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Comparative Study of Separation of Power in India, Pakistan, and South Africa and its Impact on Judicial Independence

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Abstract: ***In this paper the separation of powers and its impact on judicial impact is discussed in the country of India, Pakistan, and South Africa. The goal of this research paper is to examine the division of powers between the different organs of the government which is necessary for the good governance. Various aspects are focused in this paper including political, historical, and legal aspects. The paper includes the historical development in all the three countries and the conditions which affect doctrine in these countries. This paper includes the provisions of constitution both written and unwritten and judicial precedents that establishes the said doctrine. This paper also discusses that how the doctrine of separation of power affects the judicial independence in all the three countries.***

Keywords: Separation of Power, Democracy, Constitution, Governance, Judicial Independence.

I. INTRODUCTION AND HISTORICAL BACKGROUND OF THE CONCEPT OF SEPARATION OF POWER

The concept of separation of power can be seen in the work of Aristotle in 4th BC. In his work he divided the working of government i.e., General Assembly, Public officials & Judiciary.

The term Separation of Powers belong to French philosopher Baron de Montesquieu. He divided the political power into 3 organs i.e., an executive, a legislature, and a judiciary. His model of separation of power was inspired from the British constitutional system, where the political power is divided among the monarch, parliament, and the courts of law. Writers after him said that this inspiration was misleading because the legislature and the executive in Britain are closely related to each other and with further links to judiciary (though combined with judicial independence), which means there is a system of checks and balance and there is no rigid division between these organs.

The sense in which the Modern exponent of this doctrine asserted it is *" When the Legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."*[3]

From this it can be seen that this doctrine originally focuses on the personal Separation of Powers.

In Federalist 47, James Madison has explained the statement *" There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."*[4] As the concentration of all powers- Legislative, Executive and judiciary- in the single hands, is the perfect definition of tyranny.

We can say that the Concept of Separation of Powers basically means "to limit the jurisdiction" i.e. imposing limitation on the public authorities who have to exercise their jurisdiction within the defined boundaries/limits.

It consist of basically four principles i.e., Exclusivity Principle, Functional Principle, Checks and balance principle, Mutuality Principle.

II. SEPARATION OF POWER IN INDIA

A. Based on

The concept of Separation of Power in India is inspired from the theories of Montesquieu who was inspired from the English System of Governance and mentioned his theory in 1748 in the book named The Spirit of Laws.

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B. Constitutional Provisions and Judicial Precedents

The executive power of the union and the state are exercised by the President and the Governor, respectively by Article 53(1) and 154(1) as given under The Constitution of India but there is no provision as regards the vesting of legislative and the judicial power within a particular organ. This shows that the separation of power in India is not in rigid form like the Australian Constitution. For example, there is no bar against giving the judicial powers of state in tribunals other than the court in strict form. Article 136(1) or Article 227(1) mentions both courts and tribunals which shows that the judicial power of the state may be exercised by both the courts and the tribunals, however both the authorities are differ with each other in the nature of matter referred to them, procedure followed by them and the like.[5]

In Re Delhi Laws Act Case[6], the hon'ble Supreme Court of India observed that though our constitution does not give the legislative and the judicial powers to the legislature and the judiciary in expressed words but the majority are in effect which shows the essence of the modern concept of separation of power.

We can draw from here that no organs within the system of governance under The Constitution can interfere with the functions and the powers that are assigned to other organs either expressly or impliedly by the Indian Constitution. On the basis of the same principle no organ can get rid of the essential function which vested in that organ by the constitution of India.

It was observed in this case that though the legislative and the judicial functions of the government are not vested in particular bodies but the Indian Constitution being the written one, the powers and the functions of each must be found in the constitution itself.

For instance, Article 123 and 213 of the Indian Constitution provides that the power to make ordinance during the period when the legislature is not in function.[7]

Article 357 provides for the exercise of legislative power by the President in case of emergency in the state.[8]

From the above-mentioned instances, it can be seen that the constitution intended that the legislative power should be exercised exclusively by the legislature i.e. The parliament at union.

