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IS IT CHECK AND BALANCE OR CHECKS WITHOUT BALANCE: ANALYSING THE EROSION OF SEPARATION OF POWERS IN PRACTICE

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I. ABSTRACT

This Article focuses on the key aspects of the theory of separation of power. Separation of power in its actual sense has been differed from what we see in practicality. This article gives an overview of how the separation of powers came as a theory of checks and balance and now it has overturned as the checks without balance. The Author has tried to discuss the role of different organs of the government or different pillars of the Constitution in the Indian context in maintaining an equilibrium, but in today's context where different pillars are trying to overpower the other pillars, it becomes formidable to justify whether the theory in book succeeded in its proper implementation or failed to gain its rightful dues in the practical world. The Article has tried to portray in its actual sense, why there is need of checks and balances and how it is getting eroded by excessive overreach of power.

II. KEYWORDS

Separation of powers, checks and balance, institutional overreach, democratic governance, Judiciary, Executive, Legislature.

III. INTRODUCTION TO THE DOCTRINE

"If the legislative and executive authorities are one institution, there will be no freedom. There won't be freedom anyway if the judiciary body is not separated from the legislative and executive authorities." Charles de Montesquieu

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Separation of Power, the word by itself demonstrates that there is no accumulation of power in the hands of one. The doctrine is a fundamental requisite for a democratic state. Where there is accretion of power in one institution of government, it leads to the formation of monarchical system of governance which is basically antithesis to democracy. According to the doctrine of separation of power, the state power is divided into three essential pillars of democracy- The Legislature (as the law making body), Executive (Responsible for execution of such laws) and Judiciary (Adjudication).³ Each pillar has its own demarcated functions and power which is completely distinguishable from each other in order to maintain the integrity and to some extent sovereignty of each.

To ensure the proper functioning of the administration and adhere with the concept of welfare state it becomes expedient to have a division of powers which will not only provide least space for interference but also eliminate the chance of misuse and arbitrariness. State's primary function/responsibility is to work for the benefit of the people and society.⁴ The concept of welfare state can be understood with the Social Contract theory as emancipated by *Sir Jean-Jacques-Rousseau* where he posits that "*Man was born free, and he is everywhere in chains*", which frames the necessity of a legitimate political society⁵. Separation of power runs in consonance to the concept of welfare state as a golden thread in order to bring more transparency and responsibility towards the social well-being.

However, separation of power should also contain the aspect of check and balance. The concept of check and balance brings a limit to the unconstrained power of each branch which will otherwise lead to arbitrariness. The three pillars of the democratic state have been provided with separate powers to run the administration smoothly, but the question may arise what if there is no check and balance? it will again give

³ Jeremy Waldron, "Separation of powers in thought and practice?" 54 *Boston College Law Review* 434, available at: <https://bclawreview.bc.edu/articles/702/files/63b27c95dba61.pdf> , (last visited on October 2, 2025).

⁴ MP Jain, *Constitutional Law* 5 (N M Tripathi Private Ltd 1978) , available at: <https://ia601407.us.archive.org/6/items/in.ernet.dli.2015.404149/2015.404149.Indian-Constitutional.pdf> , (last visited on October 2, 2025).

⁵ "Jean-Jacques Rousseau and Popular Sovereignty", available at: <https://www.gktoday.in/jean-jacques-rousseau-and-popular-sovereignty/> (last visited on October 2,2025).

rise to monarchy but now in three different hands. This will fail the purpose of doctrine of separation of power whose existence is to bring a concept of responsible government. As for the better running of democratic setup it is essential to have a check on the uncontrolled power which would otherwise lead to rise of different evils of society such as discrimination, misuse and corruption. Each pillar is therefore acquainted with both powers. Firstly, the power as an independent organ of government and secondly as the appropriate authority to have a check and balance on other organ's misuse of power. The later power is provided to prevent the other organs to become too powerful.⁶

The theory in book is not what we see in reality. To implement the hypothesis, it requires a zeal to bring the change. *Check and balance has now become checks without balance*. The primary objective of separation of power is the non-interference in each other's domain, which has now been overpowered. Check and balance is a positive notion which sets the example of a responsible government. There must be a balance to the exercise of such power, and if there is any shortfall to such accountability then it will lead to the disruption of democracy.⁷ In today's era where there is a fight for supremacy among the organs of the government, they fail to understand the effect of such overreach. Check and balance inherit the limitation of power for both the organs, the one on whom such power is exercised and also on the one who exercises it. Conversely, in case of Checks without balance there is no limitation of use of such power which one exercises over other in order to avoid centralization of power.

Separation of powers and Check and Balance run hand in hand. They work in consonance to each other for a proper functioning of State's governance system. Separation of power with respect to judiciary and executive is a concept which has also found a place in our Indian Constitution enshrined under Article 50 which says "*The state shall take steps to separate the judiciary from the executive in the public services of*

⁶"Checks and balances: what are they, and why do they matter?" available at: <https://constitution-unit.com/2023/01/19/checks-and-balances-what-are-they-and-why-do-they-matter> , (last visited on October 2, 2025).

