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(DLP)

POLITY & GOVERNANCE - II

(UPSC MAINS)



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POLITY & GOVERNANCE-II

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Separation of Powers

1

Chapter

One of the many things that constitutions do is split power amongst different institutions. The doctrine of separation of powers divides power horizontally between institutions of the same tier - legislature, executive and judiciary.

Different constitutional systems vest each of these institutions with varying relative strengths. In some countries the judiciary may have limited powers of review of laws; perhaps it can only strike down actions by the executive but not the legislature. Other countries may have stronger courts, with clashes routinely emerging between the legislature and judiciary.

In the USA, the form of the government is the presidential, with the legislature and the executive often being pitted against one another; in the United Kingdom the system adopted is parliamentary and involve close links between the legislature and executive.

One of the basic features of Indian constitution is the separation of power between three different arms of the government. Widely regarded to be one of the most difficult and decisive questions of institutional design, the Indian constitution's model of separation of powers is both elaborate and unique.

Doctrine of Separation of Powers

The tripartite model of governance has its origin in Ancient Greece and Rome. Though the doctrine is traceable to Aristotle, but the writings of Locke and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded.

The first modern formulation of the doctrine was that of the French writer Montesquieu in 1748, although the English philosopher John Locke had earlier argued that the legislative power should be divided between king and Parliament. The term "Trias politica" or "separation of powers" was coined by Montesquieu, a French social and political philosopher. His publication, *Spirit of the Laws*, is considered one of the great works in the history of political theory and jurisprudence, and it inspired the Declaration of the Rights of Man of UN and the Constitution of the United States. Under his model, the political authority of the state is divided into legislative, executive and judicial powers. He asserted that, to most effectively promote liberty, these three powers must be separate and acting independently.

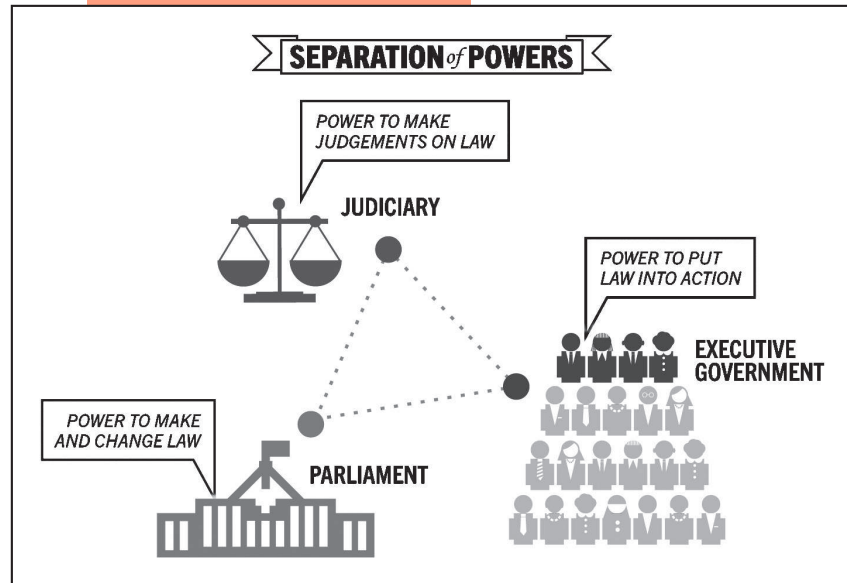
All the theories originated by these political thinkers in relation to the principle of separation of powers were on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons. Between 16-18th Centuries, the doctrine of separation of powers became a major theme in the struggle of the masses against the arbitrary rule of kings i.e. feudal monarchy.

Inspired by this in 1787, the founding fathers of the United States of America, incorporated this principle into their constitution. The constituent Assembly of France in 1789 was of the view that "there would be nothing like a constitution in the country where the doctrine of separation of power is not accepted".

Montesquieu's Theory of Separation of Powers

According to his theory, powers are of three kinds: Legislative, executive and judicial and that each of these powers should be vested in a separate and distinct organ, for if all these powers, or any two of them, are united in the same organ or individual, there will be no liberty.

If, for instance, legislative and executive powers unite, there is apprehension that the organ concerned may enact tyrannical laws and execute them in a tyrannical manner. Again, there will be no liberty if the judicial power is not separated from the legislative and the executive. Where it joined the legislative, the life and liberty of the people would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judges might behave with violence and oppression.



Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to restrict any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

- The same person should not form part of more than one of the three organs of the government i.e. separation of membership to organs.
- One organ of the government should not interfere with any other organ of the government, i.e. institutional separation of powers into the Legislature, Executive and Judiciary.
- One organ of the government should not exercise the functions assigned to any other organ, i.e. functional separation of powers into law making, enforcement and interpretation.

Benefits of Separation of Powers

- It prevents power from vesting in a single body.
- The separation of powers doctrine also intends to improve the energy and efficiency of government by allowing each branch to specialize, in effect, in order to fulfil its unique function. Though, what external factors should be employed to measure efficiency is a matter of debate.

- It also encourages democratic deliberation, because competing claims are constantly asserted, dialogue is facilitated, and through preventing a single body enjoying supremacy, each body check and balances one another

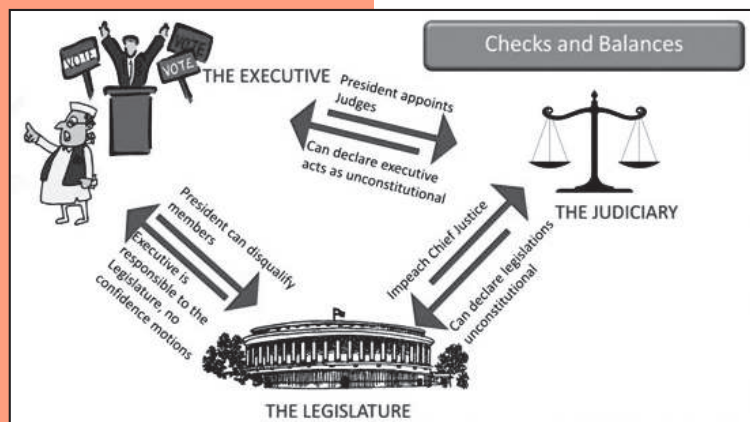
James Madison calls the combination of legislative, executive, and judicial powers “the very definition of tyranny.” In other words, if the body that made the laws could also enforce and adjudicate them, undermining the rule of law.

Principle of Checks and Balances

The powers of Government are distributed in such a way that Executive, Parliament and Judiciary hold accountable each other so that an equilibrium can be achieved which imparted a remarkable stability to the constitutional structure.

Checks and balances are applied in constitutional governments worldwide. They are of fundamental importance in tripartite governments.

Checks and balances, which modify the separation of the powers, operate under parliamentary systems such as India through the exercise of a parliament’s prerogative to adopt a no-confidence vote in a government; the government, or cabinet, in turn, ordinarily may dissolve the parliament.



The most noticeable example of a check is the power of the judiciary to appraise executive conduct and ordinary laws for the compliance with the Constitution and the Fundamental Rights. Judicial review in this case constitutes neither executive nor judicial function; it is a mere check on the exercise of executive and legislative power. It is a power exercised by the judiciary to guarantee constitutional compliance.

Defects in the Doctrine of Separation of Powers

Though, theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects are found in this doctrine:

- Historically speaking, the premise of the theory was incorrect. There was no separation of powers under the British Constitution as assumed by Montesquieu. At no point of time, this doctrine was adopted in England, not even now in its true form. As Prof. Ullman says: “England was not the classic home of separation of powers.
- This doctrine is based on the assumption that the three functions of the Government—legislative, executive and judiciary are independent and distinguishable from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw demarcating line between one power and another with mathematical precision.
- Modern state is a welfare State and it has to solve complex socio-economic problems. Thus it is not always possible to stick to this doctrine. Justice Frankfurter of USA said;

“Enforcement of a rigid conception of separation of powers would make modern Government impossible.” Strict separation of powers is a theoretical absurdity and practical impossibility.

- The modern interpretation of the doctrine of Separation of Powers mandates that discretion must be drawn between ‘essential’ and ‘incidental’ powers and one organ of the Government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental functions thereof.
- Montesquieu’s doctrine aims liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be the Rule of Law and impartial and independent judiciary and eternal vigilance on the part of subjects. A complete separation of the three organs may lead to constitutional deadlock (disunity of powers). Thus, a complete separation of powers is neither possible nor desirable.

Way Forward

- Partial separation of powers is required to achieve a mixed and balanced constitutional structure.
- It would be impractical to expect each branch of government to raise its own finances.
- The theory is based on the assumption that all the three organs of the government are equally important, but in reality it is not so. In most cases, the executive is most powerful of the three branches of government.

Separation of Powers in USA

- **Legislative Power:** It is vested in the Congress (consisting of the House of Representatives and Senate).

