

## PARLIAMENT AND THE COURTS: A COMPARATIVE SCRUTINY OF JUDICIAL REVIEW IN INDIA AND AUSTRALIA

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### Abstract

The separation of powers although not specifically spelled out in the Indian and Australian constitutional provisions, is an important element in the constitutional structure of both countries. Highest courts have made judicial interpretation in India and Australia as highly relevant to this doctrine because they emphasize how the balance between the legislative, executive, and judicial branches of the government should be taken care of by using this doctrine. Separation of powers is included in the doctrine of basic structure in India, which makes it an exception to the amendment of the constitution. In Australia, the High Court confirmed the doctrine as an important element of the constitution in *Boilermakers Society of Australia* (1956), establishing that the doctrine sealed the independence of the judiciary from meddling by other arms of the government. Accordingly, both nations recognize the importance of the separation of powers that are regarded as a primary part of democracy and constitutionality, both at the constitutional level and from a jurisprudence perspective.

**Keywords:** Separation of Power, Constitutional framework, Judicial Jurisprudence, Democratic Governance, Constitutional Integrity, Basic Structure Doctrine.

### 1.0 Introduction

The Indian Constitution and the Australian Constitution do not include the words "separation of powers" anywhere in their respective constitutional texts. Because the constitutions of both countries define and endow several organizations with varied degrees of state authority, the idea of separation of powers is an essential component of both legal systems. It has been further highlighted by opinions from the highest courts in India and Australia, which provide light on principles of separation of powers that are not immediately evident from reviewing the constitution. These cases have shed light on the extent and boundaries of these authorities. The Constitution of India provides for provisions relating to the separation of powers, which form part of the basic structure doctrine, and thus, this fundamental concept cannot be modified through Constitutional amendments. A fundamental element that underlies Australia's separation of powers is the jurisprudence of the High Court, which protects the Judiciary against real or attempted invasions by other arms of government. In its decision in the case of the *Boilermakers' Society of Australia*<sup>3</sup>, which was handed down in 1956, the High Court of Australia reaffirmed that the Separation of Powers was stated to be an essential component of the structure of the constitution. The Court reached the opinion that the logical conclusions made from the several chapters of the Constitution that created the primary institutions of government and assigned them particular powers lend credibility to the existence of the broader concept of Separation of Powers<sup>4</sup> and this was reached after the Court carefully examined the language of the Constitution as well as the circumstances in which it was written.

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<sup>3</sup> *R v. Kirby; Ex parte Boilermakers' Society of Australia*, 94 C.L.R. 254 (1956).

<sup>4</sup> Waldron, Jeremy. 2013. "Separation of Powers in Thought and Practice?" *Boston College Law Review* 54: 433–467.

Notably, the courts in both India and Australia have rejected what they perceive as a more stringent separation of powers tradition in the United States. The rationale proposed for differentiating this method is that it is believed the American model is incompatible with a Westminster parliamentary system, characterized by overlapping authorities. It is most obvious that there is a conflict of authority between the legislative and executive branches of government in both India and Australia. In both nations, the members of the executive branch, which includes the Prime Minister and cabinet, are members of parliament and participate in the process of formulating laws. Because of the comparatively limited scope of separation of powers in India and Australia, there is a lack of judicial definition or control of the boundaries that separate the legislative and executive departments. As a result, the court has either facilitated or failed to stop the trend of expanding executive power at the expense of legislative authority. This is being done at the expense of legislative authority.<sup>5</sup>

In addition, the overwhelming rhetoric of parliamentary sovereignty, which is sometimes incorrect, has played a role in fostering a predilection among the judiciary for a thin separation of powers between the legislative and executive branches of government. By the principle of the separation of powers, parliamentary delegations of law-making authority to the executive branch are rarely brought into question. However, it is important to note that both Indian and Australian courts have dissociated their doctrinal advancements from the established American jurisprudence. This was accomplished by separating themselves from the United States courts. Due to this decoupling, the judicial system in each nation has been given a significant amount of leeway to define its distinctive conception of the separation of powers, considering the specifics of the constitutional framework as well as the economic, political, and social situations of the local community. The result has been the formation of flavors, or ideas, of the separation of powers that are distinctively Indian and Australian.

## 2.0 Development of the Concept of Separation of Powers

Even though the separation of powers and the distribution of state authorities across various institutions may seem to be a cliché in modern liberal democracies, it is important to keep in mind that the incorporation of the concept of Separation of powers is a conscious decision that was made during the framing of the Constitution. There is not a single model of the separation of powers that is universally accepted and that prescribes which powers or functions should be vested in each institution. This is even though there are similarities between the constitutions of liberal democracies and possibly even among all the written constitutions of the world.<sup>6</sup> Invariably, constitutions reflect the tastes and values of the people who drafted them. These individuals make a series of design decisions to meet the conditions, requirements, and goals of the political community in their respective communities. Furthermore, some nations have rejected the concept of entirely dividing powers by choosing a different perspective on institutions under a paradigm known as "unity of powers" or "fusion." For instance, China anticipates that its institutions would collaborate in a coordinated manner that is coordinated. Thus, before analyzing its application in India and Australia, it is prudent to consider the underlying logic that supports the principle of separation of powers.

The Spirit of the Laws, a famous treatise written by Montesquieu in the middle of the

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<sup>5</sup> Reimann, Mathias, and Reinhard Zimmermann, eds. 2006. *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press.

<sup>6</sup> Manning, John F. 2011. "Separation of Powers as Ordinary Interpretation." *Harvard Law Review* 124: 1939–2040.