⁷"Separation of Power: A Disputed Territory" available at: <https://www.iipa.org.in/GyanKOSH/posts/separation-of-power-a-disputed-territory> (last visited on October 2, 2025).

the state".⁸ This shows that framers of the constitution (the supreme law of the land) to some extent wanted to enforce the doctrine of separation of powers. However, the doctrine is not accepted in its rigid sense, and it gives underlying provisions to the concept of check and balance (which shall be discussed later). The limitless intervention in each other's arena leads to the erosion of separation of power in practice. As rightly said by Aristotle:

*"When states are democratically governed according to law, there are no demagogues, and the best citizens are securely in the saddle; but where the laws are not sovereign, there you find demagogues. The people become a monarch... such people, in its role as a monarch, not being controlled by law, aims at sole power and becomes like a master."*⁹

A. Research Questions

1. Whether the doctrine of separation of powers in India continues to function as a system of checks and balances or has degenerated into "checks without balance".
2. To what extent have legislative, executive, and judicial overreach contributed to the erosion of institutional boundaries.
3. Whether constitutional provisions and judicial doctrines such as the Basic Structure doctrine are sufficient to prevent concentration of power.
4. How far judicial activism in India has crossed into the realm of judicial overreach, thereby disturbing the separation of powers.
5. Whether frequent use of ordinances and money bills reflects executive dominance over the legislature.
6. What institutional reforms are necessary to restore equilibrium among the three organs of the State.

⁸The Constitution of India, art. 50.

⁹ "Politics By Aristotle", translated by Benjamin Jowett, book four, p.no. 87, available at : , <https://historyofeconomicthought.mcmaster.ca/aristotle/Politics.pdf> , (last visited on October 2, 2025).

B. Research Objectives

1. To critically analyse the evolution of the doctrine of separation of powers from a theory of balanced governance to the present phenomenon of checks without balance.
2. To examine the constitutional scheme of checks and balances under the Indian Constitution.
3. To study the nature and impact of legislative, executive, and judicial overreach on democratic governance.
4. To evaluate the role of landmark judicial decisions in preserving or diluting the doctrine of separation of powers.
5. To assess whether existing constitutional safeguards are adequate to prevent institutional supremacy of any one organ.
6. To suggest reforms for restoring institutional harmony and maintaining constitutional accountability.

C. Research Hypotheses

1. The doctrine of separation of powers in India continues to operate effectively as a balanced system of checks and balances.
2. The doctrine of separation of powers in India has transformed into a system of "checks without balance", leading to erosion of constitutional boundaries.
3. Excessive use of ordinance making power and misuse of money bills signify growing executive dominance over the legislature.
4. Judicial activism in India has, in several instances, resulted in judicial overreach, thereby disturbing the constitutional balance of powers.
5. The absence of clear demarcation of institutional limits in the Constitution has facilitated continuous inter-institutional conflict.

IV. HISTORICAL ANALYSIS OF SEPARATION OF POWER

This doctrine is a concept which existed from time immemorial. When the concept of state emerged, it came for the well-being of the society, and for a better administration it is required to have a transparent and responsible government. Further, if we think of a responsible government, we have to limit the scope of arbitrariness and misuse of power. There are many prominent jurists who at different levels of time has propounded individual theory related to separation of power.¹⁰

A. Aristotle

Aristotle was a Greek Philosopher and polymath who was one of the disciples of Plato. When we talk about the concept of separation of power, it finds its place in one of the efficient works of Aristotle i.e., *"Politics"*. Politics is a work which is divided into eight books and the third book covers the concept of separation of power. In his fourth book i.e., *"The Best Regime"* he has discussed about the effective form of government. He deciphers different form of government such as monarchies, aristocracies and democracies and their advantages and disadvantages. He gives importance to the distribution of power where one social class does not suppress the power of other classes. ¹¹

B. Polybius

Polybius was a prominent theorist who gave the theory of separation of power with respect to the Roman empire. His work *"The Histories"* emancipated the governance of Roman Empire. He was made hostage by the Romans for 17 years. There he noticed the form of government that worked in the era. However, he never used the word explicitly as separation of power but praised the form of government romans had which impliedly showed the existence of such doctrine. This showed the evolution of such theory for the better and efficient working of administration. He even believed that Roman Constitution was the best example for others with respect

¹⁰ "Biblical Roots of Separation of Powers, Peter Barenboim", available at: http://www.florentine-society.ru/pdf/Biblical_Roots_of_Separation_of_Powers.pdf , (last visited on October 2, 2025).

