



A study of parliamentary and Presidential form of Government, recent trends in the Indian system of Government and problems faced by the Indian Judicial System

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ABSTRACT

The article studies the oldest forms of Government in the world *i.e.* Parliamentary and Presidential form of Government. The article elaborates various features of both the forms. In addition to this, the article also brings about some light on the recent trends in the Indian system of Governance detailing its various aspects. Throughout the research various cases have been discussed which elaborates the evolution of judicial system of problems faced by the Indian judiciary in keeping the complexity of the largest democracy of the world.

INTRODUCTION

The parliamentary and presidential form of government is two most famous kind of governance forms in the world. USA has a presidential form of government. India has a parliamentary form of government. Both kinds of government have their own merits as well as demerits. The following is the description of the two forms of government.

Practices in Parliamentary form of Government:

The powers are distributed between the three organs of the state in the parliamentary form of government. The parliament is supreme. The parliament is answerable to the people. In this system of governance the head of the state is not the same person who is the head of the government. The countries with parliamentary form of government can be either: *Constitutional Monarchies or Parliamentary Republics.*

The modern system of parliamentary system finds its origin to 1707 – 1800 in the Great Britain. The parliamentary system can be with a bicameral legislature or unicameral legislature. Bicameral means two houses. Unicameral means one house.

The parliamentary form of government can be further divided into two Types:

- Westminster System.
- Consensus System.

The Westminster form of government can be seen mostly in the *Common wealth of Nations*. This kind of system is believed to have a more adversarial fashion of debates and discussions and parliamentary sessions. For the purpose of elections the elections are either single transferable vote, instant runoff voting, proportional representation and plurality voting system. Some also use the Proportional representation system. The western European countries have Dualism as form of Separation of Power.

India is also one of the Commonwealth Nations. The countries which were once a colony of the British rule is called as the Commonwealth of Nations. In India the legislature and the executive are interconnected to each other. The period of emergency during the time of Mrs. Indira Gandhi was the turning point which forced the thinkers to re think if the parliamentary form of government is the best form of government.

India adopted this kind of government during the 1947 as it was very much familiar with this kind of government. The drafters of the constitution of India were greatly influenced by the English system of governance. Since India was a land of several varied groups it was important that each of the group has a representation so they do not feel left out. The presidential form of government was rejected as there was too exclusiveness in the functioning of Executive and Legislature. Which may further result in conflicts in the country.

Under the parliamentary form of government the head of the state is the President nominally while the prime minister is the real head of the state. There are several powers given to the president but he merely gets a chance to exercise them. The real powers are exercised by the Council of Ministers headed by the Prime Minister. Since India has a partial separation of powers between the executive as well as the legislature, so they are not totally independent of each other. They are mutually dependent on each other.

The residuary power vests with the Executive Branch of the government. In this kind of system the executive is more responsible to the legislature. The council of ministers has a collective responsibility towards the each other. Without giving any reasons the prime minister has the power to remove any minister from the office for the same.

The essential Features of parliamentary form of government will be:

- Presence of nominal head in the government.
- Close nexus between the executive and legislature.
- Accountability of the executive.
- Collective responsibility.
- Leadership of prime Minister.

Smooth Functioning, Quick Decision Making, Flexible System, Open Administration are some of the advantages of this system of government. The closeness between the executive and the legislature helps in the smooth running of the country. If the party is in majority without any kind of alliances then the decisions can be taken smoothly and quickly. In the Indian Constitution, the constituent Assembly had proposals to incorporate the doctrine in the constitution, but they did not accept them. As the doctrine was absolutely rigid for provisions of the constitution. The constitution did not make any absolute or rigid division of functions among the three branches of the state. Often the *Legislative* and the *Judicial* functions are given to the *Executive*. There is a functional separation in the constitution.

The *Executive* power of the union and the State is vested in the president and the Governors of the states. The president is the head of the Executive branch.. He exercises his powers on the aid and advice of his prime Minister and his council of Ministers. The supreme court is the highest court of appeal. The constitution recognizes the three fold functional division of governmental powers. *Article 50* expressly requires the state to apply the Doctrine of independence of *Judiciary* from the *Executive* as a sign of Efficient Government.

Even the implementation of the changes does not become an issue in the parliament. Since this kind of government is flexible in nature they adapt to changes quickly.

In this kind there can be certain drawback of system as well, like *Absolute Majority, Politicization Of Administration, Unsuitable For Multi-Party system,*

Emergencies and Mal- Administration. The parliamentary form becomes a virtual dictatorship if the party is in majority. Also they sometimes tend to become autocratic in their actions also. They sometimes also tend to have more politics than the welfare of the people. Parliamentary system has no qualifications to deal with situations like Emergencies etc.

The men drafters of constitutions were people of practical and political experiences and it was their practical expedient that they opted the doctrine of the *Separation of Powers*. But they did not believe in the air-tight separation that the doctrine of separation of power. They wanted to avoid the concentration of power in any one department of government, as supported by the doctrine, as that would enable that departments or organs to become autocratic. This end could best be achieved not by a theoretical application of the pure form of separation of power among the three organs of the government. But by a judicious mixing, blending and overlapping of powers which would let them have a check and balance on the other branches and avoid the tyrannical tendencies of the others. It is clear that the framers never intended to apply the doctrine in its strictest form. If they actually intended to adopt the doctrine they would have done it by applying it in its totality.

Practice in Presidential form of Government :

The presidential system is that form of government where the head of government is also act as the head of states, not only this but he also leads the executive branch which is separated from legislative branch. The United States of America has a presidential system. The legislature may have the right, in rare most cases, to dismiss the executive through impeachment.

In the Presidential form of government the executive is led by the President. In this form of government the President act both as the head of the state and also the head of the government. In this form of government the President takes up the charge in his own capacity rather than acting on the aid and advice of the Cabinet, as in the form of Parliamentary Form of Government. The President is elected directly by the people. The President s also the supreme commander of the Army and also has the power to carry on the Foreign Policies.

From gaining complete control of the government. It was hoped that by making each branch accountable to different groups a variety of interests would be reflected

hence compromises and a balancing of interests would result.

The framers of the constitution of United States have strictly adhered to the doctrine of *Separation Of Powers*. The drafters of the Constitution intended to have the balance of powers which can be attained by checks and balances between separate organs of government. The pure doctrine of the *Separation of Powers* had to be modified as it was not able to cope up with the changing dimensions of states responsibilities and changing in the complex politico-economic problems of democratic socials. The doctrine is difficult to implement in the strict form as it will be impracticable.

Separation of powers finds its origin in the draft of 1789 constitution of UNITED STATES OF AMERICA. The powers of the government are vested in three organs of the government. The American system also accepts separation of power as for Authority. It means that no person should hold office in more than one of three branches of government. *Section 6, Article 1* specially says that, "No person shall be a member of either House during his convenience in office who is holding any office under the United States." It is clear from the practice. Robert Kennedy resigned as Attorney General in order to become senator to become Secretary of Defense. Byron White resigned from Assistant Attorney General in order to become a Justice of the Supreme Court. Arthur Goldberg by resigning the post of Justiceships of the Supreme Court to become U.S Ambassador.

However, the American Constitution opted for a diluted version of the *Separation Of Powers*. A plain reading of the American Constitution of 1789 reveals that this does not formulate doctrinaire or prohibitive idea of the *Separation of Powers*. Further Holmes J. made it clear that distinction between *Legislative* and *Executive* actions cannot be carried out with mathematical precision. Neither can it be divided into watertight compartments nor is it desirable to do so.

President has always been an active member in the political processes. Although their level of participation will depend upon the legislature in majority. It is difficult to make policies in the presidential form of government as there will be slow responses. But the presidential form of government is proved more efficient in larger countries. The president is always in a dominant position in this type of government. But this does not mean that the separation of power is totally neglected or discarded.

The process of impeachment by the *Legislative* body may be termed as judicial function. But it does not form a part of the system of checks and balances which is a peculiar trend. The three branches of the government are not at all totally isolated from one another. Each of them has a sufficiently engraved system of checks and balances so that whenever required they can check each other. The Congress may keep checks on other departments in many ways in which it alone may propose. The House has the power to impeach and the Senate will try the impeachment proceedings of *Executive* and *Judicial* officers. This is how their removal from the office is done. The Congress through legislation establishes, regulates, limits or abolishes inferior courts and *Executive* governing bodies. The Congress acts as a treasury for all. The Senate has the power to control the *Executive* and the courts. The *Executive* can also reject the nomination of the President. Congress may refuse the bill to pass which the President requires passing.

