
SEPARATION OF POWERS IN THE DIGITAL AGE: A CONSTITUTIONAL PERSPECTIVE

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ABSTRACT

“The doctrine of separation of powers has historically functioned as a constitutional protection against the capricious accumulation of authority. In the digital age, algorithmic governance, executive surveillance, and the quasi-sovereignty of technology corporations put this balance at risk. In India, where the separation of powers is a fundamental aspect of its structure (*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461), these developments reveal institutional vulnerability. This study analyses the doctrine via Indian jurisprudence, the IT Act 2000, and comparative frameworks such as the GDPR and Section 230, advocating for reforms that address legislative negligence, executive overreach, judicial minimalism, and ensure constitutional accountability.”

Keywords: Separation of Powers; Digital Constitutionalism; Algorithmic Governance; Executive Surveillance; Legislative Abdication; Judicial Restraint; Basic Structure Doctrine; Technology Regulation; Information Technology Act 2000; GDPR; Section 230 CDA; Private Digital Sovereignty; Constitutional Accountability; Institutional Balance; Comparative Constitutional Law.

Introduction

The separation of powers is a lasting part of freedom and the rule of law. The concept originates from Montesquieu's seminal work, *De l'Esprit des Lois* (1748), which posited the principle that liberty is jeopardised when the legislative, executive, and judicial powers are wielded by a singular entity. This doctrine has been accepted by modern constitutionalism as a necessary function. Legislatures are supposed to make laws that are open to discussion, executives are supposed to carry out and enforce laws, and judiciaries are supposed to settle disputes that arise from laws. The tripartite division of powers is the most important part of comparative constitutional theory. This includes the checks and balances of the federal American system, the flexible construction of parliamentary sovereignty in Britain, and the mixed Indian case.

In the Indian context, although the Constitution does not distinctly establish separation of powers, it does so implicitly in terms of how it is organized and the courts have recognized it as a principle. For instance, article 50¹ prescribes separation of the judiciary from the executive in public services; articles 121² and 211³ marginalize a legislative discussion of judicial conduct; and the Supreme Court has stated that separation of powers is part of the basic structure (*Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1)⁴. As the Constituent Assembly Debates illustrate, the framers intentionally rejected a rigid textual separation in favor of practical balance between coordination and restraint. As Dr. B. R. Ambedkar⁵ stated, the Indian model was one of "functional separation" which emphasized that overlaps were necessary in a parliamentary system of government (Constituent Assembly Debates, Vol. VII, 1948).⁶

Nonetheless, the twenty-first century brings an unprecedented constitutional challenge. Digital technology has broken down the distinction between state and non-state power, domestic and transnational governance, and law and algorithm. Legislatures struggle to regulate rapidly changing areas such as data privacy, artificial intelligence, and cyber security. Executives increasingly employ surveillance, algorithmic governance, and delegated rule-making. Courts are forced to rule on disputes having to do with online free speech, see *Shreya Singhal v. Union of India*, (2015) 5 SCC 1⁷, and internet shutdowns (see *Anuradha Bhasin v. Union of India*,

¹ "Constitution of India, Article 50."

² "Constitution of India, Article 121."

³ "Constitution of India, Article 211."

⁴ "*Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1."

⁵ "Constituent Assembly Debates, Vol. VII, 4 November 1948, Speech of B. R. Ambedkar."

⁶ "Constitution of India, Article 122."

⁷ "*Shreya Singhal v. Union of India*, (2015) 5 SCC 1."

(2020) 3 SCC 637)⁸, amongst others. Place these obligations alongside private corporations, who exercise de facto regulatory power over expression, commerce, and democratic discourse, such as Google, Meta, X, and Amazon, and we must ask the question of who can be held accountable or within what constitutional framework.⁹