18<sup>th</sup> century, is credited with being the originator of the modern concept of the separation of powers.<sup>7</sup> The legislative, executive, and judicial branches of government were defined by Montesquieu as the three primary powers in the English Constitution. Montesquieu believed that in order to safeguard individual liberty, these three powers were to be kept distinct from one another.<sup>8</sup> If legislative and executive powers were united into a single organization, such an institution would have the ability to "enact tyrannical laws" and "execute them in a tyrannical manner." If the powers of the legislative and the court were combined, the subject's life and liberty would be particularly susceptible to being controlled arbitrarily. Assuming that the judicial and executive departments were combined, the judge may behave in a manner that is both aggressive and tyrannical. In addition, if all three powers were merged into a single organization, then everything would come to an end.<sup>9</sup> It would be possible for distinct institutions to "temper each other" and regulate the use of state authority if the three powers were separated from one another. Montesquieu's work continues to have an impact on constitutional thought because of the concept of establishing a balance of power among various institutions. The notion is that concentrating power in the hands of a small number of individuals increases the likelihood that that power will be abused, but fracturing power and distributing it around many institutions decreases the likelihood of that abuse occurring. It is more difficult to abuse authority when several distinct institutions need to be coordinated.

### 3.0 Indian Experience of Application of the Theory of Separation of Powers

The Constitution of India is the comprehensive and foundational document of the Governance of the country. India follows the federal form of governance and consists of 29 states and a Union government.<sup>10</sup> The text of the Constitution consists of 395 articles and 12 schedules, which are the comprehensive outline of the institutions and authorities that exist at both the state and federal levels. About the legislative powers, the Constitution distributes powers between the Union and state governments. While the Union and state governments have the sole authority to create laws in some areas, both can legislate in other areas. In situations where there is a dispute between two or more relevant laws at the federal and state levels, the federal law will often take priority in the situation.<sup>11</sup> What the Constitution does is more than simply establish a federal system; it also includes a comprehensive list of fundamental rights that both the federal government and state governments are obligated to protect. Even though it is clear from the text that the idea of separation of powers has had a role in the development of the Indian Constitution, the term itself is not specifically referenced anywhere in the instrument. It is a functionalist approach that the Constitution follows, since it outlines the tasks of each organ of government, both the federal government and the state governments. When it comes to the establishment of the Supreme Court of India, for example, the Constitution of India does not make any reference to the judicial power in any way. On the contrary, it gives Parliament the right to confer further authority to the Supreme Court and outlines the responsibilities of the Court in both its original jurisdiction and its appellate jurisdiction. In addition, the Supreme Court has some extra powers regarding the formulation

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<sup>7</sup> Magill, Elizabeth M. 2000. "The Real Separation in Separation of Powers Law." *Virginia Law Review* 76: 1127–1198.

<sup>8</sup> Krause, S. 2000. "The Spirit of Separate Powers in Montesquieu." *Australian Journal of Asian Law* 62, no. 2: 231–265.

<sup>9</sup> Sheehy, Benedict. 2005. "Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes." *Northwestern Journal of International Law and Business* 26: 225–266.

<sup>10</sup> Thiruvengadam, Arun K. 2017. *The Constitution of India: A Contextual Analysis*. Oxford: Hart.

<sup>11</sup> *The Constitution of India*, art. 246, Seventh Schedule. See also arts. 249–251.

of rules for procedure and the rendering of decisions on cases. The many protections for judicial independence that are included in the Constitution act as a form of separation between the legislative and executive departments of government and the judicial branch, given the Constitution's institutional element.<sup>12</sup> As an example, the Constitution firmly establishes tenure and salary for the Judges of the Supreme Court, and the only way to remove them from their positions is by following the procedure that requires the agreement of both the legislative and executive branches of government.

The Constitution places a duty on the government to take steps to separate the judiciary from the executive, since there was a history of colonial authorities blurring the lines between their judicial and executive powers before the country's independence. In addition to delegating tasks to various institutions to maintain a balance of power, the Constitution of India mandates several checks and balances on the authority of these institutions.<sup>13</sup> When it comes to Parliament, for instance, the President, in the capacity as the leader of the executive branch, plays a significant role in terms of accountability. The President is responsible for a variety of responsibilities, including but not limited to addressing problems about the eligibility of members, evaluating legislation, convening joint sittings of the Houses, and promulgating laws while either House is not in session. In addition, the court is responsible for interpreting and enforcing the constitutional provisions, such as fundamental rights, which have the potential to declare legislation invalid if they are against other articles of the constitution.<sup>14</sup> This is the court's second method of monitoring Parliament.

As part of its landmark decision in the case *Kesavananda Bharati v. State of Kerala*<sup>15</sup>, which was handed down in 1973, the Supreme Court of India created a broad separation of powers framework and evaluated whether certain amendments were constitutional. The Supreme Court of India made a judgment that would go down in history when it determined that the "basic structure" of the Constitution, which refers to the fundamental components upon which the document is founded, cannot be altered or removed even by amending the Constitution's ordinary amendment method. Considering this, an amendment to the Constitution might be ruled unconstitutional if it is shown to be in contradiction with the basic structure of the Constitution itself.<sup>16</sup> The separation of powers among the legislative, executive, and judicial branches was one of the crucial components that the Supreme Court considered while it conducted its examination of the preamble and the basic structure of the Constitution.<sup>17</sup> Even though the Supreme Court made a passing reference to an appeal to the Australian Privy Council and only touched upon the topic of whether or not a wide separation of powers was consistent with a Westminster parliamentary system, it did not elaborate on the definition of the term in the context of India, allowing its growth to be determined by subsequent instances.<sup>18</sup>

In the years that followed the Supreme Court's decision to include the principle of separation of powers into the fundamental framework of the Constitution, the theory gradually developed within the body of law. The Indian theory of the separation of powers is notable for its

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<sup>12</sup> Ackerman, Bruce. 2000. "The New Separation of Powers." *Harvard Law Review* 113: 633–729.

