THE SEPARATION OF POWERS IN INDIA AND FRANCE: HISTORY, EVOLUTION, AND COMPARATIVE CONSTITUTIONAL ANALYSIS

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ABSTRACT

This paper traces how the separation of powers developed, beginning with the mixed constitution of antiquity, which Locke and Montesquieu later reworked as a scheme of mutual restraint rather than isolation, and ending with the modern administrative state, in which delegated legislation, regulatory agencies and executive dominance have made the pure doctrine unworkable and shifted its emphasis towards accountability. It then compares France and India. India's Constituent Assembly chose not to write the doctrine into the constitutional text; the Supreme Court, however, later treated it as forming part of the basic structure and holds that the legislature cannot override judicial decisions without violating that structure. The countervailing worry is a judiciary which, by way of public interest litigation and the collegium, takes on tasks that belong to the political branches. France proclaimed the doctrine during the Revolution and tied it to a separate system of administrative justice; under the Fifth Republic, the presidency holds considerable sway over the legislature. The argument of the paper is that both systems have transitioned from separation to constrained interaction. The real question is no longer how far the organs are divided, but who may supervise whom, and on what conditions.

1. INTRODUCTION

The separation of powers is less concerned with institutional cleanliness than with human behaviour. People who hold authority tend to abuse it, and for that reason the legislative, executive and judicial functions ought not to be merged in the same hands. Madison described tyranny as the gathering of all powers in the same hands, 'whether of one, a few, or many'.[1] The doctrine is typically attributed to Montesquieu, and France is credited with its classic formulation and its proclamation in revolutionary texts.[2] Yet the Constitution of the Fifth Republic places a considerable measure of authority in the presidency.

India's Constituent Assembly took over the working machinery of parliamentary government yet chose not to adopt the doctrine itself,[3] and the Supreme Court later held that the separation of powers is among the features of the Constitution's basic structure that cannot be amended away.[4]

Four enquiries are posed. What was the doctrine's initial assertion, and what was its source? What remains of it in the contemporary state? In what manner has it been transported? And how have India and France, which originated from vastly distinct positions, adapted it, and to what extent?

2. THE HISTORICAL FOUNDATIONS OF THE DOCTRINE

2.1 Antiquity and the Mixed Constitution

The doctrine's history is extensive, but it is susceptible to exaggeration. Aristotle distinguished the deliberative, magisterial, and judicial components of each constitution,[5] Polybius admired the Roman Republic as a blend of monarchical, aristocratic and democratic elements, in which consuls, senate and popular assemblies each checked the others.[6] The mixed regime, in which the One, the Few, and the Many share power, was the dominant idea in ancient and medieval

[1]James Madison, *Federalist No. 47*, in Alexander Hamilton, James Madison & John Jay, The Federalist Papers (Clinton Rossiter ed., 2003).
[2]Declaration of the Rights of Man and of the Citizen of 1789, art. 16 (Fr.); Montesquieu, The Spirit of the Laws bk. XI, ch. 6 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., 1989).
[3]7 Constituent Assembly Debates (Dec. 10, 1948) (debate on proposed art. 40-A), https://www.constitutionofindia.net/debates/10-dec-1948/ (last visited Oct. 22, 2026).
[4]*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 292 (Sikri, C.J.).
[5]Aristotle, Politics bk. IV, 1297b–1301a.
[6]Polybius, The Histories bk. VI.

times, according to Calabresi and his co-authors. This idea was defended by Aristotle, Polybius, Cicero, Aquinas, and Machiavelli.[7] The distinction is significant, a mixed regime distributes power among social classes, a functional separation among types of activity, and Aristotle never transformed his tripartite observation into an argument for the separation of functions.

