

# SEPARATION OF POWER & DELEGATED LEGISLATION: AN IMPLICIT POISE CREATED BY JUDICIAL DETOUR

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## Abstract:

Profoundly democracy is the force of alchemy. The contour laid down by the democracy believes in robust idea of supremacy of divergence, decentralisation and devolution. The concentration of all governing, executive and juridical powers, in the same hands be it through justifiable or non-justifiable manner, may fairly and justly fall with dimensionality of tyranny. And this very phenomenon is antithesis to the spirit and genesis of democracy in any sovereign country. The voyage of the security against the concentration of powers can be diluted by immediate resistance to any departmental encroachment as enshrined by the grundnorm. This idea has been emphatically designed firstly, under Article 50 of Indian Constitution, 1950 as doctrine of separation power. Secondly, the administrative law concept of delegation of power. Wherein, the executive is not subject to any questioning by any other pillar of the constitution other than reasonable checks and balances. The authors intend to highlight the perceptive and essential fiber of separation of power in different chapters of this manuscript. The paper expansively examines the abovementioned doctrines by garnering literature reviews comparative analysis of various countries, and judicial trends. Lastly, the linkages would highlight various dimensions of executive India within realm Constitution of India, 1950.

## I. CONCEPT

*“There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of exacting laws, that of executing the public resolutions and of trying the causes of individuals.”<sup>1</sup>*

With the growth and importance of the administrative process in the twentieth century, administrative rule-making or legislation has assumed tremendous proportions and importance. The bulk of law which governs people has its source from the chambers of the legislative as well as from the administrative agency. It is evident in the present day, that there has been a tremendous growth in the regulatory forces which has indeed made outsourcing of law-making powers to the administrative authorities a compulsive necessity. This act as ancillary to the general-law and lays down guidelines for the proper implementation of the same.

The term Delegated Legislation is difficult to define. However, if defined, in a simple way, delegated legislation refers to all law-making which takes place outside the legislature and is generally expressed as rules, regulations, bye-laws, orders, schemes, directions or notifications, etc. In other words when an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is

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<sup>1</sup> THE SPIRIT OF THE LAWS (TRANS Nugent), pp 151-152. quoted in Thakker, C.K. ADMINISTRATIVE KAW, (1992), Eastern Book Company, p.31.

called subordinate legislation or delegated legislation.<sup>2</sup> Salmond defines delegated legislation as “that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority”.<sup>3</sup>

Black’s Law Dictionary defines ‘Delegation’ as “*The Principle (based on the Separation of Powers Concept) limiting Legislature’s ability to transfer its legislative power to another Governmental Branch, especially the Executive Branch.*” Nevertheless, from the separation of powers doctrine may be derived the principle that legislative power should not be inappropriately delegated to the executive. Although it is not clearly a right, freedom or privilege itself, the principle that legislative power should not inappropriately be delegated to the executive may be an important way of protecting other rights, freedoms and privileges. MJC Vile said the separation of powers doctrine (which supports the principle discussed in this chapter) was ‘essential for the establishment and maintenance of political liberty.’

Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But in reality it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can more readily in the case of the judicial power) is a legacy from an older era of political theory.

The doctrine of separation of powers is traceable to Aristotle.<sup>4</sup> But the writings of Locke<sup>5</sup> and Montesquieu<sup>6</sup> gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded. Locke distinguished between what he called:

- Discontinuous legislative power;
- Continuous executive power;
- Federative power.

He included within ‘discontinuous legislative power’ the general rule making power called into action from time to time and not continuously. ‘Continuous executive power’ included all those powers which we now call executive and judicial. By ‘federative power’ he meant the power of conducting foreign affairs. Montesquieu’s division of power included a legislative power and two kinds of executive powers, an executive power in the nature of Locke’s ‘federative power’ and a ‘civil law’ executive power including executive and judicial power.

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

- The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in Parliament.
- One organ of the government should not interfere with any other organ of the government.
- One organ of the government should not exercise the functions assigned to any other organ.

## II. NEED FOR ADMINISTRATIVE RULE-MAKING

<sup>2</sup> HALSBURY’S LAWS OF ENGLAND, 4<sup>th</sup> Edn., Vol. 44, pp. 981-84.

<sup>3</sup> Salmond: Jurisprudence, 12<sup>th</sup> Edn., p.116

<sup>4</sup> Aristotle: Politics, IV, p.14.

<sup>5</sup> SECOND TREATIES OF CIVIL GOVERNMENT, Chaps. 12 and 13.

<sup>6</sup> L’ ESPRIT DES LOIS (1748), Chap. 12.