Role:

- Congress has the sole power to declare war, as well as to raise, support, and regulate the military.
- It ratifies treaties signed by the President and gives advice and consent to presidential appointments to the federal judiciary, federal executive departments, and other posts (Senate only).
- It defines by law the jurisdiction of the federal judiciary in cases not specified by the Constitution.
- It regulates interstate commerce; controls the federal budget.

- **Executive Power:** It is vested in the President of USA.

Role:

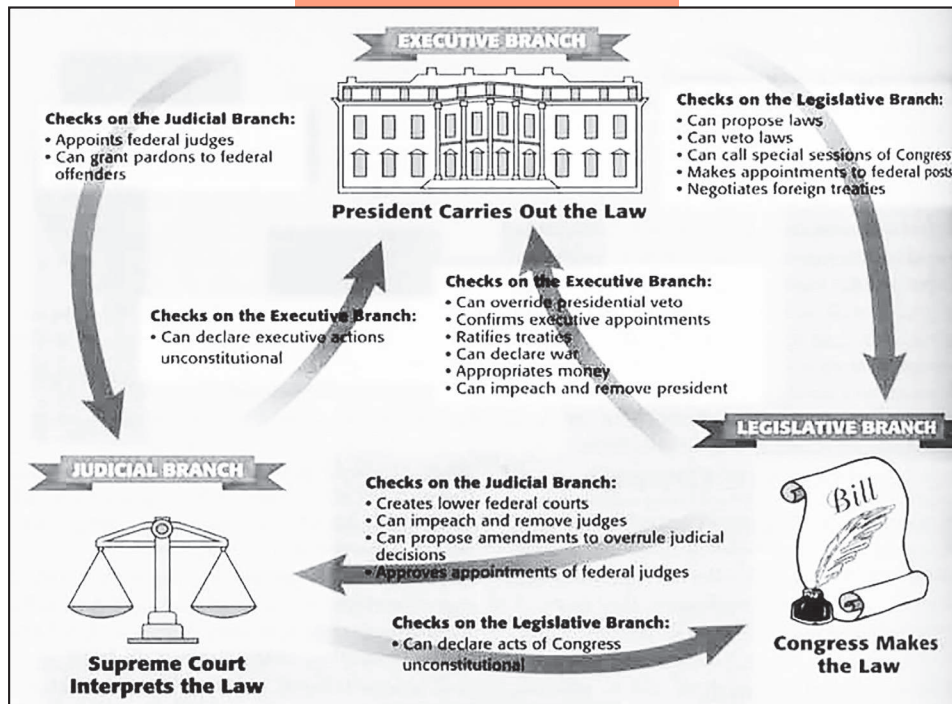
- The President executes the instructions of Congress.
- The president is the Commander in Chief of the Army and Navy, also has power to make treaties and appointments to office.
- He has the power to grant “reprieves and pardons for offences against the United States, except in cases of impeachment.”

- **Judicial Power:** It is vested in the Supreme Court of USA.

Role:

- The Supreme Court determines which laws Congress intended to apply in any given case.

- It exercises judicial review, reviewing the constitutionality of laws.
- It determines how a law acts to determine the disposition of prisoners.
- It determines how laws should be interpreted to assure uniform policies in a top-down fashion via the appeals process, but gives discretion in individual cases to low-level judges. The amount of discretion depends upon the standard of review, determined by the type of case in question.



The Constitution does not explicitly indicate the pre-eminence of any particular branch of government. In republican government, the legislative authority necessarily predominates. One may claim that the judiciary has historically been the weakest of the three branches. In fact, its power to exercise judicial review—its sole meaningful check on the other two branches—is not explicitly granted by the U.S. Constitution. The U.S. Supreme Court exercised its power to strike down congressional acts as unconstitutional only twice prior to the Civil War: in *Marbury v. Madison* (1803) and *Dred Scott v. Sandford* (1857). The Supreme Court has since then made more extensive use of judicial review.

Throughout America's history dominance of one of the three branches has essentially been a see-saw struggle between Congress and the president. Both have had periods of great power and weakness.

Separation of Powers in India

The system of checks and balances is one of the most striking aspects of the Indian constitutional scheme. Though, the three organs cannot be practically segregated into three incontrovertible compartments due to their interdependence on each other to ensure effective governance. They work in harmony and in consonance to attain a meaningful sustenance and purposeful progress of the inhabitants.



A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India.

Indian System of Separation of Powers

The constitution of India provides for a parliamentary form of government, both at the centre and in the states. The parliamentary system of government as in Britain, India, etc., is the one in which the executive is responsible to the legislature for its policies and acts. The presidential form of government as in USA is not responsible to the legislature for its policies and acts, is constitutionally independent of the legislature in respect to its term of office.