2.2 The Medieval and Early Modern Background

The opposite direction was taken by Continental Europe. Power was concentrated in a single hereditary monarch from the conclusion of the Middle Ages to the eighteenth century. In the sixteenth century, Bodin contributed to the theory by advocating for undivided sovereignty, while still permitting a distinct body of judicial magistrates.[8] England was an exception. A divided system without clear demarcation was the result of the seventeenth-century contest between the Crown and Parliament. The Act of Settlement 1701 confirmed parliamentary supremacy and secured the tenure of judges for good behaviour, with the ability to remove them only upon an address of both Houses.[9]

2.3 Locke

Locke's *Second Treatise* (1689) distinguished legislative, executive, and federative power; however, he did not regard them as equivalent or as held by distinct authorities. The Crown retained the executive and federative powers, which were difficult to separate, while the legislative power was paramount.[10]

2.4 Montesquieu

The concept received its best-known statement in Montesquieu's *De l'esprit des lois* (1748), written during the reign of Louis XV and inspired by the freedom he observed in England. He wrote that liberty is impossible when legislative and executive power are combined in a single individual or entity, and that liberty is also impossible when judicial power is not distinguished from the other two.[11] There are two factors that require attention. Initially, the descriptive premise is inadequate, Montesquieu himself refrained from investigating whether the English

[7]Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 Nw. U. L. Rev. 527, 534 n.39 (2012).
[8]Jean Bodin, Les Six Livres de la République bk. I, ch. 8 (1576); John A. Fairlie, *The Separation of Powers*, 21 Mich. L. Rev. 393, 394–95 (1923).
[9]Act of Settlement, 1701, 12 & 13 Will. 3 c. 2 (Eng.).
[10]John Locke, Two Treatises of Government, Second Treatise, ch. XII, §§ 143–48 (Peter Laslett ed., 1988).
[11]Montesquieu, *supra* note 2, bk. XI, ch. 6.

actually enjoyed the freedom that their laws had established.[12] Secondly, his recommendation is for restraint, not isolation, the arrangement of institutions should be such that power checks power.[13]

2.5 The Classical Formulation

The doctrine is usually expressed in three propositions, following Wade and Phillips: no individual should belong to more than one organ of government; no organ should dominate or meddle in the work of another; and no organ should discharge the functions that belong to another.[14] The doctrine's subsequent evolution is characterised by a transition from this rigid division to checks and balances, which enable structured interaction.

3. THE DOCTRINE IN THE CONTEMPORARY STATE

The pure doctrine is not adhered to by any contemporary state. Its justification endures due to the fact that liberty is not threatened by combined power per se, but rather by unchecked power. Justice Cardozo cautioned against treating separation of powers as a dogma to be enforced with pedantic strictness.[15] The modern restatement is 'organic' separation, which holds that an organ may carry out incidental functions of another but may not take over what is essential to it. The administrative state is the primary cause of the retreat. American courts describe the work of administrative agencies as quasi-legislative and quasi-judicial, since the same body makes rules, investigates and adjudicates.

The United States Supreme Court permitted delegation on condition that Congress lay down an 'intelligible principle' to guide the delegate.[16] The response was procedural rather than structural, the Administrative Procedure Act 1946 regulated agency procedure and judicial review, and subsequent statutes, such as the Freedom of Information Act 1966 and the Government in the Sunshine Act 1976, enhanced transparency.[17]

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[12]Montesquieu, *supra* note 2, bk. XI, ch. 6 (closing para.). *See also* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. L. Rev. 592, 595 (1986).
[13]Montesquieu, *supra* note 2, bk. XI, ch. 4. *See also* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. Rev. 433 (2013) (re-examining the theories of Locke, Montesquieu and Madison).
[14]E.C.S. Wade & G. Godfrey Phillips, Constitutional Law 22 (8th ed. 1970).
[15]*Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).
[16]*J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).
[17]Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–59; Freedom of Information Act of 1966, 5 U.S.C. § 552; Government in the Sunshine Act of 1976, 5 U.S.C. § 552b.

Kurland delineates the more extensive transition from the restricted government of 1787 to a 'service state',[18] and Calabresi and his co-authors go further, describing a crisis of separation in which legislatures transfer power to executives and courts struggle to review it.[19]

The more accurate interpretation is that separation has been reinterpreted as a doctrine of accountability. The doctrine was adopted 'not to promote efficiency but to preclude the exercise of arbitrary power', as explained by Justice Brandeis. The friction it generates is its cost.[20] This is the same perspective as the Indian Supreme Court, constitutional accountability is maintained, and overlapping functions do not violate the doctrine.[21] Therefore, the contemporary state's inquiry is not whether functions overlap, as they do, but rather whether each overlap is supervised by a distinct institution. The following is the test that was administered to France and India.