Delegated legislation is not a new phenomenon. Ever since the statutes came to be made by Parliament, delegated legislation also came to be made by an authority to which the power was delegated by Parliament. Going back into history one can find the Statute of Proclamation, 1539 under which Henry VIII was given extensive powers to legislate by proclamations.<sup>7</sup> The Indian Parliament enacted from the period 1973 to 1977 a total 302 laws; as against this the total number of statutory orders and rules passed in the same period was approx 25,414. Corresponding figures for States and Union Territories are not available, but the number of rules issued under the delegated powers may well be astronomical.<sup>8</sup> In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to 111 and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures.

It is the intention of the Constitution-makers that those bodies alone must exercise this law-making power in which this power is vested. But in the twentieth Century today these legislative bodies cannot give that quality and quantity of laws, which are required for the efficient functioning of a modern intensive form of government.

Therefore, the delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making power delegated to it by the legislature, it is known as the rule-making action of the administration or quasi-legislative action and commonly known as delegated legislation. Rule-making action of the administration partakes all the characteristics, which a normal legislative action possesses. Such characteristics may be generality, prospectively and a behaviour that bases action on policy consideration and gives a right or a disability. These characteristics are not without exception. In some cases, administrative rule-making action may be particularised, retroactive and based on evidence.<sup>9</sup>

### III. FACTORS FOR GROWTH OF QUASI-LEGISLATIVE ACTION

1. It is a trite but correct to say that even if today Parliament sits all the 365 days in a year and all the 24 hours, it may not give that quantity and quality of law. It is through delegation of legislative power which acts as a compulsive necessity to make rules and regulations for effective implementation of skeleton legislation.<sup>10</sup>
2. At present the legislation has reach to its very complexity in the intensive form of government.
3. Mere legislation making lacks the viability and experimentation. As the same has to stand the scrutiny of constant change in the society.
4. In emergent situations, administrative rule-making is a necessity because ordinary defeat its objectivity and involves delay.
5. The wide discretionary powers can be validly proposed through administrative rule-making powers.

<sup>7</sup> *Agriculture Market Committee v. Shalimar Chemical Works*, (1997) 5 SCC 516

<sup>8</sup> Statemenmt from the working paper presented by Prof. Upendra Baxi, quoted in *Avinder v. State of Punjab*, (1979) 1 SCC 137, 160: AIR 1979 SC 321.

<sup>9</sup> Anonymous, *What is rule-making action or quasi-legislative action in administrative action?*, LEGAL INDIA (Feb. 9, 2016, 10:04 AM) <http://www.legalindia.com/question/what-is-rule-making-action-or-quasi-legislative-action-in-administrative-action/>

<sup>10</sup> From the judgment of Krishna Iyer, J., in *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321

Today the question is not whether delegated legislation is desirable not, but it is what controls and safeguards can be introduced so that the power conferred is not misused or misapplied.<sup>11</sup>

#### IV. CONSTITUTIONALITY OF ADMINISTRATION RULE-MAKING OR DELEGATED LEGISLATION

The term ‘constitutionality of administrative rule-making’ means the permissible limits of the constitution of any country within the country within which the legislature, which as the sole repository of law-making power, can validly delegate rule-making power to other administrative agencies. As Schwatz<sup>12</sup> states; “If an agency acts within the statutory limits (intra vires), the action is valid; if it acts outside it (ultra vires), it is invalid. The social and economic reconstruction of a country can be accomplished through technique of delegation of legislative power.

- Constitutionality of administrative rule-making in India:

The question of constitutionality of delegation of legislative powers came before the Federal Court in *Jatindra Nath Gupta v. Province of Bihar*.<sup>13</sup> In this the validity of Section 1(3) of Bihar Maintenance of Public Order Act, 1948 was challenged on the ground it authorised the provincial government to extend the life of the Act for one year with such modifications is unconstitutional delegation of legislative power because it is an essential legislative act. In this manner for the first time it was laid down that in India that legislative powers cannot be delegated.<sup>14</sup>

The decision in *Jatindra Nath* case created doubts about the limits of the delegation of legislative powers. Therefore, in order to clarify the position of law for the future guidance of the legislature in matters of delegation of legislative functions, the president of India sought the opinion of the Court under Article 143 of the Constitution on the constitutionality of three acts covering three different periods:

- Section 7 of the Delhi Laws Act, 1912
- Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947
- Section 2 of the Part ‘C’ State (Laws) Act, 1950

Even though seven judges gave seven separate judgments but it will not be correct to hold that no principle was clearly laid down by the majority of judges. There were similarities on three points:

- That the legislature cannot give that quantity and quality of law which is required for the functioning of a modern State, hence delegation is necessity;
- That in the view of a written Constitution of the power of delegation cannot be unlimited ; and
- That the power to repeal a law or to modify legislative policy cannot be delegated because these are essential legislative policy cannot be delegated because these are essential legislative functions which cannot be delegated.

