

CHAPTER 3

SEPARATION OF POWERS AND CHECKS AND BALANCES

Background

The Constitution makers have meticulously defined the functions of various organs of the State. The Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution and no organ can usurp the functions assigned to another. The Constitution trusts these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, two facets of the People's will, have all powers including that of finance; judiciary has no power over sword or the purse; nonetheless it has powers to ensure that the aforesaid two main organs of the State function within the constitutional limitations. Judicial review is the powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. Article 50 plainly reveals that the judiciary shall be separated from the Executive control or interference.¹⁷

The Constitution of India is federal modelled on the pattern with a strong basis in favour of the Centre. It has armed the judiciary to test the validity of the legislative and executive actions on the touchstone of the constitutional provisions. The Indian Constitution has gone a step forward than the Bill of Rights incorporated in the Constitution of U.S.A. A thirteen – judge Bench (then full court) of the Supreme Court in *Keshavanand Bharti*,¹⁸ held that the separation of power between legislature, executive and the judiciary is also basic feature of the Constitution.

¹⁷ Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.

¹⁸ Keshavanand Bharti v. State of Kerala AIR 1973 SC 1463.

20

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

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

Karl Lowenstein had argued in favour of providing some irreducible minimum requirements for any formalised constitutional order. According to him, the following elements are relevant for consideration:¹⁹

- There should be a differentiation of various state functions and their assignment to different state organs or power holders, to avoid concentration of power in the hands of a single autocratic power holder;

¹⁹ Karl Lowenstein, *Political Power and the Government Process*, 2nd ed., University of Chicago Press, Chicago, U.S.A. 1965 at 127.

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

The containment of political power by the containment of the power holders is the crux of what in political history, ancient and modern, appears as constitutionalism. The purpose for which such containment is required has been explained in his observation that ‘the authority

of the power holder is indispensable for carrying out the purposes of the state society, on the one hand; the liberty under authority of power addressees is equally indispensable, on the other. The establishment of a harmonious equilibrium between these two basic values presents in a nutshell the eternal quest of man in society.²⁰

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent democratic government, fundamental rights of people, federalism, and decentralisation of power are some of the principles and norms which promote constitutionalism in a country.²¹ The separation of powers doctrine seems to be inseparable part of any modern Constitution, be it presidential or parliamentary. India is no exception to this rule.

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

²⁰ Ibid. at 9.

²¹ M.P. Jain, *Indian Constitutional Law*, 5th ed., Wadhwa and Company, New Delhi, 2005, at 6.

Separation of Powers and Checks and Balances – An Overview

The political philosophies as well as the experiences of many states had contributed immensely in the drafting of the Indian Constitution. Also, in the working of the Constitution, a very deep impact of the British Constitution could be seen during the past 55 years. One specific illustration for this observation is the treatment of the doctrine of separation of powers by the courts in India almost similar to the British constitutional developments, in spite of written provisions of the Indian Constitution to the contrary. Probably, this was due to the fact that in the initial stages of the Republic, many of the judges were British common law trained and were not able to deviate from their understanding of the Constitution. In the words of Justice V.R.Krishna Iyer, these judges were “‘robed brethren’ who did not respond to the sudden summons for large change, having been cultured in Westminster jurisprudence and law of Victorian vintage.” Added to that was the need for giving unlimited power to the Indian Parliament to make necessary laws to keep the federal feature of the new state under complete control.

A cursory look at the various provisions of the Constitution may be necessary here to illustrate the presence of the doctrine of separation of powers and functions more elaborately than in the American Constitution. Similarly, a plethora of provisions of the Indian Constitution also provide for the dependent doctrine of ‘checks and balances’. Although the framers of the Indian Constitution specifically wanted to incorporate the British Parliamentary form of government, yet in approving the draft Constitution they failed to provide for clear form of government. Answering to a series of questions on the powers conferred on the President by the draft Constitution, Dr B.R.Ambedkar referred to the proposed adoption of an ‘instrument of instruction’ that would completely bind the President by the council of ministers in the functions of the government. However, the fact

remains that such an instrument of instructions was never adopted by the Constituent Assembly.²²

Dr B.R.Ambedkar, speaking about the choice of the form of government in the Constituent Assembly observed that 'the choice between the systems is not very easy. A democratic executive must fulfil two conditions: (i) it must be a stable executive; and (ii) that it must be a responsible executive. The American system gives more stability but less responsibility. The British system gives more responsibility but less stability.'²³ Provision relating to collective responsibility was incorporated under Article 75 (3) of the Constitution that was to be exercised by the Parliament. This provision itself proves that the control is exercised by the legislature over the executive, whatever is the nature of such executive.