In the words of Kania C.J. *" Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the constitution the duty to make the laws, the duty to exercise its own wisdom judgement and patriotism in making laws is primarily cast on the legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies " executive or judicial , are not intended to discharge legislative function"?*[9]

In the case of Jayantilal Amritalal Shodhan v. F.N. Rana[10] , the hon'ble Supreme Court of India seen that it cannot be said that the legislative functions are exclusively performed by the legislature, the executive functions are solely exercised by the executive organ and the judicial functions are solely exercised by the judiciary. The Constitution of India does not provide for the absolute or rigid distribution of functions between the three organs of the state. The Doctrine of statutory construction and of constitutional trust upon which the SC has relied are also applicable to all written constitutions, subject to certain modifications warranted by the provisions of each constitution.

Except Under Article 51 of Part- IV of The Constitution of India which provides for separation of Judiciary from the Executive, The Constitution does not provide any formal division of powers. The Supreme court noticed that the Indian constitution does not recognise the doctrine of separation of powers.[11]

In **Indira Nehru Gandhi v. Raj Narayan**,[12] it was observed by the then Chief Justice Ray observed that, our constitution talks about the concept of separation in broad sense only.

Prior to this case, In **Kesavananda Bharati v. State of Kerala,**[13] out of 13 judges Justice Beg held that Separation of Power is the fundamental feature of the Indian constitution and it should be included in the theory of basic structure of the constitution, however it was not supported by other judges.

[5] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 286(Satyam Law International, New Delhi, 2nd Edition, 2019).
[6] AIR 1951 SC 332.
[7] Dr. J.N. Pandey, Constitutional Law of India 508 & 606, (Central Law Agency, Prayagraj, 58th Edition, 2021)
[8] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 286(Satyam Law International, New Delhi, 2nd Edition, 2019).
[9] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 287(Satyam Law International, New Delhi, 2nd Edition, 2019).
[10] AIR 1964 SC 648.
[11] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 288(Satyam Law International, New Delhi, 2nd Edition, 2019).
[12] AIR 1975 SC 2299.
[13] AIR 1973 SC 1469.

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In Rai Shaib Jawaya Kapur v. State of Punjab,[14] it was noticed that the Indian Constitution does not recognise the separation of power in absolute rigidity form but the functions of different parts of the govt. have been differentiated.

In one of its order the Maharashtra govt. passed a regulation[15] for the increase of the result of S.S.C. students to curb the menace of students' suicide in the wake of unexpected results, the regulation provides for the "Best of Five" formula as per which the percentage is to be calculated on the basis of the best five subjects in which the students have scored the maximum marks. This regulation was challenged by the parents of the students of C.B.S.E. and the I.C.S.E boards, getting education in Maharashtra in the high court of Bombay on the grounds of violation of Fundamental right under Article 14 i.e. Right to Equality. High Court rejected the formula of the state govt. as a classification between the students of S.S.C. and C.B.S.E. as unreasonable and contrary to the principle of equality, the govt. approached the SC against the order of HC of Bombay and the SC modified the order of HC and directed the state govt. to apply the rules to all the boards. In such kind of cases court must have to exercise a self- imposed limitation. Therefore, the High Court ought to have apply the doctrine of Prospective Overruling which was earlier applied by the Supreme Court in Golaknath v. State of Punjab.[16]

Therefore, by using the doctrine of prospective overruling in the above two cases maintained the balance between judiciary and other organs of the government. It was observed that it can also be maintained by imposing the self-imposed limitation by the judges. In the case of Divisional Manager, Aravali Golf Club v. Chander Hass and Another[17] , The Supreme court warned the high court for its over activism.

When it comes to the applicability of the Doctrine of Separation of Powers under the Constitution of India, then the observation of Bhagwati J. in the case of Minerva mills comes into mind. His observation is as follows *" Under our Constitution we have no rigid separation of powers as in the United State of America, but there is a broad demarcation though, having regard to the complex nature of the governmental function, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that " the concentration of powers in any one organ may," to quote the words of Chandrachud J. (as he then was) in Smt. Indira Gandhi's case, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which are pledged."*[18]

C. Judicial Independence

when we talk about Separation of Powers then it provide insulation to each organ from the unnecessary interference from the other organs. To ensure this isolation w.r.t. judiciary there are Articles 121 and 211 of the Indian Constitution which puts a kind of restriction on the Parliament of India and the legislatures of the states respectively that no discussion shall take part in the parliament of India and the legislatures of states with respect to the conduct of the Judges of the Supreme Court and the High Court in discharge of their duties.