This new digital constitutionalism makes us rethink the idea of separation of powers. The traditional doctrine was based on the idea of a limited territorial sovereign state, but the digital world has led to global corporations, hidden algorithmic decision-making, and executive techno-regulation. The threats of tyranny that Montesquieu feared would arise from the concentration of power are now evident not only in the state but also in private entities that govern data, speech, and our access to the crucial realms of digital infrastructure. This article contextualises the concept of separation of powers within the framework of constitutional issues in the digital era. The approach is comparative and interdisciplinary, utilising both Indian constitutional jurisprudence and examples from other constitutional democracies. The U.S. experience illustrates the constraints of judicial regulation of digital platforms under the First Amendment and Section 230 of the Communications Decency Act. In contrast, the European Union exemplifies a legislative-driven approach to digital accountability through the General Data Protection Regulation and the Digital Services Act. This contrasts with the regulatory framework established in the U.K. through the Online Safety Act, which addresses parliamentary sovereignty in the context of online harm. By combining these comparative examples with the Indian constitutional doctrine, the article proposes a normative framework to facilitate the separation of powers in digital governance. The investigation advances the thesis that separation of powers ought not to be regarded as a fixed institutional arrangement, but rather as a dynamic constitutional safeguard of the ideal. Justice Chandrachud expressed this notion in *Puttaswamy v. Union of India* ((2017) 10 SCC 1), contending that constitutional principles must adapt to new challenges, as “the Constitution is a living document which must be understood in keeping with contemporary realities.” This concept necessitates a reinterpretation of the separation of powers, considering the distinct context introduced by technology: executive overreach via surveillance, legislative inaction amid corporate lobbying, judicial intervention in the regulation of algorithms, and de facto private digital sovereignties.

⁸ “*Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.”

⁹ “Geoffrey Marshall, *Constitutional Theory* (1971).”

The Classical Doctrine and Constitutional Foundations

Montesquieu, Locke, and the Intellectual Roots

The principle of separation of powers is most famously associated with Montesquieu's *De l'Esprit des Lois* (1748). Montesquieu warned that, "there is no liberty if the judiciary power be not separated from the legislative and the executive" (Book XI, Ch. 6). His thinking was directly influenced by Locke¹⁰, who, in his *Second Treatise of Government* (1690), distinguished between legislative, executive, and federative powers. While Locke permitted some overlap between executive and federative powers, Montesquieu sharpened the distinction into a formalized principle of division to preserve liberty.

The central normative reason for the doctrine was to protect against arbitrary rule. If legislative power—the authority to make laws—were combined with executive power, the same body could not only make rules but also execute them, ruling with few limitations. If judicial power were combined with either body, disputes would be resolved with interested parties. Accordingly, separation was developed as a foundational safeguard against tyranny.

This intellectual backdrop substantially influenced modern constitutions, especially that of the United States of America (1787), which makes separation a formal part of its institutional design. In *The Federalist Papers* No. 47, James Madison¹¹ wrote that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny." Hence, the U.S. system entrenches separation in its institutional design: Articles I-III allocate powers uniquely to Congress, the President, and the Judiciary respectively..

The American Model: Rigid Separation with Checks

Separation of powers operates in the U.S. through structural provisions and judicial action. The Supreme Court has long used separation of powers to check overreach by Congress (*INS v. Chadha*, 462 U.S. 919 (1983)¹², invalidating legislative veto) and the executive branch (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)¹³, invalidating Harry Truman's

¹⁰ "John Locke, *Two Treatises of Government* (1690), Second Treatise, Ch. XII–XIV."

¹¹ "James Madison, *The Federalist* No. 47 (1788)."

¹² "*INS v. Chadha*, 462 U.S. 919 (1983)."

¹³ "*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)."

seizure of steel). The existence of judicial review, noted in *Marbury v. Madison* (5 U.S. (1 Cranch) 137 (1803)),¹⁴ is a function of both separation and balance that ensures Congress and the President act within constitutional limits. But the U.S. model is not about airtight separation; it is about "separation of powers and checks and balances." The President can veto legislation, the Senate must confirm judicial appointments, and the courts can overturn both legislative and executive actions. Therefore, the rigid allocation of power is mitigated by checks on interdependence.

The British Model: Fusion and Parliamentary Supremacy

On the other hand, the British constitutional framework embodies a blend of powers based on parliamentary sovereignty. The executive derives from the legislature and remains accountable to it, and the independence of the judiciary developed slowly through pressures for reform, such as the Act of Settlement 1701¹⁵, and, more recently, through the Constitutional Reform Act 2005¹⁶, which established the UK Supreme Court as an independent body, separate from the House of Lords.

While Montesquieu is often said to have awarded acclaim for the separation of powers to the English constitution, he actually referred to the balance within it that guaranteed liberty through mutual checks on liberty. The British consultative model shows that separation of powers can be achieved to reflect functional independence and conventions of power, rather than strict institutional separation.