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

- What are the specific powers and functions provided under the Indian Constitution?
- What are the limitations provided under the Indian Constitution on those powers of the three different branches of the government, both at the centre and at states? And
- What are the checks that can be exercised by one branch over the other two whenever any one of the branches violates the constitutional limits?

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

²² P.B. Mukherji, *The Critical Problem of the Indian Constitution*, University of Bombay, 1967.

²³ Constitutional Assembly Debates, Vol VII, at 986.

Accordingly, the executive power of the Union is vested in the President.²⁴

Similarly, the executive power is vested in the Governor in so far as the executive power of the state is concerned.²⁵

Executive Powers and Functions of the Union and States

In terms of the executive powers and functions of both the Union and States, the Articles listed below and many other provisions of the Indian Constitution provide for the same.

<u>Article</u>	<u>Short Title</u>
72	Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.
73	Extent of executive power of the Union.
76	Attorney-General for India.
77	Conduct of business of the Government of India.
111	Assent to Bills.
117	Special provisions as to financial Bills.
123	Power of President to promulgate Ordinances during recess of Parliament.
124	Establishment and constitution of Supreme Court.
143	Power of President to consult Supreme Court.
144	Civil and judicial authorities to act in aid of the Supreme Court.
155	Appointment of Governor.
156	Term of office of Governor.
216	Constitution of High Courts.

²⁴ Article 53 – ‘The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution.’

²⁵ Article 153 – ‘The executive power of the State shall be vested in the Governor and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution.’

<u>Article</u>	<u>Short Title</u>
223	Appointment of acting Chief Justice.
224	Appointment of additional and acting Judges.
162	Extent of executive power of State.
163 (2)	Council of Ministers to aid and advise Governor.
165	Advocate-General for the State.
166	Conduct of business of the Government of a State.
174	Sessions of the State Legislature, prorogation and dissolution.
176	Special address by the Governor.
192	Decision on questions as to disqualifications of members.
200	Assent to Bills.
207	Special provisions as to financial Bills.
213	Power of Governor to promulgate Ordinances during recess of Legislature.
239	Administration of Union territories.
239AB	Power of administrator to promulgate Ordinances during recess of Legislature.
239B	Special provisions with respect to Delhi
240	Power of President to make regulations for certain Union territories.
263	Provisions with respect to an inter-State Council.
280	Finance Commission.
292	Borrowing by the Government of India.
293	Borrowing by States.
316	Appointment and term of office of members.
318	Power to make regulations as to conditions of service of members and staff of the Commission.

<u>Article</u>	<u>Short Title</u>
331	Representation of the Anglo-Indian community in the House of the People.
333	Representation of the Anglo-Indian community in the Legislative Assemblies of the States.
339	Control of the Union over the Administration of Scheduled Areas and the welfare of Scheduled Tribes.
340	Appointment of a Commission to investigate the conditions of backward classes.
341	Scheduled Castes.
342	Scheduled Tribes
344	Commission and Committee of Parliament on official language.
350B	Special Officer for linguistic minorities.
352	Proclamation of Emergency
353	Effect of Proclamation of Emergency.
354	Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.
355	Duty of the Union to protect States against external aggression and internal disturbance.
356	Provisions in case of failure of constitutional machinery in States.
357	Exercise of legislative powers under Proclamation issued under article 356.
358	Suspension of provisions of article 19 during emergencies.
359	Suspension of the enforcement of the rights conferred by Part III during emergencies.
360	Provisions as to financial emergency.
372A	Special provision with respect to the State of Nagaland.
373	Power of President to make order in respect of persons under preventive detention in certain cases.
392	Power of the President to remove difficulties.

The aforesaid provisions pave way for a series of executive powers and functions to be performed by the President and the Governors under the Indian Constitution. The specific executive functions are also mentioned in Articles 85, 87, 103, 192 and 258A.

