



UNIT I

CHAPTER

3

Separation of Powers

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Learning Outcomes

After the completion of this chapter, the students will be able to:

- Define separation of powers
- Explain historical evolution of the Montesquieu's doctrine of separation of powers
- Evaluate Montesquieu's doctrine of separation of powers- it's advantages, disadvantages, impact and defects
- Describe the concept of checks and balances of power
- Explain the relevance of Montesquieu's doctrine in governance and comment on its limitations
- Analyse and compare the application of doctrine of separation of powers in UK, USA and India

I. Concept of Separation of Powers

For the preservation of the political liberty of the individuals and democracy, it becomes necessary in a state to establish special organs for the exercise of powers. The powers of the government are



divided between its organs in accordance with the nature of powers to be exercised. Broadly, the powers of a government in a state have been classified as the power to:

- i. Enact laws i.e., powers of the Legislature.
- ii. Interpret laws i.e. powers of the Judiciary.
- iii. Enforce laws i.e. powers of the Executive.

The theory of separation of powers in its simplest form implies that all the above functions should be entrusted to three different authorities. The three organs of the government should be kept separate and distinct. One organ should be independent of the control of others.



Each organ shall exercise its powers within its own sphere. This doctrine entails that each organ shall not encroach upon or interfere with the powers and independence of other organs of government. If any organ encroaches into the terrain of the other organ, it shall be checked by another organ of the government. Thus, no new organ is created over and above the existing organs of government, to check encroachment.

On the whole, separation of powers requires the existence of a written Constitution to define the formal powers of each organ. The powers shall be so defined and divided to create a system of checks and balances of powers among the organs. This view finds support from the writings of Carl J. Friedrich (1901-1984), a German-American political theorist.

In the words of Wade and Phillips (Constitutional Law, 1960), separation of powers may mean three different things:

- i. The same persons should not form part of more than one of the three organs of the Government
- ii. One organ of the government should not control or interfere with the exercise of its function by another organ
- iii. One organ of the government should not exercise the functions of another

II. Historical Background and Evolution of Montesquieu's Doctrine of Separation of Powers

A. Montesquieu's Doctrine of Separation of Powers

The most original, systematic as well as scientific elaboration of the concept of 'separation of powers' has been given by the French philosopher Baron De Montesquieu (1689-1755) in the 18th century. Montesquieu's theory on 'separation of powers' has become the model for governance of all democracies.

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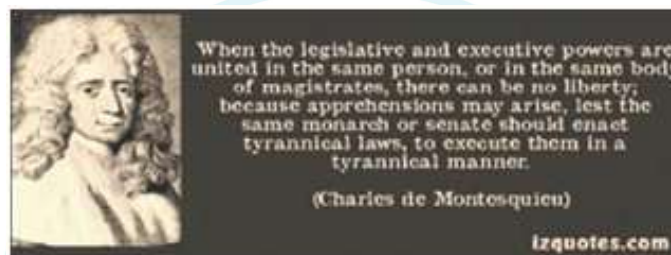
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During his time, he saw the oppressive and despotic rule of French King Louis XIV (1661-1715). The ruler enjoyed the absolute powers of State, and the prevailing dictum was, 'I am the State'. Liberty of the people was suppressed under the despotic rule of the King and his administrators.

During his visit to England, Montesquieu experienced the sense of liberty and freedom enjoyed by the citizens of England. He was very impressed with the thoughts of Locke. He compared their system of governance with the system prevailing in his country. He examined the separation of powers of the government, and their exercise by separate organs of the government namely, the King, Parliament and the law courts in the governance structure in England.

The doctrine of the separation of powers emerged as a distinct doctrine in his famous book 'Esprit Des Lois' (The Spirit of Laws) published in 1748.