Art. 121. Restriction on Discussion in Parliament:

"No discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties expect upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided."

Art. 211. Restriction on Discussion in the Legislature:

"No discussion shall take place in the Legislature of a Stale with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties."

Also, Article 50 which provides,

Art.50. Separation of judiciary from executive:

"The State shall take steps to separate the judiciary from the executive in the public services of the State."

From the above-mentioned articles, we can infer that Although there is a separation of powers but still constitution of India provides for the Independence of Judiciary. However, there is a system of checks and balances and the independence is not absolute and arbitrary.[19]

[14] AIR 1955 SC 123.
[15] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 289(Satyam Law International, New Delhi, 2nd Edition, 2019).
[16] 2008 (1) SCC 683
[17] 2008 (1) SCC 683.
[18] Prof.(Dr.) Nuzhat Parveen Khan, Comparative Constitutional Law 292(Satyam Law International, New Delhi, 2nd Edition, 2019).
[19] Dr. Justice B.S. Chauhan, "The legislative Aspect of Judiciary: Judicial Activism and Judicial Restraint," Lucknow, https://www.tnsja.tn.gov.in/article/BS%20Chauhan%20Speech-%20Lucknow.pdf

D. Recent Case Laws

Roger Matthew v. South Indian Bank Limited,[20] the court observed that the lack of involvement of judicial authority in the appointment process of the presiding officers of the tribunals is the violation of the doctrine of Separation of Powers. It is considered as the encroachment into the ambit of the Judiciary.

Ashwini Kumar v. Union of India,[21] In this case the petitioner requested the court for issuance of writ of mandamus under Article 32 to the parliament to raise the minimum marriage age for the women to 21 years to bring it at par with the minimum age of the marriage for men. The three judges bench headed by the Hon'ble Chief Justice of India Dr. D.Y. Chandrachud held that SC cannot issue such writ to the parliament as this issue was within the jurisdiction of the legislature. This established the doctrine of Separation of Power and the Judiciary cannot encroach into the limits of Legislature. The Supreme court mentioned that the classical theory of separation of power given by Montesquieu, in present , the bedrock of the American setup is considered to be an inspiration for the Indian Parliamentary Democracy. The executive and the legislative are linked together with respect to the powers and the functions and sometimes there is an overlapping of the persons performing their functions in multiple branches of the governance. The court held that all the institutions of the government have their defined boundaries or limitation under the Constitution of India to prevent the encroachment on any organ into the ambit of another organ. Supriyo @ Supriya Chakraborty & Anr. V. Union of India, [22] This case was related to the issue of recognition of same sex marriages. The contention put by party is that the Special Marriage Act 1954 was violative of Articles 14,15,19,21 and 25 of the Indian Constitution as it does not give provision with respect to the marriage of the same sex or LGBTQ couples. Further they made the contentions that the terms "husband" and "wife" should be replaced by the gender-neutral terms like the parties or the spouse.[23]

The five judges bench headed by the Hon'ble Chief Justice of India Dr. D.Y. Chandrachud held that the judiciary does not have the power to either strike down the Constitutional validity of the special marriage act 1954 or read the words into the act due to its institutional limitations. The court further stated that in exercise of the power the judicial review the court must put care on matter which impinge on policy as such matters falls within the ambit of the legislative domain.