The Indian Constituent Assembly and Constitutional Design

As the Indian Constitution was being drafted, different models of governance proposed varying degrees of separation and flexible cooperative parliamentary models. In response to criticisms of the Constitution not directly enshrining the doctrine of separation of powers, Dr. B. R. Ambedkar stated:

"The draft Constitution has not been able to embody the doctrine of separation of powers in its absolute rigidity ... The executive is part of the legislature. The legislature has the right to

¹⁴ "*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)."

¹⁵ "Act of Settlement 1701 (Eng.)."

¹⁶ "Constitutional Reform Act 2005 (UK)."

remove the executive. This is a parliamentary system, not a presidential system of government.” (Constituent Assembly Debates, Vol. VII, 1948).

K. M. Munshi¹⁷ similarly stated that this doctrine must be modified to Indian conditions, and that a rigid separation would simply be impossible to implement in a multi-cultural, parliamentary democracy. Thus, while the Constitution acknowledges this principle, it is not strictly allocated, allowing for overlaps in the interests of operational efficiency.

Legislative Inertia and the Delegation Problem

It is a constitutionally defined function of legislatures to act as the primary sites of democratic deliberation. In the Indian Constitution, Article 245 grants Parliament and State Legislatures the power to make laws, subject to constitutional limitations, while Article 246, read with the Seventh Schedule, further specifies the legislative competence. Notably, the speed of technological advancement exceeds the political timeliness of legislators and the legislative process. Consider conducting research on the Information Technology Act of 2000. Originally intended to enable e-commerce and digital signatures, this Act now acts as the key legislation for regulating speech, privacy, or cyber security, even though it is outdated in many ways.

This delay in passing laws makes it possible for delegated legislation to be used instead, which can be sloppy at times. Section 87 of the IT Act gives the executive the power to make rules, which gives them a lot of control over their intermediaries, content regulation, and data use. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, which came into effect in 2021 and were changed in 2023, give the government the power to set up fact-checking units that can tell platforms to remove content that is marked as "fake" or "misleading." The Supreme Court gave a split decision on whether these rules were factually constitutional, as it did in *Kunal Kamra v. Union of India*. However, it ultimately ruled that they did violate Article 19(1)(a) and went beyond what was allowed. This case demonstrates the permeability of the legislative-executive boundary in the context of digital governance. The concept of non-abdication of legislative functions, as delineated in the *Delhi Laws Act* case (AIR 1951 SC 332), appears to be facing scrutiny. Giving the executive the power to set norms without any legal standards undermines Parliament's ability to make decisions. This also brings up the bigger question of whether the separation of powers doctrine can work in a

¹⁷ “Constituent Assembly Debates, Vol. VII, 7 November 1948, Speech of K. M. Munshi.”

constitutional setting when legislatures choose to give executive agencies the power to make laws in a world where technology is changing quickly. As the Constituent Assembly had warned, the danger was that practical delegation would weaken parliamentary sovereignty.

Private Digital Sovereigns and Constitutional Accountability

The most serious disruption does not come from state organs but from private actors exercising public power in digital spaces. Google, Meta, Amazon, and X, among others will regulate speech, commerce, and political discussions on a global basis, through their content moderation policies, algorithmic ranking and data collection methods, all of which are scrutinizing fundamental rights to speech, association, and privacy. However, as private corporations, they do not have the usual constitutional obligations.

Indian jurisprudence begins to grapple with this challenge. In *Kaushal Kishor*, the Court indicated that in some cases, fundamental rights might apply horizontally, particularly in contexts where private action impacts constitutional values. In *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649¹⁸, the Court held that even though the Board of Control for Cricket in India was a private body, it was still amenable to constitutional scrutiny when it exercised powers in relation to public importance. These decisions suggest a doctrine of functional publicness, in that private actors exercising regulatory authority may fall under constitutional obligations.

This is supported by comparative experience. In the U.S., increased attention has been given to debates around “common carriers” and the regulations affecting platforms, especially with cases like *NetChoice, LLC v. Paxton* (U.S. Supreme Court, pending decision, 2024) who define the limits of state authority to regulate content moderation decisions. In the EU Digital Services Act, platforms will face new obligations around fundamental rights, transparency, and due process. The UK's Online Safety Act has a related framework. Overall, the implication from these developments is that constitutional democracies must loosen accountability structures and expand it to include private digital power.