B. Basic Features of the Doctrine Separation of Powers as Enunciated by Montesquieu



1. Montesquieu proposed the theory of separation of powers. He advised that the division of powers is necessary in between the legislative, the executive and the judicial system.
2. Different departments must exercise the three powers of the government with their respective personnel. He provided the reason for the division of powers between the three branches of the government as follows:
 - a. When the legislative and executive powers are united in the same persons, there cannot be liberty. It may lead to apprehensions that the monarch may enact tyrannical laws and execute them in a tyrannical manner, as the same agency becomes the maker and executor of laws.
 - b. Where judicial powers are combined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, as the Judge would be the legislator.
 - c. Where the judicial power is combined with the executive power, the Judge might behave in a violent and oppressive manner. The prosecutor and the Judge would then be the same person and authority.
 - d. If powers are vested in one organ, or exercised without separation, governance would not be effective.
3. It is inherent in any authority to abuse powers unless limitations are imposed on its exercise.
4. For safeguarding the liberty of people, each organ of the Government shall have the obligation to act within its own sphere and not beyond it. If the authority acts beyond the permitted limits, it would be checked by the other organs. This means that the executive organ shall exercise some control over legislative and judiciary, the legislative organ over executive and judiciary, and the judiciary over legislative and executive organs. The system of checking the encroachment of powers by each organ and thus balancing the division of powers is termed as the system of 'checks and balances'.

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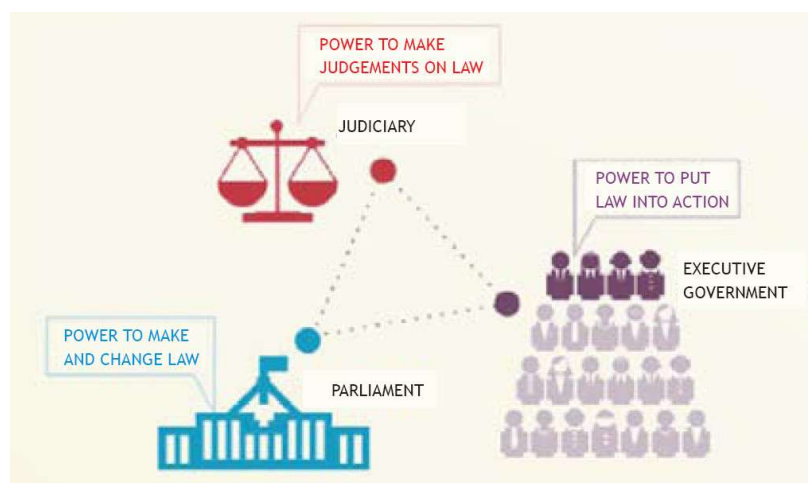
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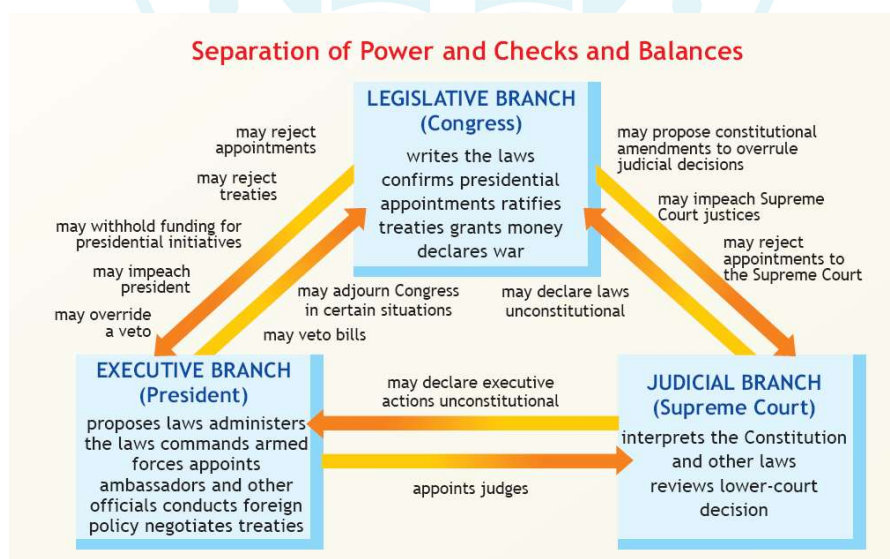


This kind of overview is the correct meaning of the maxim *le pouvoir arrête le pouvoir* which means, power halts power. By separating the functions of the executive, legislature and judiciary, one power may operate as a balance against another and thus have a check on the power exercised by another.



C. Checks and Balances of Power

- The origin of the concept of check and balances is specifically credited to Montesquieu.
- This concept provides a system-based regulation that allows one branch to limit another.
- The following chart explains the operation of check and balance mechanism between different organs of the government in the United States.



D. Impact of the Doctrine

- Montesquieu advocated the adoption of this doctrine in his own country's political system.
- His teachings gave boost to the French Revolution and led to the adoption of the Declaration of Rights in 1789.



