

1. Introduction

The separation of powers is an **organizational structure in which responsibilities, authorities, and powers are divided between groups (branches of government) rather than being centrally held**. The doctrine is rooted in a political philosophy that too much power concentrated in the hands of few, without adequate checks and balances, increases the likelihood of misuse of that power.

2. Features of the Doctrine of Separation of Power

The basic elements of separation of powers are:

- **Division of state power among various organs:** The overall authority of the state/ government is divided into **three structural organs**- Legislative, Executive, and Judiciary. All branches of the government have their own tasks.
- **Independence to exercise the power:** By putting functional boundaries on each organ, it prevents one organ from performing the functions of the other.
 - **Separation of personnel:** To enjoy functional independence, each organ of state should have its own personnel. No person should be a member of more than one organ.
 - **Limitation of appointing powers:** One organ of the state should not appoint or elect members for the other.
- **Check and Balance Principle:** Checks are made on each organ by other organs to ensure that the functions and duties performed by each organ are within the constitutional bounds.
- **Mutuality Principle:** It aims at creating concord, not discord, cooperation not confrontation, engagement not estrangement among various organs.

3. Models of Separation of Power

There are 2 models of Separation of Power (SoP) commonly followed:

1. **Rigid model:-** This model follows the **Montesquieu dictum**. A rigid SoP provides that the power entrusted with one organ of state should not be exercised by any other organ, as far as possible. **For example-** USA, Australia's model are regarded as rigid models.
2. **Loose model:-** A looser separation (or the Westminster model of SoP) is based on the principle of supremacy of Parliament. **For example-** UK follows the loose SoP where the British cabinet acts as a hyphen which joins the legislative part of the state to the executive part.

India has a different model of SoP which we shall deal in detail now.

4. Separation of Power in India

The Indian constitution provides a **third model of SoP** due to its unique constitutional set-up.

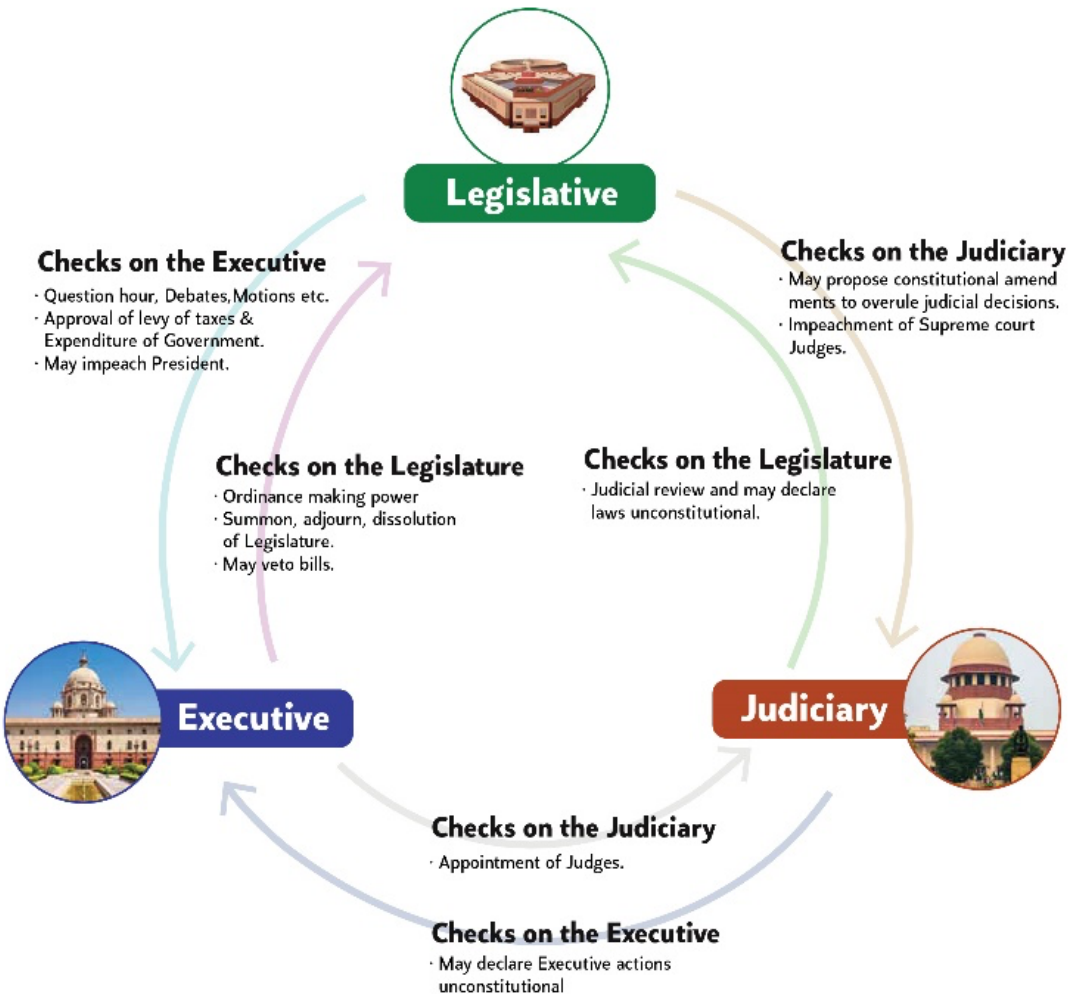
The State itself is divided into **three units**—Union, State and local. Except at the local level, the powers of these federal units are distributed into **three organs** viz. executive, legislature and judiciary.