¹¹ *Supra* note 9 at 80-107.

to the state's governance system.¹² His underlying idea of separation of power was also highlighted by *Sir Scott Gordon* in his book related to checks and balances.¹³

C. John Locke

John Locke was one of the legal jurists who believed in the theory of separation of power, and he termed it as check and balance on duty of other organs of government to have an accountable governance. There are some of the theories related to the Doctrine of separation of power propounded by John Locke:

- 1. Social Contract Theory-** As we all know that concept of state was developed through the theory of social contract to protect the interest of society. "*The man is born free however they are in chains*". Every person is independent in their rights. However, they have a duty to not interfere in the domain of other's right. The state was formed because of the consensus among the people to work for the well-being of the society. This also provides the need of check and balance to establish responsible government.¹⁴
- 2. Demarcation of power between Legislative and Executive-** Locke didn't use the term Separation of power. However, he emphasized on the demarcation of powers within legislative and executive. He contemplated that the duty of Legislature is to enact laws which should be in the interest of the mass and the executive shall work for the implementation of such laws. There must be clear distribution of powers between the two for better governance system.¹⁵
- 3. Check and Balance-** According to the Locke's Social Contract theory and limited government concept, the foremost duty of state is to protect the inherent rights of the public such as rights related to life, liberty, property

¹² Donald E. Glover Award, "Polybius and the Founding Fathers: the separation of powers", available at: <https://www.mlloyd.org/mdl-idx/polybius/intro.htm> , (last visited on October 2, 2025).

¹³Book Review by Richard E. Wagner on Scott Gordan, "Controlling the State: Constitutionalism from Ancient Athens to Today", Cambridge, Mass: Harvard University Press, 1999, available at: <https://www.independent.org/tir/2001-02-winter/controlling-the-state/> (last visited on October 2, 2025).

¹⁴ "Social Contract Theory", available at: <https://iep.utm.edu/soc-cont/> , (last visited on October 2, 2025).

¹⁵ *Supra* note 3 at 445-447.

etc. He propounded that the formation of the state is with the consensus of the people, it is the will of the people by which they want to submit their power in the state. Therefore, state must be accountable for its citizens, and it can be done through the concept of check and balance.¹⁶

With the different theories propounded by John Locke and taking it cumulatively, we can draw a conclusion that though the jurist didn't use the term explicitly but indirectly he propounded the theory related to separation of power with the checks and balance.¹⁷

V. MONTESQUIEU'S DOCTRINE OF SEPARATION OF POWERS

Charles de Montesquieu was a French political philosopher cum scientist. The term "*Separation of power*" or "*trias-politica*" was coined by the said jurist. He propounded the theory in his book "*Esprit des Lois*" (The Spirit of Laws) published in 1785. He explained that when there is centralization of power in one hand, it will lead to a despotic government which brings arbitrariness. He argued that if one wants to have transparency then there must be clear division of power among the said organs of the government which is Legislature, Executive and Judiciary.¹⁸

In the "*Spirit of Laws*" there is a small chapter named "*The Laws*" which basically talks about the political liberty with respect to the Constitution. The division of powers among the three organs of the state that is the Legislative, Executive and Judiciary where each branch is independent in powers to the other branch is basically a key feature to the federal Constitution. This doctrine has two underlying connotations, the first is the non-intervention in each other's domain to maintain the integrity of each and second is the check and balance which prevent the exercise of uncontrolled power.¹⁹

Montesquieu has compared the lack of doctrine of separation of power with the monarchical system of governance where there is uncontrolled exercise of power. He

¹⁶ *Supra* note 14.

¹⁷ *Ibid.*

¹⁸ Montesquieu, "On the Spirit of the Laws", Garnier 1777, Book XI, Chapter VI, available at: [https://fr.wikisource.org/wiki/Esprit_des_lois_\(1777\)/L11/C6](https://fr.wikisource.org/wiki/Esprit_des_lois_(1777)/L11/C6), (last visited on October 2, 2025).

¹⁹ *Ibid.*

argued for the checks upon the different organs of the government so as to bring transparency.²⁰

According to Montesquieu, Power is divided into three parts. Firstly, Legislative power which focuses on the enactment of law by the king. Secondly, the executive power where the decisions with respect to war and peace, public security etc. is taken. Thirdly, the Judicial power which focuses on the punishment of the criminals.

He argued that, if Legislative and executive power comes in the same hand then there will be no place of liberty and monarch will enact and implement law in a very tyrannical way. Similarly, if Judicial power is also placed in single hand, then the question of life and liberty will be decided in an arbitrary manner. He was a believer of Political liberty, where the government is also held accountable through checks and balance so that there should not be any abuse of power.

VI. CHECKS AND BALANCE

The Doctrine of separation of power is one of the essential requirements of democratic system. However, this doctrine can't be accepted in its rigid form and thus must be a blend of separation of power theory and concept of Checks and Balance. The doctrine of checks and balance propounds that each organ of the state shall have a duty to enter the domain of others so as to prevent the centralization of power which would otherwise give rise to arbitrariness.²¹ The concept of welfare state emerged to ensure the well-being of the society.