4. THE DOCTRINE ABROAD

4.1 The United States

The United States is the usual point of comparison. *Marbury v Madison* established judicial review of legislation, while Articles I, II, and III place legislative, executive, and judicial power in separate hands.[22] In practice the arrangement operates through checks and balances: the presidential veto, Senate confirmation of appointments and consent to treaties, congressional control of the budget, impeachment and judicial review.

4.2 The United Kingdom

Britain stands at the other extreme. Bagehot called the Cabinet 'a hyphen which joins, a buckle which fastens the legislative part of the state to the executive part'.[23] The Prime Minister and most ministers sit in the Commons. The Constitutional Reform Act 2005, however, created a Supreme Court, reshaped the office of Lord Chancellor and gave statutory protection to judicial independence. When the Supreme Court began work in October 2009, the House of Lords ceased to exercise judicial functions.[24] Earlier, Lord Diplock had stressed, in *Duport Steels*,

[18]Kurland, *supra* note 12, at 612.
[19]Calabresi et al., *supra* note 7, at 528.
[20]*Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
[21]*Bhim Singh v. Union of India*, (2010) 5 SCC 538.
[22]U.S. Const. arts. I, II, III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
[23]Walter Bagehot, The English Constitution ch. 1 (1867).
[24]Constitutional Reform Act 2005, c. 4, §§ 3, 23 (UK).

that the 'great constitutional separation of powers' underpins the rule of law; on this understanding, Parliament enacts the law and the judges interpret it.[25]

4.3 Post-War Constitutionalism and the 'New Separation of Powers'

Ackerman's reevaluation is the most ambitious. He notes that Japan, Germany, and Italy implemented 'constrained parliamentarianism' following 1945. This model involves a cabinet that is subordinate to the lower house, but a parliament that is obligated to adhere to a written constitution, a bill of rights, and a constitutional court. He also observes this model in India, Canada, and South Africa.[26] He cautions that American-style presidentialism has been repeatedly dismantled, and that the combination of proportional representation and a separately elected president is particularly perilous. Because a fragmented legislature leaves the president little option except to bypass it.[27] He suggests the establishment of four additional branches, distributive justice, regulatory, integrity, and democracy. He identifies India's Election Commission as a prime example of a democracy branch.[28]

The history thus falls into three phases: a pre-modern preference for mixed government; an Enlightenment move towards a functional separation that was rigid in its American and revolutionary French forms; and a modern settlement which combines functions with institutional checks. India and France are two routes to the third phase.

5. SEPARATION OF POWERS IN INDIA: ORIGINS AND DEVELOPMENT

5.1 The Framers' Choice and the Constitutional Text

In the Constituent Assembly, KT Shah moved a new Article 40-A under which 'there shall be complete separation of powers as between the principal organs of the State', the Legislative, the Executive, and the Judicial.[29] The amendment was not enacted; the Assembly favoured a parliamentary system in which ministers were seated in the legislature. The text reflects that decision. The only separation it demands is a directive principle, which obliges the State to take steps to keep judicial functions distinct from executive ones in its public services.[30] The

[25]*Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142 (HL) 157.
[26]Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 633–42 (2000).
[27]*Id.* at 644–57.
[28]*Id.* at 693–97, 716–27.
[29]Constituent Assembly Debates, *supra* note 3 (K.T. Shah moving new art. 40-A).
[30]India Const. art. 50.

executive power of the Union and the States lies with the President and the Governors respectively,[31] but no article assigns legislative or judicial power to any particular organ. A strict separation cannot be asserted in any circumstance: the President is part of Parliament, the Governor part of the State legislature, the Council of Ministers is drawn from and answerable to the legislature, and the President must act on its aid and advice.[32]

The extent of the overlaps is substantial. The President and Governors issue ordinances, legislate by proclamation under Articles 356 and 357, determine disqualification of members, and grant pardons. Parliament forms and alters States and participates in the removal of judges. The courts regulate their own staff and procedure.[33] Consequently, the Constitution differentiates organs based on their functions, allowing each to fulfil certain functions of the others.