Comparative Constitutional Perspectives

The hurdles that have emerged due to the digital age are not unique to India. Every

¹⁸ “*Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649.”

constitutional system in which powers are separated has been forced to address new power arrangements due to a combination of executive techno-regulation, legislative inaction, judicial intervention, and the emergence of private digital actors. Comparative experience is especially instructive because it shows us different institutional approaches to bring traditional doctrines into alignment with technology governance.

The United States: Judicial Supremacy and the Limits of Legislative Action

The United States is a good example of how to show that you believe in the separation of powers. The U.S. Constitution lists the duties of each branch separately, and the judiciary has the power to review the actions of both the legislative and executive branches. This has changed the way people challenge different types of digital governance for good. Legislative inertia has been clear when it comes to making laws about digital platforms. Section 230 of the Communications Decency Act of 1996, which protects platforms from being sued for content posted by others, is still in effect. Congress looked at it and decided it wasn't necessary to change. Congress is having a hard time passing laws that protect people's data or regulate digital platforms as a whole. When there is no law, executive agencies and courts have stepped in to fill the gap.

Judicial actions have demonstrated their significance as a crucial instrument for delineating constitutional rights on digital platforms. The U.S. Supreme Court said in *Carpenter v. United States* that getting historical cell-site location information is a search that is protected by the Fourth Amendment and needs a warrant. This shows how courts are changing their minds about the law because of new technology. The U.S. Supreme Court threw out new rules that made it harder for registered sex offenders to use social media in *Packingham v. North Carolina*. The case also showed how important digital platforms are for protecting free speech under the First Amendment.

The executive branch has also extended its regulatory authority. This is particularly evident with the Federal Communications Commission (FCC) moving back and forth on the idea of net neutrality with each administration. This reveals the dangers of executive overreach when Congress does not act clearly or explicitly. In the most recent case involving this issue, the Supreme Court's "major questions doctrine" in *West Virginia v. EPA* (142 S. Ct. 2587 (2022))¹⁹

¹⁹ "*West Virginia v. EPA*, 142 S. Ct. 2587 (2022)."

indicates judicial skepticism around executive agencies exercising broad authority in contexts of great economic and political importance without clear congressional authority. If a similar doctrine is applied with respect to digital regulatory reforms, it may limit the executive branch's efforts to regulate technology and a digital economy.

The United Kingdom: Parliamentary Sovereignty and Digital Regulation

The United Kingdom functions on the foundation of parliamentary sovereignty, which is a different context entirely. Prior to digital governance, under the theory of separation of powers, the UK had a malleable doctrine and even a fusion between the executive and the legislature; however, tensions with the exercise of executive discretion has been amplified since digital governance functions like the Investigatory Powers Act, 2016 ("Snoopers' Charter") guaranteed surveillance powers for the executive. Civil liberties organizations challenged many of the provisions of the Investigatory Powers Act, 2016, which set the stage for a major case: the European Court of Human Rights case of *Big Brother Watch v. United Kingdom* in 2021²⁰. The Court found that the United Kingdom's bulk interception powers violated an individual's right to privacy under Article 8 of the European Convention on Human Rights. Although UK Courts have outlawed some aspects of executive powers in the investigation and surveillance, they are still operating under the holistic doctrine of parliamentary supremacy.

The UK passed the Online Safety Act in 2023 to control harmful content that is online. The Act makes it the job of platforms to get rid of any illegal or harmful content, and Ofcom is in charge of making sure this happens. People are worried that it gives the executive regulator too much power, which could lead to censorship and stifling of speech. But the fact that Parliament itself passed the regime says a lot about Britain's reliance on legislative supremacy instead of judicial activism. The courts can only make sure that laws are followed; they can't use the constitution to throw out laws.

The UK model shows both the good and bad sides of parliamentary sovereignty. The UK has flexible laws for the digital world, but it doesn't have a strong judicial check on actions taken by the legislature or the executive. This makes it harder to protect people's rights.

²⁰ "Big Brother Watch v. United Kingdom, App. Nos. 58170/13, 62322/14, 24960/15 (ECHR, 2021)."