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- The Declaration provided that: 'Every society in which Separation of Powers is not determined has no Constitution. The French Constitution, 1791 made executive, legislative and judiciary independent of one another'.
- James Madison (1751-1836), the 4th President of United States of America wrote in The Federalist that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny".
- The doctrine of separation of powers forms the foundation on which the entire structure of the U.S. Constitution 1787 is based. Montesquieu thus became the intellectual father of the American Constitution.

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III. Evaluation of The Doctrine of Separation of Powers

The doctrine of separation of powers can be better understood in two forms. First, it implies that concentration of powers in the same person or same body of persons should be avoided. Secondly, it implies division of those powers which essentially and primarily belong to one organ and not the other. Then allied functions can be performed with the coordination of the other organs. Emphasis must be laid on modification of the concentration of powers.

The doctrine can be better evaluated after studying its key benefits and defects.

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A. Key Benefits and Advantages of the Doctrine of Separation of Powers

- Different personnel, with respective capabilities for different organs, bring efficiency to the performance of functions and administration. This indeed serves the purpose of the State and its people. Each organ must do its job to the best of its efficiency, and with due regard to its responsibility.
- The doctrine of separation of powers, safeguards the liberty and freedom of individuals. The doctrine requires that each organ must act within the sphere of law. Thus, it establishes the government of law rather than of official will. It aims at protecting freedom of individual from the tyrannical rule of absolute monarchy. Montesquieu developed the theory as a means of limiting the absolute powers of the ruler in France.
- One important aspect of this doctrine is to establish an independent judiciary that is free from administrative discretion. Montesquieu was interested in setting the judicial power as a check on and as arbiter between the other two organs.
- The system of check and balances within the organs of the government provides stability to the government by protecting the sovereignty of the state. It promotes harmonious exercise of powers and functions within the three organs.

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B. Defects of the Doctrine

- Historically speaking, there was no separation of powers under the British Constitution, as construed by Montesquieu. A. V. Dicey had observed that the British constitution had "a weak Separation of Powers". As remarked by Barnett in Constitutional and Administrative Law (2005), "Britain has an uncodified or unwritten Constitution. Much of the British constitution is embodied in written documents, within statutes, court judgments and treaties as the supreme and final sources of law. The statutes of Parliament can change the Constitution by passing new legislations. The Constitution has other unwritten sources, including Parliamentary constitutional conventions".

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- The three organs of government and their functions cannot be divided into water-tight compartments. It would be wrong to say that they are not interconnected, though their mode of action may differ. The legislature deliberates; the executive takes rapid actions and gives effect to legislative enactments and judicial decisions. The Judiciary critically analyses the laws and actions of the executive, and may even declare them invalid.
- Extreme separation of powers prevents the unity and coordination needed to administer the legally expressed will of the State; extreme checks and balances create frictions and dead-locks that prevent smooth and efficient government. The functions performed by each organ are not unique. A Judge makes law in the form of precedents. The Executive legislates in the form of framing subordinate legislation, such as rules, bye-laws, regulations, policies, schemes etc. The Legislature acts judicially in deciding the breach of its privileges. Absolute separation of powers may even prove hazardous in the smooth functioning of the government.
- “Power tends to corrupt, and absolute power corrupts absolutely” arose as a part of a quotation by John Emerich Edward Dalberg (1834-1902), a historian, politician and writer, who is popularly known as Lord Acton, who expressed this opinion in a letter to Bishop Mandell Creighton in 1887.
- Separation of powers is in itself a protest against power. Its meaning can be better analyzed if the use of the word powers of the organs is substituted by functions. The word ‘functions’ implies the attitude of service, while the word ‘powers’ implies force. The government performs activities to serve the purpose of the State and its individuals through its classified functions for which the different organs are created.
- The theory of separation in its strict sense cannot apply to the countries having Parliamentary form of Government where the legislative and executive organs are combined.

Growth of executive organ in welfare state: Montesquieu had envisaged that all the three organs of the government would be given equal and independent position in the political organization of the country. But in fact it is not so in reality. The concept of Welfare State demands more and more action and services from the government such as health, education, food and public distribution, public transport and supply of electricity. It tends to increase the powers of the executive, and develop the executive as a multifunctional organ. Today, the executive legislates, exercises judicial jurisdiction and plans the future activities of the government. As remarked by Barker: “If the growth of legislative organ, in consequence of cabinet system, was the notable feature of 18th century, it may be said that growth of executive organ in consequence of the extension of rights and the corresponding extension of services which mostly fall to the lot of executives, is the notable feature of the 20th century”.