In *Agricultural Market Committee v. Shalimar Chemical Works*<sup>15</sup>, the Supreme Court has made it abundantly clear that the power of delegation is constituent element of legislative power as a whole under Article 245 and

<sup>11</sup> The committee on Sub-ordinate legislation (First Lok Sabha), 1954 (3<sup>rd</sup> Report) at p.16; see also, Jain & Jain, Principles of Administrative Law (2007) at p.117

<sup>12</sup> Administrative Law (1984) at p. 153

<sup>13</sup> AIR 1949 FC 175

<sup>14</sup> *Id.* P. 194

<sup>15</sup> (1997) 5 SCC 516

other relative articles of Constitution of India. The delegate must act in good faith, reasonability, intra vires the power granted and on relevant consideration.

On the same hand, excessive delegation of legislative power is unconstitutional. The legislative body can only delegate ancillary or subordinate legislative functions, generally termed as, power to fill up details. In the case of *St. Johns Teachers Training Institute v. Regional Director, NCTE*<sup>16</sup> enunciated factors to decide whether legislation suffers from excessive delegation. This includes:

- Subject matter of law
- Provisions of the statute including its preamble
- Scheme of the law
- Factual and circumstantial background in which law is enacted

An action which is ultra-vires is without jurisdiction, null and void, and of no legal effect whatsoever. It has no legal leg to stand on.<sup>17</sup> Once the court declares that some administrative act is legally nullity, the consequence is that such act has not happened at all. But it is also possible that delegated legislation may be partially good and partially bad. If both the parts (good and bad) are severable, the instrument cannot be struck down as a whole. In such case, legal and valid part can be enforced, ignoring invalid part.<sup>18</sup>

## V. CONTROL MECHANISM OF ADMINISTRATIVE RULE-MAKING IN INDIA

### 1. Parliamentary Control

Parliamentary control over delegated legislation should be a living continuity as a constitutional necessity as there is inherent risk of abuse of power.<sup>19</sup> Since it is the legislature which grants legislative power to the administration, it is primarily its responsibility to ensure the proper exercise of the delegated legislative power, to supervise and control the actual exercise of this power, and ensure against the danger of its objectionable, abusive, and unwarranted use by the administration.<sup>20</sup> Control provides the opportunity to criticise the delegate if there is abuse of the power on their part and such mechanism is called as 'legislative veto'.<sup>21</sup>

In USA, the control of the congress over delegated legislation is highly limited. In England, due to parliamentary sovereignty the control exercised by the Parliament over administrative rule-making is very broad and effective. But in India the control of such rule-making agency is implicit as a normal constitutional function.

Such control can be classified into:

1. Direct general Control
  - a. By debate on the Act which contains necessity, type, extent, and authority to whom the authority is delegated.
  - b. By questioning the aspect of delegation and if dissatisfied the member can give notice for discussion under Rule 59 of the Procedure and conduct of Business in Lok Sabha Rules.

<sup>16</sup> (2003) 3 SCC 321

<sup>17</sup> *Lord Greene in Minister of Agriculture v. Mathews*, (1950) 1 KB 148 (153)

<sup>18</sup> *Wade & Forsyth, Administrative Law* (2005) at pp. 887-88; *M.J. Sivani v. State of Karnataka*, (1995) 6 SCC 289; *State of T.N. v. P. KrishnaMurthy*, (2006)4 SCC 517

<sup>19</sup> *Supra* at 4

<sup>20</sup> *Supra* at 14

<sup>21</sup> *Supra* at 8

- c. By moving resolution and notice in the House.
- d. Through vote of grant
- e. Through a private member's Bill to seek modifications in the parent act.

## 2. Direct Special Control

Such control mechanism is exercised through the technique of laying on the table of the House, Such laying can be of various types.

- a. Laying with no further direction
- b. Laying subject to negative to negative resolution
- c. Laying subject to the affirmative resolution

The consequence of non-compliance with laying provision depend upon whether the provision in the enabling act is mandatory or directory. In *Narendra Kumar v. Union of India*<sup>22</sup>, the Supreme Court held that the section of the disputed act is mandatory and has no effect unless laid down before the Parliament.

## 3. Indirect Control

Such control is being exercised by the Parliament through its committees. Such a committee was known as Committee on Subordinate legislation of Lok Sabha (1953) or Rajya Sabha (1964), consisting of 15 members nominated by the speaker. Such committee has the power to compel the attendance of any person or compel the production of documents and records. This committee has between 1953-1961, scrutinized about 5300 orders and rules. As per the Rule 223 its main functions is to check: the rules are in accordance with the general object of the act, rules contain any matter which could be proper be dealt, rules contains imposition of tax, does it bar the jurisdiction of the court, retrospective, expenditure from the consolidated fund , delay in publication of rules, requires further elucidation.