III. SEPARATION OF POWER IN PAKISTAN

A. Based on

The theory of separation of Power in Pakistan is also inspired from the theory of Montesquieu in the 18th Century[24]. The story of establishment of democracy in Pakistan is not very alluring and it was full of instabilities. There are certain loopholes that are created by the elected politicians that provided the opportunity to different institutions to intervene with the political System and thereby dismantle the democracy.[25] As per some influential scholars of the Pakistan the 1973 constitution of Pakistan clearly mention the limitation for the three main branches of the government defining the powers of the Executive, judiciary, and legislature. Sultana states that *"the smooth and uninterrupted working of the state machinery depends on the three main branches i.e., Executive, the legislature, and the judiciary where each institution works responsibly in their respective Area, along with maintaining a system of checks and balances. However unfortunately the Pakistani judiciary and executive are empowered institution, which end up compromising the very essence of democracy itself."*[26]

B. An Analysis of the Constitution of Pakistan

Democracy is a form of government where the supreme power is vested in the people of the country and is exercised by the elected representative of that country under a free electoral system. Since the formation of the Pakistan , three constitutions have been promulgated in the country Pakistan: The constitution of 1956, The Constitution of 1962, The Constitution of 1973.

Pakistan has a parliamentary form of democratic set-up under both the constitution of 1956 and 1973 but Public is not satisfied with this system of governance and it is quite evident. Undemocratic behaviour and norms does not let the democracy to flourish in Pakistan.

[20] (2020) 6 SCC 1.
[21] Air 2019 SC 1002.
[22] 2023 INSC 920.
[23] Supriyo @ Supriya Chakraborty & Anr. V. Union of India supra note 20 Available at https://www.scobserver.in/cases/plea-for-marriage-equality/ (lasted visited on 3rdNovember 2024).
[24] Montesquieu and the Separation of Powers. Retrieved from Online Library of Liberty: https://oll.libertyfund.org/pages/montesquieu-and-the-separation-of-powers
[25] Interview with Khalid, Pakistan, 2012.
[26] Statement by Sultana, Pakistan,2012.

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As per the Article 175(3) of the constitution of Pakistan , the judiciary and the administration should be separated from each other. No authority shall intervene with the functioning of the other except in accordance with the law.[27]

The legislative and the executive powers are mentioned under article 7 of the Pakistan's Constitution of 1973. Article 7[28] states that *"unless the context otherwise requires, "the State" means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess."*

Whereas the judicial powers are explained in part VII " The Judicature" of the constitution of Pakistan, 1973. The interpretation is that the executive institutions cannot exercise the judicial powers, just as the judiciary cannot use the administrative powers.[29] As per Dr. Hasnain Javed, a well-read individual, indicated that the constitution of Pakistan have different composition but still the separation of power prevails in Pakistan.[30] He pointed out towards different factors which affect the separation of powers that is why desired result does not come:

"We, as a nation, follow in the footsteps of the Western democracy where majority is authority and under this system the constitution has been amalgamated and fused differently; at times the majority influences the separation of powers, at others the judiciary employs excessive powers and sometimes it is the parliament that goes the extra mile. There are also instances when the people use their freedom of expression aggressively and agitatedly to get favourable decisions."[31]

An adept Bureaucrat, Tariq Mahmood expressed his views about the separation of power " *we do have three distinct, yet contentiously spelled out, branches in our system; the Legislative, which is supposed to formulate laws or rules; an administration which implements these laws; and the judiciary which ensures that the laws are framed in accordance with the constitution. The interpretation of these laws is also a power vested in the judiciary. In this way, the principle of separation of powers exist in both our constitution as well as in the political practices."*[32]

A Renowned politician and a well reputed barrister , argues that the constitution of Pakistan is a "hybrid one" and there is a difference between the theoretical and practical approach. In Pakistan, the judiciary exercise its power beyond their defined jurisdiction and a extremely superior status has been enjoyed by the judiciary.[33] They are that much superior in nature that a judge can only be removed by the order of its peer or by the Supreme judicial council which is made up of judges and we can assume the superiority that till date no judge has been actually removed , only one or two have been forced to resign from their position. From this we can extract that the judiciary become independent to the extent that they do not exercise their independence under the constitution but of the constitution.[34]