5.2 Judicial Construction: From Differentiation of Functions to the Basic Structure

The Court developed the doctrine over several stages. First, it rejected rigidity and stressed the differentiation of functions. In *In re Delhi Laws Act* the legislature was allowed to delegate ancillary matters, but not to abdicate its essential legislative function, namely laying down policy and enacting it as a binding rule.[34] *Ram Jawaya Kapur* further stated that the Constitution 'has not indeed recognised the doctrine of separation of powers in its absolute rigidity' but that it does not permit any organ or part of the State to take over functions that belong in essence to another.[35] Even in the absence of an American-style vesting clause, *Ram Krishna Dalmia* perceived a division of powers as implicit.[36]

Secondly, the Court gave the principle constitutional status. In *Kesavananda Bharati*, Sikri CJ, listed the separation of powers between the legislature, executive and judiciary among the basic features that no amendment may destroy.[37] In *Indira Nehru Gandhi v Raj Narain*, the Thirty-ninth Amendment inserted Article 329A, which sought to displace the Allahabad High Court's decision setting aside the Prime Minister's election. The Court struck down the offending

[31]India Const. arts. 53(1), 154.
[32]India Const. arts. 74(1), 75(3), 79, 163, 164(2), 168.
[33]India Const. arts. 123, 213 (ordinances); arts. 356–57 (proclamation); arts. 103, 192 (disqualification); arts. 72, 161 (pardon); art. 3 (States); art. 124(4)–(5) (removal of judges); arts. 145–46, 227, 229 (courts' rules and staff).
[34]*In re Delhi Laws Act, 1912*, AIR 1951 SC 332.
[35]*Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, ¶ 12.
[36]*Ram Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538.
[37]*Kesavananda Bharati*, (1973) 4 SCC 225, ¶ 292.

clause because deciding a particular dispute is a judicial function, one that Parliament may not perform even while amending the Constitution.[38] *Minerva Mills* struck down the immunity clauses inserted by the Forty-second Amendment, treating judicial review as a fundamental feature;[39] and *IR Coelho*, among other decisions, made laws placed in the Ninth Schedule after 24 April 1973 reviewable on the touchstone of the basic structure.[40]

Third, the Court polices the separation from both sides. It shields judicial independence from legislative and executive encroachment and guards the legislative sphere against excessive delegation. The National Company Law Tribunal withstood a challenge on separation grounds and was established,[41] but the National Tax Tribunal Act was struck down because it moved High Court functions to a body outside the judiciary.[42] The legislature has the authority to retroactively amend a judicial finding in order to eliminate its basis; however, it is not permitted to declare a judgement invalid or unconstitutional. The Court has invalidated tribunal provisions that re-enacted conditions it had previously struck down on that basis.[43] Most recently, in November 2025, it struck down key provisions of the Tribunals Reforms Act 2021 and, on the same reasoning, directed the Union to set up a National Tribunals Commission.[44] The working formula is that functions may overlap in situations where accountability is maintained, but they may not be usurped.

5.3 Contemporary Pressures

Four pressures deserve mention. The first is executive lawmaking. The Court has held that the legislative process is subverted when ordinances are promulgated again and again without being laid before the legislature, although Article 123 ordinances are meant only for urgent situations arising while Parliament is not sitting.[45] The second is the Emergency of 1975–77, during which executive power was expanded and fundamental rights were suspended. The

[38]India Const. amend. XXXIX (1975); *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.
[39]India Const. amend. XLII (1976); *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.
[40]*I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.
[41]*Union of India v. R. Gandhi, President, Madras Bar Ass'n*, (2010) 11 SCC 1; *Madras Bar Ass'n v. Union of India*, (2015) 8 SCC 583.
[42]The National Tax Tribunal Act, No. 49 of 2005, India Code (2005); *Madras Bar Ass'n v. Union of India*, (2014) 10 SCC 1.
[43]*Madras Bar Ass'n v. Union of India*, (2021) 7 SCC 369; *Madras Bar Ass'n v. Union of India*, (2022) 12 SCC 455.
[44]The Tribunals Reforms Act, No. 33 of 2021, India Code (2021); *Madras Bar Ass'n v. Union of India*, 2025 INSC 1330 (Nov. 19, 2025).
[45]India Const. art. 123; *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378; *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1.