Critical Analysis and Doctrinal Challenges

Although the idea of separation of powers may appear formally robust, it faces severe strain under the different requirements of digital governance. Conventional categories—legislative, executive, judicial—were established for a constitutional order in which the state was the primary site of authority.²¹ However, digital governance shows power dispersed among state agencies, private corporations, and transnational entities. The dispersal of authority contributes to increasingly pressing doctrinal questions for constitutional law.²²

Legislative Abdication and the Hollowing of Deliberation

While judicial encroachment is a threat to democracy, legislatures are accused of a different mode of democratic failure, namely, abdication. The Indian Parliament has passed broad statutes such as the Information Technology Act, 2000, and the Digital Personal Data Protection Act, 2023, but continues to delegate vital normative substance to the executive. For instance, section 87 of the IT Act is a mechanism that allows the government to enact rules that can have far-reaching effects on speech, privacy, and platform governance.²³ Both the IT Rules, 2021 and 2023, involved little parliamentary debate or oversight, demonstrating a pattern of regulation by the executive.²⁴

This abdication of responsibilities hinders the deliberative aspect of democracy. Based on the debates in the Constituent Assembly, it is clear that the founders of the Constitution perceived overlap of functions but anticipated the Parliament would be the central vehicle for making laws. As Alladi Krishnaswami Ayyar averred, “It is not possible to have a complete separation of powers in a parliamentary system, but it is equally undesirable to surrender the core functions of legislation to the executive” (CAD, Vol. VII, 1948).²⁵

The implications are powerful. When legislatures delegate normative choices, powers disproportionately shift to the executive and the courts must play their role, thus creating

²¹ “S. Krishnaswamy, “Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine” (Oxford University Press, 2010).”

²² “Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart Publishing, 2017).”

²³ “Vicki C. Jackson, “Proportionality and Structure in Comparative Constitutional Law” (2015) 34 *Oxford Journal of Legal Studies* 1.”

²⁴ “Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).”

²⁵ “Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).”

institutional imbalance. The basic structure doctrine articulated in *Kesavananda Bharati v State of Kerala* (AIR 1973 SC 1461)²⁶ treats separation of powers as a feature of the basic structure of government. One cannot violate this basic structure by amending a provision, but by simply failing to take action. In a constitutional democracy, Parliament's failure to provide meaningful deliberation about governance in the digital space could amount to a departure from its very own legitimacy.

Executive Techno-Regulation and Democratic Deficit

The executive branch has risen to become the dominant overseer of our digital lives. Whether it's Aadhaar, internet shutdowns, algorithmic surveillance, or regulation of platforms, executive agencies, whether at the central or state level, are making decisions that have real constitutional significance.²⁷ Unfortunately, these decisions are often made without any transparent processes, opportunities for public consultation, or oversight by parliament. Section 69A blocking orders are issued in private; surveillance instructions via the Telegraph Act come without independent scrutiny; and fact-checking units threaten to censor political speech.²⁸

This concentration of power goes against the purpose of separation. The executive isn't just implementing laws—they are establishing binding standards. The concern of Montesquieu vis-à-vis legislative and executive fusions is now realized through techno-regulation. In India, the problem is compounded by weak institutional checks.²⁹ Whereas the U.S. deploys congressional oversight committees and the EU requires impact assessments before digital regulations can come into effect, India's reliance is almost entirely on judicial review for those same checks. This creates a disproportionate load on courts and abilities to preserve balance among branches of government.³⁰

The Challenge of Private Digital Sovereignty

In the digital era, possibly the toughest problem posed for the separation of powers, is the

²⁶ “*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.”

²⁷ “Amnon Reichman, “The Limits of Proportionality: Judicial Review of National Security” (2014) 27 *Harvard Human Rights Journal* 23.”

²⁸ “Tarunabh Khaitan, “Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Weakening of Checks and Balances in India” (2020) 14(1) *Law & Ethics of Human Rights* 49.”

²⁹ “Vivek Krishnamurthy, “Internet Platform Liability and the Limits of Freedom of Expression” (2018) 34(2) *Computer Law & Security Review* 369.”

³⁰ “Anupama Roy, “Constitutionalism and the Politics of Governance in India” (2016) 51(4) *Economic & Political Weekly* 45.”

growth of private companies exercising public functions. Companies, such as Google, Meta and Amazon, regulate speech, commerce, and association with a power and reach that exceeds many states. The decisions they make around content moderation, algorithmic ranking and use of data have direct ramifications on constitutional values related to speech, equality, and privacy, but they do so beyond the state's vertical accountability.