Though the doctrine of separation of power tries to divide the powers among the different organs of the government still there must be a space to have a check on the uncontrolled power of each organ.²² Check and Balance focuses on two major aspects, first that there must not be absolute power in the hand of majority, there must be a place to ensure that the minorities rights are also taken care of. Secondly, whatever laws are made, there must be provision to ensure the correctness and

²⁰ *Ibid.*

²¹ Alan L. Feld, "Separation of Political Powers: Boundaries or Balance" 21 GEORGIA LAW REVIEW 171 (1986). available at: https://scholarship.law.bu.edu/faculty_scholarship/2944 , (last visited on October 2, 2025).

²² *Supra* note 3 at 438.

transparency of such laws. This will have a great impact on decision making which will further ensure that there is no decision against the interest of the society and integrity of the nation.

James Madison wrote in "Federalist no. 51". "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other and that the private interest of every individual may be a sentinel over public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State"²³

The concept of Checks and balance ensures that the organs of the government stay in its place, it not only provides the independence of the organs but also gives the legit power to each organ to defend itself from the intervention of other branches.

VII. CHECKS AND BALANCE BY DIFFERENT ORGANS (INDIAN CONTEXT)

There are certain controlling powers that have been provided by our Indian Constitution so that there should not be any excessive exercise of power by any single organ of the government.²⁴ Our Indian Constitution is considered to be the lengthiest constitution in the world.²⁵ Unlike America the Constitution of India has not accepted the Doctrine in its strict sense, rather it has adopted the blend of Separation of power and Checks and balance. Checks and balance allow a limited

²³ James Hamilton or Madison, "The Federalist Papers : No. 51, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments From the New York Packet." Friday, February 8, 1788, available at:

https://avalon.law.yale.edu/18th_century/fed51.asp , (last visited on October 2, 2025).

²⁴ "Checks and Balances", available at : <https://www.britannica.com/topic/checks-and-balances> , (last visited on October 2, 2025).

²⁵ *Supra* note 4 at 3.

intervention only to avoid uncontrolled exercise of power.²⁶ There are various instruments of checks and balance which has been discussed below.

A. Legislative Control over Executive

Legislature's primary role is to enact law. However, it has been acquainted with additional power to have a check on the proper functioning of executive to bring out the purpose of responsible government.

- 1. Members of Legislature joins as the head of the Ministries-** Indian democratic polity consists of bicameralism where there is legislature at the state and union level. If we take the example of Central legislative framework, the Parliament comprises of Lok Sabha and Rajya Sabha. The members of Lok Sabha are elected through the general elections and on the other hand the members of Rajya Sabha are elected via indirect elections. The majority party is called upon to form the government at Union level and the leader of party will become Prime Minister with his council of ministers who will be the part of executive. This is considered as Functional Overlapping. It also portrays that the executive is accountable to the Legislature.²⁷
- 2. Legislature's Power of No confidence-** Legislature can dissolve the government with a no confidence motion. This motion is introduced by the opposition in Lok Sabha to show that the Prime Minister has lost confidence in government. This shows that the Executive is accountable to Legislature as to prove its confidence in the government.²⁸
- 3. Power of Parliament to Impeach President-** Article 61 of Indian Constitution provides the process of impeachment in context to the removal of President on the ground of violation of Constitution. President is the head of executive and its impeachment can be done only in the Legislature. This shows that President is also duty bound to follow the law and no one is above law. Under Constitution the process of impeachment can be started

²⁶ *Supra* note 23

²⁷ *Supra* note 3 at 12-16.

²⁸ JN Pandey, *Constitutional Law of India* 537-538 (Central Law Agency, 58th edn., 2021)

in any house of the parliament but must be signed by 1/4th of the members of the house. The president must be given 14 days-notice. On the approval by 2/3rd members the President is removed. This process of impeachment acts on the check of the executive by the Legislature.²⁹

4. **Matters Related to Money Bills-** The legislature has the power to make law or amend any law with respect to the money bills. If a money bill is passed in Lok Sabha and Rajya Sabha, the President can't send the bill for reconsideration, he can only give or withhold the assent.³⁰

B. Executive Control Over Legislature

1. The President of India has been provided with powers to summon, prorogue and even dissolve the Lok Sabha which is House of people as enshrined in Article 85 of the Indian Constitution.³¹ Under Article 86 the President is entitled to address and send messages to both Houses with regards to the bill pending or otherwise.³²
2. Under Article 103, President is the authority to decide on the matter of disqualification of any member of the House after taking opinion from the Election Commission and his decision will be considered as final.³³ Under Article 108, President is entitled to call for the joint sitting of the Houses of Parliament.³⁴ The Veto power of the President is one of the essential features which shows the effect of Check and balance on the Legislative power. Under Article 111 President has the power related to Veto, in concept of Absolute Veto, Suspensive Veto and the Pocket veto which he can exercise on the legislative bills.³⁵
3. The Executive control over the legislature can be best induced from the Ordinance making power of the President and Governor under Article 123 and Article 213 respectively. In general, the Legislature has been given

²⁹ *Ibid* at 505-506.