Such model of separation of power in India ensures **broad division** of power into three organs of state at different levels (Centre and state) in such a way that instead of a domain being exclusively with a specific branch (which may give rise to inconsistency), it rather makes it possible to have a **balance of this power** and makes the government more democratic and effective.

The important aspects of Indian model of separation of power can be summarised as follows:

- Though the constitution **does not explicitly define** the separation of powers, it recognizes three organs of the state viz. the executive, legislative and judicial bodies. Broadly, the separation is as follows:
 - The **Legislature** frames the laws.

- The **Executive** implements the laws.
- The **Judiciary** monitors the constitutionality and resolves the dispute.
- Unlike the constitution of the USA (*which expressly vests powers to three organs of state under Articles I, II, III*), the constitution of India **doesn't expressly vest the different kinds of power in the different organs** of the state, except the executive powers of the President and Governors.
- There is **no exclusivity in the nature of functions** to be performed by various organs. **There is a functional overlap** between the executive, legislative and judicial wings of the Government.



In the '**Re Delhi Laws Act case (1951)**', the Supreme Court observed that except where the Constitution has vested power in a body, the principle that one organ should not perform functions which essentially belong to others is followed in India. Later, in **Kesavananda Bharati case**, the doctrine of "separation of powers" was acknowledged as an integral part of the **basic features** of our Constitution.

Let's look at the separation of power in India through study of **functional overlaps** and **checks and balances** on various organs of state.

4.1. Functional Overlap

In India, the three organs of state enjoy their functional domain with some overlap. Let's look at such functional overlaps.

1. Functional overlap between Legislature and Judiciary:

Student Notes:

Overlap with respect to legislative powers	Overlap with respect to judicial powers
Judiciary exercises certain legislative functions in following manners: - Through instruments like judicial review and PIL, judiciary has expanded the ambit of fundamental rights, which is a legislative function. For example, Right to clean environment has been incorporated into Right to life (Article 21) recently. - The 'due process of law' concept introduced in Articles 14 and 21 has granted the judiciary vast powers to invalidate arbitrary or unreasonable part of legislations. - In the absence of legislation, courts have occasionally issued binding directives under Article 142 until appropriate legislation is enacted. For example, Supreme Court issued Vishaka guidelines regarding sexual harassment at workplace.	The legislature besides exercising law-making powers exercises judicial powers in following cases: - Impeachment of the President. - Removal of judges. - Breach of its privilege and the contempt of legislatures. - The presiding officer of the House while discharging functions under the Tenth schedule of the constitution acts as a tribunal. Jan Vishwas Act 2022 replaces criminal imprisonment with monetary penalties and transfers the authority to impose penalties for offenses from the judiciary to the bureaucracy.

2. Functional overlap between Executive and Legislature:

Overlap with respect to legislative powers	Overlap with respect to executive powers
- Bills originate with the executive and since the executive commands the majority in the legislature, it follows that executive predominates in the legislative process. Additionally, Article 245 doesn't provide or prohibit legislation by the executive. - Executive orders under articles 73 (union) and 162 (state) have an equal efficacy as an act of parliament or state legislature respectively. Executive legislation consequently covers a broad spectrum and the executive exercises such power when there is no legislation covering the field or as a delegate of the legislative bodies. - Additionally, article 123 and 213 respectively provides power to union and state executive to promulgate ordinances, when the legislature is not in session and is satisfied that circumstances exist that necessitate immediate action.	The legislature exercises certain limited functions of executive nature in following cases: MPLADS allocates five crore rupees to each MP per year, for sanctioning development activities in their constituencies. - Legislature can approve or disapprove execution of national/State development strategies. Example, Parliament and various state legislatures have approved financial allocation for execution of Smart Cities Mission.