IV. Separation of Powers in Practice

Depending on the form of Government in a State, there is overlapping of powers among the organs. This can be better explained by studying the functions performed by different organs in a State.

A. Separation of Powers in Britain

The British governing system follows a Parliamentary form of Government. The British Constitutional system has adopted a fusion of powers rather than separation of powers.

In Britain, the three organs of Government are the Executive Head (the British monarch), Legislature comprised of House of Commons and House of Lords, and the Judiciary.

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EXECUTIVE

The British Queen acts as the nominal executive head devoid of political powers. She holds the office by virtue of hereditary succession. The real executive powers vests with the Prime Minister and the Council of Ministers. The Queen exercises powers on the advice of the Council of Ministers.

LEGISLATURE

The United Kingdom Parliament consists of two Houses: the **House of Commons** and the **House of Lords**. Their work is similar: making laws (legislation), checking the work of the government (scrutiny), and debating on current issues.

The Prime Minister and his Council of Ministers are part of the legislature. They are collectively responsible to it and play important role in legislative activities. They remain in office so long as they enjoy the confidence of the House of Commons. They make subordinate legislation. They perform judicial functions by being the members of Administrative Boards and Tribunals. The House of Commons performs judicial function in case of breach of its own privileges.

JUDICIARY

The highest judicial court in the UK is the Supreme Court and is relatively new. It was established in October 2009 after the Constitutional Reform Act, 2005. The judges of the Supreme Court are known as Justices of the Supreme Court or Privy Counsellors. Justices of the Supreme Court are granted the courtesy title *Lord* or *Lady* for life.

Prior to the creation of the Supreme Court, the highest court of appeal was the House of Lords Appellate Committee made up of Law Lords. Formerly, Law Lords, who were the final arbiters of judicial disputes in Britain sat simultaneously in the House of Lords, the upper house of the legislature. This arrangement ceased in October 2009 when the Supreme Court of the United Kingdom came into existence.

Until the Constitutional Reform Act, 2005 the Lord Chancellor was the head of the Judiciary in Britain. He fused the Legislature, Executive and Judiciary, as he was the ex - officio Speaker of the House of Lords, a Government Minister who sat in Cabinet and was head of the Lord Chancellor's Department, which administered the courts, the justice system and appointed judges. He sat as a judge on the Judicial Committee of the House of Lords, the highest domestic court in the entire United Kingdom, and the Judicial Committee of the Privy Council, the senior tribunal court for parts of the Commonwealth.

The Constitutional Reform Act, 2005 separated the powers. The Lord Chancellor ceased to be the Speaker of the Lords, and was replaced by the Lord Speaker. Also, the Lord Chief Justice is now head of the judiciary, and the Lord Chancellor may no longer sit as a judge. Therefore, legislative functions are now vested with an elected Lord Speaker and the judicial functions are vested with the Lord Chief Justice. The Lord Chancellor's Department was replaced with a Ministry of Justice and the Lord Chancellor currently serves in the position of Secretary of State for Justice.

B. Separation of Powers in the United States of America

The U.S. Constitution has adopted a Presidential form of Government. The three organs of the Government are the President as the executive organ, the Supreme Court of America and the subordinate courts as the judicial organ, and the Congress as the legislative organ, with two houses - Senate (the upper house) and the House of Representatives (the lower house).

The theory of separation of powers finds its best expression in the United States of America.

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The American Constitution did not explicitly state that powers ought to be separate. It simply distributed the powers: the legislative powers are vested in the Congress, the executive powers in the President, and the judicial powers in the court. While apportioning the lion's share of powers to one organ of Government, the Constitution gave smaller slices to each of the other organs. This was done to avoid concentration and consequent abuse of power. The fathers of the Constitution considered that power should be limited, controlled and diffused.

LEGISLATURE

- The US Congress is the legislative organ, with two houses - Senate (the upper house) and the House of Representatives (the lower house).
- The law making power is vested in the Congress. The Congress is elected by the people. The members of the Senate sit for six years and those of the House of Representatives for two years.
- The bills passed by the legislature, except money bills are subject to ratification or veto of the President. The Senate shares with the President his powers to make appointments, declare war and ratify treaties. The Congress acts in a judicial capacity in cases of impeachment of the President and Supreme Court Judges.
- The U.S. Congress delegates law making powers to the executive after laying down the legislative policy and principle.
- The Congress cannot be dissolved by the President.
- There are provisions in the Constitution to over-ride veto power of the President, by special majority vote in the legislature.