³⁰ *Ibid* at 540-543.

³¹ The Constitution of India, art.85.

³² *Ibid*, art.86.

³³ *Ibid* art.103.

³⁴ *Ibid* art.108.

³⁵ *Ibid* art.111.

power and responsibility with respect to the enactment of laws. However, there are situations when Legislature is not in session and it is not possible for the legislature to make laws, so head of the executive comes into picture and promulgates ordinances which has the same effect as Legislature enacting laws. However, this power is exercised in need of time and is subject to approval by parliament within 6 weeks of new session.³⁶

C. Legislative Control over Judiciary

1. The removal of Judges of Supreme court and High court is the prerogative of Legislature which has been inscribed under Article 124 of Indian Constitution. The judges of the High Court or Supreme Court can only be removed through an order passed by President after address by both the houses of Parliament. The judges can be removed on the grounds of proved misbehavior or incapacity.³⁷
2. The jurisdiction of the Supreme Court and total strength of the Supreme court under Article 124 and Article 138 respectively is decided by the power conferred by Parliament. Under Article 140, the Parliament can confer additional powers to the Supreme Court.³⁸
3. Whenever a law enacted by the Legislature is declared unconstitutional, the Legislature has got power to reconsider such law and to bring such other amendments as required and again revalidate it.³⁹

D. Judicial Control over Legislature

1. **The Doctrine of Basic Structure:** The Doctrine of Basic Structure has been evolved by Supreme Court in one of the landmark cases *Kesavananda Bharti V State of Kerala*⁴⁰, which provided a restriction on the wide

³⁶ *Ibid* 123,213.

³⁷ *Ibid* art.124.

³⁸*Ibid* arts. 124, 138, 140.

³⁹ *Cheviti Venkanna Yadav v. State of Telangana*, (2017) 1 SCC 283, & *Dr. Jaya Thakur v. Union of India*, 2023 SCC OnLine SC 813, available at: <https://www.scconline.com/blog/post/2023/09/08/sc-lays-down-principles-for-exercise-of-legislative-power-of-abrogating-a-law-legal-news/> (last visited on October 2, 2025).

⁴⁰ AIR 1973 SUPREME COURT 1461, 1973 4 SCC 225, available at: <https://judgments.ecourts.gov.in/KBJ/?p=home/intro>, (last visited on October 2, 2025).

amending power of the Parliament to amend the Constitution under Article 368 of the Indian Constitution. It ruled that the Parliament though has the power to amend the constitution and even the Fundamental Rights but under the purview of basic structure. Doctrine says that if parliament amends the part of constitution and it is violative of basic structure of the constitution, then such amendment will be held invalid and unconstitutional by the apex court. This Doctrine provided a hard check and balance system over the Legislative power which was at a point of time getting uncontrolled.

2. **Law to be declared void if violated of Fundamental Rights: Article 13** clearly emancipates that the Parliament shall not make any law which is violative of Fundamental Right.⁴¹
3. **Judicial Review:** it is a concept adopted by the judiciary to restrict the unparalleled power execution by the Legislature and Executive. The judiciary has the power to check the constitutionality of any action on the grounds that it violates Basic Structure.

Justice P.N. Bhagwati ruled in the case of *Minerva Mills V Union of India* (1980)⁴² : *"It is for the judiciary to hold the constitutional values and to enforce the Constitutional limitations, that is the essence of rule of law. The exercise of powers by the government, whether it be legislative or executive or any authority, be by the constitution and the law"*⁴³

E. Executive Control over Judiciary

1. **Appointment of Judges:** When we talk about appointment of judges, the first thing that comes to our mind is the conflict between executive and judiciary. The judges of the Supreme Court and High court are appointed through an established collegium system, but this system is not independent in such appointment. The collegium system submits the

⁴¹ The Constitution of India, art.13.

⁴² AIR 1980 SC 1789 , (1980) 3 SCC 625.