<sup>13</sup> Campbell, Tom. 2005. *Separation of Powers in Practice*. Stanford, CA: Stanford University Press.

<sup>14</sup> *The Constitution of India*, arts. 131–134.

<sup>15</sup> *Kesavananda Bharati v. State of Kerala*. AIR 1973 SC 1461 (India).

<sup>16</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 (India).

<sup>17</sup> *Commonwealth v. Bank of New South Wales*, [1950] AC 235 (PC).

<sup>18</sup> Skach, Cindy. 2007. "The Newest Separation of Powers: Semi-Presidentialism." *International Journal of Constitutional Law* 5: 93–121.



emphasis on preventing the judicial branch from interfering with the operations of other institutions. This is an essential thread that arose and evolved from the Indian model. Because of the robust judicial independence theory and the robust inherent judicial protection, the Supreme Court has not deemed it necessary to use the separation of powers to protect courts against interference. In addition, it is quite probable that the enormous ramifications of adding new characteristics to the separation doctrine, namely the constitutional entrenchment without the option of change, had a part in the courts' treading carefully.

As a means of providing justification for the result of instances in which it decides not to interfere, the Supreme Court refers to the separation of powers, therefore shifting the responsibility for acting to the other parts of government. There is no question that the Indian Supreme Court is subject to tremendous pressure from a variety of sources. It has been accused of judicial activism.<sup>19</sup> For its bold and interventionist rulings, and it has also been subjected to pressure from litigants who have great expectations that the court can solve their economic and social issues<sup>20</sup>.

The Supreme Court cannot be expected to bear the responsibility of resolving all the nation's concerns, even with novel procedures such as suo-moto powers and a broad constitutional jurisdiction to interpret and enforce basic rights. This is because the Supreme Court has the exclusive authority to interpret and enforce fundamental rights. As a result, the Supreme Court employs a deliberate approach, selecting the appropriate times to intervene to establish and preserve its legitimacy as a significant but unelected participant in the administration of state affairs. The trust of the public is ultimately what determines the effectiveness of the organization.<sup>21</sup> An excessive amount of judicial action runs the danger of burdening the Supreme Court with an influx of new cases, which increases the strain on resources that are already restricted, diminishes the quality of judicial decision-making, and raises the possibility of retribution from other institutions, which might have long-lasting effects.

There is also a high probability that it will further develop unreasonable expectations of what the courts can do, which will always be impossible to maintain since every new verdict will produce victors and losers. Through its articulation of the separation of powers, the Supreme Court places an emphasis on collaboration across institutions as a means of providing support for its strategic restraint.

In its decisions, the Supreme Court of India has maintained that the separation of powers ought to be defined in a manner that is open to interpretation within the framework of the Indian Constitution. It is not considered viable to rigidly enforce a division of legislative, executive, and judicial powers in situations where there is already a thorough constitutional framework that dictates institutional tasks. This is even though the Constitution represents a balance of power to encourage accountability. Therefore, the separation of powers is not used to establish new dividing lines among institutions based on the three primary powers.<sup>22</sup> As an alternative, the theory aims to ensure that institutions concentrate on responsibilities that have already been assigned to them by the Constitution. This is a more restricted version of the concept of the separation of powers, which is referred to as the "stay in your lane"

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<sup>19</sup> Cassels, Jamie. 1989. "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *American Journal of Comparative Law* 37: 495–519.

<sup>20</sup> Dev, S. Mahendra, and P. G. Babu, eds. 2016. *Development in India: Micro and Macro Perspectives*. New Delhi: Springer.

<sup>21</sup> Vile, M. J. C. *Constitutionalism and the Separation of Powers*. 2nd ed. Indianapolis: Liberty Fund, 1998.

<sup>22</sup> Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in Democracy" 116 Harv. L. Rev 19 (2002).

concept.<sup>23</sup>

The separation of powers principle is clear from the Constitution in terms of its scope, function, and visibility, even though it is not specifically codified in what is known as the Constitution. Within the framework of the Indian Constitution, there is no distinct division between the legislative, executive, and judicial departments of government.<sup>24</sup>

The Supreme Court's interpretation of a constitutionally protected function is not always obvious from a reading of the constitutional wording, although the idea of separation of powers lends itself to a degree of flexibility.<sup>25</sup> If Parliament were to approve a bill that would overturn a judgment made by a court, the Supreme Court would be acting in the capacity of a judge, which would constitute a violation of the separation of powers clause.<sup>26</sup> A flexible notion of the separation of powers has several drawbacks, one of which is that it has a limited capacity to set new limits and control authority across the institutions of government. Although the Constitution provides a detailed description of the roles of institutions, each function entails some degree of discretion, which may be less strictly controlled in comparison to a separation theory that is more stringent. The issue of inadequate accountability in India's flexible approach is particularly severe when it comes to the relationship between the legislative and executive arms of government.<sup>27</sup>