EXECUTIVE

- The President is elected by the people. The President remains in power for four years.
- The President receives his share of powers to recommend measures, to summon Congress in special session and to veto bills (except money bills) passed by the Congress. The President has been given the powers of making appointments but these have to be ratified by the Senate. The President appoints Secretaries, with the approval of the Congress as executive heads of the departments. The President and Secretaries are not members of legislature i.e. Congress and do not take part in legislative deliberations or in voting a bill. The President formulates national policy, mobilizes military troops and can declare state emergency.
- The President can declare war but he can do so only if he has got the approval of both the Houses of the Congress.
- The Presidents' policies and treaties making decisions are subject to be ratification by the Senate.
- The President could intervene in the business of the court through his power of pardon for all offences except treason.
- Thus, this system works on the principle of 'separation of powers' and 'checks and balances'.
- Neither the President is responsible to the Congress nor the Congress is responsible to the President.

JUDICIARY

- While the judges of the Supreme Court are nominated by the President, their appointments have to be ratified by the Senate. The U.S. Supreme Court has the power under the

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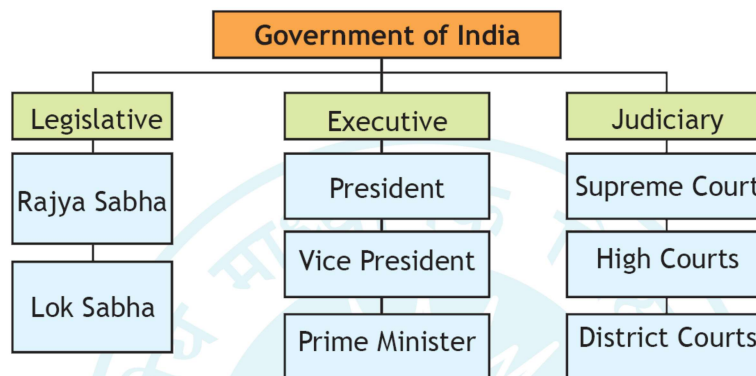


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constitution to declare void the acts and actions of the legislature and executive. In certain circumstances, the Senate may refuse to ratify the choices made by the President.

- The Supreme Court has the power of judicial review. The Court has the power to examine the laws passed by the Congress and the executive orders issued by the President and declare null and void if it contravenes the provisions of the U.S. Constitution.

C. Separation of Powers in India



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- India's governing system is broadly similar to that of Britain's. Both the countries have adopted the Parliamentary System of Government.
- Under the Constitution of India, the three organs of Government are the legislature, executive and the judiciary. As stated in Article 79 of the Constitution of India, the Parliament consists of the President and two Houses known as the Council of States and the House of the People.
- The Constitution of India has not adopted the doctrine of separation of powers in its strict sense. Nevertheless, the Constitution of India has sufficiently differentiated the essential functions of the organs and no organ shall assume to itself what essentially belongs to the other.

EXECUTIVE

- The President of India is the nominal executive head. The real executive is the Prime Minister and his/her Council of Ministers. The President exercises his/her powers/functions with the aid and advice of the Prime Minister and his/her Council of Ministers. Usually the advice is binding on the President.
- The President is elected by the Electoral College consisting of the elected members of both houses of Parliament and the elected members of the legislative assemblies of the state.
- He/she is appointed for a fixed term of 5 years.

POWERS OF THE PRESIDENT

The President has wide legislative powers to issue ordinances for immediate action during the recess of legislature. An ordinance issued shall have the force and effect as that of an Act by Parliament. President has the power to dissolve House of People. The President has the power to declare National Emergency, State Emergency and Financial Emergency. The President is authorized to exercise legislative powers in case of State Emergency.



LEGISLATURE

The Prime Minister and his/her Council are normally Members of Parliament. They play an active role in proposing a bill and voting a bill in the Parliament. A bill becomes an Act when President gives his/her assent to it. The Council of Ministers including the Prime Minister is collectively responsible to the House of People. Thus, they remain in office so long as they enjoy the confidence of the House of People. The President may be impeached by the Parliament.

Powers and functions of the Legislature

The Constitution of India provides for the powers and functions of the legislature. Article 246 of the Constitution provides that the Parliament and the Legislatures of the States have power to make laws. The matters are listed in Schedule VII of the Constitution under Union List, State List and the Concurrent List.

JUDICIARY

Judiciary refers to the Supreme Court of India, High Courts and the subordinate courts. The Supreme Court of India is the final court of appeal for the whole of India.