Court's decision to maintain the suspension was subsequently overturned.[46]

The third is the growth of judicial power. The collegium system emerged from the Second and Third Judges cases, in which the judiciary acquired the decisive voice in appointing judges to the higher courts.[47] In 2015 the Court struck down the Ninety-ninth Amendment and the National Judicial Appointments Commission Act 2014, and the collegium was thereby restored.[48] One consequence was the removal of a significant check that the executive and legislature had on the judiciary. Public interest litigation has likewise allowed courts to fill gaps left by the legislature; in *Vishaka*, for instance, the Court laid down binding guidelines against sexual harassment at the workplace before Parliament had legislated on the subject.[49]

The Court has at times drawn a line of its own. It treats law-making directions as an exception, used only to bridge a gap until the legislature acts; it does not direct Parliament to enact particular legislation, and it has said that it cannot rewrite legislation.[50] In *State of West Bengal v Committee for Protection of Democratic Rights*, it held, consistently with federalism and the separation of powers, that a constitutional court may direct the CBI to investigate an offence inside a State without that State's consent.[51] In *Kalpana Mehta*, it further held that reports of parliamentary committees are not substantive evidence of wrongdoing, which leaves the courts, not Parliament, to determine the facts.[52]

The fourth is the rise of 'fourth-branch' institutions such as the Finance Commission, the Election Commission and the Comptroller and Auditor General.[53] Ackerman praises the Election Commission.[54] However, his account is outdated.

In *Anoop Baranwal* the Court directed that, until Parliament legislated, appointments would be made on the advice of a committee comprising the Prime Minister, the Leader of the Opposition and the Chief Justice of India. Parliament's 2023 Act then substituted for the Chief Justice a

[46]*ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521, *overruled by Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.
[47]*Supreme Court Advocates-on-Record Ass'n v. Union of India*, (1993) 4 SCC 441; *Special Reference No. 1 of 1998*, (1998) 7 SCC 739.
[48]India Const. amend. XCIX (2014); The National Judicial Appointments Commission Act, No. 40 of 2014, India Code (2014); *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (2016) 5 SCC 1.
[49]The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14 of 2013, India Code (2013); *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.
[50]*Pravasi Bhalai Sangathan v. Union of India*, (2014) 11 SCC 477.
[51]*State of West Bengal v. Committee for Protection of Democratic Rights*, (2010) 3 SCC 571.
[52]*Kalpana Mehta v. Union of India*, (2018) 7 SCC 1.
[53]India Const. arts. 148, 280, 324.
[54]Ackerman, *supra* note 26, at 718–20.

Union Cabinet Minister nominated by the Prime Minister, and the validity of that substitution has been challenged in court.[55] The independence claimed for the 'democracy branch' is thus open to question, and this supports the view that independent institutions require multi-partisan or non-executive appointments.

6. THE SEPARATION OF POWERS IN FRANCE: ORIGINS AND DEVELOPMENT

6.1 The Revolution and the Third Republic

France's relationship with the doctrine is paradoxical. Article 16 of the 1789 Declaration says that a society without a separation of powers has no constitution at all.[56] Yet revolutionary separation was aimed as much at the judiciary as at the executive. The law of 16–24 August 1790 declared judicial functions distinct from administrative ones and forbade judges from interfering in the operations of administrative bodies.[57] Fairlie notes that the French conception of separation was influenced by the system of administrative justice, rather than the other way around; it was used as a defence mechanism against the courts.[58]

Constitutional instability followed. The Conseil d'État was created under the First Consul by the Constitution of Year VIII.[59] In *Blanco* (1873), the Tribunal des conflits held that the administrative courts are competent to determine State liability, which is governed by special public-law principles.[60]

French writers were taught by Louis-Napoleon's coup following the directly elected presidency of 1848 that the head of state should be accountable to the legislature. This lesson is reflected in the Third Republic.[61] French doctrine regarded it with scepticism. Duguit contended that indivisible sovereignty renders separation impossible and advocated for a 'intimate penetration' of the organs, whereas Carré de Malberg discovered that separation had been replaced by a 'gradation of powers'.[62]