3. Functional overlap between Executive and Judiciary:

Overlap with respect to judicial powers	Overlap with respect to executive powers
The executive exercises judicial powers under following provisions: - The President (Head of union executive) decides on whether an MP has become disqualified. - The head of executive has the right to grant pardon or to modify the punishment of a	The Supreme Court under Article 142 may pass a decree or order as is necessary for doing complete justice. Such orders may interfere in

convicted person on advice of his/her council of ministers. • The executive has power to hold an inquiry into charges against any person holding a civil post under the Union or the State and to award punishment (Article 311).	functional domain of executive. • The Higher judiciary can issue writs, orders or directions against the executive action.
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Thus, in **Indira Nehru Gandhi v. Raj Narain, 1975**, the Supreme Court of India observed that “*in the Indian Constitution, there is separation of powers in a broad sense only and a rigid separation of powers does not apply to India.*”

4.2. Mutual Checks on Various Organs of Government in India

There is a robust system of checks and balances to ensure the healthy exercise of separation of power.

1. Judiciary control of legislature:

‘Control’ by the judiciary of the other organs follows from the existence of a written constitution and its power of judicial review. The judiciary has provided sufficient checks on legislative actions through its various judgements.

- In **Kihoto Hollohan Vs Zachillhu**, the Supreme Court held that the finality of decision of the presiding officer regarding disqualification due to defection doesn’t abrogate the judicial review of the decision under A 136, 226, 227 of the constitution.
- Judicially developed constitutional concepts such as **Basic structure doctrine** (in **Kesavananda Bharti case**), **constitutional morality** (in **Navtej Singh Johar case**), and ‘**due process of law**’ have circumscribed legislative powers. In **P Kannadasan V State of Tamil Nadu**, it was held, “the Constitution has invested the Constitutional Courts with the power to invalidate laws made by Parliament and the state legislatures transgressing Constitutional limitations.”
- In **Lily Thomas 2013**, Supreme Court held that disqualification of members of legislature (under Articles 102 and 191) would take effect immediately upon their conviction.

2. Judiciary control of executive:

- The Supreme court has often issued directions for executive and at times set up committees to monitor and oversee the implementation of its directions to executive. For example, in **Ram Jethmalani Vs Uol 2011**, court formed a committee to investigate the impact of **Pegasus** on citizens’ right to privacy.
- Courts have often placed a check on arbitrary executive actions. For example, in **Rameshwar Prasad case (2006)**, the Supreme Court held that proclamation of President rule was subject to judicial review and relevant material must exist to justify the issue of Proclamation.
- The **collegium system for judicial appointments** maintains judicial independence by limiting executive influence on selection of judges.

3. Legislature control on executive:

Legislative organ exercises control and check over executive through following instruments:

- **Question hours, debates, motions** and parliamentary committees to exercise control over policies and budgets.
- Parliament is responsible for **scrutinizing the finances of the Executive** by: (i) approving the levy of taxes and expenditure of the government, and (ii) examining if the approved expenditure has been spent properly.
- The executive is accountable to Parliament and can be dismissed by a **vote of no confidence**.

4. Legislature control on judiciary:

- 42nd Constitutional Amendment Act 1976 introduced **Article 323A and 323B** which authorize parliament and state legislatures to create **tribunals** for adjudication of disputes on various subjects **while excluding the jurisdiction of courts** and power of judicial review.
- The power of **impeachment of judges** lies with the Parliament.

5. Executive control on Judiciary:

- The President of India decides on **who is to be appointed as a judge** of Supreme Court or High Court.
- Executive also controls the **appointment and service conditions** of the District judiciary.
- Executive has the power to **prosecute judges** for offences under the Prevention of Corruption Act (**K Veeraswami case 1991**).

6. Executive control on legislature:

- President and Governor enjoys certain **veto powers** regarding bills originating from Parliament and state legislature respectively.
- The **prior recommendation of executive** is required to introduce a bill on certain matters such as a bill for formation of new states or to alter boundaries or names of existing states, money bill etc.
- The President and the Governor can **summon, prorogue** both Houses of Parliament and state legislatures respectively and **dissolve** the House of People or state legislative assembly respectively.