The Congress has the power to limit the appellate jurisdiction of the Supreme Court. Similarly, there are other ways through which other branches might be checked by the President. The President has the power to veto through which he can keep a check on the Congress. But this veto can be overridden by a 2/3 vote. He can keep a check on the courts through his power to appoint judges.

Similarly, the courts can check the other departments by interpreting and applying acts of Congress and treaties of the United States. This gives them the power to have a check on both Congress and the President. The courts may also declare acts of Congress to be unconstitutional and thus prevent enforcement. The courts also control *Executive* and administrative actions through entertaining suits and issuing court orders against public officers.

Presidential form of government cannot be treated as a sufficient cause for the failure of democracy. The presidential system has its own ways to keep checks on each other. There is less danger of oppression in the presidential form of government. Since the President is elected directly it is easy to make him accountable.

Even in the presidential form of government people can be called as sovereign authority. The powers of the state are limited. The President holds the office for a fixed term. The other procedure to remove the President is through impeachment.

The basic Features of a Presidential form of

government are:

- President is the real head.
- Separation of power.
- Ministers are accountable to the President.

People directly elect the President. So the Congress as well as the President is not a part of the legislature. Neither have they held the offices like monarchs. They become accountable to the people and not to the legislature. The powers of the President are very real though the exercise of them varies greatly with the personality of the President, and it is the President's business to execute the Laws passed by Congress, in its legislation he can and does influence the actions of Congress. When he gives his speech he influences the Congress up to a greater extent. Even the President has no powers to dissolve the Congress. The independence of judiciary can be clearly seen. So a system of checks and balances can be seen in the residential form of government. The doctrine did not give the Supreme Court the power to decide political questions, because it wanted to avoid interference with the exercise of power of the *Executive*. The power to override judicial reviews was not given to Supreme Court. The President has the right to co-exercise the powers of the Congress through his vetoes. The President also exercises the law making power through his treaty making decisions. When the President appoints the judges it can be seen as hindering with the judicial decisions also.

The presidential form of government has its own merits and demerits. *More Democratic, Stability and Continuity of Government, People Choose President, More Efficient in Working, Prompt Decisions, Best Deals with Emergencies, More Suitable for Multi-Party System and More Unity Can Be Seen* are some of the merits of the presidential form of government.

The powers of *Executive* include veto over the bills, making of treaties, appointments of judges and other officials. But the chief function of *Executive* remains to be the enforcement of law. The President, *Executive* head, is the commander-in-chief of the military. He also has pardoning powers. The judiciary has the power to interpret the laws in federal cases and try them. There is a system of checks and balances by the legislative and judiciary so that the *Executive* does not exceed its ambit of work. The legislative power includes the law making power, establishment of lower federal courts and enactment of all federal laws. The powers regarding

president is overriding of Presidential veto and impeachment of president. The checks and balances are done by the executive and judiciary so that there is no hindrance with the rights of the people. The additional power vested with the courts is declaring any law or executive action as unconstitutional. The checks and balance system by the executive and legislative works in the same way.

The framers of the constitution of United States have strictly adhered to the doctrine of *Separation of Powers*. The drafters of the Constitution intended to have the balance of powers which can be completed by checks and balances between separate organs of government. The pure doctrine of the *Separation of Powers* had to be modified as it was not able to cope up with the changing dimensions of states responsibilities and changing in the complex politico-economic problems of democratic socials. In the strict form it is very difficult to apply the doctrine as it will be impracticable.

The doctrine of separation of power that attracted the framers of U.S. constitution was designed to prevent the majority from being dictator. From their past experiences, the framers wanted to be sure that no new government has too much power, rather a system of checks and balances. *Article 1* of the constitution provide for a legislative comprising of the house and the senate. *Article 2* provides for the executive, which includes the President, the Vice-president and the departments. *Article 3* provides for the judiciary comprising of the federal courts and the Supreme Court. With a system of checks and balances each branch has their own powers and their own ambit. The system of checks and balances was designed rather than evolved by an accident. This system makes each branch accountable and responsible to each other, which helps any of the branches from becoming dominant.

Conflicts and deadlock, absence of accountability to people, rigidity, weak foreign policy can be termed as some of the demerits of this form of government. This form of government is less accountable to people as compared to the parliamentary form of government. In the Indian Constitution, the constituent Assembly had proposals to incorporate the doctrine in the constitution, but they did not accept them. As the doctrine was absolutely rigid for provisions of the constitution. The constitution did not make any absolute or rigid division of functions among the three branches of the state. Often

the *Legislative* and the judicial functions are given to the *Executive*. There is a functional separation in the constitution. The *Executive* power of the union and the State is vested in the president and in the Governors of the states. The president is the head of the Executive branch. He exercises his powers on the aid and advice of his prime Minister and his council of Ministers. The Supreme Court is the highest court of appeal. The constitution recognizes the three fold functional division of governmental powers. *Article 50* expressly requires the state to apply the Doctrine of independence of *Judiciary* form the *Executive* as a sign of Efficient Government

Although there have been controversies that the presidential form of government is not much appreciation to this form and is seen mostly in United States Of America, it is important to note that every form has their own merits and demerits. They have been running since a longer time. As a matter of fact they still run with all the glory and success.

Recent trends in The Doctrine under the Indian system :

The doctrine of *Separation Of Powers* is a strict and absolute doctrine. But it has been modified to meet the challenges of different societies. The Indian Parliamentary system has its own systems of modifications. From the "*Pure Doctrine*" of the *Separation of Powers* there is a little divergence and even the American model has made a lot of modifications. We have adopted the doctrine from the constitution of America. The modifications have been made due to changes in the present day requirements in which isolation of the organs will not work. The system of checks and balances have been established to prevent the government from becoming Despotic.

The following heads will discuss the latest application of the doctrine of separation of power in The Indian Parliamentary set up:

Accountability of Executive to Parliament :

The Indian parliament has been facing challenges regarding the accountability of executive to the parliament. It is believed that the decline in the effectiveness is caused by the lack of accountability of the executive to the legislature. Globalization has also eroded the powers of the parliament. Firstly the economic

decisions are taken keeping in mind the global prospective. Secondly by the restructuring of the regulatory framework which has to be given to a lot of non elected institutions. The weakness of the Indian Parliament has also give a slow pace to the formation and implementation of legislations. Even the political leaders do not have the caliber of person who should be entering the parliament. The lack in their educational and professional background has affected the executive negatively. Although the constitution of India has always aimed at the democratic accountability it has to some extent lagged behind in parliamentary accountability. Looking at the recent past India has widened the scope of democratic participation to a greater extent. India has also gained a lot of significance in the economic area. India always had a bicameral legislature. India also has a concept of universal adult franchise. The Lok Sabha and the Rajya Sabha are the two houses where as the members of Lok Sabha are directly elected but this kind of election is more of a favoritism banned the actual assessment of the work of the leaders. The authority in accountability of parliament is limited by the system of checks and balances exercised by the other organs. There was a time when there was a perfect balance between the legislature and the executive but the two organs now have been losing this balance lately.

Although parliament is not the supreme authority but it has been controlling the other two organs either directly or indirectly. In India the will of the people is embodied the parliament, so it is the duty of the parliament that the people are their prime importance. The executive accountability will ensure the public character of the organ and also will prove that there is no despotism or corruption or any other kind of inappropriate behaviour.

The accountability will also promote performance leading to setting standards and norms which are important for the public welfare. The accountability of the executive will also lead to easy access to the government. The three organs have to work in co-ordination with each other for the smooth running of the country. The council of ministers is accountable to the parliament for their actions, but there is no legal duty on the parliament to enforce the accountability to the executive. A good responsible government always follows the guiding principles of the constitution.

The constitution of India speaks about the

parliamentary form of government which means that the Parliament is supreme. Certain provisions gives parliament to have a control over the government. The council of ministers are collectively responsible to the Rajya Sabha as per *Article 75(3)*. According to this article individual minister is accountable for his respective department. For the executive to declare emergency at the state level, the power is subjected to parliamentary control.

For the money matters it is important to obtain grant from the Lok Sabha for which the government has to show the need and spending amount. It is evident with the present working of the executive and the legislature that the executive has a control over the parliament and not vice versa. Also there is a lack of accountability on the part of executive.

The Democratic theory provides that since power generates from the people within the government, each level of the *Executive* authority is accountable to next, running on up to the cabinet or the president. The *Executive* authority is accountable to the legislature. The three important conditions which determines the effectiveness of the *Legislative* control over administrative actions. First of all, as a matter of principle legislatures can be effective in its control over the *Executive* only in proportion to the strength and appeal to the electorate, expects that someday it would have a chance to a cabinet of the future.