Nasira Javed J. , an Hon'ble retired judge, elucidate positively the role of judiciary as the protector of the fundamental rights. In her views she considers judiciary as the least dangerous branch of the governance. Like Mr. T. Mahmood said[35], she also admitted that the idea of Separation of Power is not presented in the Pakistani Constitution, as the various institutions of the government perform their allocated duties. Judiciary has a duty to redress the problems of the public, if the legislature made any law which is against the public interest, then people can go to judiciary , along with the issues of mutual dispute. According to her judiciary is least dangerous because it does not put obligation neither on any branch of the government nor the public.[36]

C. Independence of Judiciary

When we look at all the three organs of the governance, we come to see that judiciary is the only non- political organ. The judicial branch in Pakistan is constitutionally more autonomous and its primary role is to adjudicate.

For a democratic system it is very important that the judiciary must be independent and autonomous. The judiciary has to deal with the disputes between the individuals, the provinces, and the various other institutions so it must be free from the influences and other biasness.

[27] The Constitution of Pakistan, 2024, art. 175(3).
[28] The Constitution of Pakistan, 1973, Part II, art.7.
[29] Bellamy, 2005.
[30] Saima Bazmi, "Separation of Powers: Prerequisite for a stable democracy" 4 Pakistan Journal of Social Sciences 878 (2021).
[31] Personal interview with Dr. H. Javed ,Lahore, December 3, 2020.
[32] Personal interview with T. Mahmood, Lahore October 26,2020.
[33] Saima Bazmi, "Separation of Powers: Prerequisite for a stable democracy" 4 Pakistan Journal of Social Sciences 879 (2021).
[34] Farooq, 2016.
[35] Supra note 24 at 878.
[36] Supra note 25, Para 3.

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As per Mian Imran Masood , an eminent politician and former education minister of Pakistan said on the independence or we can say on the superiority of the judicial branch among the other branches of the institutions that the members of the parliament can not discuss the judges' conduct in any house of the parliament because of certain rules which do not allow the members of house to discuss it. This limitation is imposed on the idea that judiciary is a sacrosanct body.[37]

In an Interview a statement was made by T. Mahmood as *" Constitutionally speaking, the judiciary has the power to oversee. If there exist any administrative issues even when they falls under the domain of judiciary to oversee it i.e. to look into it and correct or rectify it. For example, the tribunals that take place, they are basically a corrective mechanism. Thus, this particular role of oversight belongs to Judiciary and, hence, it keeps in check how the other two organs of the government are performing."*[38]

Hassnain Javed admitted that *"the Judiciary commands a higher position amongst the institutions; he also pointed out that it is actually a weak democracy that exists in Pakistan and that is the actual reason of the Judiciary's supremacy. The prime example of this is the case of Imran Khan."*[39]

The primary duty of the judicial institution is to ensure the protection of fundamental rights of the people. *"The power of judicial review is also related to the fundamental rights of the people because the constitution gives the utmost importance to the fundamental rights."*[40]

D. Recent Cases

ZAB v. State,[41] recently on 6th March 2024, The SC reassessed its judgement in ZAB v. State, noticing that the Former Prime Minister had not received a fair trial. This reflected the courts pro activeness in 1972 in the Yahya khan period where the court has undone its Dosso judgement in Asma Jilani vs Govt. of Punjab. Imran Ahmed Khan Niazi vs Muhammad Nawaz Sharif or Nawaz Sharif's Ineligibility case,[42] (Also known as Panama Papers Case) recently in February 2024 the Supreme Court undid the lifetime ineligibility of Nawaz Sharif, which read down the older strict interpretation of the terms "Sadiq" and "ameen". The Pakistani media gave this head of "belated correction", this verdict again suited the Pakistan Army (virulently anti- Imran Khan by late 2023). This decision by the apex court of Pakistan served as juridical survival by correcting its older judgement which is considered as bad in law, its 2024 order pandered to institutional survival by placating the establishment's need.[43]

Other examples:

- Memo Gate Scandal,[44] the memo gate scandal of 2011 is the example of judicial overreach.
- When the chief justice Chaudhary was restored in Pakistan in 2009, the judiciary started functioning independently, this is considered by some theorist as the beginning of separation of power.[45]