## 2. Procedural Control

The above discussed method as a control mechanism is ineffective and weak as the legislators are deficit of legal skills. An alternative and more effective mechanism, that is providing effective vigil over administrative rule making and guarantee mass participation. Hence, procedural control mechanism operates in the following components

### a) Drafting :

The drafting of delegated legislation by an expert draftsman, who is placed in the procedure to advise, whether the proposed rules and regulations are intra-vires. For instance, Australia the bulk of delegated legislation is either drafted or checked by parliamentary draftsmen.<sup>23</sup> But in India there is no special procedure for this, because of which India poorly draft their rules and creates real hardship and unnecessary litigation.

### b) Antenatal publicity

The term 'Antenatal' means before birth, and in the context of delegation of rule making it means that the rules must first be published in draft form to give an opportunity to the people to have their say in the rule-making. The American experience shows that the antenatal publicity is most beneficial practice. In Britain, unlike in USA, the emphasis is on informal procedure requirements. The procedure for such method is correctly and unambiguously laid down in Sec-23 of General Clauses Act, 1897

- i) That the rules be published in draft form in the Gazette.

<sup>22</sup> AIR 1960 SC 430

<sup>23</sup> See Benjafield and Whitmore: PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW, (1976), p. 106

- ii) That Objections and suggestions be invited by a specific date.
- iii) Those objections and suggestions be considered by the rule making agency.

For instance, Section 15 of the Central Tea Board Act, 1949, Section 30(3) of the Chartered Accountants Act, 1949 and Section 43 of the Co-operative Societies Act, 1912.

c) Consultation with affected persons

This method is one of the democratic form of model and therefore, increases its acceptability and effectivity. In the case of *Banwarilal Agarwalla v. State of Bihar*<sup>24</sup> it was held that India doesn't follow any provision for prior consultation but the same can be made mandatory by the enabling act. And its violation is visited with the invalidity of the rules. But in the case *Hindustan Zinc Ltd. v. APSEB*<sup>25</sup>, held that failure to consult doesn't render the power given in rules as invalid as the consultation with the council was not made mandatory. Such consultation can be grouped in 5 possible headings:

- i) Official consultation with the named body
- ii) Consultation with Administrative Boards
- iii) Consultation with a statutory board in charge of a particular subject.
- iv) Consultation with interested persons
- v) Preparation of rules by the affected interests

d) Postnatal publicity

Such publicity is a necessary element as we know *ignorantia juris non excusat*, such publication is based on this dictum. Such rules should be accessible and reachable to public at large. Due to lack of prescribed publication or procedure, the practice of publication of the statute differs from statute to statute. But where the parent law prescribes a mode of publication that mode must be followed. The Supreme Court in *Harla v. State of Rajasthan*<sup>26</sup> it was held that a law cannot be enforced unless published.

### 3. Judicial Control

In India Judicial control is done through judicial review and is subject to normal rules governing administrative action. Merely, that rules are not legislation and only subordinate legislation, such contention cannot take away the judicial intervention through judicial review.<sup>27</sup> The courts can invalidate on grounds

- i) That the enabling Act is ultra vires to the Constitution

If the enabling act is ultra vires the Constitution which curtail any arbitrariness by prescribing boundaries, the rules and regulation framed thereunder would also be void. There is a presumption in favour of its constitutionality. The legislature cannot delegate its essential power to any other agency, and if so delegated it will be ultra-vires.<sup>28</sup> The Court is required to have a liberal view in determining the constitutionality.

- ii) The administrative legislation is ultra-vires to the Constitution

There is a possibility that the enabling act is intra-vires yet the rules and regulations framed thereunder are ultra-vires and violate the provision of the constitution. In *Narendra Kumar v. Union of India*<sup>29</sup>, the Supreme

<sup>24</sup> AIR 1961 SC 849

<sup>25</sup> (1991) 3 SCC 299

<sup>26</sup> AIR 1951 SC 467

<sup>27</sup> General Officer Commanding-in-Chief v. Subhash Chandra Yadav, (1988) 2 SCC 351

<sup>28</sup> *In re Delhi Laws Act*, AIR 1951 SC 332

<sup>29</sup> AIR 1960 SC 430

Court held that even if enabling act is intra-vires, the constitutionality of the delegated legislation can still be considered because the law cannot be presumed to authorise anything unconstitutional.

iii) The administrative legislation is ultra-vires to the enabling Act

Such challenge of constitutionality can sustain on the grounds:

- a) That administrative legislation is in excess power which is not conferred by the enabling act, they stand invalid<sup>30</sup>.
- b) That the rules are in conflict with the enabling act. This may include object and purpose and object of the enabling act. But anything done within the power and competence given by the parent act can't be invalidated<sup>31</sup>
- c) That it is in conflict with the procedure prescribed. When parent law prescribe any procedure the same is required to be followed and if so not followed the rules may be declared as invalid.
- d) That it is unreasonable, arbitrary and discriminatory. There is no settled position to this ground and in the case of *Central Inland Water Transport Corporation v. Borjo Nath Ganguly*<sup>32</sup>, it was held that courts have no jurisdiction under Art. 226 to go into reasonable rates. But it can be challenged on violation of Art. 14.<sup>33</sup> The test of unreasonableness was laid down in *Kruse v. Johnson*<sup>34</sup>, it gave 5 parameters: Partial Operation, Manifestly Unjust, Bad faith, Oppressiveness, Gross interference without justification.
- e) That encroaches upon the rights of the private citizens; it can be only invoked where such interference was arbitrary.
- f) That it conflicts with the terms of some other statute, it is now a settled position that a rule is not only required to be made in conformity with provision of the enabling act but must be in conformity with the existing law.
- g) Vagueness, rules can be challenged on the ground if there is no mention of the enforceable date of any rule.<sup>35</sup>

## VI. SEPARATION OF POWERS IN U.S.A.

If the Rule of Law as enunciated by Dicey affected the growth of Administrative Law in Britain; the doctrine of 'Separation of Powers' had an intimate impact on the development of Administrative Law in the U.S.A. As Davis points out "*probably the principal doctrinal barrier to the development of the Administrative process has been the theory of separation of powers*". The truth is that while the doctrine of separation has affected the character of the American Administrative Law, the doctrine itself has been affected by the newly emerging trend in favour of Administrative Law.<sup>36</sup>

The doctrine of separation forms the basis of American constitutional structure. Articles I, II and III delegate and separate powers and also exemplify the concept of separation of powers. Art. I vests legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme

<sup>30</sup> Ibrahim v. Regional Transport Authority, (1971) 2 SCC 314

<sup>31</sup> State of M.P. v. MAhalaxmi Fabric Mills, 1995 Supp (1) SCC 642

<sup>32</sup> (1986) 3 SCC 156

<sup>33</sup> Air India v. Nergesh Meerza, (1981) 4 SCC 335

<sup>34</sup> (1898) 2 QB 91

<sup>35</sup> Vice-Chancellor, M.D.U., Rohtak University, (2007) 5 SCC 77

<sup>36</sup> Upadhaya J.J.R, "Administrative Law", Central Law Agency, Allahabad, 2006, p 31.



Court.<sup>37</sup> The ideal of separation, both functional and personnel is yet unrealized but nearest approximation is reached in the State Constitution of Massachusetts in the U.S. It is said therein, that-

*“... The legislative department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative or executive powers, or either of them; to the end it may be a government of law and not of men.”*<sup>38</sup>

## VII. JUDICIAL OPINION OF THE DOCTRINE OF SEPARATION OF POWERS

As clearly mentioned about the separation of powers there were times where the judiciary has faced tough challenges in maintaining and preserving the Doctrine of separation of powers and it has in the process of preservation of the above said Doctrine has delivered landmark judgments which clearly talks about the independence of judiciary as well as the success of judiciary in India for the last six decades. A survey of the constitutional provisions establishes that this doctrine under the Constitution of India is an approximation of the British position rather than American. There is no direct declaration on this point which is also not possible today when the doctrine is being surrendered in the face of unprecedented growth of delegated legislation and judicial powers of the Administration. Justice Mahajan took note of this point and stated in the famous case of *Re Delhi Laws Act*,<sup>39</sup> that:

*“It does not admit of serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that India has, at present under our Constitution. Unlike the American and Australian Constitution the Indian Constitution does not expressly vest the different sets of powers in different organs of the State. Our Constitution though federal in form is modeled on the British Parliamentary system, the essential feature of which is the responsibility of the executive of the Legislature.....”*

There have been several landmark judgements that have changed the face of the doctrine of separation of powers in India. These are discussed in this section.

The only validity of the doctrine of separation of powers is in the sense that one organ should not assume the essential functions of the other. This was the view of Supreme Court in *Ram Jawaya Kapur v. State of Punjab*<sup>40</sup>, it was held that the

*“...Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”*<sup>41</sup>

<sup>37</sup> *Id.* at p 32.

<sup>38</sup> Jain Kagzi M.C., “The Indian Administrative Law”, University Law Publishing Co. Pvt. Ltd., 2002, p 16.

<sup>39</sup> AIR 1951 SC 747.

<sup>40</sup> AIR 1955 SC 549.

<sup>41</sup> Massey I.P., “Administrative Law”, Eastern Book Company, Lucknow, 2012, p 40.

Since after the *Kesavananda Bharti v. State of Kerala*<sup>42</sup>, and the judicial articulation of the doctrine of basic structure and essential features of the Constitution therein, the separation of powers is spoken as a structural basis of the constitutional framework and cannot be destroyed by any amendment.

The doctrine puts less and less emphasis on organizational pattern, and seeks to effect increasingly functional division. In *re Delhi Laws Act case*<sup>43</sup>, Hon'ble Kania, CJ, observed that.