There is an opposition party which tends to work as a barrier for the present government if they try to act despotic. Not only this but the strength and quality of public opinion also affects the functioning of the parliament. Strong opinion of public which supports the legislature can effectively retain Executive and administrative action. Public opinion controls the *Executive* both through independent expression of opinion on public issues, supporting or opposing the legislature in its attitude towards the *Executive* and also during the time of elections by choosing such people who would be honest and fearless in criticizing actions of the Government. Moreover, the effectiveness of *Legislative* control over the *Executive* also depends upon the devices and procedures installed by the legislature in carrying out its functions to meet the changing needs of the modern society.

Groups in the Parliament of India and the state legislature are such that they cannot end winding counter

weight to the powerful *Executive*. So, in the matter of power the role of the parliamentary party assumes special significance. The control of parliament is weakened up to a great extent because of the incapability of the opposition to present a complete, effective and constructive challenge to the party in power.

The efficiency of parliament lies in its mastery of details and the unwinding attention it pays to aspects of implementation of policy. It has no voice in the laying down of policy except in so far as its work is influenced by the majority party. But its control can be more effective if the members are alert to the way the policies are introduced and implemented and point out competence to understand the contents of policy over them accordingly on the floor of the house.

Administrative pronouncements :

Administrative Adjudication is the process by which an administrative agency issues an affirmative, negative, inactive or declaratory order. The formal proceedings before an administrative agency adopt the process of rulemaking or adjudication. In recent times, the administration has obtained powers of adjudication over disputes between itself and private individuals inter alia, and has emerged with a plethora of tribunals. The administration has secured detailed powers to grant, refuse or revoke licenses, impose sanctions and take actions of various kinds in its discretion or subjective satisfaction. Proceeding to this, it has been given vast powers of inquiry, analysis, investigation, search and relinquishment and surveillance.

For determination of major policies a *Legislative* body is best suited in the given setup, but it also lacks time, technique and expertise to handle it. Therefore, the legislature has to be satisfied by laying down broad policies and leave the rest to the administration, thus has resulted in delegated legislation. In support of this, administrative adjudication has arisen largely because of the multitude of cases arising for adjudication under the modern legislation that need to be decided sweepingly without much formal and technical delays, and with the special persons with the specialized skills. The courts are not in a position to fulfill these conditions and so the administrative tribunals have come into picture.

Administrative adjudication is the power of an administrative agency of judicial powers which have been given to them by a legislative body. These Agencies

typically possess both legislative and judicial powers. The legislative power gives this administrative adjudicatory body an authority to issue regulations, whereas the judicial power gives this administrative adjudicatory body an authority to adjudicate cases. The current distinction was not made historically between adjudication in courts of law and within administrative agencies.

Administrative courts mostly work for determining the rights of the individuals against other individuals and their duties. They also entertain the cases that are against the government. This function mainly distinguishes administrative tribunals from civil courts. The administrative tribunals are having the power to assess various penalties, like forfeiture of licenses for violating a statutory or administrative regulation. Many administrative bodies are not vested with adjudicative powers and they must proceed through the regular courts of law for civil or criminal sanctions.

Adjudication can also be in the competitions, like it can also be the process, at dancing competitions, in television, game shows and at other competitive forums, according to which competitors are evaluated and ranked and a winner is found. But we are talking about the Adjudication in the legal terms which is a legal procedure to resolve a dispute. The academic giving or uttering of a judgment or decree in a proceeding of court, also the judgment or decision given. The entry of the decree by a court in respect to the parties involved in the case. It implies a hearing by a court, after a notice of legal evidence on the factual issue involved. The equivalent of a determination which indicates that the claims of all the parties thereto have been considered and set at rest. Adjudication is a process by which an arbiter or a judge analysis evidence and disputation, including legal reasoning set forth by opposition parties or offender to come to a decision which determines rights and obligations between the parties involved in it. Three types of disputes are resolved through adjudication: Disputes between the private parties, which may be individuals or corporations, disputes between the private parties and public officials and public bodies or public officials.

Another point of difference between administrative tribunals and regular courts is nature of subject matter. The subject matter of an administrative tribunal is a single economic activity, or a set of densely related economic

activities, or specific benefits conferred by government. The administrative tribunals are mostly the quasi judicial bodies. They are established either through a law or by any act of delegation by the legislature to executive. The executive has a jurisdiction over the administrative tribunals.

Administrative adjudication has been gaining a lot of importance in the recent past. It is a new branch of law that finds its origin in the *Droit Administratif* of France. Administrative law has gained its importance in the whole world. Administrative law deals with the principles that govern the governmental agencies both of the state or union as well as that of the federal. The basic aim is to see that the government acts within its limits of jurisdiction. They should not violate the rights of the people. Administrative law is one of the branch of Public law. This branch of law was popularised in the 20th Century. The administrative law has been an outcome of the socio-economic functions of the state that have been increasing at a very fast pace. Due to this reason there has been an increase in the administrative functions as well as powers.

Judicial review :

The countries with common law system have the method of judicial review, which is embodied in their constitutions or any source of the same. Any law which is passed by the legislature or executive, the power to review that law is vested in the High Courts and Supreme Court. It is important as it the measure through which legislative and executive remains under the surveillance. The system of the checks and balances has made it easy so that they can check other branches.

For the judicial review of legislations The Indian Constitution has some provisions. This concept has taken from the constitution of United States Of America. which makes the judiciary empower to make decisions and review the laws passed by the legislature. If any part of the legislation is in coercion with the constitution of India then it can also be rendered as unconstitutional.

This power conferred on the Judiciary has a lot of significance as it has to deal directly with people and protect the rights of people against the tyranny of the other two organs. It is however important to see that the procedure of judicial review forms a part of the system of checks and balances.

In *Union Of India v. Satish Chandra*¹, Krishna Iyer,

J. observed that: “*Neither we are in the mood to condone willful procrastination nor suffer wanton stagnation in administration in obeying order of courts as a ground for default. The law does not respect lazy bosses nor cheeky evaders. Nevertheless, behaving in a pragmatic manner and taking into consideration on the paper logged procedure, millions of people and miles of red tape in governmental functioning, the court stressed that contempt power must be used sparingly if it is conceived that there has been willful defiance or disobedience. Court has now developed the concept of ‘Continuous Mandamus’ to monitor compliance of its direction.*”

The Judicial Review has been controlling the powers of the government over the years. It has acted as a controlling mechanism so that the government does not become autocratic. It is necessary to control the government because otherwise it will be hindering the rights of the people. The welfare of the people is the prime aim of the people.

As we have a written constitution, there have been several situations when it had become necessary to decide whether Acts passed by the parliament had adversely affected the fundamental rights guaranteed under the Constitution. In this context the principle of judicial review has played a very important role.

Judicial review is the doctrine under which actions of legislative and executive are subject to review by the judiciary. With a judicial review power a court may overrule laws and decisions that are inappropriate with a higher authority, such as the terms of a written constitution. In the separation of powers the term is one of the checks and balances: the power of the judiciary to administer the legislative and executive branches when the latter exceed their authority. The agenda and scope of judicial review may differ between and within countries because the doctrine varies between jurisdictions.

Civil law and Common law are two distinct but parallel legal systems in the context of which the term Judicial review can be appreciated, and also by two distinct theories of democracy with reference to the manner in which government should be formulated with respect to the principles and doctrines of the separation of powers and legislative supremacy.

One more reason why the judicial review should be understood in the situation of both the development of two distinct legal systems (common law and civil law)

and two theories of democracy (legislative supremacy and separation of powers) is that some countries don't have any type of judicial review of the primary legislation with common law systems. Still in the United Kingdom a common law system is presented, the country still has a strong attachment to the idea of legislative supremacy; consequently, judges do not have the power to shoot down primary legislation in the United Kingdom. Nonetheless, there has been tension between united kingdom's propensity toward legislative supremacy and the EU's legal system since the United Kingdom became a member of European Union, which categorically provides the power of judicial review to the Court of Justice of the European Union.

The courts is granted to review administrative acts by the most modernized legal systems (individual decisions of a public body, such as a decision to assist a subsidy or to withdraw a permit of residence). In most of the systems, review of secondary legislation are also included (legally enforceable rules of general appropriateness approved by administrative bodies). Some countries, markedly France and Germany, have enforced a system of administrative courts which are charged with resolving disputes between administration and the members of the public. In other countries counting the United States and the United Kingdom, the judicial review carried out by the regular civil courts, although it may be assigned to specialized panels within these courts.

The United States employed a mixed system in which the district courts of the United States review some administrative decisions, some decisions are directly reviewed by the courts of appeals of the United States and the specialized tribunals like the United States Court of Appeals, for Veterans Claims which is not technically part of the federal judicial branch despite its name, review other decisions. It is quite common that such preliminary conditions like a complaint to the authority must be fulfilled before a request for judicial review of an administrative act filed with a court. In most of the countries, the courts apply such special procedures in administrative cases.