Independence of Judiciary

Various provisions are incorporated in the Constitution to establish an independent judiciary. Article 50 of the Constitution of India provides that the State shall take steps to separate the judiciary from the executive in the public services of the state. The object behind Article 50 is to provide for the independence of judiciary.

Judges of the Supreme Court and High Courts shall be appointed by the President after consultation with such Judges of the Supreme Court and of the High Courts in the states, as laid down in Article 124 (2) of the Constitution. A nine-Judge Constitution Bench of the Supreme Court (In Re Presidential Reference, AIR 1999 SC 1) laid down the norms and requirements of consultation process to be observed by the executive on the appointment of judges to the Supreme Court and High Court and, transfer of the latter.

The privileges and the allowances of a Judge cannot be varied after his appointment. No discussion shall take place in Parliament with respect to the conduct of any Judge of Supreme Court or of High Court, except when a proceeding of impeachment is initiated against him.

Role of Judiciary

- The Judiciary in India interprets the Constitution. The judiciary is entitled to scrutinize the legislations and administrative process and assess whether or not they conform to the Constitution.
- The judiciary provides for remedies for enforcement of Fundamental Rights of citizens, guaranteed by the Constitution. A writ jurisdiction can be invoked to move the Supreme Court under Article 32 and High Court under Article 226 of the Constitution.
- The judiciary plays the role of legislature while laying its own procedures for the dispensation of justice. It supervises, administers and controls the subordinate judiciary and thus performs an administrative function.
- The judges of Supreme Court and High Court can be removed on impeachment by the legislature, only on the grounds of proved misbehavior or incapacity.
- Article 368 of the Constitution provides for constituent powers of the Parliament, and lays down the procedure for amendment of the Constitution. In the exercise of its power of judicial review, the Supreme Court of India in Keshavananda Bharati case (AIR 1973 SC 1461) popularly known as Fundamental Right's Case, held that the Parliament in exercise of its amending power under Article 368 could not alter the Basic Structure of the Constitution. Thus the basic structure limits the amending power of the Parliament.

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- The Judges while deciding this case could not form a unanimous opinion on the provisions of the Constitution which constitutes its Basic Structure. On a perusal of different cases decided by Supreme Court, the following features seem to emerge as the Basic Structure, so as to be beyond the amending power of the Parliament under Article 368:
 - a) Supremacy of the Constitution
 - b) Republic and democratic form of Government
 - c) Secular character of the Constitution and State
 - d) Sovereignty of India
 - e) Judicial Review and jurisdiction of courts under Article 32 & Article 226
 - f) Separation of Powers and Independent Judiciary (In the case of State of Bihar vs. Bal Mukund Shah (AIR 2000SC1296)
 - g) Right to Equality and Rule of Law

It is, therefore, for the Supreme Court of India to determine finally the essential features constituting the framework of the Constitution. In other words, the Supreme Court has assumed to itself the constituent power in exercise of Judicial Review.

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V. Exercises

Based on your understanding, answer the following questions:

Q-1 Write short notes on the following-

1. Article 368
2. Concept of Separation of Powers
3. Separation of powers in Britain
4. Separation of powers in USA

Q-2 Answer the following questions briefly-

1. Enumerate a few features that comes under basic structure of the Constitution of India which are beyond the amending power of the Parliament under Article 368.
2. How did Wade and Phillips interpret the Separation of powers in their 1960 work?
3. What were the reasons that led Montesquieu to advocate the doctrine of Separation of Powers?
4. List down a few powers of the following-
 - a. The President of USA
 - b. The Indian President
 - c. The British Monarch

Q-3 Answer the following questions in about 200 words-

1. Evaluate the doctrine of Separation of Powers by providing a few advantages and defects of the doctrine.
2. Explain how doctrine of Separation of Powers is exercised in India.

Q-4 Can Montesquie's separation of powers be applied in countries like India and UK?

Q-5 Explain why America is the best example of separation of powers.

Q-6 In USA, 'while apportioning the lion's share of powers to one organ of Government, the Constitution gave smaller slices to each of the other organs. This was done to avoid concentration and consequent abuse of power'.

- a. Which organ of the government has maximum power in the USA?
- b. Comment whether power should be limited, controlled and diffused equally among the three organs of the government and support your argument with relevant doctrine.
- c. Of the three countries USA, UK and India where is the power most evenly divided amongst the three organs of the government?

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