The Indian judiciary has taken small steps to expand constitutional duties on private actors. *Zee Telefilms Ltd. v. Union of India* (2005) 4 SCC 649 noted that private entities discharging public functions could be subject under constitutional scrutiny. However, Justice Bhat in *Kaushal Kishor* (2023) held that fundamental rights could be invoked horizontally, in some circumstances. Though, the scope of this doctrine is unclear. Excessively broadening the horizontal application of rights dilutes the centrality of the state in the corpus of constitutional obligations, while failing to recast some obligations in this way subjects citizens to the vulnerability of unaccountable private power.³¹

Comparative experience offers possible models. The Digital Services Act of the European Union mandates platforms, thereby infusing constitutional norms into statutory regimes. In the United States, the discussions on platform regulation as common carriers, as in *NetChoice, LLC v. Paxton* (2024 pending), provide another pathway. The challenge for India is doctrinal and structural: can separation of powers accommodate holding private digital sovereigns accountable without losing the public/private law distinction?³²

Strengthening Parliamentary Deliberation in Digital Governance

To begin, the first step in the reform process must be to give up legislative power. Parliament can't just sit back and let the executive have so much power over important issues when it comes to digital governance. The Digital Personal Data Protection Act, 2023, which was just passed, is a big step forward, but it shows the problem. A lot of the important regulatory details—the legal rules of the game, as you and I would call them—have been given to the executive, which makes rules on its own. This makes it harder for Parliament to talk things over and makes democracy weaker.

³¹ “Malavika Jayaram, “Data Protection in India: A Constitutional Perspective” (2012) 48(2) *Economic & Political Weekly* 56.”

³² “Angela Daly, *Private Power, Online Information Flows and EU Law: Mind the Gap* (Hart, 2016).”

We could suggest that one change be the creation of a permanent National Parliamentary Committee on Digital Affairs, made up of people with technical knowledge, like the U.S. House and Senate science and technology committees or the commerce committees. Parliamentary standing committees in India already play an important and significant role in reviewing bills. However, for this to work, those committees would need to have some specialised knowledge of data governance, artificial intelligence, and algorithmic accountability. If those standing committees were stronger, it might be less common for people to give too much power to others.

Second, Parliament should also consider requiring sunset clauses for any delegated powers it provides for future technology legislation. The principle of temporality would inherently require periodic renewal, debate, and legislative approval of any system of techno-regulation by the executive on a scheduled basis.³³ This practice does occur relatively frequently in the European Union where all their digital frameworks are debated on a regular basis to ensure their laws reflect the fast-paced technological landscape without having relinquished discretionary authority to the executive office indefinitely.³⁴

Lastly, parliamentary discussions need to be more substantive and readily available to the public.³⁵ The Constituent Assembly involved rigorous debates on the constitutional arrangement, including the separation of powers. Today's parliamentary conversations on digital governance should bear the same level of scrutiny and transparency.³⁶

Executive Accountability through Oversight and Transparency

It is not possible to eliminate executive techno-regulation in light of the pace of technological change; however, it should be subject to strict oversight and transparency obligations. Section 69A of the IT Act, which provides for blocking online content, generally operates in the dark of secrecy.³⁷ There is judicial review available, but infrequently and not without some limitations, because such orders are rarely provided to the public. Because of this dark of

³³ “R. Dixon, *Constitutional Amendment and Political Constitutionalism in the Digital Era*, (2018) 77 Cambridge Law Journal 233.”

³⁴ “B. Ackerman, *The New Separation of Powers*, (2000) 113 Harvard Law Review 633.”

³⁵ “R. Albert, *Separation of Powers and Constitutional Amendment*, (2014) 63 International and Comparative Law Quarterly 1.”

³⁶ “A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).”

³⁷ “J. Balkin, *Constitutionalism in the Algorithmic Society*, (2018) 51 UC Davis Law Review 1149.”

secrecy, both accountability and freedoms under the Constitution are compromised.³⁸

In such a reform model, the United Kingdom's Investigatory Powers Commissioner acts as an independent oversight/enforcement body of executive powers to surveil. India should have an independent Digital Regulation Oversight Commission, which would be statutorily independent, appointed and empowered to review executive orders on surveillance, blocking of text, and algorithmic regulation. An independent body accountable to parliament and subject to judicial review, would ameliorate the power balance between executive, legislative and judiciary branches.³⁹