⁴³ Dr. Priya Rao & Abhay Kumar Tiwari, "Comparative study of Indian Judicial Review System with the U.S.A. and U.K.", available at:

<https://ijassonline.in/HTMLPaper.aspx?Journal=International%20Journal%20of%20Advances%20in%20Social%20Sciences;PID=2021-9-2-4> ,(last visited on October 2, 2025).

opinion to the Department of law and justice, Ministry of Law and Justice, who would further submit it to the Prime Minister. Subsequently the President will be advised by the Prime Minister in that behalf. President further signs the warrant of appointment.⁴⁴

2. Power to Grant Pardon, commute, suspend, remit sentences: President and Governors have been provided power to Pardon, commute, suspend, remit sentences under **Article 72** and **Article 161** of the Indian Constitution respectively. Judiciary is the appropriate institution according to the Doctrine of Separation of Power who is entitled to adjudicate on the matter of criminals and punishments. But with such intervention backed by our supreme law of the land, it is well established that Executive has the power of check and balance. It is the duty of the court to award punishment. However, the accused has the option of **Article 72** and **Article 161** for pardon, commute, remit the sentence.⁴⁵

3. Role of President in Removal of Judges: After address by both the houses, the judge can be removed by the order of the President only.⁴⁶

F. Judicial Control over Executive:

1. Writ Jurisdiction of Higher courts: The Supreme court and High court has been provided with the Writ jurisdiction under Article 32 and Article 226 of Constitution respectively. This shows the check and balance by the Judiciary over the actions of the Executive. If any action by the executive is violative of the fundamental rights of the person, the judiciary comes in front to defend the rights of the persons against the arbitrary actions of the state.⁴⁷

⁴⁴“Memorandum of procedure of appointment of Supreme Court Judges”, available at: <https://doj.gov.in/memorandum-of-procedure-of-appointment-of-supreme-court-judges/> (last visited on October 2, 2025).

⁴⁵ The Constitution of India, arts. 72, 161

⁴⁶ “Explainer: How a Sitting Judge Can Be Removed From Office”, available at: <https://prsindia.org/articles-by-prs-team/explainer-how-a-sitting-judge-can-be-removed-from-office> , (last visited on October 2, 2025).

⁴⁷ *Supra* note 28 at 440, 645-646.

2. **Article 13 of Indian Constitution:** The Higher Judiciary is acquainted with the power to declare any law or order passed by the Legislature or Executive void if it is violative of Fundamental Rights guaranteed under Indian Constitution.⁴⁸ Delegated Legislation is a concept of transferred legislative power to pass any circulars, orders, directives on behalf of the Legislature by the executive. Such action is also under the domain of Check and balance by the Judiciary.⁴⁹
3. **Article 142:** This is a power provided to the apex court to decide on any matter pending before it for the sake of Complete Justice.⁵⁰

VIII. CHECKS WITHOUT BALANCE – EROSION OF SEPARATION OF POWER

Check and Balance is a concept of good governance. As rightly said "*With great power comes great responsibility*". When an institution is provided with power which when used in a legit manner, can decide the need of one and when used arbitrarily can destroy the future of one. Check and balance is a mechanism which has been provided to each organ to work in a manner to defend its own integrity and at the same time prevent the misuse of power by the other organs. However, in today's time the concept of check and balance has more become the theory of unparalleled interference which can be said as Checks Without balance.⁵¹ Each organ of the democratic system is entering into others' domain and creating hindrance in the efficient working of administration. The purpose of doctrine of separation of power seems like failing.

There are certain shortfalls in the concept of check and balance, such as:

1. The clear division of power has not been mentioned for each organ. The concept of check and balance does not provide the amount of interference allowed in each

⁴⁸ The Constitution of India, art.13.

⁴⁹"Delegated Legislation In India", available at : <https://gyansanchay.csjmu.ac.in/wp-content/uploads/2023/03/delegated-legislation-1-2.pdf> , (last visited on October 2, 2025).

⁵⁰ The Constitution of India, art.142.

⁵¹ "Doctrine of Checks and Balances", available at: <https://vajiramandravi.com/upsc-exam/doctrine-of-checks-and-balances/> , (last visited on October 2, 2025).

other's domain. The clear demarcation has not been provided by any law including the supreme law that is Constitution.⁵²

2. There is a thought of supremacy existing in the mind of each branch of government. Every organ is in a race to establish its supremacy over other. The concept of check and balance only allows to prevent the misuse of power and not to decide the power. ⁵³
3. There is a strong centralization of power in executive. The executive is having a strong hand over other organ, for e.g., in case of appointments related to Judges of the apex court. There could be chances of biasness and favoritism, the power of ordinance which is an exceptional power and can be used only in case of emergency, is now being used very frequently.⁵⁴

IX. LEGISLATIVE OVERREACH

The major function of Legislature is to enact laws, and when legislature exceeds its authority and enter into domain of executive and judiciary to act like them, then it is called legislative overreach. Separation of power restricts the organs to take control over other organs of the government and to interrupt their basic function.