The British system is based on the doctrine of the sovereignty of Parliament, while the parliament in India enjoys limited and restricted powers due to a written constitution, federal system, judicial review and fundamental rights. The parliament has the legislative powers which are constrained only by the provisions of the constitutions and contains no internal limitations.

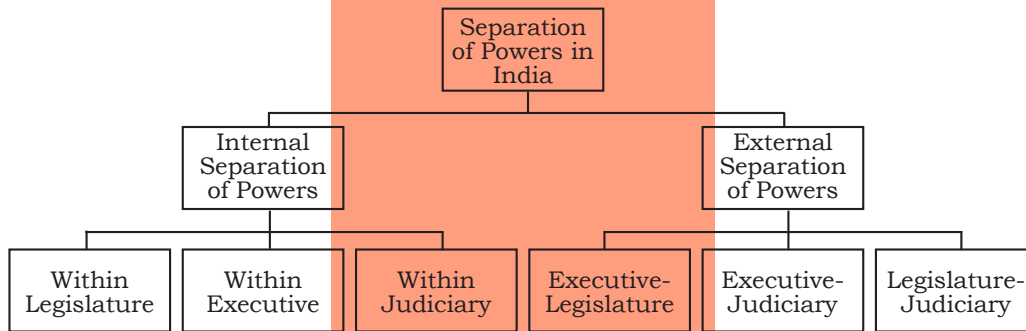
For the first time, the Delhi Laws Act case in 1951 itself, the Supreme Court held that the principle that one organ should not perform functions which essentially belong to others, is followed in India except where the constitution has vested power in a body. Justice C.J. Kania commented: “Although 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. 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 functions?”

India does not have a strict separation of power as executive is part of the legislature under its parliamentary form of government. In *Indira Nehru Gandhi v. Raj Narain* in 1974, the limitation of separation of powers in India was explained by the Supreme Court. The Supreme Court commented: “In our Constitution, there is separation of powers in a broad sense. But the larger question is whether there is any doctrine of separation of powers when it comes to exercise of constituent power. The doctrine of separation of powers as recognised in America is not applicable to our country. The rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to our country. Many powers, which are strictly judicial have been excluded from the purview of the courts.”

However India has a system of checks and balances where one branch can check the arbitrary action of another. Each branch of the government has some influence over the actions of the others, but no branch can exercise its powers without cooperation from the others.

Internal Checks and Balances

Not only external checks, but internal checks within one organ are central to India’s constitutional vision, a vision that rejects unitary executive theory. Constitutions often provide for an internal separation of powers within the legislative branch through bicameralism, but internal checks within the executive or judicial branches are nearly always absent. India’s constitution is striking insofar as it mandates an internal separation of powers within all the three traditional branches of government, and in this way shapes the institutional dynamics of its democracy.



External Separation of Powers

Separation of Powers Between Executive and Legislature

The President is the head of the executive and head of the state. It acts on the advice of the Council of Ministers headed by the Prime Minister. The Council of Ministers is appointed by the president on the recommendation of the president and each minister works during the pleasure of the President.

In India, the executive is part of the parliament. The parties of the alliance who gets majority forms the government, hence all the members of the council of ministers are either part of Lok Sabha or Rajya Sabha.

The fundamental principle underlying the working of parliamentary system of government is the principle of collective responsibility. Article 75 clearly states that the council of ministers is collectively responsible to the Lok Sabha or lower house of parliament for all their acts of omission and commission. When the Lok Sabha passes a no-confidence motion against it, all the ministers have to resign. The president can also be impeached by Parliament. Hence India doesn't have a strict separation of membership between its legislative and executive organ.

However, there are sufficient mechanisms in place so that both can check each other. Ways of checks and balances exerted by parliament are:

- By not passing a motion of thanks on the president's inaugural address.
- By rejecting a money bill or ordinary bill
- By passing a censure motion or adjournment motion
- By defeating the government on an important issue of discussion
- By passing a cut motion during budget discussions
- Through budgetary control, i.e. control before the appropriation of grants through enactment of the budget
- Post-budgetary control, that is, control after the appropriation of grants through Finance committees and Departmental standing committees.
- No money can be withdrawn from the consolidated fund of India except under appropriation made by law. Through the rule of lapse of funds, parliament exercises effective financial control also.

Executive Control Over Legislature

- No bill passed by Parliament can become a law unless the president signs it. The president can veto a bill or doesn't sign it at all.