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[55]The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, No. 49 of 2023, India Code (2023), § 7(1); *Anoop Baranwal v. Union of India*, (2023) 6 SCC 161.
[56]Declaration of the Rights of Man and of the Citizen of 1789, art. 16 (Fr.).
[57]Loi des 16–24 août 1790 sur l'organisation judiciaire [Law of 16–24 August 1790 on Judicial Organization], tit. II, art. 13 (Fr.).
[58]Fairlie, *supra* note 8, at 408, 420–21 n.55.
[59]Constitution of 22 Frimaire Year VIII (Dec. 13, 1799), art. 52 (Fr.).
[60]*Blanco*, Tribunal des conflits [TC] [Jurisdictional Court] Feb. 8, 1873, Rec. Lebon 1er supp. 61 (Fr.).
[61]Fairlie, *supra* note 8, at 409–10.
[62]*Id.* at 420–22 (discussing the views of Duguit and Carré de Malberg).

6.2 Administrative Justice and the Dual Jurisdiction

France's most distinctive contribution is administrative law. The administration is primarily exempt from the ordinary courts, which are independent of the executive. The Tribunal des conflits decides whether a given dispute belongs before the administrative or the ordinary courts. The Conseil d'État sits at the head of the administrative courts and hears challenges to ministerial decrees as the first and last instance. An action for excess of power may be initiated by any affected individual, and compensation may be obtained without the necessity of demonstrating negligence. Dicey was concerned that the State would be favoured by special administrative courts.[63] The Conseil, however, has since earned a reputation for impartiality, and Ackerman suggests that when Dicey gave his warning it was not yet clear how such courts would handle bureaucratic power.[64]

This arrangement has since been constitutionalised by the Constitutional Council. It has regarded the independence of the administrative jurisdiction as a constitutional principle and has held that this jurisdiction is, in principle, competent to annul or reform the decisions that executive authorities take in exercising the prerogatives of public power.[65] Costs are also associated with the system.

Because the boundary between the two jurisdictions is technical, remedies may be restricted, and control of the executive depends on judicial creativity rather than constitutional text, since *droit administratif* is largely judge-made. In *Procola* the European Court of Human Rights found a violation of the right to a fair hearing in Luxembourg's equivalent body, whose members had first advised on a measure and then adjudicated upon it. The same concern arises from the Conseil's twin role as a court and as adviser on government bills.[66]

6.3 The Fifth Republic

The Fifth Republic set up a semi-presidential system. The President appoints the Prime Minister, may dissolve the National Assembly, may put certain bills to a referendum, and may exercise emergency powers.[67] The presidential term has been five years since the 2000 reform,

[63] A.V. Dicey, Introduction to the Study of the Law of the Constitution chs. IV, XII (10th ed. 1959).
[64] Ackerman, *supra* note 26, at 692.
[65] Conseil constitutionnel [CC] [Constitutional Council] decision No. 80-119 DC, July 22, 1980 (Fr.); Conseil constitutionnel [CC] [Constitutional Council] decision No. 86-224 DC, Jan. 23, 1987 (Fr.).
[66] 1958 Const. art. 39 (Fr.); *Procola v. Luxembourg*, App. No. 14570/89, Judgment, Eur. Ct. H.R. (ser. A) No. 326 (Sept. 28, 1995).
[67] 1958 Const. arts. 8, 12, 11, 16 (Fr.).

with a limit of two consecutive terms since 2008.[68] The executive also possesses an autonomous regulatory domain. Statutes are restricted to the matters specified in Article 34, and all other matters are subject to regulation. The government may request the authority to act by ordinance from Parliament.[69] The President and the Assembly majority operate in 'cohabitation' when they belong to different factions, as in 1986–88, 1993–95, and 1997–2002, without pathological conflict. However, when they belong to the same camp, the result is what some refer to as a fusion of powers.[70] The party alignment upon which presidential dominance was predicated cannot be assumed since the dissolution of June 2024 and the subsequent elections. The Assembly has not been dominated by a single party.[71]