4.3. Constitutional Balances to Ensure Mutual Non-interference

Apart from such checks and control, the constitution of India has provided various provisions to ensure non-interference into working of each organ of state.

- **Provisions for legislature:-**
 - **Article 122 and 212** provides that the **validity of proceedings** in Parliament and the State Legislatures **cannot be called into question in any court**. This ensures the separation and immunity of the legislatures from judicial intervention on the allegation of procedural irregularity.
 - To ensure that legislators scrutinize the Executive without any influence, the Constitution provides that an MP/MLA may be disqualified for holding an **office of profit** under the government.
- **Provisions for judiciary:-** Further, **Articles 121 and 211** provide that **the judicial conduct of a judge** of the Supreme Court and the High Courts **cannot be discussed** in the Parliament and the State Legislatures.
- **Provisions for executive:-** **Article 361** provides that the President or the Governor shall **not be answerable to any court** for the exercise and performance of the powers and duties of his office. Also **no criminal proceedings** whatsoever can be instituted or continued against the President, or the Governor of a State, in any court during his term of office. Further, **no process for the arrest or imprisonment** of the President or the Governor can be issue from any court during his term of office.

These mechanisms collectively uphold a democratic equilibrium, ensuring that no branch oversteps its constitutional boundaries.

5. Separation of Power in Different Countries

Student Notes:

USA	UK
• It has a more rigid separation of powers. The US Constitution expressly vests the legislative, the executive and the judicial powers in the Congress, the President and the judiciary in Articles I, II and III respectively. • Unlike India, the President of USA doesn't have ordinance making power. • Though the President of USA can veto legislation passed by the Congress, Congress can override the veto with a two-thirds majority in both houses.	• The UK has a loose model of SoP due to unwritten nature of constitution and parliamentary supremacy that limits judicial power of review. • However, the judiciary remains independent and can review executive actions, maintaining some level of checks and balances.

6. Instances Undermining the Separation of Powers in India

In practice, the separation of power has been undermined due to following practices:

- **Exclusion of judicial review through the Ninth schedule:** Legislature continues to put laws under the Ninth schedule to shield them from judicial review. Currently, over 284 such laws are shielded from judicial review.
- **Judicial intervention in other's domain:** There have been some cases where the courts have issued laws and policy related orders through their judgements. These includes:
 - In 2016, Supreme Court banned the **sale of liquor within 500 metres** of the outer edge of national and State highways, which is a functional domain of executive.
 - In 2011, the court had appointed a **high-level Special Investigation Team (SIT)** to monitor the investigation and the steps being taken to bring back black money stashed away in foreign banks.
- **Tribalization of justice:** Many tribunals have a majority of **executive members**. The qualifications, appointments, and service conditions of tribunal members are determined by the executive. They also lack security of tenure. Combinedly, such provisions hamper the independence of tribunals and negate the constitutional spirit of separation of judiciary from the executive.
- **Excessive promulgation of ordinance:** Frequent promulgation of ordinances undermines encroaches on legislature's functions. It has been used as a mechanism to bypass legislative scrutiny. For example, **Bihar's Land Reforms Ordinances were re-promulgated many times** between 1967 and 1981. Thus, in **DC Wadhwa v. State of Bihar (1986)**, the Court criticized the repeated re-promulgation as a "fraud on the Constitution." Court's directions have helped in reduction of the number of ordinances promulgated in recent times. For example, in the last 10 years the average number of ordinances issued per year by Union executive is 6.
- **Issues with Delegated legislation:** Delegated legislation lack parliamentary scrutiny and oversight. Few delegated legislations have been criticized to work against the spirit of parent laws. For example, **Environment Impact Assessment (EIA) Draft Notification, 2020** is criticized for dilution of environmental norms and procedures. In order to strengthen Parliamentary control over delegated legislation, Parliament has constituted a committee on subordinate legislation. It has made the following main recommendations:
 - The legislative policy must be formulated by the legislature and details may be left to the executive to supply
 - There should not be an inordinate delay in making of rules by the administration and should be made within six months from the date of commencement of the Parent Act.
 - Rules should not go beyond the rulemaking power conferred by the Parent Act.
 - The language in which the rules are written should be simple and clear and all ambiguities are strictly to be avoided.