In particular, the Supreme Court has acknowledged the practice of legislators handing up their authority to make laws to the executive branch of government. Although delegated legislation plays an important part in any system. The legal system, the executive branch has amassed a significant amount of legislative authority, and this transfer of power has only intensified because of the executive branch's dominance of Parliament through the party system.<sup>28</sup> And although India's flexible separation doctrine is justified based on the functional approach of the Constitution and the Westminster parliamentary<sup>29</sup> system, the limitations of this doctrine ought to prompt the courts to consider other ways of placing meaningful checks on executive powers to safeguard Parliament's constitutional role as the principal lawmaker. If this pattern of power consolidation within the executive branch continues, we face the danger of experiencing a serious constitutional imbalance that is in direct opposition to the principles outlined in our founding documents and undermines the fundamental basis upon which our system of checks and balances is organized. The last point is that, as was indicated earlier, the Indian perspective on the separation of powers seeks to prevent institutions from abdicating the obligations that have been legally given to them and taking control over other institutions. Recently, the Supreme Court has also used terminology that is related to the separation of powers to remind other institutions that they are responsible for carrying out their duties by principle. Therefore, to accommodate modern conceptions of governance, the division of powers must be adapted to include more fluid connections between different institutions. For ensuring that the system of checks and balances continues

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<sup>23</sup> Kyritsis, Dimitrios. *Where Our Protection Lies: Separation of Powers and Constitutional Review*. Oxford: Oxford University Press, 2017.

<sup>24</sup> *Bhim Singh v. Union of India*, AIR 2010 SCW 3510 (India).

<sup>25</sup> Kavanagh, Aileen. "The Constitutional Separation of Powers." In *Philosophical Foundations of Constitutional Law*, edited by David Dyzenhaus and Malcolm Thorburn, 221–250. Oxford: Oxford University Press, 2016.

<sup>26</sup> *Union of India v. Mohammed Rawther*, AIR 2007 SC 3014 (India).

<sup>27</sup> *State of Karnataka v. Karnataka Pawn Brokers Association*, AIR 2018 SC 1441 (India).

<sup>28</sup> *D. S. Garewal v. State of Punjab*, AIR 1959 SC 512 (India).

<sup>29</sup> Chandrachud, Chintan. 2017. *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom*. Oxford: Oxford University Press.

to operate effectively, it is the responsibility of each institution to provide advice to the others. Following this course of action will assist the country in moving closer to the democratic ideal of law and order, as well as excellent governance.

As a result of the establishment of the Separation of Powers doctrine, the idea of checks and balances has traditionally been associated only with instances in which the state has abused its authority.<sup>30</sup> Positive rights and acceptable social and economic entitlements, hybrid administrative organizations, and private functionaries carrying out public responsibilities are some of the characteristics that define modern society. Because of this, we need to increase the amount of monitoring we exercise and widen the scope of checks and balances so that they include the inactivity of the government.<sup>31</sup> The country may begin to descend into a severe depression if this does not take place. As a result, social engineering and institutional engineering are both aspects that fall under this obligation.

It does not seem that these suggestions for institutions to take action represent a legally enforceable obligation currently. As much as it is understandable that the impetus to push along recalcitrant or inactive institutions to get the government moving is understandable, it is somewhat perplexing that this form of communication is derived from the separation of powers because it involves one institution seeking to direct another (even if it is just a polite direction to do something)<sup>32</sup>. In addition, it is not apparent whether the Supreme Court considers this mode of communication to proceed only from the judicial system to other institutions, or if the courts themselves are vulnerable to being perforated by other organs.

#### **4.0 Australia's Experience of Application of the Theory of Separation of Powers**

The Constitution of Australia was drafted in a series of constitutional conventions, approved in referenda held across the Australian colonies, and came into force in 1901<sup>33</sup>. The document is made up of 128 sections and includes one schedule. It creates a federation of six states and a national Commonwealth government. The Constitution focuses its energies on the Commonwealth: a reading of the text makes clear the founders' central objective to create a new national government to act on matters that were perceived as beyond the capacity of the states to effectively manage individually, such as international relations, national defence, and interstate trade and commerce.<sup>34</sup> Commonwealth powers are thus constitutionally confined to listed subject matters. The states, on the other hand, enjoy plenary powers and can, for the most part, concurrently legislate in all areas, including those of the Commonwealth.<sup>35</sup> While states are bound by the Constitution, there is little discussion in the Constitution of the extent of the power. One important limit to the powers of the states, however, is that valid law made by the Commonwealth is deemed paramount over any inconsistent state law. In addition to its focus on the Commonwealth, the Constitution has limited reach on encroachment of Rights.<sup>36</sup> It does not include a bill of rights: only a few individual rights are constitutionally

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<sup>30</sup> D. D. Basu, *Commentary on the Constitution of India*, vol. II (Calcutta: S. C. Sarkar & Sons, 1965), 882.

<sup>31</sup> Galanter, Marc. 2014. "Snakes and Ladders: Suo Motu Intervention and the Indian Judiciary." *FIU Law Review* 10: 69–114.

<sup>32</sup> Choudhry, Sujit, Madhav Khosla, and Pratap Bhanu Mehta, eds. 2016. *The Oxford Handbook of the Indian Constitution*. Oxford: Oxford University Press.

<sup>33</sup> Saunders, Cheryl. 2010. *The Constitution of Australia: A Contextual Analysis*. Oxford: Hart.

<sup>34</sup> Secs. 80 (trial by jury), 116 (freedom of religion), 117 (prohibition of state discrimination based on residency).

<sup>35</sup> Most of the Commonwealth's powers are set out in sections 51 and 52 of the *Constitution of Australia*.