IV. SEPARATION OF POWER IN SOUTH AFRICA

Basis: The constitution of the Republic of South Africa, 1996 provides for a system of governance in which there is a separation of power which is exercised by different branches of the state. The doctrine is generally based on the several held principles under which the government is divided into three institutions i.e., Legislative, Executive and judiciary with the conception that each branch has their unique function to perform and that function is identifiable to that particular branch only and the person of one branch should be limited to that one branch only , this is to ensure that one person should not serve in more than one institution.[46]

In the earlier stages, the constitution provides that the legislative authority of the Republic, at the national level is vested in Parliament; at the provincial level is vested in the provincial legislature; and at the local level of government vested in the municipal

[37] Saima Bazmi, "Separation of Powers: Prerequisite for a stable democracy" 4 Pakistan Journal of Social Sciences 881 (2021).
[38] Personal interview with Tariq Mahmood, October 26, 2020.
[39] Supra note 30 at 882.
[40] Haider, 2018.
[41] ZAB v. State, Available at https://www.orfonline.org/expert-speak/pakistans-judiciary-as-a-compliant-arbiter-of-power#:~:text=As%20recently%20as%20the%206,evidenced%20by%20the%20following%20cases. (lasted visited 3rd November 2024)
[42] Bashir Ali Abbas, Pakistan's Judiciary as a Compliant arbiter of Power, Published on 6 April 2024,Available at https://www.orfonline.org/expert-speak/pakistans-judiciary-as-a-compliant-arbiter-of-power#:~:text=As%20recently%20as%20the%206,evidenced%20by%20the%20following%20cases (last visited 3rd November 2024).
[43] PLD 2017 SC 692.
[44] Lubna Ghulam Sarwar, "Article 184(3) of Constitution of Pakistan: Remedy or Judicial Activism?" 21 migration letters 577.
[45] Khan, "An Evaluation of Separation of Powers: A case study of Pakistan (2007-2013)" 31 South Asian Studies, Lahore, 257 (2016).
[46] Bradley and Morrison "Historical Gloss and the Separation of Powers" Harvard Law Review 411 (2012).

council.[47] The executive authority of the Republic at the national level vested in the President;[48] at the provincial level the executive authority is vested in the premier of the province;[49] and at the local level is vested in the Municipal Council[50]. The judicial authority of the nation is vested in the courts.[51]

The power to pass the legislation is vested in the legislative arm of the state. In terms of Section 44 of the Constitution , *"only the legislative arm of the state is empowered to pass legislation. No organ of State except the legislative arm is given the power to pass legislation."*

The power to amend the Constitution is vested in the National Assembly at the national level, the national assembly has the power to pass legislation ad to assign any of its legislative powers, except the power of amending the constitution.

The primary duty of the executive is to implement the passed legislations and the judiciary has the duty to interpret and apply the provisions of law.

Each organ have certain defined boundaries and every organ is required to perform their function within their boundaries assigned by the Constitution. Court should not interrupt in the function of other organs unless they cross their boundaries or limitations that is drawn by the Constitution.

With respect to the application of this doctrine there is constant tussle between the branches of the governance due to different understanding of this doctrine[52]. Sometimes , when there is any kind of political issue between two parties the aggrieved party reaches the doors of the court on the reasoning of check and balance principles while the other party argues it is against the principles of Separation of Power.[53]

It is the constitution which plays significant role in empowering different branches with their respective functions and played an essential role for the good governance[54]. The judiciary is different and superior to other organs as it is the guardian and custodian of the Constitution. The judiciary has the power to declare the actions of the legislature and the executive to be invalid if they exercise their powers outside the ambit defined by the constitution.