Two bodies deserve mention. The Constitutional Council reviews legislation, but its nine appointed members are chosen three each by the President of the Republic and the presiding officers of the two houses, which introduces political influence.[72] Nevertheless, Ackerman regarded it as 'quite fearless' in invalidating the initiatives of a President with full political authority, despite the fact that it was a lesser check than the American Supreme Court was.[73] The claim that French constitutional review is feeble is weakened by the fact that any litigant may now raise the constitutionality of a statute that is already in force before the ordinary or administrative courts, as of 2008.[74] Ackerman respects the Conseil d'État as one of the most significant accomplishments of legality; however, he emphasises that the government must consult it in confidence prior to introducing draft laws, and that Europeans have largely failed to incorporate the bureaucracy into constitutional thinking.[75]

7. CRITICAL ANALYSIS

7.1 What Is the Doctrine For?

The notion that concentrated power results in tyranny is the starting point for nearly all scholars; however, the vocabulary used to describe the idea varies: separation of functions,

[68]Loi constitutionnelle No. 2000-964 of Oct. 2, 2000 (Fr.); 1958 Const. art. 6 (Fr.) (as amended by Loi constitutionnelle No. 2008-724 of July 23, 2008).
[69]1958 Const. arts. 34, 37, 38 (Fr.).
[70]Ackerman, *supra* note 26, at 644–53.
[71]1958 Const. art. 12 (Fr.); Décret du 9 juin 2024 portant dissolution de l'Assemblée nationale [Decree of June 9, 2024 Dissolving the National Assembly] (Fr.).
[72]1958 Const. art. 56 (Fr.).
[73]Ackerman, *supra* note 26, at 644–53.
[74]1958 Const. art. 61-1 (Fr.) (inserted by Loi constitutionnelle No. 2008-724 of July 23, 2008).
[75]Ackerman, *supra* note 26, at 692.

checks and balances, a principle of restraint, a community of powers.[76] These are not equivalent. Some doctrines establish separation of responsibilities, while others specify who has the authority to prevent another from doing so. A 'community of powers' that lacks a rule of last resort is perilously close to the fusion that Montesquieu's argument was intended to prevent. For France and India, the primary inquiry is the existence of checks, the identity of their administrators, and the extent to which they are themselves subject to control.

7.2 India, Judicial Strength and Institutional Imbalance

India has built a judiciary able to hold the government and Parliament alike to account. Through the basic-structure doctrine, a text that does not demand strict separation has come to require it, and *Indira Gandhi* shows the worth of that shift: a legislature that tried to validate its leader's election was told that it could not decide a particular dispute.[77] The deficiencies are equally instructive. The doctrine is not consistently enforced; the Court claims primacy over judicial appointments, which protects its independence but also removes an external check upon it. Public interest litigation rests on the failures of the legislature and administration, and it too takes over their responsibilities. The legislature has shown little interest in building mechanisms to regulate the administration, so that administrative law has been created mainly by the courts, a 'reactive enterprise'. And because the executive commands the majority in Parliament, the judiciary is often the only effective check.

7.3 France, Executive Pre-eminence and an Unusual Judiciary

France excels in administrative justice. Created at the outset to shield the administration from the courts, it grew into a body of case law that restrains the administration and compensates individuals irrespective of fault. The difficulties are political. The President is directly elected, can dissolve the Assembly and, when backed by a parliamentary majority, holds the authority to regulate legislation. The political branches appoint the Constitutional Council, which is meant to counteract this tendency. In France it is administrative law that acts as a strong check upon the executive, whereas constitutional law is weaker, although the 2008 reform has narrowed the gap.

[76]Waldron, *supra* note 13 (distinguishing the functional separation of powers from checks and balances and from the dispersal of power generally).
[77]*Indira Nehru Gandhi*, 1975 Supp SCC 1.

8. COMPARATIVE ANALYSIS

India and France both acknowledge that strict separation is unattainable; however, they disagree on nearly every other aspect, and the contrasts can be observed across six dimensions. On the textual plane, India has no general clause vesting legislative or judicial power in separate organs. The only express provision is Article 50, a directive principle limited to keeping the judiciary apart from the executive in the public services.[78] The Constituent Assembly rejected KT Shah's proposal for express separation.[79] France, by contrast, begins from Article 16 of the 1789 Declaration,[80] and the Constitution of 1958 distinguishes the legislature from the executive.