<sup>36</sup> Twomey, Anne. 2006. "The Refusal or Deferral of Royal Assent." *Hamline Journal of Public Law & Policy* 27: 580.

entrenched. Moreover, the constitutional guarantees that do exist, such as trial by jury and freedom of religion, apply only to the Commonwealth and not to the states.<sup>37</sup>

Like India and the United States, the separation of powers is not expressly mentioned in the Australian constitutional text. Instead, the Constitution tracks the American approach by vesting Montesquieu's powers in three different institutions. For instance, under Chapter III, the 'judicial power of the Commonwealth' is vested in the High Court of Australia, the country's final appellate body, and other courts as mentioned.<sup>38</sup> Only Commonwealth powers are separated by the Constitution, leaving the question of separation in the states to local constitutions, which do not always follow the tripartite model.<sup>39</sup> While the Constitution separates federal powers, Australia's adoption of a Westminster parliamentary system limits the application of the doctrine as between the legislature and the executive. Despite the structure of the Constitution, there is no strict demarcation between the legislative and executive powers of the Commonwealth. In addition to separating Commonwealth powers, the Constitution partly elaborates on the meaning of these powers by describing in some detail the functions allocated to each institution.

In relation to the High Court, for instance, the Constitution describes its original and appellate jurisdictions. The Constitution also imposes checks on each branch of government, although these are more limited than in India or the United States. In relation to Parliament, for example, legislation requires the assent of the Governor-General acting on behalf of the Queen. The refusal to provide assent to a duly passed bill, however, is virtually non-existent in practice and may breach constitutional convention. The main form of accountability for Parliament comes through general elections. While the judiciary plays an important role in checking Parliament through its power of interpretation and the enforcement of constitutional provisions, these are mostly limited to powers exercised by the Commonwealth and the few entrenched individual rights. In relation to the federal judiciary, checks include appointments by the executive branch and the power of Parliament to create new federal courts and define their jurisdiction.<sup>40</sup>

An early development in High Court decisions was the recognition of the constitutionally mandated division of powers within the Commonwealth government. The Court has emphasized that nobody other than the courts may exercise the Commonwealth's judicial authority.<sup>41</sup> In terms of defining judicial power, and therefore what was protected from the encroachment of the legislature and executive, the Court took a functional approach.<sup>42</sup>

Under the Australian Constitution, however, the Commonwealth executive focused on executing and maintaining federal law. A court, by contrast, operated as an impartial tribunal. Under the Constitution, federal judicial power could only be exercised by these strictly

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<sup>37</sup> Sections 80 (trial by jury), 116 (freedom of religion), and 117 (prohibition of state discrimination based on residency).

<sup>38</sup> Sections 71–77 of the *Constitution of Australia* set out key governmental powers. The "legislative power of the Commonwealth" is vested in Parliament (*Constitution of Australia*, s. 1), while the "executive power of the Commonwealth" is vested in the Queen but exercised by the Governor-General (*Constitution of Australia*, s. 61).

<sup>39</sup> *Kable v. Director of Public Prosecutions (NSW)*, (1996) 189 CLR 51. Many states do not separate powers to the same extent as the Commonwealth.

<sup>40</sup> Aronson, Mark, Matthew Groves, and Greg Weeks. 2016. *Judicial Review of Administrative Action and Government Liability*. 6th ed. Sydney: Thomson Reuters.

<sup>41</sup> Patapan, Haig. 1999. "Separation of Powers in Australia." *Australian Journal of Asian Law* 34: 391.

<sup>42</sup> Brown, A. J. 1992. "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge." *Federal Communications Law Journal* 21: 48.



so-called judicial tribunals.<sup>43</sup> While acknowledging that there may be incidents to each power which resemble the other main powers, one institution exercising the primary function of another would be “violently opposed to the fundamental structure and scheme of the Constitution. This kind of overlap could only be permitted to occur where there was very explicit” constitutional authorization in unmistakable words to undo the effect of the dominant principle of demarcation. Other cases continued to focus on protecting the exclusivity of the federal judicial power for Chapter III courts, establishing limits on the functions of courts and other institutions.<sup>44</sup>

Australian separation of powers was unable to completely divorce legislative and executive authority due to the Westminster parliamentary tradition. The doctrine's emphasis instead was on checks and balances for the judiciary. The separation of powers was initially based on the principle that no institution could legitimately exercise federal judicial authority unless it was a Chapter III court or specifically designated as a possible recipient of such authority. A body formed for reasons unrelated to the judicial authority cannot exercise a jurisdiction that naturally belongs to the Commonwealth's judicial power, as stated in the Constitution.<sup>45</sup> Courts cannot be legitimately entrusted with responsibilities or powers of a higher degree by Parliament. However, a wide view is required when thinking about what judicial authority means. A wide range of ancillary powers connected to any and every authority or ability required or appropriate for the exercise of judicial power were included in the judicial powers. Further, if additional powers were sufficiently related to the judicial function or had been established by past practice, Parliament might grant them to courts.<sup>46</sup> The auxiliary or incidental powers may, at first glance, seem to be inherent to another branch of government, such as the authority for a court to establish procedural rules as laid down in the legislation.

## 5.0 Comparative Analysis Of Application Of Theory Of Separation Of Powers In India & Australia

While the separation of powers has taken different constitutional paths in its process of evolution in India and Australia, some similar trends cut across these differences. In terms of their constitutional frameworks, both India and Australia have written Constitutions that adopt a functional approach to the separation of powers. By comparison to Australia, the Indian Constitution is more detailed in describing the machinery of government.<sup>47</sup> Under the Indian Constitution, institutions of both the Union and state governments are established and regulated, while the Australian Constitution focuses principally on Commonwealth institutions.<sup>48</sup> There is perhaps some convergence with the Kable doctrine, which extends aspects of the federal separation of powers doctrine to the states. Importantly, India and Australia share an inheritance of the Westminster parliamentary system and the

<sup>43</sup> Gelber, Katharine. 2006. “High Court Review 2005: The Manifestation of Separation of Powers in Australia.” *University of Colorado Law Review* 77: 437.