In the case of Economic Freedom Fighters v. Speaker of the National Assembly[55] the judgement of the majority is in the violation of the doctrine of Separation of Power. Mogoeng CJ said on the majority judgement *"a textbook case of judicial overreach – a Constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament."*[56]

E. Judicial Independence and Self Restraint in Discharging Judicial Powers: Analysis of Case Laws:

The principle of Separation of Power also embodies the concept of Judicial independence, the idea behind this is that the judicial function of the governance should be exercised only by the judiciary and it should not be interfered by the other branches. Independence also means that the judiciary should adjudicate matters impartially and without biasness.[57]

In exercising Judicial powers, the court must function in accordance with their assigned task under the constitution and must give due respect to other branches. There are salient cases in which it was held that the must exercise self-restraint while adjudicating matters. In the case of President of the Republic of South Africa v. South African Rugby Football Union,[58] the Constitutional court held that it is against the interest of justice that the High Court ordered the President of the Republic of South Africa to appear in the court and give oral evidence , it is against the dignity and the status of the President and the dignity and the status of the president must be protected. The court gave the reasoning behind this that it must be protected so that the executive perform efficiently and effectively. Therefore, the Court held that judiciary should exercise self-restraint in such cases and being sensitive to the status and dignity of the head of the state and integrity of the executive branch of the government. This case established that each organ should give respect to each other but that doesn't mean that they should not discharge their Constitutional Responsibilities. In this case the Apex Court disagreed with the High Court decision to call the president in person for the purpose of oral evidence.[59]

[47] The Constitution of the Republic of South Africa, 1966, Section 43.
[48] The Constitution of the Republic of South Africa, 1966, Section 85.
[49] The Constitution of the Republic of South Africa, 1966, Section 125.
[50] The Constitution of the Republic of South Africa, 1966, Section 151(2).
[51] The Constitution of the Republic of South Africa, 1966, Section 165.
[52] Bradley and Siegel " Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers" Georgia Law Journal 255 (2016).
[53] Garry, "The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers" Alabama Law Review 689 (2005).
[54] Robinson " Expanding Judiciaries: India and the Rise of the Good Governance Court" Washington University Global Studies Law Review 3-8 (2009).
[55] (2018) 2 CC 571.
[56] Economic Freedom Fighters v Speaker of the National Assemble, supra note 44.
[57] Currie and De Waal, "The Bill of Rights Handbook" 34 (2013).
[58] (2000) 1 CC 1.
[59] Supra note 47 at 550.

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In the case of Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism,[60] the CC denied to enter into the ambit of the executive branch. In this case the applicant was not satisfied from the fishing quota allocation of the 2001 process for the fishing season of 2002 to 2005 and it asked for review of the same. The review was done by the High Court of Cape but after appeal the judgement was overturned. The court put emphasis on the very idea that one arm of the governance should respect the other organ of the government.

Although the judiciary is independent but still while dealing with the matters in which the case involves exercise of power by other branch , it should be dealt with extra care.

In the case of Soobramoney v. Minister of Health, KwaZulu Natal,[61] the court refused to order the ministry of health to provide for the dialysis treatment of the applicant. The application was dismissed. Then, the appellant appealed to the apex court. There also the appeal was dismissed. The Constitutional Court held that they did not desire to enter the ambit of the other branch of the government i.e., the executive and order the respective ministry to provide the dialysis treatment or other medical facility which would go beyond the resources of the State. The CC held that the judiciary will not interfere in the decisions taken by political organs and medical authorities in good faith.