*“Although in the Constitution of India. . . . There is no express separation of power, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?”*

Therefore, the functions of different organs are clearly earmarked so that one organ does not usurp the functions of another. In *Indira Nehru Gandhi v. Raj Narain*<sup>44</sup>, Ray CJ., also observed that in the Indian Constitution there is separation of powers in broad sense only. Beg, J., has observed that basic structure also embodies the separation of powers doctrine and none of the pillars of the Indian Republic can take over the other functions, even under Article 368. Chandrachud, J., reiterated this view and held that this doctrine is useful as a means of checks and balances in a political setup. For examples the judiciary should shy away from the politics of the Parliament and the latter should revere the opinion of the Courts.<sup>45</sup>

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of broad division of the power of state has been accepted under the Constitution of India. In *Golaknath v. State of Punjab*<sup>46</sup>, Subba Rao, CJ., observed:

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

In *Bandhuva Mukti Morcha v. Union of India*<sup>47</sup>, Pathak J., said:

*“The Constitution envisages a broad division of the power of state between the legislature, the executive and the judiciary. Although the division is not precisely demarcated, there is general acknowledgment of its limits. The limits can be gathered from the written text of the Constitution, from conventions and constitutional practice, and from an entire array of judicial decisions.”*

<sup>42</sup> AIR 1973 SC 1461.

<sup>43</sup> AIR 1951 SC 332.

<sup>44</sup> AIR 1975 SC 2299

<sup>45</sup> Kesari U.P.D, “Lectures on Administrative Law”, Central Law Publications, Allahabad, 2005, pp 23,24.

<sup>46</sup> AIR 1967 SC 1643.

<sup>47</sup> AIR 1984 SC 802.

Similarly, in *Supreme Court Employees' Welfare Association v. Union of India*<sup>48</sup>, it was held that no court can issue a direction to a legislature to enact a particular law neither it can direct an executive authority to enact a law which it has been empowered to do under the delegated legislative authority.

The Constitution has distributed not only legislative powers but also administrative powers between the Union and the States.<sup>49</sup> One salient principle in this regard is executive powers is co-terminus with legislative powers. Whenever the State Government wants to delegate its executive powers to the Union it can do so in accordance with the provisions mentioned in Article 258-A and not otherwise. Therefore, the courts can not overlook this constitutional provision and exercise administrative powers vested in the States in violation of this provision. If the provision is violated it will have debilitating effect on the inter-Governmental delegation of administration powers and more specifically the provisions contained by Article 258-A.

### VIII. SYSTEM OF CHECKS AND BALANCES

Today, a new interpretation of the doctrine has been evolved. It seeks to emphasize upon the functional division of powers. The principle of delegation of legislative functions is not regarded inconsistent with the doctrine. Emphasis is laid on the balance of powers and a system of checks. No single agency of the State should emerge as dominant one by assuming greater powers in its hands and each of them should exercise a check upon the other so that none of them exceeds the authority vested in it by the Constitution. The very purpose of the doctrine is to prevent concentration of powers in any one of these three agencies and also to prevent them from making encroachments upon the other's activities so that autocracy may not replace rule of law. All these organs must act in complete coordination with each other without interfering the functioning of the other organ. Considering the present meaning of the doctrine in this perspective the Indian Constitution can rightly claim to represent it.

Chandrachud, J., took the same view when he observed that the political usefulness of the doctrine is now widely recognised. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems, enshrined in the 'political thicket'. Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept innate in the prudence of self-preservation, that discretion is the better part of valour.<sup>50</sup>

Perhaps, in view of the above meaning of the doctrine evolved in modern times, the Supreme Court in the *Kesavanand Bharti's case*<sup>51</sup> changed its opinion and pointed out that both the supremacy of the Constitution and separation of powers are constituents of the basic structure of the Indian Constitution. The view has been reaffirmed by the Court in *Smt. Indira Nehru Gandhi v. Raj Narain Singh*<sup>52</sup> Beg, J., observed: "this Constitution has a basic structure comprising the three organs of the Republic the Executive, the Legislature and the Judiciary. It is through each of these organs that the sovereign will of the people has to operate and manifest itself and not through only one of them. Neither of these separate organs of the Republic can take over the functions assigned to the other. This is the basic structure of scheme of the Government of the Republic laid down in this Constitution."<sup>53</sup>

The Supreme Court in the case of *Asif Hamid v. State of J and K*<sup>54</sup>, has observed that "Judicial review is a powerful weapon to restrain, unconstitutional exercise of powers by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own

<sup>48</sup> AIR 1990 SC 334.

<sup>49</sup> Article 256-258 A of the Constitution of India.

<sup>50</sup> AIR 1975 SC 2294.

<sup>51</sup> AIR 1973 SC 1461.

<sup>52</sup> AIR 1975 SC 2299.

<sup>53</sup> Ibid., at p. 2336.