<sup>44</sup> Gerangelos, Peter. 2017. “Separation of Powers in the Australian Constitution: Themes and Reflections.” *Asian-American Law Journal* 29: 903.

<sup>45</sup> Gerangelos, Peter. 2018. “The Relationship Between the Executive Government and Parliament in Australia: Accommodating Responsible Government with the Separation of Powers.” *ILSA Journal of International & Comparative Law* 5: 289.

<sup>46</sup> Gibbs, Harry. 1987. “The Separation of Powers – A Comparison.” *Duke Journal of Comparative & International Law* 17: 151.

<sup>47</sup> Reddy, O. Chinnappa. 2010. *The Court and the Constitution of India: Summit and Shadows*. New Delhi: Oxford University Press.

<sup>48</sup> Mate, Manoj. 2015. “The Rise of Judicial Governance in the Supreme Court of India.” *Boston University International Law Journal* 33: 169.

common law tradition. This heritage continues to influence the separation of powers of doctrines in both countries, as can be seen in the jurisprudential discussions.

The Westminster system acts as a constitutional beachhead for British legislative traditions and conventions, while the common law has transplanted notions of the English courts and their judicial functions. These traditions occupy constitutional space in India and Australia as the background context in which their Constitutions were drafted. Yet both Constitutions also depart from this heritage in important ways, most obviously concerning federalism and the availability of constitutional review. British traditions have thus become an available source of constitutional law that can be adapted and applied by judges as needed. It can, however, be difficult to locate a principled or even consistent approach to their judicial invocation in the Indian and Australian separation of powers cases. At best, it appears that British traditions are drawn upon by Indian and Australian courts about central questions about the roles and functions of institutions, at least as a starting point in the analysis. And, although it is at times distinguished, the American tradition of separation of powers continues to carry influence in India and Australia. Both the Supreme Court of India and the High Court of Australia have felt it necessary to justify their departures from the American lead in key separation of powers cases. The result of this contest between traditions is flexibility for the Indian and Australian courts to articulate their conceptions of the separation of powers, drawing on features of either tradition to support the preferred outcome. Given this flexibility and the constitutional entrenchment of a broad separation of powers doctrine, which carries the status of the supreme law, the judiciaries of India and Australia have been placed in the position of establishing, regulating, and patrolling dividing lines among institutions and setting the limits of their functions. In this way, the Indian Supreme Court and the Australian High Court have become part architects of their respective constitutional settlements.

In time, it is conceivable that one may be able to refer to more than just uniquely Indian or Australian conceptions, or flavours, of the separation of powers, but a distinctly Indian or Australian separation of powers tradition. Broadly speaking, the separation of powers in India and Australia seeks to preserve the integrity of institutions in their core constitutional roles. Preserving integrity maintains a power balance and space for each institution to contribute to a model of shared governance. By fracturing power, the doctrine can facilitate accountability by requiring institutions to work together (and check each other) to accomplish important tasks. While maintaining institutional integrity can be identified as the common element of the separation principle in both countries, the doctrines in India and Australia are designed to achieve this objective in different ways.

Each doctrine has been judicially crafted to address issues of local relevance. In India, the principal use of the separation of powers is as a strategic deflective device. It is invoked by the Supreme Court to avoid having to answer certain economic, political, or social questions that have been litigated. In such cases, the separation of powers is relied upon by the Supreme Court to justify its deference to the other branches and its respect for different institutional roles. The doctrine places limits on the otherwise expansive powers and jurisdiction of the Supreme Court and therefore maintains a degree of institutional integrity, particularly for the legislative and executive branches.<sup>49</sup> In applying this self-limiting doctrine, the Supreme Court may be less motivated by preserving the integrity of the other institutions and more by its appraisal of where it can intervene and maintain its legitimacy. The Indian conception of the separation of powers, therefore, has the effect of limiting matters to adjudication. It is grounded in the view of a powerful Supreme Court that runs the risk of

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<sup>49</sup> Chopra, Pran, ed. 2006. *The Supreme Court versus the Constitution*. New Delhi: Sage.

taking over the functions of the other branches.<sup>50</sup>

By contrast, in Australia, the principal use of the separation of powers is as a defensive shield against perceived intrusions by the other branches into the federal judicial business.<sup>51</sup>

The High Court applies the doctrine to protect a broad scope of decision-making authority for the courts and the independence of the judicial process. Parliament must not force courts to perform tasks that are considered incompatible with their judicial function, nor can it transfer judicial functions to other institutions without ensuring that the impartiality of judicial decision-making is preserved. Thus, the theory is concerned with preserving the credibility of the court system. Accordingly, issues are preserved for judicial adjudication according to the Australian understanding of the separation of powers. It is based on the idea that the other branches might undermine the functioning of the vulnerable courts.

The division of powers is best understood in its operational and situational settings, as shown by doctrinal differences between Australia and India. The separation of powers was conceptualized by the Indian Supreme Court and the Australian High Court within the context of their respective constitutions. The Constitution of India has robust safeguards for judicial independence, including judges' tenure and fixed pay, which are believed to contribute to a larger dedication to judicial independence. The Supreme Court's distinct development of a strong independence doctrine is a direct result of this dedication. Since the Supreme Court has ruled that judicial independence is an inherent part of the Constitution, any changes to the document, including amendments, must be seen as fitting with the court's understanding of its autonomy for them to take effect.