Civil law and common law are the two distinct legal systems of the starting, which have contrasting views about judicial review. The Common law judges are seen as sources of law, skilful in innovating new legal principles, not only this but also experienced in rejecting

legal principles that are no longer lawful. Who apply the law are seen as judges, having no power to destroy legal principles according to the tradition of civil law. Not only this but the idea of separation of powers is also a different theory about how the government of a democratic society should be organized. In comparison with the legislative supremacy, Montesquieu was the first to introduced the idea of separation of powers.

In *Marbury v. Madison*² case the Supreme Court ruled under the court of John Marshall in the United States. "*The Separation of powers is based on the idea according to which, without any due process of law no wing of government should be able to drill power over any other branch, there should be a check on power with each branch of the government, so that it could check the other branches of government, thus creating a bureaucratic balance among all the branches of the government. checks and balances is a key to this idea. On the powers of the other two branches of the government by the judiciary, judicial review is treated as a key check in the US.*"

Regarding judicial review, along with the societies based on common law and those underscoring the doctrine, differences in constructing such democratic societies led to different views being the most likely to utilize judicial review. Still, many countries, whose legal systems are stationed on the idea of legislative supremacy, have learned the possible dangers and limitations of assigning power absolutely to the legislative branch of the government. To branch the tyranny of the majority with the civil law system many countries have adopted a form of judicial review.

Nullification of Judicial decisions :

All the organs of the government get their powers from the constitution. To enact laws the legislature has residuary power. *Articles 245 and 246* of our constitution read with three lists of *7th Schedule* distributes the *Legislative* powers between the state legislatures and the parliament both territorially and on the basis of subject matters. Within the sphere allotted to the legislature, it is supreme.

The legislature can enjoy the constitution power of making laws both eventually and retrospectively. The legislature enacted the law, the defects are identified by the *Judiciary*. Then it is legislature again which amends the law and abolishes defects pointed out by *Judiciary*.

Validating laws can also be passed by it. The power of legislature to validate invalid laws by making retrospective enactments has been admitted by the Supreme Court. If a law is not valid for the reason that without *Legislative* competence the legislature has passed it and action is taken under its provisions, if the subsequent law passed by the same legislature then the said action can be validated, after it is covered with the necessary *Legislative* power. The power to validate an invalidate law is also included with the power to make laws. By changing the basis of decision retrospectively the legislature can abolish the effect of a decision. The courts have maintained distinction between two sorts of *Legislative* abolition of judicial decision; first of all abolishing the effect of a judicial decision by changing law retrospectively and then, making encroachment with judicial process. The former is allowed but the latter is not. However, during the emergency of 1975, when most of the dissenters were interned and truncated parliament mutilated the constitution through various constitutional amendments, the possibility of abuse of power no longer remained imaginary. The Supreme Court itself faced that reality in Indira Gandhi case, where Iyer. J., held that she could not vote in parliament or perform any such duty which was associated with her membership of parliament. Hence, the promulgation of emergency in 1975 came soon after the above decision of the Supreme Court. After the promulgation, the Gandhi government enacted a number of constitutional amendments. But the constitutional harmony between the legislature and *Judiciary* is fundamental for constitutional peace and good government. it is not enough in the constitutional law to separate the two "In water-tight compartments". Though the separation is no doubt necessary but what is more essential is an active and dynamic co-operation between the two.

The theory of abolition is based on a view that the States formed the Union by an agreement (or "compact") among the States, and that as founder of the federal government, the final authority to determine the limits of the power of that government vested in the hands of state. Under this, the compact theory, the States and not the federal courts are the eventual interpreters of the extent of the power of the federal government. Under this theory, the States therefore may reject, or abolish, federal laws that the States admit are beyond the constitutional powers of the federal government. The

related idea of interposition is a theory that when the federal government enacts laws a state has the right and the duty to arbitrate itself that the state believes to be unconstitutional. The theories of nullification and interposition was boosted by Thomas Jefferson and James Madison in the Kentucky and Virginia Resolutions in 1798.

In a verdict that could influence the pending interstate water disputes, the Supreme Court ruled that Parliament and Assemblies have no power to enact laws that abolish the judicial verdicts based on facts and findings. Because of this pretension of power, legislature has no power to neutralize the effect of any judgment which is given after scrutinising the facts by means of evidence or materials placed by the parties before the court of law.

The Supreme Court has acknowledged that the legislature has the power to make judicial decisions as ineffective by enacting a law which validates the legislative field by fundamentally altering or changing the character even retrospectively.

This power has not much application where a judicial decision has been given by recording the finding of facts. A Judicial decision, which of the matter by giving findings upon the facts, should not be changed by legislature. A final judgment should operate and remain in force until it is altered by the court in appropriate proceedings.

Thus, judicial review is a weapon to check whether the *Legislative* and *Executive* are in their ambit of work or not. It is important to keep them in check as it will be leading to chaos and confusions. This will also lead to them becoming autocratic. The character of the government which is democratic should not be changed because of this to despotic. The framers of our Constitution drafted it so flawlessly that it aims for an independent and impartial *Judiciary* as the interpreter custodian and guardian of the Constitution and also protector of the rights of the citizens by the process of *Judicial Review*. This makes it mandatory for the *Judiciary* to interpret the laws but not to make them. The Supreme Court is the apex court of the country. There is a hierarchy of courts in India.

There has been a lot of dissatisfaction regarding the failure of Judiciary, it has been felt that an independent machinery like the NJC which, would have helped in achieving the accountability which is much desirable

these days. The suggestions that were made for a NJC formed the part of the Report of the Law Commission of India.

As Judiciary is one of the three crucial pillars of Indian democracy. Judiciary is the final interpreter of the Constitution of India and laws. It helps in maintaining the social order by dealing with the ones in the opposition of the law. It has been an upholder of the Rule of Law and has enforced of the right to liberty, the role of the Judiciary is incomparable. The people have faith and confidence in the Judiciary. This is an evidence of the fact that the Judiciary has responded to the needs of the hour. Justice is best accepted when it is much in the access of the people.

The Maintenance of the Rule of law is an important attribute of the judicial branch in every democracy. The Constitution of India sets out the noble objective of securing justice of social, economic or political nature to all the citizens of India. In ancient times too, the rule of law was more about the sustenance and holding together the human society through the norms which are the moral command of the consensus.

If the poorest of the poor has an Access to justice this would Mean *Justice for All*. An independent and compassionate judicial system is a must for a country which has a lot of poor citizens in the country. *Article 39A* of the Constitution provides for a free legal aid service to all. This means that the one who is not in a position to afford the legal expenses must not be denied of the legal aid service. They should be able to have a fee access to the services of the lawyers. Voluntary efforts by all those who are concerned with his provision are required to make this provision a celebrated truth. It is required to educate the people legally. Imparting the positive and good values in the young lawyers and is important. The Legal Services Authorities Act was enacted in 1987 to give a static base to the uniform legal aid programmes in the country. The Judges have played an important role in enforcement of the Act. Provision of free legal service to the weaker sections would provide a strong impetus to the cause of 'Justice for all.

The Constitution in India is a written constitution. The provisions are recorded in a single document. It can be termed as Magana Carat of India. The Supreme Court has been interpreting the importance of good government as enshrined in the Constitution of India continuously.

Judicial accountability as an exception :

Independence of the *Judiciary* is a one of the basic structure of the Indian democracy as well as the constitutional culture under this constitutional system being equally important as the guarantee of the liberties which are given to every person in the country but are kept in check by the judiciary. It is important to keep a check because this ensure lawfulness in the country.

The three organs of the government – Legislature, Executive and Judiciary perform the three most important functions *i.e.* law making, enforcement of the law and interpretation of the laws. The basic agenda behind this is separation of powers. This brings accountability also keeps the government in check and also the rights and liberties guaranteed to us are safeguarded.

The another principle that has been working with the separation or balance of power is the system of checks and balances. In simple words the principle of checks and balances means that no organ of the government should be have unchecked powers. The power of one organ should be checked and balanced by the other two. So in this way the balance is also achieved. In India the executive is answerable and accountable to both legislature as well as the judiciary. Because of the anti-defection law there has been a decrease in accountability. The parliament also is answerable and accountable to the people and also the other two branches.

Independence is an embankment of the rule of law. It is equally important that Judges should be independent in implementing law and rendering judicial decisions, if the law, which is to be applied to all citizens in the country, is equal to all. Judges can be subject to intimidation and pressures from litigants, including criminal element of society. Independence of judiciary is accepted principle adopted by most of the democratic countries. With the history of judicial independence in United Kingdom, United States the history of judicial independence in India has been provided.