Legislative Powers and Functions of the Union Parliament and State Legislatures

The legislative powers and functions of both the Union Parliament and State Legislatures are provided under Articles listed below²⁶ and many other provisions of the Indian Constitution:

<u>Article</u>	<u>Short Title</u>
241	High Courts for Union territories.
245	Extent of laws made by Parliament and by the Legislatures of States.
246	Subject-matter of laws made by Parliament and by the Legislatures of States.
247	Power of Parliament to provide for the establishment of certain additional courts.
248	Residuary powers of legislation.
249	Power of Parliament to legislate with respect to a matter in the State List in the national interest.
250	Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation.
252	Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State.
253	Legislation for giving effect to international agreements.
265	Taxes not to be imposed save by authority of law.
267	Contingency Fund.
271	Surcharge on certain duties and taxes for purposes of the Union.

²⁶ <http://lawmin.nic.in/coi/contents.htm> accessed on 10 Nov 2011 at 11:29

<u>Article</u>	<u>Short Title</u>
275	Grants from the Union to certain States.
276	Taxes on professions, trades, callings and employments.
286	Restrictions as to imposition of tax on the sale or purchase of goods.
302	Power of Parliament to impose restrictions on trade, commerce and intercourse.
303	Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.
304	Restrictions on trade, commerce and intercourse among States.
307	Appointment of authority for carrying out the purposes of articles 301 to 304.
309	Recruitment and conditions of service of persons serving the Union or a State.
312	All-India services.
312A	Power of Parliament to vary or revoke conditions of service of officers of certain services.
321	Power to extend functions of Public Service Commissions.
323A	Administrative tribunals.
323B	Tribunals for other matters.
327	Power of Parliament to make provision with respect to elections to Legislatures
328	Power of Legislature of a State to make provision with respect to elections to such Legislature.
345	Official language or languages of a State.
357	Exercise of legislative powers under Proclamation issued under article 356.

<u>Article</u>	<u>Short Title</u>
368	Power of Parliament to amend the Constitution and procedure there for.
370	Temporary provisions with respect to the State of Jammu and Kashmir.
371	Special provision with respect to the States of Maharashtra and Gujarat.
372	Continuance in force of existing laws and their adaptation.

Judicial Powers and Functions

The judicial powers and functions are provided under Articles listed below and many other provisions of the Indian Constitution.

<u>Article</u>	<u>Short Title</u>
124	Establishment and constitution of Supreme Court.
131	Original jurisdiction of the Supreme Court.
132	Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.
133	Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to Civil matters.
134	Appellate jurisdiction of Supreme Court in regard to criminal matters.
135	Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court.
136	Special leave to appeal by the Supreme Court.
137	Review of judgments or orders by the Supreme Court.
138	Enlargement of the jurisdiction of the Supreme Court.
139	Conferment on the Supreme Court of powers to issue certain writs.

<u>Article</u>	<u>Short Title</u>
140	Ancillary powers of Supreme Court.
141	Law declared by Supreme Court to be binding on all courts.
142	Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.
143	Power of President to consult Supreme Court.
214	High Courts for States.
215	High Courts to be courts of record.
216	Constitution of High Courts.
217	Appointment and conditions of the office of a Judge of a High Court.
220	Restriction on practice after being a permanent Judge.
221	Salaries, etc., of Judges
222	Transfer of a Judge from one High Court to another.
223	Appointment of acting Chief Justice.
224	Appointment of additional and acting Judges.
225	Jurisdiction of existing High Courts.
226	Power of High Courts to issue certain writs.
227	Power of superintendence over all courts by the High Court.
229	Officers and servants and the expenses of High Courts.

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

Provisions to Check Transgression of Powers.