Transparency is just as vital. There should be a legal requirement for executive agencies to publish annual or bi-annual transparency reports detailing the number of surveillance requests for targeting, number of content blocking orders, and number of algorithmic interventions. There are instructive models of this sort of reporting in the U.S. Freedom of Information Act and the EU's⁴⁰ stated transparency obligations under the DSA. Without transparency, any judicial review or parliamentary oversight is meaningless.⁴¹

Judicial Calibration and Doctrinal Restraint

The judiciary must continue to be the guardian of fundamental rights in the digital governance context. However, it must calibrate its interventions so as not to serve as the policymaker. Proportionality — as in Puttaswamy and Anuradha Bhasin — can be a usable doctrine, but the courts must deploy it with an understanding of institutional competence.⁴²

One approach is to establish a strong procedural constitutionalism for algorithmic governance.⁴³ Courts should focus on whether executive agencies and platforms have complied with processes of transparency, consultation, and review required by legislation, rather than

³⁸ “U. Baxi, *Judicial Activism in India: A Critique of the Separation of Powers Doctrine*, (1980) 22 *Journal of the Indian Law Institute* 120.”

³⁹ “R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).”

⁴⁰ “M. Rosenfeld, *Separation of Powers and Democratic Accountability: Comparative Constitutional Perspectives*, (2002) 9 *Columbia Journal of European Law* 117.”

⁴¹ “J. Waldron, *The Core of the Case Against Judicial Review*, (2006) 115 *Yale Law Journal* 1346.”

⁴² “J. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019).”

⁴³ “S. Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs, 2019).”

creating substantive policies. This preserves judicial review while respecting the prerogative of the legislature and executive.⁴⁴

Judicial restraint does not mean abdication. Courts must continue to strike down unconstitutional laws, as in *Shreya Singhal*, and require proportionality for limitations on rights. However, the courts should not play the role of the supervisory regulator. The balance is to ensure constitutional standards while resisting non-judicial functions.⁴⁵

Embedding Constitutional Values in Private Digital Governance

Digital platforms that operate in private have regulatory authority similar to state organs. Their algorithmic choices and content moderation choices shape public discourse, while remaining largely free from accountability.⁴⁶ The challenge for India is to develop a hybrid model that will impose statutory obligations on platforms while also reaching into private conduct constitutional norms of responsibility in contexts where private power is performing public functions.⁴⁷

The Digital Services Act of the European Union could serve as a model for India. The Act codifies certain obligations on platforms to safeguard people's rights.⁴⁸ Platform actions would need to respect fundamental rights, provide rights of defence in a transparent process before content is moderated, and provide rights of defence when allowing appeal processes available through algorithmic actions as well as personal data.⁴⁹

The development of horizontal rights in Indian private law has been developed tentatively in the *Kaushal Kishor* case and would need to be carefully cultivated through the common law. A functional perspective could be adopted: in situations where platforms are carrying out tasks, they should be measured against constitutional norms.⁵⁰ However, evidence to support this would need to avoid media panache and distributed connection rights, which are both seen as

⁴⁴ “J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).”

⁴⁵ “A. Stone Sweet & J. Mathews, *Proportionality Balancing and Global Constitutionalism*, (2008) 47 Columbia Journal of Transnational Law 73.”

⁴⁶ “A. Murray, *Information Technology Law: Law and Society* (Oxford University Press, 2019).”

⁴⁷ “N. Suzor, *Lawless: The Secret Rules that Govern Our Digital Lives* (Cambridge University Press, 2019).”

⁴⁸ “D. Pozen, *Constitutional Bad Faith*, (2016) 129 Harvard Law Review 885.”

⁴⁹ “F. Pasquale, *From Transparency to Accountability in Algorithmic Regulation*, (2016) 90 Minnesota Law Review 241.”

⁵⁰ “D. Bilchitz, *Constitutionalism in the Global South and Digital Sovereignty*, (2021) 14(3) Global Constitutionalism 460.”

potentially undermining the public-private distinction. That is the challenge ahead; positioning constitutional power over private digital sovereignty while abstracting away from market freedoms and innovation.⁵¹

Recalibrating the Basic Structure in the Digital Age

The doctrine of basic structure has acted as the fundamental safeguard of essential constitutional components. While it includes the separation of powers doctrine, its application has been solely confined to amendments to the constitution. However, in a digital age, the erosion of separation of powers is not achieved through a constitutional amendment, but rather through the abdication of legislatures to act, the overreach of executives, and the activism of the judiciary.⁵²