Judges were appointed by the Crown before independence, yet they are independent from it. This principle was taken seriously after independence and it became a part of the Basic Structure of the Constitution, which cannot be amended. The independence of judiciary is given by the Constitution to the judges of the Supreme Court and the High Court will hold office till they attains 65 and 62 years of age. The parliament is authorized to determine the privileges, allowance, leave and pension

of the judges of the Supreme Court. High qualifications for the judges is prescribed by the constitution

President cannot remove any judge from his office except upon the presentation of him of an address by both the houses of the parliament for such removal on the grounds of misbehavior and incapability. The President of India appoints the judges of supreme court and high court in consultation with the CJ of India and such judges of the supreme court and High Court as he may deem necessary. The SC is also treated as the court of record. However many people have misused this independence and it has also been the reason for the growth of colossal power. The problem actually lies in the understanding of the independence. It has to be understood as independence from legislature and executive and not as independence from being accountable. The spirit of independence has been captured very aptly, the independence of the Judiciary is not the property of Judiciary, but a commodity to be held by the Judiciary in faith for the public.

The need for the independence of the Judiciary is essentially imminent. In order that the justices administer justice freely, without any fear and favor, fairly, It is imperative that their tenure is not depend upon the pleasure of the president who is the appointing authority. They are servant to the law not to the President. Therefore, their tenure has been made dependent upon the pleasure of good behavior so that there is no internal consequence and this is secured by an express provision in the Indian Constitution that Judges of SC and of HC shall not be removable except by an address by both the Houses of the Parliament to the president, passed by a special majority and on the ground of proved misbehavior or disqualification. The independence of the Judiciary is the basic and essential feature of the constitution. It is an integral part of our constitutional system and without the rule of law would become an illusion and an impractical promise.

A democracy republic is one where the government if of the people, for the people and by the people also because of the democracy they also become answerable to the people. The accountability includes not only the politicians, but everybody who are called as public servants like the bureaucrats, judges and everyone in whom the power is vested. The person who has been assigned some power by the government becomes accountable to the people. Through the judicial system,

the agency of courts, deals with the administration of justice. Judges are the human stuff who presides over the courts. They are not simply visible symbols of courts, in the flesh and blood they are actually their representatives. The image of courts determined by the manners in which judge's discharge their duties and the creditability of judicial system itself. From the ancient time the judges have been held in high venerate and revered as super humans in India but coming across recent incidents in Bihar represent that disheartened by the failure to get justice (like killing of an under trial in the court itself and execution a suspected thief to death), faith of people in judiciary is going downward slowly and are taking law into their hands. This is highly disastrous. A need absolutely is there to make judiciary accountable, because judiciary has to act as the guardian of our constitution so denigration of values is far more dangerous in judiciary than in any other wing of the government. Judicial accountability and liability of the judges is an old concept. Several countries have already provided for ensuring accountability of judiciary in their constitutions. This is to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and ravage into the domain of other organs. But at the same time oath of the office of every judge requires him to act without fear or favor judicial independence is a prerequisite, closeness of ill-will and to vindicate the constitution and laws of the country

The only available mechanism, that is impeachment, is too impractical. The only way through which the members of the higher judiciary that are the Chief Justices and Judges of Supreme Court and High Courts are accountable or can be removed is through impeachment according to the Indian Constitution. Many regard impeachments as a failure, but before moving into that, is far-reaching to see the constitutional provisions. Under Article 124(4), only on the grounds of proven misbehaviour or incapacity the process of impeachment is carried out. The Judges Inquiry Act 1968 says that a complaint against a judge is to be made by a resolution signed either by 100 members of the Lok Sabha or by the 50 members of the Rajya Sabha to their respective presiding officers. Comprising two judges one from Supreme Court there is a three member committee including Chief Justice of India if it is against the judge of a high court and two Supreme Court judges if it is

against a sitting judge at the Supreme Court. Before making a recommendation Investigations are carried out to the house. If the committee concludes in favor of the impeachment process it takes place. The matter is then discussed in both houses of the parliament. The accused judge is also given a chance to speak in his favor. After the discussion is over and the judge is heard, the house put the motion for vote. A resolution then passed by both houses with 2/3rds majority. This whole process should be completed within a single session. Once the resolution is passed it is sent to the President for his assent.

According to the Oxford Dictionary 'Accountable' means 'to be responsible and answerable for your own actions. Being able to explain the reason those actions'. Accountability is the precondition of democracy. Transparency promotes accountability. All the public servants and departments are accountable. But there manner of being accountable may differ from department to department. Judiciary is also answerable to both legislature as well as executive. Although the accountability meter differs for judiciary also in comparison to legislature and executive. However because of various social problems like corruption it is a severe blow to the government. This has shaken up the faith of the people.

The superior court have been a great organ which has exercised its powers variedly and also one of the strongest organ of the government. The executive activity as well as he legislation can be struck down by the judiciary. It is beyond imagination that even the judicial system which has all the burden of saving the rights of the people has gone wrong at many points.

The Judiciary in the present days has been given the function of expanding the laws and their scope but also the function of protecting the rights of the people. The courts should not only on answering the questions of law but also of the people.

The framers of the Constitution have not imagined that within a small period the Judiciary would become the most powerful organ in the State. The Constitution has established the High Courts and the Supreme Court as watchdog, independence of the executive and the legislature for not only giving justice but also to keep a check on the legislature as well as the executive. The Judiciary has the powers to interpret the Constitution and quash any executive activity that hinder any law or the rights of citizens. It also checks the laws framed by

Parliament that they are within the limits of constitution of India. Where the supreme court has been given power to check legislature and executive also empowering the executive and legislature to make law, the judiciary ha also curtailed them by keeping a check on them. Many acts, regulations, laws and constitutional amendments have been turned down by the Courts.

Since the courts are the most important organ the legislature has found a way to curtail its limits by the collegiums that was earlier to be made but later was turned down because it was hampering the independence of the judiciary which was the basic structure of the constitution. No system as such is followed in the selection of judges and there is no transparency is there in the system. There is no much importance is given to examining of the records and credentials of a judges of their ideology and adherence to the constitutional ideals of a socialist, secular and democratic republic or their understanding of sensitivity towards the common people of the country who cannot afford much legal services or poor, unable to fight for their rights in the courts or are marginalized.

The courts in India enjoy absolute and unchecked power unequalled by any Court in the world. These days it is very much vital that the judges of the supreme court be more accountable for their performances and their conducts be it for corruption or the disregard of the constitutional values and hindering the rights of citizens. Sadly, there is no law that can measure the performance of a judge or his attitude towards the same. Impeachment is the only removal procedure of the High Court and Supreme Court judges. This process is long and requires signatures of the MPs of the House of People and of the Council of States for it to initiate. An Inquiry Committee of 3 judges is constituted for the trial of the judge. If a motion consisting the charges about the misconduct with the requisite signatures is submitted.

Justice is denied when it is delayed. Justice should be affordable, accessible and speedy. In today's time Our Courts are overburdened on account of the large number of cases pending before them. The number of vacancies is the basis for the pending cases in the courts. The judges have to keep a check on the legislature and the executive so they do not violate the rights of the people. This is one of the main aim of judiciary.

The judiciary has widened the ambit of justice to a greater extent. Locus standi has been widened by the

Supreme Court through judicial activism. Anyone can file a suit who is having a bonafide intention for filing the suit. The courts have tried to make it comfortable for the common man to reach the courts. Even a letter written to a supreme court judge may act as a PIL. These are some of the new inventions.

The time is now correct to make the *Judiciary* as a more accountable organ. Democratic and transparent methods to be used for removal, transfer, appointment of the judges. It is also necessary that proper mechanism is there in the constitution to punish the judges who has acted maliciously.

The judiciary needs to be independent of outside influence like of political and economic persons like government parties or industrial associations. This does not make the judges autocratic they have a set standard in which they have to behave. The basis of Judicial independence is public trust and judges must have the highest of standards of answerability and accountability in them. If the judges or court officials are suspected of any activity which is not pleasant then strict actions are to be taken against them.

Accountability is the ability to hold anybody responsible for their actions. The judiciary should be accountable towards the law like the decisions made should be in accordance with the law and should not be arbitrary. The judiciary should be accountable to the general people it serves.

The judiciary is more independent, impartial which gives it a new way to lead in the organs. There should be more of accountability than that of the other branches. There should be code of conduct for the judiciary as well as others so the accountability and the independence are not hampered. As they serve as a guide to and also a measure for the judicial conduct. The judges should interact more often so that they can impart true values of law under the law graduates and also they can develop more ways if they are allowed to speak their mind out. Even though there is judicial accountability even the public should act properly so that they can help the judiciary to maintain the law and order situation in the country.