Some of the provisions that seek to check the powers and functions of the three branches of the government whenever they transgress the constitutionally provided limits are listed below:-

<u>Article</u>	<u>Short Title</u>
117	Special provisions as to financial Bills.
121	Restriction on discussion in Parliament
122	Courts not to inquire into proceedings of Parliament.
151	Audit reports.
207	Special provisions as to financial Bills.
211	Restriction on discussion in the Legislature.
212	Courts not to inquire into proceedings of the Legislature.
217	Appointment and conditions of the office of a Judge of a High Court.
222	Transfer of a Judge from one High Court to another
247	Power of Parliament to provide for the establishment of certain additional courts.
262(2)	Adjudication of disputes relating to waters of inter-State rivers or river valleys.
274	Prior recommendation of President required to Bills affecting taxation in which States are interested.
280	Finance Commission.
281	Recommendations of the Finance Commission.
292	Borrowing by the Government of India.
323	Reports of Public Service Commissions

<u>Article</u>	<u>Short Title</u>
324	Superintendence, direction and control of elections to be vested in an Election Commission.
329	Bar to interference by courts in electoral matters.
338	National Commission for Scheduled Castes.
352	Proclamation of Emergency.
353	Effect of Proclamation of Emergency.
354	Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.
356	Provisions in case of failure of constitutional machinery in States.
357	Exercise of legislative powers under Proclamation issued under article 356.
358	Suspension of provisions of article 19 during emergencies.
360	Provisions as to financial emergency.
365	Effect of failure to comply with, or to give effect to, directions given by the Union.

The presence of these elaborate checks and balances prove the existence of the doctrine of 'separation of powers' whether recognised or not.

Separation of Powers: American v. Indian Constitution

However, immediately after the commencement of the Constitution, in one of the first Constitutional challenges based on the doctrine of Separation of Powers, *In re Delhi Laws Act*,²⁷ a seven judge bench of the Supreme Court held that the Indian Constitution does not provide for strict separation of powers. Justice Fazal Ali observed that 'the doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American Courts to check undue and

²⁷ AIR 1951 SC 332.

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

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

American Courts are able to enforce the maxim because it has been made by the process of judicial construction an integral part of the American Constitution as a necessary corollary of the doctrine of separation of powers. But the position in India, as pointed out above, is entirely different, and the courts in this country cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence, or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent'.

A Review of Certain Judicial Decisions on the doctrines of 'Separation of Powers' and 'Checks and Balances'

In *In re Keshav Singh*,²⁸ a seven judge bench of the Supreme Court observed that 'there is another aspect of this matter which must also be mentioned; whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not.

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

²⁸ AIR 1965 SC 745.

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

The court went on to add that, 'the Constitution is of course supreme and even if it was based on the principle of separation of powers, there was nothing to prevent the Constitution makers, if they, so liked, from conferring judicial powers on a legislative body. If they did so, it could not be said that the provision concerning it was bad as our Constitution was based on a division of powers. Such a contention would of course be absurd. The only question, therefore, is whether our Constitution makers have conferred the power to commit on the Legislatures. The question is not whether they had the power to do so, for there was no limit to their powers. What the Constitution makers had done can, however, be ascertained only from the words used by them in the Constitution that they made. If those words were plain, effect must be given to them irrespective of whether our Constitution is based on a division of power or not.'²⁹

In *Chandra Mohan v. State of Uttar Pradesh*,³⁰ a constitution bench had observed that 'before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the same whether one construes the provisions of the Constitution or an Act of Parliament namely, that the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, if, however, two constructions are possible then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States'.

²⁹ Ibid. at Para 156.

³⁰ AIR 1966 SC 1987.

Another constitution bench in *Minerva Mills Ltd. V. Union of India*³¹ had observed that 'it is a fundamental principle of our constitutional scheme, that every organ of the State, every authority under the Constitution derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of Government are divided, the Executive, the Legislature and the Judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable.'³²

Referring to an earlier decision,³³ the Supreme Court held that 'the reason for this broad separation of powers is that the concentration of powers in any one organ may by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which we are pledged. Take for example, a case where the executive who is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons, first, the decision of the question would depend upon the interpretation of the constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution

³¹ AIR 1980 SC 1789.

³² Ibid. at Para 95.

³³ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299.

cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution'.

The court also referred to Dr B.R.Ambedkar who had observed that 'power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution... If I was asked to name any particular Article in this Constitution as the most important – an article without which this constitution would be a nullity – I could not refer to any other Article except this one (Article 32). It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance'.³⁴ It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority however lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the Government whether it is the legislature or the executive or any other authority, be conditioned by the Constitution and the law." The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. If there is one feature of our Constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of

³⁴ Constituent Assembly Debates, Vol VII, p. 953.

law, it is the power of the judicial review and it is unquestionably, part of the basic structure of the Constitution.

Findings

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