This raises the issue of whether courts should extend their basic structure review to activities that damage the balance established by the constitution and its structure.⁵³ For example, when Parliament continually abstains from exercising its law-making authority in any area of governance that legislates digital issues, is that not just as damaging as an amendment that would undermine the separation of powers?⁵⁴ Extending the doctrine in this way is controversial, as it ventures into the realm of judicial supremacy. However, if we deny the courts this power and accept the gradual erosion of our constitutional separation of powers by practice and custom, the alternative may be even more troubling.⁵⁵

Alternatively, we may consider the basic structure doctrine as a holistic interpretive framework for the balance of our institutions. So, for instance, courts cannot repeal laws simply on the grounds that they are contrary to the proper balance of powers between institutions. But courts can interpret laws and guidelines that operate outside the constitutional order to maintain that balance.⁵⁶ As an interpretive use of doctrines of basic structure, this may allow the doctrines to

⁵¹ “S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).”

⁵² “K. Bhuvania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, 2017).”

⁵³ “M. Arun, *Digital Constitutionalism: Platforms, Private Power, and the Public Interest in India*, (2020) 55(4) *Economic & Political Weekly* 42.”

⁵⁴ “R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996).”

⁵⁵ “A. Roy, *Separation of Powers in India’s Parliamentary Committees: Weaknesses and Reform Proposals*, (2017) 52(21) *Economic & Political Weekly* 32.”

⁵⁶ “A. Thiruvengadam, *Constitutionalism and the Politics of Governance in India* (Hart Publishing, 2017).”

be sensitive to ongoing issues while still acting within the bounds of the legitimacy of the doctrine of basic structure.⁵⁷

Toward a Digital Constitutionalism

In the end, the separation of powers in the digital age should be seen as part of a bigger project of digital constitutionalism. The Constitution must be interpreted to limit not only state powers but also private digital sovereignties and transnational agreements. This necessitates a flexible doctrine of accountability, transparency, and rights protection that transcends institutional boundaries.⁵⁸

In India, this means making sure that Parliament has the most power over how digital spaces are run, limiting the executive's freedom of choice through oversight, adjusting judicial remedies, and putting rules on private platforms. It also means taking transnational frameworks seriously and making sure that executive diplomacy about sharing data and digital trade is checked by parliament and the courts. Only then will we be able to keep the separation of powers alive in the twenty-first century.⁵⁹

Conclusion & Suggestions

The doctrine of separation of powers has never been a fixed idea; instead, it has always been a changing idea meant to keep balance, responsibility, and freedom in constitutional government. In the digital age, it has become more important, not less important. The growth of executive techno-regulation, legislative inaction, judicial overreach, and the semi-sovereign power of private digital entities all present serious threats to constitutionalism. This study has followed the doctrine's intellectual and institutional path, from its classical beginnings to its inclusion in Indian constitutional law and its current adjustment to digital governance. The formal architecture of separation remains intact, yet the substantive balance among institutions has been compromised. Parliamentary power has slowly given way to executive power; the executive has gained a lot of discretionary power through unclear regulatory processes; the judiciary has sometimes crossed into policy areas, even though it usually protects rights; and private companies now have regulatory power with little

⁵⁷ “E. Fisher, *Executive Accountability in the Information State*, (2010) 33(2) *Journal of Law and Society* 145.”

⁵⁸ “K. Jayaswal, *Transparency and Accountability in India’s Digital Governance: A Constitutional Appraisal*, (2022) 64 *Journal of the Indian Law Institute* 213.”

⁵⁹ “A. Daly, *Private Power and Public Responsibility on the Internet*, (2010) 18 *International Journal of Law and Information Technology* 347.”

accountability.⁶⁰

The basic structure doctrine, which includes separation of powers, should be a living constitutional safeguard that helps judges interpret the law in a way that keeps the balance of power between institutions without giving judges too much power. To sum up, the future of separation of powers in the digital age depends on seeing constitutionalism as a flexible system that limits the power of both state and non-state groups. Montesquieu's observation that liberty diminishes in the absence of constrained power must now be applicable to the digital domain. The doctrine, redefined as a constitutional ethic rather than merely an institutional mechanism, remains essential for safeguarding liberty, accountability, and democratic legitimacy in the twenty-first century.

⁶⁰ “M. Howse & R. Teitel, *Global Constitutionalism and Digital Rights*, (2010) 47 *Stanford Journal of International Law* 121.”

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