The judges are the true interpreters of the constitution and they know exactly from where it should begin. Since ancient ages various laws have been enforced to govern the country. Sometimes it was the Muslim legal court while the other time it was about the criminal

justice. Indian judiciary is the most powerful judiciary after USA in the world. Since India is a democratic country judiciary has the highest place it is considered to be the most vital and crucial organ of the government. These days there are many questions that arise on the judiciary and its accountability. The judges enquiry act 1968 has replaced by the judicial standards and accountability bill 2010. This act has enforced certain standards for the conduct of the judges of the high court and the Supreme Court.

The Judicial Standards are set by Accountability Bill and the judicial standards and make judges accountable for their lapses. It will also instruct that judges of the Supreme Court and High Court to declare their assets and liabilities having in mind those of their dependents and spouses. The draft Judicial Standards and Accountability Bill 2010 has approved by The Union Cabinet that provides for setting up an oversight committee office members to deal with complaints against members of the higher judiciary. These details will be put up on the websites of the Supreme Court and high courts. It will further require judges that they should not have close relation with any member of the Bar especially with those members who practice in the same court. The growing concerns regarding the need to ensure greater accountability of the higher judiciary will address by the enactment of the Bill by bringing in more transparency, and it will further build up the independence of the judiciary and credibility. The former chief justice of India headed the proposed oversight committee which includes the attorney general, a chief justice of a high court, a Supreme Court judge and an eminent person nominated by the President.

For this it is imperative for the parliament to amend the law in this respect. The present laws are either proving to be inadequate or have become abortive and obsolete to cure the miscarriage of Justice. But again the delicate methods of removing a Judge poses a threat to the independence of the *Judiciary vis-à-vis* abdicating the doctrine of *Separation of Powers* implicit in the constitution. At present, the *Executive* and the legislature are subject to heavy criticisms at the hands of both public and media. But where should an aggrieved person so if the protector becomes destroyer. Let us not get stuck into the old well settled laws or doctrines. Judicial accountability can be an exception to the rule of independence of *Judiciary*. In present scenario what is

at stake is not the independence of *Judiciary* but the very existence of rule of law and constitutional values, elements and culture. It is high time now to demarcate the arena of judicial independence and secure its accountability.

The judiciary and the judges are associated with the higher cause of truth and justice are given a distinct position. The constitution of India calls for an impartial and independent judiciary. No authority in India can be absolute and unaccountable. They should be accountable either to its origin or to the organ and most importantly to the people. All the organs of the government have the people a sovereign. Nobody is above the law and also no institution no matter how high can claim to be unanswerable. So every organ is accountable to the people of the country in every democratic constitution. Many countries already have the accountability of judiciary. This prevents the concentration of power in a single hand. Also it is important to have Judicial Activism. The Judicial independence is a pre-condition for all the judges whose office wants him to act without fear or favors, attraction towards the ill- will and who has to uplift the constitution and other laws of the country. This may sometimes lead to tension between Judicial Independence and Judicial Accountability.

The powers are not to be allowed to be absolute can be seen from the powers of judges which are very wide. One of the constitutional limitations on the judges is the 'removal' of judges of the High Courts and Supreme Court by addressing by the Houses of Parliament to the President on the basis of proved misbehavior or incapacity. *Article 124 (2) and (4)* talks about the removal of the judges of the Supreme Court *Article 217* provides for the procedure removal of judges of the High Court.

The judges of the high court and supreme court have their own ambit of powers which is checked by the legislature as well as the executive. No organ has immense power that they become not answerable to anybody.

Democracy is a mirror of rule of law and the foremost duty of the government to make sure that the rule of law is obeyed by the people. When the rule of law is broken, corruption and injustice will come into picture. If a crime goes unpunished then it will hinder the rule of law. The law should not be too liberal. Corruption erodes the values that people cherish and projects the State as rude and unjust organ. Corruption

tends to decrease the decency of the State and makes a joke out of the rule of law. Corruption comes from the human beings.

The basic deficiency in the manner in which the candidates are elected to the legislature has its brunt on the law making. Only the composition of the legislatures is broken by the corruption but also the process of law making and application.

The constitutional organs which are supposed to protect and uphold freedom and rule of law turn against them because of corruption. The only way left is bring into play the local mafia to the majority of Indians, who are more than wanting to allocate rough and ready justice for a price, outstanding to criminalization of Indian society. The very aspect of a modern democracy are access to justice and Rule of Law and we cannot call ourselves a great democracy in any sense without both of them.

Global Corruption Report 2007 is a report by Transparency International. This report was built on 2005 survey conducted in the whole country of public perceptions and experiences about the corruption in the lower judiciary area, manipulated by the Centre for Media Studies, found that a very high percentage of respondents believe the Indian judiciary is corrupt. It says that bribe seems to be petitioned as for the price of getting the things done. The estimated amount paid for bribe in a period of 12 month was around 580 million dollars.

So the predator kills the prey and Corruption kills Rule of Law therefore wherever there is corruption there is no Rule of law.

Our constitution is a very comprehensive document. Different roles are assigned by it to all the three wings of governance that are the executive, judiciary and the legislature. There is no confusion about powers of each wing, duties and privileges. Parliament makes law, Executive executes these laws and the judiciary interprets them. Overstepping is supposed to be there.

Battle of Judiciary versus the Executive or legislature is not new but in recent times the battle is unprecedented with both the executive and judiciary taking the separation of powers to a next level. The Lok Sabha Speaker fired the first salvo as there are many who accuse the Judiciary for hindering with the legislative matters and stated publicly that everyone should remain within the boundary of the Constitution. The conflict sometimes arises in practical application of

law that sometimes oversteps. Finally, it is for the judiciary to decide if there has been a hindrance with law in each other's ambit. The judiciary should be in the limits of the Constitution.

Article 121 of the Constitution of India speaks that the conduct of a judge should not be discussed in the Parliament. There is a separate and comprehensive procedure for impeachment of judges which was the intention to secure the impartiality and independence of the judiciary. Also *Article 122* talks about the proceedings of the parliament which cannot be questioned by the judiciary. This is indirectly anticipated about the supremacy of the legislature for making laws that are based on ample policies that should not be questioned.

Nations like India are excited to incorporate international treaties and even traditional international law into the municipal or local laws where there is no exclusive confusion. They, contribute for the cooperation which is necessary and certainly inevitable in different legal systems so that they make sure that society and the State and the economy are not hindered by differences of legal systems. The conviction of cooperation in the nations and all the legal systems wants sightedness by both the Courts and legislature of the globalized world we are living in.

So thinking that any one branch is superior to the other is wrong on the part of people. It is good to know that the three organs try to keep each other's dignity saved. And also work with coordination and cooperation.

India is a democracy and should be governed only by elected representatives and not just the judges, or various committees and some commission that are answerable to the Supreme Court. The judiciary should barge upon the wrongs instead of going after the enforcement. The friction of the organs until solved will result in problems in governance.

In The doctrine of Separation of Power judicial review is important. There are three organs of the state Executive, Legislature and Judiciary with their function clearly jotted down in the constitution of India. *Article 13* of the constitution states that the State should not make any law which violates, hinders or abridges or takes away rights given by Part III'. This means that the Judiciary and the Legislature can make a Laws. But with the system of checks and balances, the judiciary has been given the powers to keep a check on the rules made by the legislature. This is how it exercises the judicial review.

The judicial accountability of a judicial review is still questioned. The Judges are accountable anyone not even to the other judge then question of legislature and executive has no meaning at all. The supremacy of the constitution always prevails, but the limit has been left for judges to decide.

All the amendment and ordinary laws are going beyond the examination of judicial review. Frictions between the three organs of the state are not new. Every department clarifies saying that it is as per the provisions of the constitution. It is the judiciary that has a firm footing in the interpretation of the constitution.

The Supreme Court of India has gained a global recognition for its high standards and great ideals. Landmark are passed by this Court which have not only strengthened the legal and constitutional framework of India but are also widely quoted by the Judiciary in many other nations which seek to build progressive mark. The judges of the Supreme Court are known for their intellect, wisdom and legal attitude. The Supreme Court has over the years been serving the vigor, vitality and intellectual depth which is necessary to create a globalised institution.