In the relationship between executive and legislature, India follows the parliamentary model of fusion. The President acts on ministerial advice, the Council of Ministers is drawn from and answerable to the legislature, and the executive legislates through proclamations under Articles 356 and 357 and ordinances under Article 123.[81] France is semi-presidential: its directly elected President can dissolve the Assembly, put particular bills to referendum and exercise emergency powers.[82] India's courts form a single hierarchy, and the writ jurisdiction under Articles 32 and 226 reaches the administration.[83]

France has a dual structure: administrative courts headed by the Conseil d'État, ordinary courts headed by the Court of Cassation, and the Tribunal des conflits, which resolves disputes between the two. In India the Supreme Court and the High Courts act as constitutional guardians, armed with the basic-structure doctrine and primacy in judicial appointments. Since 2008 the *question prioritaire de constitutionnalité* (QPC) has let individual litigants challenge statutes already in force, although France still relies on a Constitutional Council whose members are appointed by the President and the presiding officers of the two chambers.[84]

India has also created independent institutions such as the Election Commission, the Finance Commission and the Comptroller and Auditor General.[85] France's counterpart is the Conseil

[78]India Const. art. 50.
[79]Constituent Assembly Debates, *supra* note 3.
[80]Declaration of the Rights of Man and of the Citizen of 1789, art. 16 (Fr.).
[81]India Const. arts. 123, 356–57. *See also supra* note 32.
[82]1958 Const. arts. 8, 12, 11, 16 (Fr.).
[83]India Const. arts. 32, 226.
[84]1958 Const. arts. 56, 61-1 (Fr.).
[85]India Const. arts. 148, 280, 324.

d'État, which is both the supreme administrative court and the government's adviser. Lastly, each system possesses its own unique pathology. India's vulnerability is in the expansion of the judiciary into political functions and executive lawmaking. France's vulnerability is derived from the President's alignment with a parliamentary majority and the executive's preeminence.

Three distinctions are particularly noteworthy. The first concerns the source of the check. In India the Supreme Court, together with a growing number of independent commissions, restrains the political branches. In France that role falls to an administrative court and to a Constitutional Council whose members are politically appointed. As a result, India's constitutional courts exercise greater control over legislation, whereas France's administrative courts exercise greater control over administration.

The second is the characteristic pathology. India has a judiciary able to take on political responsibilities; France has an executive that dominates the legislature, even though it answers to a separate court because of the dual jurisdiction. The third is how executive and legislature relate. In India parliamentary fusion delivers stability and executive leadership. In France the directly elected President stands apart from the legislature yet keeps control over it, a combination that Ackerman regards as risky.[86]

The Indian administrative law is based on the common-law model of review by ordinary judges, but it has selectively borrowed from external sources. The Indian review now encompasses proportionality, which the Court has addressed in light of English and European authority, and legitimate expectation, which was established in English law.[87]

9. CONCLUSION

The separation of powers began as a safeguard for liberty, as a reading of England's constitution shows. It has since developed into a method of structured collaboration among the organs of government. The pure version, with three organs, three sets of officials and three functions, now commands little support. The doctrine survives as a logic of moderation, and neither India nor France departs from that pattern. In India the Supreme Court has made restraint a core element of the Constitution and has limited legislative override of judicial

[86]Ackerman, *supra* note 26, at 644–57.
[87]*Food Corp. of India v. Kamdhenu Cattle Feed Indus.*, (1993) 1 SCC 71; *Om Kumar v. Union of India*, (2001) 2 SCC 386.

decisions, even though the framers rejected rigid separation. France declared the doctrine during the Revolution, established a unique administrative justice system, and currently maintains a presidency that exercises significant influence over the legislature.

The quality of each organ's inspection is more important than the precision with which it is divided. In both nations, overlap is an inevitable consequence of contemporary governance. The evaluation is whether each overlap is overseen by a distinct and impartial entity. India's primary vulnerability on that assessment is its unregulated judiciary and its law-making authority, while France's is its robust executive and constitutional oversight of political composition. Both systems would benefit from independent specialist institutions that answer to the legislature rather than the executive, enjoy operational independence and are staffed through multipartisan appointment. The doctrine remains significant; however, it is determined by the arrangement of checks rather than the location of the lines.