If we take India as an example, in 2015, the Supreme Court struck down a constitutional amendment that sought to create a new method for selecting judges.<sup>52</sup> The court ruled that the measure violated judges' autonomy since it did not provide judges with a significant enough voice in the matter. This distinct and powerful judicial independence means that the Indian separation of powers isn't required to carry out nearly as much work. Furthermore, at the federal, state, and local levels, the Indian Constitution guarantees a wide range of basic liberties. It is possible to challenge laws and executive orders by pointing to these rights, which the Supreme Court interprets and applies. Due to its extensive and long-standing authority, the Indian court does not need the separation of powers to carry out its duties, according to the country's constitution.

Although federal courts are safeguarded under the Australian Constitution regarding pay and tenure, the wider concept of judicial independence is absent.<sup>53</sup> Rather, the division of powers has emerged as the go-to mechanism for safeguarding judicial independence and decision-making authority. Both the Indian and Australian theories of separation of powers have their flaws. Concerning the timing of its application, the Indian philosophy is vague.<sup>54</sup> It is impossible to anticipate how the Supreme Court of India would utilize the separation of powers theory to re-route matters to the other branches in specific instances, even when it appropriately examines the boundaries of its function. It would be helpful if the Supreme Court could clarify more precisely when the doctrine would be applied. An uncomfortable

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<sup>50</sup> Mate, Manoj. 2014. "Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India." *Temple International & Comparative Law Journal* 28: 361.

<sup>51</sup> Handsley, Elizabeth. 1998. "Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power." *Texas Law Review* 76: 183.

<sup>52</sup> *Supreme Court Advocates-On-Record Association v. Union of India*, AIR 2015 SC (Supp) 2463 (India).

<sup>53</sup> Henckels, Caroline. 2017. "Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference." *Australian Journal of Asian Law* 45: 181.

<sup>54</sup> Austin, Granville. 2000. *The Indian Constitution*. 3rd ed. Oxford: Oxford University Press.

mismatch exists between the rationales of judicial independence and separation of powers, which is the primary issue with Australia's approach.<sup>55</sup>

While judicial independence requires the courts to provide what is necessary to preserve the judge's position as an unbiased third party to a dispute, separation of powers seeks to preserve the integrity of all state institutions, not just the courts. Therefore, other institutions may be neglected, and the Australian separation concept may be seen as self-serving due to its concentration on the judiciary. In using the separation of powers to shield courts from interference, the Australian doctrine has been plagued by definitional and technical challenges that make it difficult to apply in practice.<sup>56</sup> It can also be applied inconsistently because of its various presumptions and exceptions, requiring courts to revisit aspects of the doctrine in cases on the margin, which generates further questions and fresh litigation. Perhaps most importantly, the separation of powers is also ill-equipped to protect judicial independence: the doctrine is essentially about institutional separation that focuses on external threats to the courts. A more complete view of the independence of the judiciary must also consider internal threats to the independence of individual judges. Turning to consider the future of the separation of powers, there are several challenges facing both India and Australia. First, the growth of the administrative and regulatory state continues to place pressure on the separation of powers doctrine. How will new and innovative forms of public authority be accommodated from a separation of powers perspective?

Constitutionally speaking, how far can Parliament go in vesting mixed powers in an administrative decision-maker? What impact would the constitutional entrenchment of such entities have on the growth of the doctrine and the conventional tripartite model of legislative, executive, and judicial powers? When looking at a decision made by an administrative agency or a delegated legislature, what should a reviewing court do? What kind of evaluation criteria must be utilized?<sup>57</sup> Second, despite the existence of checks and balances, the executive branch in both India and Australia continues to amass an excessive amount of legal authority. Given that the executive branches of both India and Australia have amassed more authority at the cost of their legislatures via delegation, it is debatable whether either nation has attained the constitutionally intended balance of powers.<sup>58</sup>

While it must be acknowledged that there is a blurring of legislative and executive roles in a Westminster system, this fact alone is not a sufficient reason for the courts to abdicate responsibility for maintaining a constitutional balance and retreat from imposing meaningful controls to protect the integrity of the legislative branch. Under the Constitutions of India and Australia, Parliament has been vested with subject-matter jurisdiction in its role as the principal democratic institution where important laws are supposed to be made. Judicial rhetoric about parliamentary sovereignty does not appropriately consider of Parliament's constitutionally prescribed role as a lawmaker in chief. Courts should be challenged to think creatively about controls that can be established to restore the balance, including the capacity of Parliament to delegate its law-making powers to the executive (in effect, to save Parliament from itself). There are also other potential solutions.

In Canada, the Supreme Court has identified the core competencies of each branch as part of

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<sup>55</sup> Wheeler, Fiona. 1997. "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia." *Mississippi College Law Review* 23: 25.

<sup>56</sup> Taylor, Greg. 2015. "Conceived in Sin, Shaped in Iniquity – The Kable Principle as a Breach of the Rule of Law." *McGeorge Law Review* 34: 265.

<sup>57</sup> Noorani, A. G. 2002. *Constitutional Questions in India*. New Delhi: Oxford University Press.

