



Doctrine of Separation of Powers

For Prelims: Doctrine of Separation of Powers, Basic Structure of Constitution, Supreme Court, NJAC Act

For Mains: Doctrine of Separation of Power and issues, Basic Structure of Constitution

Why in News?

Recently, [Vice-President of India](#) has rekindled the debate over the [doctrine of separation of powers](#) by citing the Supreme Court's landmark [1973 Kesavananda Bharati case](#), which ruled that Parliament has the authority to amend the Constitution but not its basic structure.

What is the Doctrine of Separation of Powers?

- Separation of powers is the **division of the legislative, executive, and judicial functions of government**.
 - Article 50 says that states shall take steps to separate the Judiciary from the Executive.
- The constitutional demarcation precludes the concentration of excessive power by any branch of the government.
- The **Indian Constitution** lays down the structure and defines and determines the role and functions of every organ of the State and establishes norms for their inter-relationships and [checks and balances](#).

What are the Instruments of Checks & Balances?

- **Legislature Control:**
 - **On Judiciary:** Impeachment and the removal of the judges. Power to amend laws declared ultra vires by the Court and revalidating it.
 - **On Executive:** Through a no-confidence vote it can dissolve the Government. Power to assess works of the executive through the [question hour and zero hour](#).
- **Executive Control:**
 - **On Judiciary:** Making appointments to the office of [Chief Justice](#) and other judges.
 - **On Legislature:** Powers under [delegated legislation](#). Authority to make rules for regulating their respective procedure and conduct of business subject to the provisions of this Constitution.
- **Judicial Control:**
 - **On Executive:** [Judicial review](#) i.e., the power to review executive action to determine if it violates the Constitution.
 - **On Legislature:** Unamendability of the constitution under the **basic structure doctrine** pronounced by the Supreme Court in Kesavananda Bharati Case 1973.

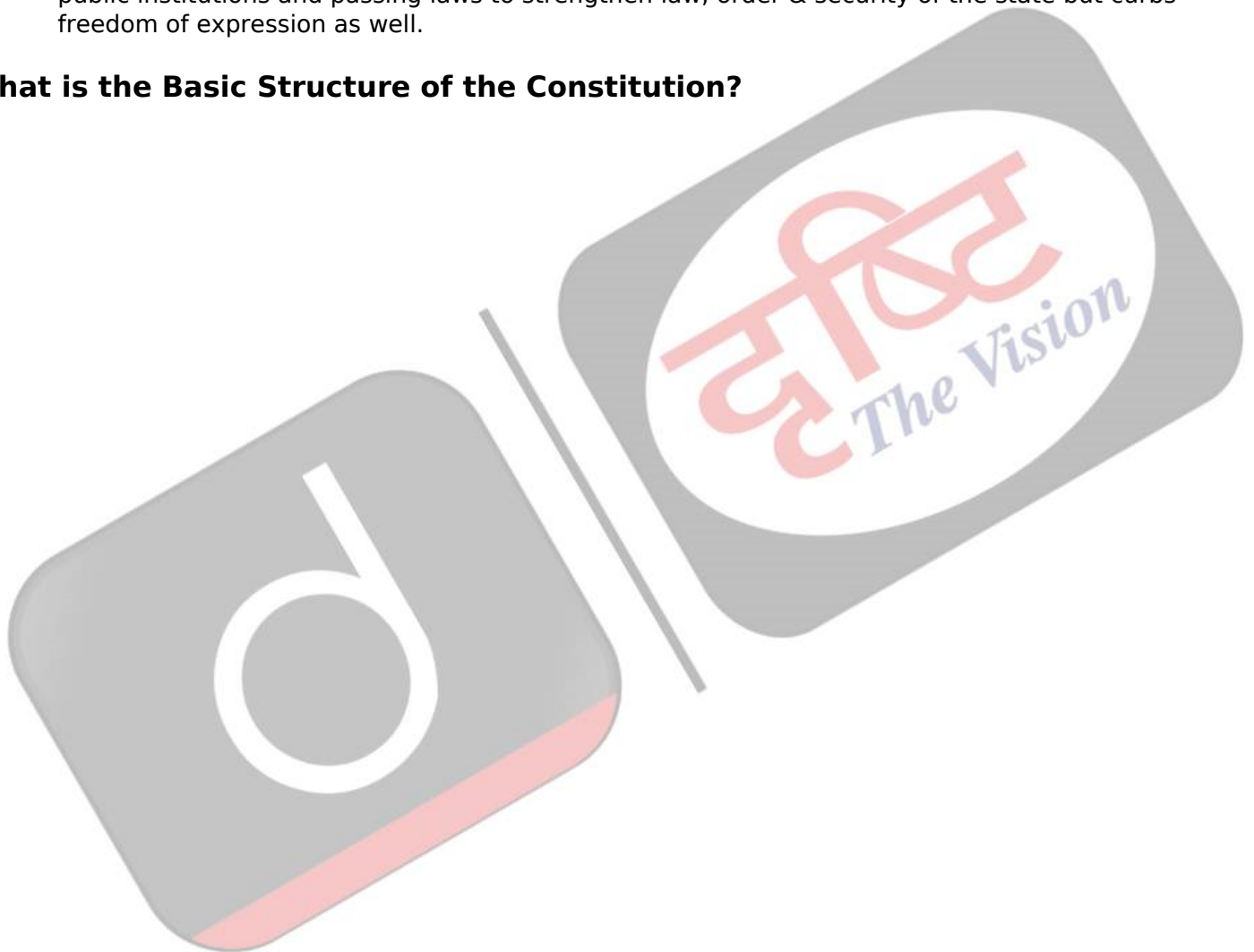
What are the Issues with the Separation of Powers?