1. **The misuse of Money Bills-** Government to surpass the role of Rajya Sabha introduced several bills in Lok Sabha despite having more function than a mere financial bill. For example, Aadhar Act of 2016.⁵⁵
2. **Undermines Judicial Authority-** Legislature tries to enact laws which have a deep concern with the basic prerogative of judiciary. The appointment of judges should always be the prerogative of the judiciary to maintain the integrity of separation of power theory. However, Legislature to limit the exercise of such

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ "Misuse of Money Bills as battering ram" (The Hindu, Published -July 15, 2024 11:03 pm IST - New Delhi), available at: <https://www.thehindu.com/news/national/misuse-of-money-bills-as-battering-ram-congress-seeks-verdict-before-cji-retires/article68407179.ece> , (last visited on October 2, 2025).

function tried to implement law like NJAC Act in 2014, which was later on struck down by the Supreme court in 2015.⁵⁶

3. **Excessive power delegation to Executive-** Legislature always tried to pass laws which provided excess power in hands of executive to enact rules which is the prerogative of legislature.⁵⁷

X. EXECUTIVE OVERREACH

Our Governmental setup has a strong executive hand, where it allows itself to interfere in others' arena. The party which is in majority is called upon to form the government which becomes the part of Executive. So, this overlapping of function gives the executive a better authority than others.

1. **Misuse of Ordinance making Power-** This power has constitutional mandate to be exercised in time of urgency, it is not a general power that can be exercised at any time. However, Executive uses it more often these days on whatever issue they feel like. For example, The Farm Laws of 2020, ordinance related to land acquisition passed in 2015 which even after getting disapproval from Parliament was re-promulgated. As observed by the apex court in the D.C. Wadhwa Case⁵⁸, during the period of 1967-98, some ordinances in Bihar were kept in force for 14 years by successive re-promulgation.⁵⁹
2. **Interference in Judicial Functions-** NJAC Act of 2014 sets the best example for such overreach as it wanted a control on the appointments related to judges in the higher courts. Even in case of recommendation of appointment of judges by Supreme Court Collegium System, the seal of Head of the Executive is important for such appointment.⁶⁰
3. **Disrespect to federalism-** The executive tries to interfere in the independent matters of state through the Governors. For example- delay of giving assent to

⁵⁶ "Undermining the Judiciary, Peoples Democracy", Published on January 22, 2023, available at: https://peoplesdemocracy.in/2023/0122_pd/undermining-judiciary , (last visited on October 2, 2025).

⁵⁷ *Supra* note 49.

⁵⁸ *D.C. Wadhwa v. State of Bihar* (1987) 1 SCC 363, AIR 1987 SC 579.

⁵⁹ "Ordinance Making Power of the President & Governor", available at:

<https://www.nextias.com/blog/ordinance-making-power/> , (last visited on October 2, 2025).

⁶⁰ *Supra* note 56.

the bills passed by elected assemblies, the rift between the Delhi government and Lieutenant Governor in Delhi for the administrative control.

XI.JUDICIAL ACTIVISM VS JUDICIAL OVERREACH

The role of judiciary is to interpret law and not to enact or implement law. These days, courts are being criticized for their excessive proactive role in observing rights of the citizens. Judicial overreach and judicial activism have a very thin line difference. Judicial activism is a positive term and is constitutionally valid if it does not interfere in the basic functions of other organs of the government. It is a concept where judiciary plays a proactive role to protect the interest of the society. When judiciary tries to fill the gaps left behind by legislature while enacting laws or by executive while implementing laws for the social benefits.⁶¹ Some examples of theory of Judicial Activism are:-

1. The judgement of *Vishaka v State of Rajasthan (1997)* - The court decided that "*International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.*"⁶²
2. *Union Carbide Corporation v Union of India (1988)* - This case is also known by Bhopal Gas Leak case. The court reiterated the concept of Strict Liability and Absolute Liability and widened the scope of Article 21. It evolved compensatory jurisprudence in terms of environmental matters.⁶³

However, the concept of Judicial Overreach is the excessive and unauthorized use of Judicial Activism. When court starts entering in the domain of other branches which often lead to policy making or policy implementation then it is considered as Judicial Overreach. In the case of *Aravali Golf Club v Chander Hass (2008)* Supreme court

⁶¹ Dr. Justice BS Chauhan, "The Legislative Aspect of the Judiciary: Judicial Activism and Judicial Restraint" , available at: <https://www.tnsja.tn.gov.in/article/BS%20Chauhan%20Speech-%20Lucknow.pdf> , (last visited on October 2, 2025).

⁶² 6 SCC 241, AIR1997SC3011, 1997 INSC 604.

⁶³ 4 SCC 584, 1992 AIR 248.

didn't acknowledge the concept of Judicial Overreach and said, "*Judges must know their limits and must not try to run government*"⁶⁴.

