

## 6. Separation of powers, comparison of constitutions

### Separation of powers

1. The doctrine of separation of power claims that **state power is not a single entity** but **rather a composite of different governmental functions** carried out by state bodies independently of each other. The objective is to ensure that **different branches of government** should **work autonomously** with **minimal interference** from others. It also aims to reduce **over-centralisation** of power in the hand any branch of the Government and thus reduce instances of abuse of power.
2. The constitution of India **embraces the idea of separation of powers** in an **implied manner**. Despite there being **no express provision recognising** the doctrine of separation of powers, the Constitution does make the **provisions for a reasonable separation of functions** and powers between the three organs of Government.
3. **Functional separation**
  1. **Article 50** lays down that State shall take steps to **separate the judiciary from the executive**. This is for the purpose of ensuring the **independence** of judiciary.
  2. **Article 121 and 211** provides that **judicial conduct** of a judge of the Supreme Court and the High Court **cannot be discussed in the Parliament** and the state legislature.
  3. **Article 122 and 212** provides that **legislatures cannot be called into question in any court**. This ensures the separation and immunity of the legislatures from judicial intervention.
  4. **Articles 53 and 154** provides that the executive power of the Union and the State shall be vested with the **President** and the **Governor** and they **enjoy immunity** from civil and criminal liability.
  5. **Article 361** declared that **President** or the Governor shall not be **answerable to any court** for the exercise and performance of the powers and duties of his office.
4. **Functional overlap**
  1. The **legislature** besides exercising **law making** powers exercises **judicial powers** in cases of **breach of its privilege**, impeachment of the President and the **removal of the judges**.
  2. The **executive** makes **appointments** to the Judiciary and thus

affects its functioning.

3. **Ministers** are members of the **legislature**.
4. **Legislative power** can be exercised by the **executive**. For example, President or the Governor can **promulgate ordinances** when the legislature is not in session.
5. The **tribunals** and other **quasi-judicial bodies** which are a part of the executive also discharge **judicial functions**. Administrative tribunals which are a part of the executive also discharge judicial functions.
6. Besides the functional overlapping, the **Indian system also lacks the separation of personnel** amongst the three departments.

#### 5. **Judicial pronouncements**

1. Constitutional scheme does not provide any formalistic division of powers. It is through **judicial pronouncements**, passed from time to time, that the boundaries of applicability of the doctrine have been determined.
2. In the **re Delhi Laws Act case**, **SC** observed that **one organ should not perform functions** which belong to others in India.
3. In **Keshavananda Bharti** case, the **doctrine of separation of powers** is acknowledged as an integral part of the **basic features** of constitution.
4. In the **Indira Gandhi vs Raj Narain** case, this doctrine was made clearer. Court observed that in the Indian Constitution, there is **separation of powers in a broad sense only**. A rigid separation of powers as under the American Constitution does not apply to India.

#### 6. **Checks and balances**

1. The constitution of India expressly **provides** a system of checks and balances in order to prevent the **arbitrary** or **capricious** use of **power**. Though such a system appears dilatory of the doctrine of separation of powers, it is essential for **just** and **equitable functioning** of the constitutional system.
2. The **judges of the SC and the HC** are appointed by the **President**. But they may be removed from office only if they are impeached by **Parliament**. This measure helps the judiciary to function without any fear of the executive.
3. Similarly, the **executive** is responsible to Parliament in its day to

day functioning. While the **President appoints** the leader of the majority party, a government is duty bound to lay down power if the **House adopts a motion** expressing no confidence in the government.

4. Similarly the **judiciary** keeps a check on the laws made by Parliament and actions taken by Executives, whether they conform to the constitution or not, using the tool of **Judicial Review**.

## **Indian vs British**

1. The **doctrine of sovereignty of Parliament** is associated with the British Parliament. This means Parliament can **make, amend, substitute or repeal** any law. Parliament can make constitutional laws by the same procedure as ordinary laws and **Parliamentary laws cannot be declared invalid by the Judiciary**.

### **2. Differences in Indian Parliament vs British Parliament**

1. **Written constitution:** The Parliament has to operate within the limits prescribed by the Constitution. In Britain, on the other hand, the **Constitution is neither written** nor there is anything like a fundamental law of the land. **British Parliament is sovereign** and can do or undo anything. The point is that in the sense of constitutional sovereignty, their powers are not limited by a constitutional document.
2. **Upper chamber:** The upper chamber of British Parliament is known as House of Lords. **It has no fixed number unlike Rajya Sabha** in India and currently it is the biggest legislative body among democracies across the world. It is one of the **least powerful upper house in world**.
3. **Lower chamber:** The house of commons is one with the **most authority**. UK is divided into 650 constituencies each electing one MP to the commons. Thus house of common is **much more representative than Lok Sabha** of India, considering the population of India and UK.
4. **Federal system:** **India has a federal system** with a constitutional division of powers between the Union and the states. Britain, on the other hand, has a **unitary system of Government** and hence, all the powers are vested in the Centre.

5. **Judicial review:** The adoption of an independent Judiciary with the power of judicial review also **restricts the supremacy of our Parliament**. The British courts have to apply the Parliamentary laws to specific cases, without examining their constitutionality, legality or reasonableness.
6. **Fundamental rights:** Article 13 prohibits the State from making a law that either takes away totally or abrogates in part a fundamental right. In Britain, on the other hand, there is **no codification of justiciable fundamental rights**.
3. In this regard, the **Indian Parliament is similar to the American Congress**. In USA also, the sovereignty of Congress is legally restricted by the written character of the Constitution, the federal system of government, the system of judicial review and the Bill of Rights.

#### 4. **Indian judiciary vs British Judiciary**

##### 1. **Differences**

1. In case of British system, the **lack of concept of 'Basic Structure'** makes amending power of the Parliament supersede any judicial pronouncement. Whereas, in case of the Indian Judiciary system, the concept of 'Basic Structure' has provided a potent tool to Judiciary by which it can scuttle down any Executive or Legislative action, which it deems as against the basic spirit of the Constitution.
2. **British legal system is completely based on 'Common Law System'**. Common Law System implies that law is developed by the judges through their decisions, orders, or judgments. However, unlike the British system, which is entirely based on the Common Law System, where it had originated from, the Indian system incorporates the Common Law System along with the statutory and regulatory laws.

##### 2. **Similarities**

1. The Rule of Law in Britain is safeguarded by the provision that **judges can only be removed from office for serious misbehavior** and according to a procedure requiring the consent of both the Houses of Parliament. So, the judges are able to give their judgments without any fear or favor. The same has been adopted in India, where **independence of Judiciary is hailed** as an unmistakable part of the

## Constitution

2. The **actions of executive can be declared ultra vires** in both the systems.
3. The judiciary is considered the **highest interpreter of the Constitution**.
4. Off late, there has been a **splurge in judicial activism** in Britain and judiciary is becoming more and more active. A similar evolution of judiciary has been noticeable in the Indian case too.