The judiciary and legal system of India has reached a stage now where the public openly criticize the judiciary and debate of the News Channels even the judgments delivered by the Constitutional Courts. It is an open fact in the opinion of author that the public opinion in the legal system in India and as to how the judiciary is not able to deliver results meeting the desires of the public, has taken away the caution to be enjoyed while referring to the legal system. The respect can never effectively be received and it should come voluntarily. The functioning of the legal system has a direct effect on the society and the rights of the people. If a criminal could manage a magistrate or dealing of court with his case, then who will protect the people from the evil forces? In the Indian political system we cannot expect the government to be very clean and conscious given the complications. As such the legal system has played a vital role in protecting the rights of the people, ensuring systemization in the system and even making a judgment on the actions of the executive when those are not in conformity with the public interest. There are critics on the allegations of corruption and scarcity of transparency in the judicial system. Accordingly many people talk about the judiciary and the judicial reforms only because of the people who have the hope that Judiciary can protect their rights and

ensures their right to life as enshrined under Article 21 of Constitution of India and further widened.

Indian Judiciary and the acceptance of the Doctrine in its practice :

The President being the executive head is also empowered to exercise legislative powers. He may promulgate ordinances in his capacity of legislative in order to meet the situation as *Article 123(1)* says “*If at any time president is satisfied the circumstances that exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require except when both houses of parliament are in session,*”. Due to failure of constitutional machinery, when president declares the proclamation of emergency, the legislative power under *Article 357* of our constitution has been given to The President to make any laws in order to meet the situations. Under *article 372 and 372A*, a power has also been conferred on the president of India to adapt any law in the country by making such accommodations and adjustments whether by way of repeal or amendment as may be necessary or expedient for the purpose or to bring the provisions of such law in accordance with the provisions of the constitution.

Judicial function under *Article 103(1)* of the constitution exercised by the president of India is notable in connection. According to this article of the constitution “As mentioned in *Article 102(1)* If any question arises as to whether a member of either house of the parliament has become subject to disqualification, the question shall be referred for the decisions of the president and his decision shall be final. Pg. no. 41 Bare Act. *Article 50* lays emphasis to separate the judiciary from the executive. But in practice we find that the powers of judiciary also exercised by the executive as in appointment of judges under *Article 124, 126, and 127*. The legislature also exercises the judicial function in removal of president under *Article 56* in a prescribed manner. Judiciary also exercises legislative power; high court and Supreme Court are empowered to make certain rules in legislative character. Whenever a certain provision of law against the constitution or public policy found by the high court and the Supreme Court it declares the same null and void, and then in the legal system the amendments may be incorporated. Sometimes high courts and Supreme Court formulate the principle on the point

where law is silent. The power is also legislative in character.

Case laws explaining separation of power prevailing in India :

The Supreme Court has never devoid itself of the existence of the application of doctrine although it does not form the very base of our constitution. But it makes a founding stone in the United States of America. However, the separation of powers of the Government into *Legislative Executive* and judicial powers is present Impliedly present in the provisions of the constitution.

In *Kesavananda Bharti v. State Of Kerala*³, Hon’ble Chief Justice Sikri observed: “*Any form of amendment cannot destroy Separation of powers among the legislature, the executive and judiciary that are a part of the basic structure.*”

In *Ram Jawaya Kapur v. State of Punjab*⁴, The Supreme Court held that “*The doctrine of Separation Of Powers has not indeed recognized by the Indian Constitution in its absolute rigidity but the functions of the different branches or parts of the government have been adequately differentiated and consequently it can be very well said that constitution of our country does not consider assumption by one organ or part of the state of functions that essentially belong to any other*”.

In *Re Delhi Laws Act Cas*⁵, Chief Justice Kaniya observed; “*Although there is no express separation of power in the constitution of India. It is clear that the constitution created the legislature and for making that legislature which passes the laws detailed provisions are made. It is then too much to say that under the constitution the duty to make laws, the duty to exercise its own judgment, patriotism and wisdom in making law is primarily cast on the legislature. Does it not imply that unless it can be gathered from the other provisions of the constitution, other bodies executive or judicial are not intended to discharge legislative functions.*”

In *Chandra Mohan v. State Of U.P*⁶, the Supreme Court held: “*The Indian constitution provides for an independent judiciary in the state but at the time the direct control of the executive, though the strict doctrine of separation of powers does not accepted by it. In pre independent India, truly it is common knowledge that there was a strong agitation that the executive should be separated from the judiciary and that agitation was based on the assumption that unless they were separated, the*

independence of judiciary at the power levels would be a mockery.”

In *Smt. Indira Nehru Gandhi v. Raj Narayan*⁷, the petitioner was one of the candidates along with the respondent Raj Narayan Seeking election from the Raebareli Parliamentary Constituency in the state of Uttar Pradesh, she was declared elected on March 1, 1971. The respondent was the nearest rival defeated candidate. He challenged the validity of the petitioner’s election on various grounds including on the ground of commission of corruption election practices in the election. In 1951, He moved the Allahabad High Court by an election petition under the provisions of the Representation of the peoples Art. The petition allowed by the High Court and declared by the judgment of June 12, 1975, the petitioner’s election to be void. The content also declared her to be disqualified for a period of six years from the candidature for and membership of any House of Parliament as also of any of the state legislature. The petitioner, who was at the time the prime minister asked for a stay of the order of the High Court, and then preferred on appeal the judgment of the High Court. While this appeal was still pending parliament passed, with unchaste haste before the appeal came up for hearing in the supreme Court the election laws Amendment Act, 1975; and further immediately thereafter passed the constitution’s thirty-Ninth amendment Act, 1975. The amending election law retrospectively removed the grounds. On which the petitioner’s election had been declared to be void and provided the manner of conferring immunity from the consequential disqualifications under the unlamented election Law. As if this was not enough the said constitutional amendment further declared that the petitioner’s elector would not be deemed to be valid on any of the grounds on which the High Court had decided against her. The constitutional amendment declared the petitioner’s election not be void... Further the amendment laid down that any appeal including one filed by the petitioner in the supreme court would abate and shall be disposed of in conformity with the provisions of clauses (4) set out above. Further *Ray, C.J.* observed in the same case that, in the Indian Constitution there is *Separation of Power* in a broad sense only. As under the American or Under the Australian Constitution a rigid *Separation of Powers* does not apply to India. Hon’ble *Justice Chanadrachud* observed: “*A rigid separation of the powers of government provided by the American*

Constitution into three basic divisions the executive, the legislative and the judicial. It is essential principle of that constitution whose powers entrusted to any department should not be exercised by any other department. The constitution of Australia follows the twin pattern of power distribution. Unlike these constitutions, the three kinds of powers do not expressly vest in three organs of the state by the Indian constitution. For keeping the three organs of the government within the strict confines of their functions the principle of separation of powers is not a mythical formula.”

In *Asif Hamid v. State Of Jammu & Kashmir*⁸, The supreme court observed: “*Although the doctrine of separation of power has not been recognized under the constitution in its absolute rigidity but the functions of various organs of the state have meticulously defined by the constitution makers. Legislature, Executive and Judiciary have to function within their own spheres marked off under the constitution that no organ can usurp the functions assigned to another. To function and exercise their discretion the constitution trusts to the judgment of these organs by strictly following the procedure prescribed there in. the functioning of democracy depends upon the strength and independence of each of its organs.”*

In *Ram Krishna Dalmia v. Justice Tendulkar*⁹, Hon’ble Chief Justice *SR Das* opined that: “*In the absence specific provisions for the separation of power in our constitution, such as there is under the American constitutions, some such divisions of power legislative, executive and judicial is nevertheless implicit in our constitution.”*

In *Uday Ram Sharma v. Union of India*¹⁰, It was held by the Supreme Court that: “*The American doctrine of well defined separation of legislative and judicial power has no application to India.”*

In *Sita Ram v. State Of U.P.*¹¹, Hon’ble *Hedge J.* expressed the attitude of the court regarding delegation of legislative powers in the following words; “*However much one might mourn the new satrapy of the executive, the very complexity of the modern society and the demand it makes on its government have set in motion forces which have made it thoroughly necessary for the legislature to entrust more and more power to the executive. Text book doctrines emerged in the nineteenth century have become out of date. Present position as regards delegation of legislative powers may not be ideal,*

but there is no escape from it in the absence of any better alternative.”

In *Hari Shankar Nagla v. State of M.P.*¹², it was observed that: “In respect of a major and its formulation as a rule of conduct the legislature cannot delegate its functions of laying down legislative policy. The legislature must declare the policy of law and the legal principle which are to supervise any given cases and must provide a standard to guide the body in power to execute the law or the officials. The essential legislature function consists in the determination of the preference of the legislative policy and regularly enacting that policy into a binding rule of conduct.”

In *S.P. Gupta v. Union Of India*¹³: it was held by the supreme court that; “Appointment of judges was not an executive act but in spirit and word the result of consultation process must be noticed.”

