Powers.

A review of these and many other judicial decision on this doctrines of 'separation of powers' and 'checks and balances' would reveal that the courts have not clearly laid down the nature and extent of the presence of these doctrines under the Constitution. It may be observed further here that the courts have been lamenting on a number of occasions, particularly in the field of enforcing environmental legislation, the failure on the part of the executive to enforce them. What exactly the courts can do under such circumstances except giving directions is not very clear. The accountability of the executive to the legislature and to the other constitutional organs of the government is yet to crystallize in a proper form and in accordance with the written provisions of the Indian Constitution.