<sup>54</sup> AIR 1989 SC 1899

exercise of powers is the self-imposed discipline of judicial restraint.” But, in *Krishan Kumar v. Union of India*,<sup>55</sup> the Constitution Bench of the Supreme Court observed “In the matter of expenditure includible in the Annual Financial Statement this Court has to pass any order or give any directions because of the division of functions between the three co-equal organs of the Government under the Constitution” not, any court can issue a direction to a Legislature to enact a particular law. Similarly, a court cannot direct an executive authority to enact a law which it has been empowered to do under the delegated legislative authority.<sup>56</sup> But in *I.R. Coelho (dead) by L.R.S's v. State of Tamil Nadu*,<sup>57</sup> the Supreme Court observed that the Constitution is living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of law. The principle of constitutionalism is now a legal principle .which requires control over the exercise of governmental powers to ensure that it does not destroy the democratic principles including the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers. It requires a diffusion of powers, necessitating different independent centers of decisions-making. The principle of constitutionalism under-pin the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for law protecting fundamental right to be impliedly repealed by future statutes. The protection of fundamental constitutional right through the common law is main feature of common law constitutionalism. According to Dr. Amartya Sen, the justification for protecting fundamental right is not on the assumption that they are higher rights but that protection is the best way to promote a just and tolerant society. According to Lord Steyn, Judiciary is the best institution to protect fundamental right, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law. Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England, where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, courts may be forced to modify the principle of parliamentary sovereignty. For example, in cases where judicial review is sought to be abolished. By this, the Judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the government is maintained. To prevent one branch from becoming supreme, protect the opulent minority from the majority and to introduce the way which is best suitable in Indian phenomen and to suggest government system that employed a separation of powers with balance of the powers of each branches.

Typically this can be accomplished through a system of “checks and balances”, the origin of which, like separation of powers itself, is specifically credited to Montesquieu. Checks and balances allow for a system based regulation that allows one branch to limit another, such as the powers of Legislatures to alter the composition and jurisdiction of the federal courts. In India, the doctrine of separation of powers has been accepted with the principle of checks and balances

Though the Constitution of India does not recognize the doctrine of separation of powers in absolute manner, framers have meticulously differentiated functions of various organs of the Government. Each organ has to function within its own sphere demarcated under the Constitution. The principle of "checks and balances" obtaining in our democracy play vital role in respect of separation of powers. The doctrine of separation of powers has been held by the Supreme Court of India as one of the basic features of the Constitution, which cannot be impaired even by amending.<sup>58</sup>

A distinction may be necessary between essential and incidental powers of an organ of Government. Government is not a machine, but a living thing. Its life is dependent upon cooperation of its organs, which are

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<sup>55</sup> 1990 (4) SCC 207.

<sup>56</sup> *Employee's Welfare Association v. Union of India*, AIR 1990 SC 334

<sup>57</sup> AIR 2007 SC 861.

<sup>58</sup> *Kesavananda v. State of Kerala*, AIR 1973 SC 1461, *Smt. Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

interdependent. An organ may exercise some of the incidental powers of another organ. However, no organ of Government is supreme as per discussion of democracy. Each organ is limited to the exercise of the powers confided to it under the law of its creation.

On the issue of Cabinet, the Supreme Court of India has said, is a hyphen which joins, or a buckle which fastens the Legislative part of the State to its executive part. The Constitution of India under Article 50, however, defines separation of the Judiciary from the Executive. The vitality and importance of the doctrine of separation of powers lies not in any rigid separation of functions, but in a working synthesis with the guarantee of judicial independence.

Article 32 of the Constitution makes the Supreme Court the ultimate guardian of the Fundamental Rights of the citizens and clothes it with the powers to issue the writs for their enforcement. Article 142 guarantees wide powers to apex court to make orders as necessary in the interest of justice or matter before it. In addition Constitution confers powers to make decisions under articles 131 to 136. Article 142 contains no words of limitation and has enabled the court to intervene in a wide variety of cases starting with *Union Carbide Corpn. v. Union of India*,<sup>59</sup> in which Supreme Court has made significant strides to maintain the rule of law, which is the bedrock of our Constitution.

Judicial review is a powerful weapon to restrain any unconstitutional exercise of powers by the Legislature and the Executive is subject to judicial restraint. The only check on the exercise of powers by the judiciary, however, is the self-imposed discipline of judicial restraint. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize vis-a-vis any matter which under the Constitution lies within the sphere of Legislature or the Executive, provided those authorities do not transgress their constitutional limits or statutory powers.<sup>60</sup>