- **Weakened Opposition in India:** Democracy works on the principle of checks and balances. It is these checks and balances that prevent democracy from turning into majoritarianism.

- In a Parliamentary system, these checks and balances are **provided by the opposition party**.
- However, the majority of a single party in the Lok Sabha **has diminished the role of an effective opposition in the Parliament**.
- **Judiciary Being Averse to Checks & Balances:** The Supreme Court has held the [99th constitutional amendment](#), which provided for the establishment of the [National Judicial Appointments Commission](#) as ultra-vires.
 - The **NJAC could guarantee the independence of the system from inappropriate politicization**, strengthen the quality of appointments, enhance the fairness of the selection process, promote diversity in the composition of the judiciary, and rebuild public confidence in the system.
- **Judicial Activism:** In many recent judgments, the SC has become hyper-activist in making judgements that are deemed as laws and rules. This transgresses the domain of legislature and executive.
- **Executive Excesses:** Executive in India is alleged of over-centralisation of power, weakening of public institutions and passing laws to strengthen law, order & security of the state but curbs freedom of expression as well.

What is the Basic Structure of the Constitution?

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Doctrine of Basic Structure

Original Idea:

- German Constitution

Landmark Judgement:

- Kesavananda Bharati case 1973 (the phrase 'basic structure of the Constitution' was used for the first time)

Constituents of Basic Structure:

- Supremacy of the Constitution, Parliamentary system, Free and fair elections, Independence of Judiciary, Limited power of Parliament to amend the Constitution, Powers of the Supreme Court under Articles 32, 136, 141 and 142, Powers of the High Courts under Articles 226 and 227...

Evolution

Shankari Prasad case and Sajjan Singh case

1951 & 1965

The SC held that Parliament has the absolute power to amend the Constitution under Article 368.

Parliament cannot amend Fundamental Rights, and this power rests only with a Constituent Assembly; 24th Amendment Act, 1971 was introduced.

1967

Golak Nath v/s State of Punjab

Kesavananda Bharti v/s State of Kerala

1973

Parliament could amend any part of the Constitution, but it cannot not alter the basic structure or essential features of the Constitution.

The Doctrine of Basic Structure reaffirmed and a provision of the 39th Amendment Act (1975) (keeping election disputes involving the PM and the Speaker outside the jurisdiction of all courts) was invalidated.

1975

Indira Nehru Gandhi v/s Raj Narain

Minerva Mills v/s Union of India

1980

Judicial review and harmony between Fundamental Rights and DPSP were added to the basic structure.

The SC held that the doctrine would apply to constitutional amendments enacted after the date of the judgement in the KB case.

1981

Waman Rao v/s Union of India

Indira Sawhney Vs. Union of India

1992

Rule of law declared as a part of the basic structure.

Federalism, Secularism, Democracy, Unity and integrity of the nation and Social justice were iterated as basic structure of the Constitution.

1994

S.R Bommai vs Union of India

Significance:

- Limits the power of a majoritarian government to undermine the Constitution's central ideals.

Criticism:

- "Basic Structure" finds no mention anywhere in the Indian Constitution. Further, there is no exclusive definition of basic structure given by the judiciary.
- The SC has assumed much power in the name of basic structure.

Way Forward

- The **Constitution of India is an organic or living document** and needs to be amended with the changing time and needs of the society.
- The framers of the **Indian Constitution recognized that no generation possesses a monopoly on wisdom** and cannot dictate what government should look like to future generations.
 - However, such power of amendment must be used judiciously.

UPSC Civil Services Examination, Previous Year Question (PYQ)

Prelims

Q. Consider the following statements: (2020)

1. The Constitution of India defines its 'basic structure' in terms of federalism, secularism, fundamental rights and democracy.
2. The Constitution of India provides for 'judicial review' to safeguard the citizens' liberties and to preserve the ideals on which the Constitution is based.

Which of the statements given above is/are correct?

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

Ans: (d)

Exp:

- The Constitution of India does not define the basic structure, it is a judicial innovation.
- In *Kesavananda Bharati vs State of Kerala* case (1973), the Supreme Court ruled that the Parliament could amend any part of the Constitution so long as it did not alter or amend the basic structure or essential features of the Constitution.
- However, the court did not define the term 'basic structure', and only listed a few principles — federalism, secularism, democracy — as being its part.
- The 'basic structure' doctrine has since been interpreted to include the supremacy of the Constitution, the rule of law, Independence of the judiciary, doctrine of separation of powers, sovereign democratic republic, the parliamentary system of government, the principle of free and fair elections, welfare state, etc. **Hence, statement 1 is not correct.**
- There is no direct and express provision in the constitution empowering the courts to invalidate laws, but the constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void. The court is entrusted with the task of deciding whether any of the constitutional limitations has been transgressed or not. **Hence, statement 2 is not correct. Therefore, option (d) is the correct answer.**

Mains

Q1. Starting from inventing the 'basic structure' doctrine, the judiciary has played a highly proactive role in ensuring that India develops into a thriving democracy. In light of the statement, evaluate the role played by judicial activism in achieving the ideals of democracy. **(2014)**

Q2. Resorting to ordinances has always raised concern on violation of the spirit of separation of power doctrine. While noting the rationales justifying the power to promulgate ordinances, analyse whether the decision of the Supreme Court on the issue have further facilitated to resorting to this power. Should the

power to promulgate the ordinances be repealed? **(2015)**

Q3. Do you think that Constitution of India does not accept principle of strict separation of powers rather it is based on the principle of 'checks and balance'? Explain. **(2019)**

Q4. Judicial Legislation is antithetical to the doctrine of separation of powers as envisaged in the Indian Constitution. In this context justify the filing of large number of public interest petitions praying for issuing guidelines to executive authorities. **(2020)**

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