<sup>58</sup> Basu, Durgadas. 2013. *Introduction to the Constitution of India*. 21st ed. Gurgaon: LexisNexis.



its separation of powers analysis. This approach takes on board the historical and constitutional role of each institution, along with more recent developments that account for accumulated specialization and expertise.<sup>59</sup> Such competencies can be judicially protected through a separation of powers doctrine and may provide greater certainty than trying to define the meaning of broad powers. There is also the opportunity for courts to adopt more restrictive approaches to delegation provisions and strengthen the vires analysis of challenged regulations, which presently benefit from strong presumptions of validity. An appropriately contextualized application of administrative law principles, such as the duty to consult as part of procedural fairness, should also be considered. Finally, there is the question of whether the doctrines in India and Australia are converging or diverging.<sup>60</sup> The Australian doctrine appears to have been relaxed somewhat in recent decades, perhaps partly in response to academic criticism, so there may be some convergence toward a more flexible separation of powers model. In relation to the above-mentioned challenges relating to the administrative state and executive power, there may be similar solutions that could also act as a force of convergence. In addition, there is the potential for the cross-pollination of ideas through constitutional jurisprudence and comparative scholarship. That said, differences will likely persist in the decades ahead, given the different focuses of the doctrines in India and Australia and the economic, social, and political contexts in which they developed (and continue to develop). It is worth noting that if Australia decided to move forward with constitutionally entrenching a federal bill of rights, this major shift in the constitutional landscape would justify a reconsideration of the separation doctrine.

## 6.0 Way Forward

By reflecting on the similarities and differences that have been observed in India and Australia, it is possible to understand the separation of powers more generally and how it has the potential to take shape and work in different domestic legal systems. These case studies show us that we can learn more about legal principles by studying how they manifest themselves in particular jurisdictions. Contextualist comparative scholarship should be encouraged as the means to think through design choices and to better understand the contours and dynamics of legal principles. While there are a variety of separation of powers models, including a trend toward greater functionalism in written constitutions, an entrenched doctrine will inevitably be shaped by courts through their jurisprudence, developing over time in individual cases. The purpose of the separation of powers is the preservation of institutional integrity. Yet, what this means exactly in the nuance of any given legal system is open-textured, even with a detailed constitutional framework. The courts will be called upon to mold the separation of powers to meet perceived local needs. Over time, the separation of powers will become a product of each country's domestic tradition and be sewn into its legal landscape. One key attribute of the separation of powers is its lofty rhetoric and tremendous flexibility, which makes it liable to become a constitutional gap-filler, inserted into the available spaces in the constitutional design. An important question to be asked, therefore, is: what is in the constitutional mix alongside the separation of powers? The composition of the mix will offer some clues as to how the doctrine will evolve. For jurisdictions like India, the separation of powers may end up becoming a device for the

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<sup>59</sup> Neudorf, Lorne. 2018. "Reassessing the Constitutional Foundation of Delegated Legislation in Canada." *Georgetown Law Journal* 41: 519.

<sup>60</sup> Appleby, Gabrielle. 2014. "The High Court and Kable: A Study in Federalism and Rights Protection." *Hamline Law Review* 40: 673.

judiciary to self-limit, while in others like Australia, it may become a way to preserve judicial power and the standing of the judicial institution. Given its flexibility, the doctrine can become unruly in a legal system that craves certainty and predictability. While courts will seek to provide clarity, they are unlikely to succeed in formulating a complete definition, resulting in continuing conceptual and practical challenges that require further litigation to resolve. This litigation will continue to adapt the doctrine to evolving domestic contexts and maintain its dynamism. Even in the United States, with the benefit of more than two centuries of jurisprudence, vigorous debates continue about the practical meaning of the separation of powers and how it should be applied, in addition to its proper theoretical foundation. The real litmus test of any separation of powers doctrine should be whether it is able to preserve a meaningful role for different state institutions so that none is eclipsed by the others. It must be remembered that the institutional integrity protected by the separation of powers does not derive its value solely from the mere existence of separation. Its value also comes from the doctrine working to enable that institution's ability to contribute, clearing a path for its participation in a model of shared governance that includes checks and balances by others. In developing a constitutional separation of powers doctrine, courts should pause to genuinely consider the perspectives of other institutions and obtain a better understanding of the contributions that they are best able to make.

## References

1. C. Montesquieu, *The Spirit of the Laws* (1989, translated), 157
2. W. A Wynes, *Legislative, Executive and Indicial Powers in Australia* (1976), 7
3. Bansal, Agam. "Parliamentary Privileges, Freedom of Speech and Judicial Review." *International Journal of Law Management & Humanities* 3, no. 2 (2020): 898.
4. Blackstone, William. *Commentaries on the Laws of England*. 1765.
5. Singleton, Gwynneth, Don Aitkin, Brian Jinks, and John Warhurst. *Australian Political Institutions*. 7th ed. Melbourne: Pearson Education, 2003.
6. Commonwealth of Australia. *Australia's Constitution*. Reprint, 2003.
7. Ely, Richard, and Jean Ely. *Lionel Murphy: The Rule of Law*. Melbourne: Viking, 1986.
8. Sykes, Andrew. "Rule of Law as an Australian Constitutionalist Promise." (2002) 9(1) *E Law: Murdoch University Electronic Journal of Law*. Accessed at: <http://www.murdoch.edu.au/elaw/issues>.
9. Butterworth's Concise Legal Dictionary. 2nd ed. Sydney: Butterworths, 1998.
10. D.F Jackson, "The Australian Judicial System' (2001) 58 University of NSW Law Journal <<http://www.austlii.edu.au/au/journals/UNSWLI/>> at 1
11. George Williams" The High Court and the Mass Media" (1999) 1 UTSLR <[www.austlii.edu.au/au/journals/UTSLR/](http://www.austlii.edu.au/au/journals/UTSLR/)> at 1
12. N. B Simonds, *Central Issues in Jurisprudence - Justice, Law and Rights* (1986), 88-9
13. Lionel Murphy, "The Responsibility of Judges" in G. Evans (ed) *Law, Politics and the Labor Movement* (1980), 6