It is said that there is a shift from the traditional judicial role to judicial activism, from passivity to creativity, in that the courts are taking judicial notice of the changing needs of the society and evolving new tools for redressing public wrongs. Public Interest Litigation based on the enlarged concept of locus standi, has developed on account of judicial activism. In boundless matters, the courts have moulded reliefs, be they cases concerning the deprived or disadvantaged sections of the society, prisoners, environmental degradation, closure of polluting industries in Delhi, encroachments and unauthorised constructions, immediate medical aid by Government hospitals to seriously injured persons, reparations to riot-victims, professional college admissions, contempt involving disobedience or imperviousness to court orders, corruption in high places, or malfeasance of public servants including Ministers involving breach of public trust, etc. As we are aware, the Supreme Court had very recently held that exemplary damages could be awarded for oppressive, arbitrary and unconstitutional actions by public servants, and imposed the same on two former Ministers though this decision in Mr. Satish Sharma's case was recently overturned by the Supreme Court of India.<sup>61</sup> The Supreme Court had also awarded to a former Chief Minister a symbolic one day imprisonment for his administrative inaction involving contempt besides punishing civil servants for the same.

Undoubtedly, the maxim "the King can do no wrong" or absolute immunity of the Government is not recognized in our legal system, Independence and impartiality are two basic attributes essential for proper discharge of judicial functions. In fact, 'judicial activism' is nothing but Judiciary's insistence that the rule of law must guide the legislature and the Executive in enacting or enforcing the laws of the land. Judicial review is a constitutionally embraced concept, nay, a basic feature of our Constitution,<sup>62</sup>; *S.P. Sampath Kumar v. Union of India*<sup>63</sup>, *Subhash Sharma v. Union of India*<sup>64</sup>. Indian Judicial review, a power born on the first principles of

<sup>59</sup> (1991) 4 SCC 584.

<sup>60</sup> Asif Harmed v. State of J&K, AIR 1989 SC 1899

<sup>61</sup> The Pioneer, August 4, 1999, p. 4

<sup>62</sup> Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

<sup>63</sup> AIR 1987 SC 386.

<sup>64</sup> AIR 1991 SC 631

democracy's constitutionalism, is today an area of great promise.<sup>65</sup> However, it must also be kept in view that the actual governance of the country is certainly the sphere of the Executive which is accountable to Parliament. Neither the Executive nor the Judiciary should exceed their legitimate functions. Only then the two organs of the State can function harmoniously. There should be no occasion for one organ of the State to usurp powers of the other organ so as to lead to constitutional crisis. Self-restraint is the key to the whole issue.

## IX. CONCLUSION

Plenary powers of law making are entrusted to elected representative. But in present scenario, the government model is one of the intensive forms of government. Such government has to make balance between in powers and duties and accomplish social welfare in the form of growth and liberty. There must be social auditing by public at large. The modern trend is that Parliament passes only a skeletal legislation. Thus, law making has to be outsourced as it will positively affect the quality of the law. The objectivity behind this step is that delegation helps to fill up details to make legislation more fruitful and effective. The fact is that the direct legislation of Parliament is not complete, unless it is read with the help of rules and regulations framed thereunder; otherwise by itself it becomes misleading.

In the regime of Constitution of India, there is no room for arbitrariness and is considered to be antithesis to equality, supremacy of law and rule of law. Therefore, under this light unlimited power of delegation to the executive by the legislature may, on critical occasions, be subversive of responsible government and erosive of democratic order.<sup>66</sup> Hence, the system of quasi-legislative action needs careful and radical restructuring. The guidance which saves the delegation from the excessiveness may be express or implied. Any delegation which transgresses this limit infringes the constitutional scheme.<sup>67</sup> It is evident from the above-mentioned methods, anecdotes and instances that India, lacks in its administrative system as the procedure followed by our nation are cumbersome, vague, general and sometimes not presumable. This leads to hassles, hardships and never-ending litigation. Adopting and inventing new policy for a complex democracy like ours is the need of the hour.

In India, the doctrine of Separation of Powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.<sup>68</sup> As a general provision, Parliament is entrusted to make the law for the union. Executive is entrusted with duty of implementation of law and judiciary is also considered to be independent under the constitutional scheme in India. However, there are many exceptions which negate the application of this doctrine.<sup>69</sup>

The Executive in India is authorized to legislate in the name of delegated legislation. In the name of administrative adjudication of the right of individual citizens, the administrative agencies, which are statutory tribunals and domestic tribunals have been constituted and perform judicial function.<sup>70</sup>

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<sup>65</sup> Judicial Review as a part of Rule of Law.

<sup>66</sup> Avinder Singh v. State of Punjab, (1979) 1 SCC 137

<sup>67</sup> Industrial Deptt. V. American Petroleum Institution, (1980), 448 US 607

<sup>68</sup> Massey I.P, "Administrative Law", Eastern Book Company, Lucknow, 2012, p 40.

<sup>69</sup> Kumar Devinder, "Administrative Law", Allahabad Law Agency, Faridabad, 2007, p 19.

<sup>70</sup> ain Kagzi M.C., "The Indian Administrative Law", University Law Publishing Co. Pvt. Ltd., 2002, pp 19.