F. Recent Cases

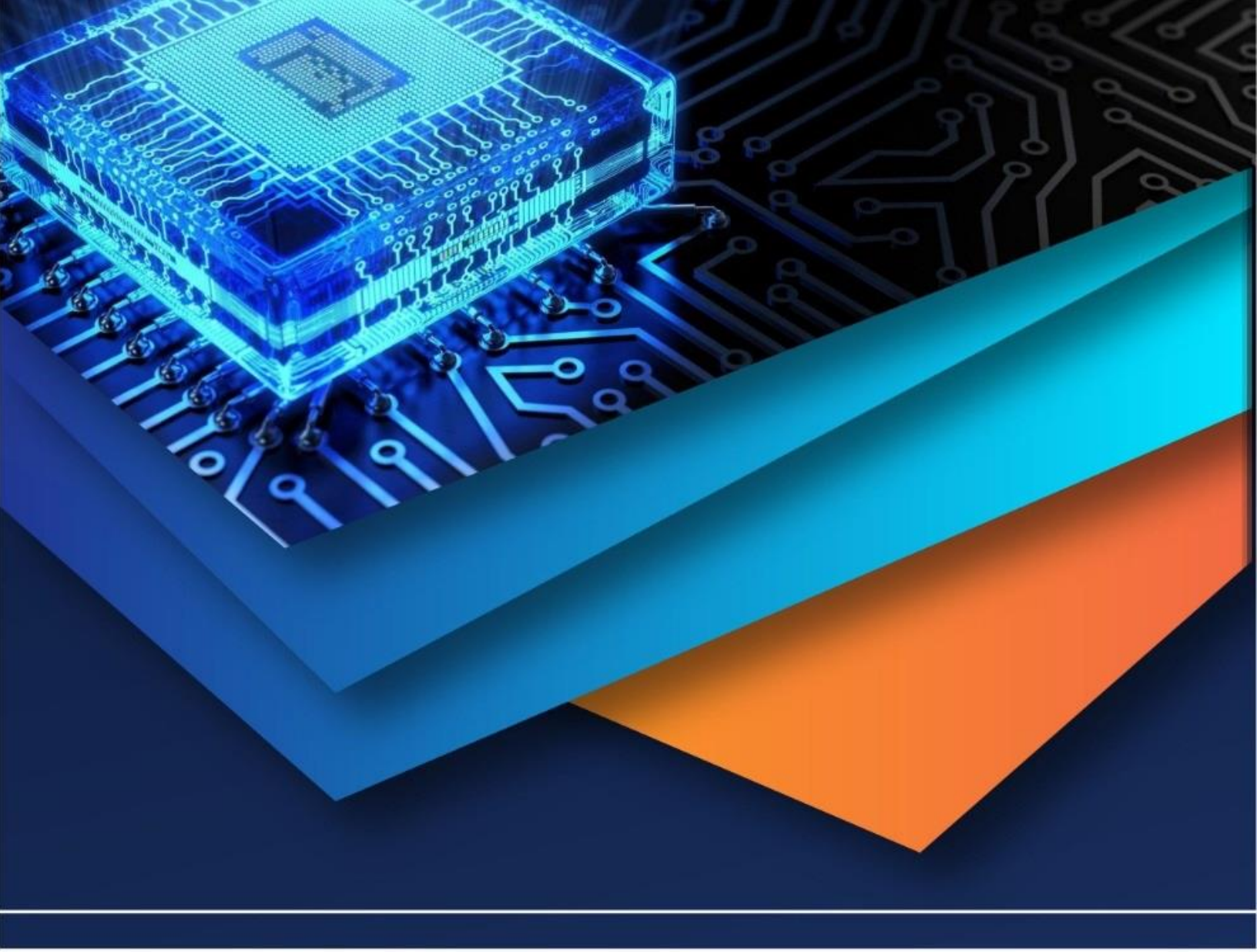
National Treasury v Opposition to Urban Trolling Alliance and Anr.[62] In this case the CC refused the grant of interim relief on th ground of Separation of Power and the same reasoning was given in the case of The and Anr. V. President of the Republic of South Africa and others also known as Marikana 1 case).[63]

V. CONCLUSION

The theory that is in debate must not be understood in absolute way but should be understood for the actual purpose. The only way to get the full benefit of it is to take it in broader view especially in this era of privatization and globalisation. Considering it as a medium of categorizing is too rigorous and it should not be done instead it should be used in good spirit of unity and collective development. This doctrine make good governance possible and restrict the misuse of power by the government. For the effective and efficient functioning of the government it is necessary to have the doctrine of Separation of power but that should not be applied in strict sense there should be a system of checks and balance providing overall development of the nation for the greater good of the people.

[60] (2004) 4 CC 490.
[61] (1998) 1 CC 765.
[62] (2012) 6 CC 223.
[63] Chuks Okpaluba," Between Separation of Power and justiciability: Rationalising the Constitutional Court's judgement in the Gauteng E-tolling litigation in South Africa" 21 Law Democracy, Cape Town (2017).

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