Chief Justice Subba Rao in *Golak Nath v. State of Punjab*¹⁴: “The Constitution marks off their jurisdiction minutely and hope them to exercise their respective powers without violating their limits. There is a sphere allotted to them and they should function within the limits of the sphere allotted to them.No authority created under the Constitution; the Constitution is supreme law of land and all the authorities function under the supreme law of the land.”

Conclusion :

The constitution of India is the *Lex Loci*. The role which constitution assigned to the organ they should not go beyond the roles. It is the obligation of the three organs of the government to strictly stick to one of the most fundamental features of the Constitution that is separation of powers. It is not required to criticize the Constitutional Plan of *Separation Of Powers* if the existing provisions are not being religiously observed. Beyond the doubts there is a need for a more booming interpretation and our dynamic Constitution has enough space to include the same. There is a vast gap between the Constitutional plan and practice of the doctrine of *Separation Of Powers*. India also has a concept of universal adult franchise. The Lok Sabha and the Rajya Sabha are the two houses where as the members of Lok Sabha are directly elected but this kind of election is more of a favoritism banned the actual assessment of the work of the leaders. It can only be bridged when all the executive, the legislative and the judiciary move a step towards all the other

democracies of the world by working in peace. The position and the powers of the three organs of the state defined by the founding framers of the constitution. They felt that the government would never be able to accomplish the complete *Separation of Powers*. But, it does not mean that each branch has absolute powers, but they have limits according to the Constitution to be adhered to. The spirit of the Constitution is not on explicitly but on shared cooperation.

The constitution of India was framed after a presenting many draft constitutions, as the constitution of India is the combination of government of India act and the borrowings from the other countries. As we took many concepts from many countries like, UK, USA, Ireland, Canada, South Africa etc. the constitution was framed by the constituent assembly, election for which was held in 1946. The members of the constituent assembly were elected by the provisional assembly by the method of single transferable vote system of proportional representation. The first session of constituent assembly was held on 9th of December in 1946 and Dr. Sachidanand Sinha presided over the inaugural session.

Constitution was finalized after some drafting constitution drafted by the drafting committee. Drafting committee was appointed by the constituent assembly on 29th of August and Dr. Bhim Rao Ambedkar was appointed as the chairman of drafting committee, who is also known as the Father Of Our Indian Constitution.

The *Executive* has grown very powerful in the current time that has certainly led them towards a wide misuse of powers. In India, we do not follow *Separation Of Powers* but we follow separation of functions. And so we do not abide by the principle in its concrete. The principle of the checks and balances remains like a part of this doctrine. So, the essential functions of the organs can be usurped by then one of the three organs. Constitution is the supreme *Lex Loci*. No organ should exceed the limit of the role as given to it by the Constitution. It is the obligation of the three organs of the constitution to strictly stick to one of the most important pillar of the Constitution that is *Separation of Powers*. There is no need to criticize the Constitutional Plan of separation of powers when the existing provisions are not being religiously observed.

The Indian parliament has been facing challenges regarding the accountability of executive to the

parliament. It is believed that the decline in the effectiveness is caused by the lack of accountability of the executive to the legislature. Globalization has also eroded the powers of the parliament. Looking at the recent past India has widened the scope of democratic participation to a greater extent. India has also gained a lot of significance in the economic area. India always had a bicameral legislature. Firstly the economic decisions are taken keeping in mind the global mindset. Secondly by the reconstruction of the regulatory framework which has to be given to a lot of non elected institutions. The weakness of the Indian Parliament has also give a slow pace to the formation and implementation of legislations.

Even the political leaders do not have the caliber of person who should be entering the parliament. The lack in their educational and professional background has affected the executive negatively. Although the constitution of India has always aimed at the democratic accountability it has to some extent lagged behind in parliamentary accountability. The authority in accountability of parliament is limited by the system of checks and balances exercised by the other organs. There was a time when there was a perfect balance between the legislature and the executive but the two organs now have been losing this balance lately.

Beyond the doubts, there is a need of a more booming interpretation and our ever changing Constitution has enough space to accommodate the same. The towering ideal of the Constitutional system needs to be guarded which can be kept only when brought into practice. There is a huge gap between the Constitutional plan and practice of the doctrine of Separation of powers. It can only be successful when the three organs of the government take a step towards all the other democracies of the world by working in sheer peace and coordination.

They are discouraging the rights of the people by not doing so. The position and the powers of the three organs of the state is defined by the framers of the constitution. They knew it will be impractical to achieve the doctrine in its strictest sense. The efficiency of parliament lies in its mastery of details and the unwinding attention it pays to aspects of implementation of policy. It has no voice in the laying down of policy except in so far as its work is influenced by the majority party. But its control can be more effective if the members are alert to the way the policies are introduced and implemented

and point out competence to understand the contents of policy over them accordingly on the floor of the house.

So talking in vacuum is equivalent to aiming for a complete separation of powers. The idea that the governmental functions must be based on a tripartite division of three organs of the government is excogitated by the doctrine of *Separation of Powers*.

When it is referred to as tripartite division it means three divisions or branches. *Separation of Power* refers to the idea that the governmental organs of the state should be functionally independent of each other. The *Legislative* organ of the state makes laws, the *Executive* enforces them and the *Judiciary* applies them to the special cases occurring out of the breach of law. Each organ should perform the activities intends to interfere in the ambit of work of another organ because a stringent demarcation of functions is not possible when they are dealing with the public at large.

The three organs should be distinct sovereign and separate in their own premises or area of functions, so that they do not overstep the authority of the other, which in turn will also keep away the ambiguity. There are three different functions in every government through which the will of the people is verbalized. Thus, overlapping functions tend to appear amongst these organs even while acting in ambit of their own power. Which means that there should not watertight compartment in the functions although they are divided. The *Judiciary* keeps a check on both *Legislative* and *Executive*..

It does not means that each branch will have explicit powers rather they have their Constitutional limits to stick to. The spirit of the Constitution is not on arbitrariness but on mutual co-ordination.

The Executive is very powerful in the recently that has certainly led them to a big misuse of powers. Aloof from the check kept on them by the Legislature and Judiciary, NGOs and the media have played a vital role in revealing the misconducts of Government. If the legislature makes any law which is not in harmony with the law of the land '*Constitutional Law*', it is quashed down by the *Judiciary*. Also if the *Executive* tries to work beyond its ambit the *Judiciary* plays a watchdog and keeps it in its area of work. So it can be said as *Judiciary* is one of the branches of the government where people go and seek remedy for the wrongs of legislature as well as *Executive*.

Finally, the objective of the three organs of the

government is to protect the rights of the people. Vigilant attitude of the people can help ensuring a proper functioning in a democracy and keep away arbitrary use of the power. The three organs have to be at peace for our accomplishment.

We do not follow Separation of powers in India but we follow the separation of functions. And now we do not stick to the principle in its rigidity. A Democratic country is one where the people have a right to choose the leaders. It generates a feeling of common good and larger satisfaction of the needs of the people. Democracies make the leaders responsible and answerable to the public at large. When the people are unsatisfied by one government they may opt to vote it out of the majority in the other tenure.

A democracy is a system of government in which all the people of the state are involved in making decisions about its affairs typically through voting for the elected representatives to a parliament or similar assembly. Though strict separation of powers is not followed in India like in American sense but the principle of checks and balances exists as a part of this doctrine. So no organs can conflict the functions of the organs, which constitute a part of the basic structure doctrine. Even by amending the Constitution any such amendment is made then the court will strike it down as unconstitutional.

The countries with common law system have the method of judicial review, which is embodied in their constitutions or any source of the same. Any law which is passed by the legislature or executive, the power to review that law is vested in the High Courts and Supreme Court. It is important as if the measure through which legislative and executive remains under the surveillance. The system of the checks and balances has made it easy so that they can check other branches.

For the judicial review of legislations The Indian Constitution has some provisions. This concept has taken from the constitution of United States of America. Which makes the judiciary empower to make decisions and review the laws passed by the legislature. If any part of the legislation is in coercion with the constitution of India then it can also be rendered as unconstitutional.

The doctrine of separation of power is one of the

basic structures of the constitution which aims at keeping the country under the law and order situation. It is important for the judiciary, a executive and legislature to be in the limits prescribed to them by the constitution.

The doctrine has made the government more accountable and answerable to the people. It aims to treat the people as the sovereign authority in the country. The Rule of law is the most important aspect of the judiciary in a democracy. The Constitution has recognized and has also set some of the noble objective as securing justice to all the citizens and cheaper justice in terms of money which can be social, economical or political. In ancient times also, the rule of law was there retain and hold together the human society through the norms which are the moral and command the consensus of the good men in the whole community.

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