Certain examples of Judicial overreach are as follows: -

1. **Shyam Narayan Chouksey v Union of India** ⁶⁵- Here, the court provided a mandate of playing national anthem in cinema halls, through this it neglected its own judgement of Bijoe Emmanuel case, where it held that forcing people to sing national anthem is the violation of their constitutional rights of freedom of religion.
2. **Censorship of Jolly LLB 2** - The court overreached its power while deciding the censorship of certain scenes which was a prerogative of the Film Certification Board under The Cinematograph Act of 1952.⁶⁶
3. **Liquor Ban** - A PIL was decided to ban liquor sale within 500 m of National or State Highway. This decision is the prerogative of the State as it involves revenue aspect, employment aspect. However, court decided it in the ambit of Article 142 of Indian Constitution.⁶⁷
4. **Lodha Committee on BCCI** - A Lodha committee was set up by the Supreme court to submit the report for the changes in the BCCI. The BCCI was an independent registered society which was not a part of central or state government. Lodha committee had no authority to amend or modify the byelaws of BCCI. It was not the function of the court to decide on the internal matter of the society registered under society's act.⁶⁸
5. **Ban on Firecrackers in Delhi**- The court banned the sale of firecrackers in Delhi, this was a policy making decision which the state has the power to do.

A. ⁶⁴ MANU/SC/4463/2007, 2007 INSC 1240.

⁶⁵ AIR 2018 SC 357.

⁶⁶ "Judicial Censorship and Judicial Evasion: The Depressing Story of Jolly LLB 2", available at: <https://indconlawphil.wordpress.com/2017/02/07/judicial-censorship-and-judicial-evasion-the-depressing-story-of-jolly-llb-2/> , (last visited on October 2, 2025).

⁶⁷ "Case Comment: The Highway Liquor Ban Case: State of Tamil Nadu v. K. Balu & Others" 6 Christ University Law Journal 77-86, 2017, available at: <https://pure.jgu.edu.in/id/eprint/3023/1/1881-Article%20Text-3630-1-10-20190327.pdf> , (last visited on October 2, 2025).

⁶⁸"Timeline of BCCI v Lodha Committee", TIMESOFINDIA.COM / Nov 29, 2017, 10:17 IST available at: <https://timesofindia.indiatimes.com/sports/cricket/news/timeline-of-bcci-v-lodha-committee/articleshow/61845064.cms> , (last visited on October 2, 2025).

XII. CONCLUSION

Doctrine of Separation of Power is a theory which makes the government accountable to its citizens. We vouch ourselves to be the welfare state, and primary objective of a welfare state is to provide political liberty in society. As rightly said by *Lord Acton*, "*Power Corrupts, and absolute power corrupts absolutely*". No single organ of the government shall have the centralization of power. The absolute concentration of power will bring arbitrariness, and society will be the subject to such unreasoned actions. Our forefathers wanted a democratic setup under Indian governance system as we were never independent, we were always ruled by some external forces.

So, framers of Constitution chose political sovereignty among people of India and not monarchical setup. The separation of power runs as a golden thread to the constitution of India. It balances the power among different branches of government so as to protect the integrity of each branch and interest of the society at the same time. Separation of power restricts interference of one branch in the core function of other branches. However, separation of power is not a loner concept, it has the support of the concept of Check and Balance.

Many people find it against the strict meaning of Doctrine of Separation of power. "*Change is the only constant*", with new adaptations in theory we can expect a better implementation with the need of time. Check and balance is one of them. This concept serves as the controlling power by one over uncontrolled power of others. Doctrine of separation of power should be read in consonance to the concept of check and balance, there must be a harmonious construction between the two.

However, in today's time the concept of check and balance is being misused by the organs of the government, they have started interfering in the core function of other branches which is against the said doctrine. To have a better functioning of administration and to maintain the political democracy in the country, it is required by each branch to work harmoniously and not to run in the race to establish supremacy.

XIII. BIBLIOGRAPHY

A. Books

1. Charles de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans., Batoche Books 2001).
2. John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge Univ. Press 1988).
3. Aristotle, *Politics* (Benjamin Jowett trans., Dover Publ'ns 2000).
4. Sir Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard Univ. Press 1999).
5. M.P. Jain, *Indian Constitutional Law* (8th ed. 2018).
6. V.N. Shukla, *Constitution of India* (Mahendra P. Singh ed., 13th ed. 2017).

B. Cases

1. Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (India).
2. Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625 (India).
3. D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378 (India).
4. Vishaka v. State of Rajasthan, (1997) 6 SCC 241 (India).
5. Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683 (India).
6. Shyam Narayan Chouksey v. Union of India, (2018) 2 SCC 574 (India).
7. Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615 (India).
8. Supreme Court Advocates-on-Record Ass'n v. Union of India (NJAC Case), (2016) 5 SCC 1 (India).

C. Constitutional Provisions

1. India Const. arts. 13, 32, 50, 61, 72, 85–86, 108, 111, 123, 124, 138, 142, 161, 213, 226, 368.

D. Articles and Reports

1. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford Univ. Press 1999).
2. Upendra Baxi, *Judicial Activism and Indian Supreme Court*, 21 J. Indian L. Inst. 456 (1979).