

UNIT 26 – UPSC - Separation of powers between various organs

The separation of powers, sometimes vaguely used interchangeably with the 'Trias politica' principle is a model for the governance of a state. It is established in documents that dogma of separation of powers considers the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs should be separate, distinct and independent in its own sphere so that one does not intrude the territory of the other. Previous literature denoted that Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Later many theorists such as Montesquieu, John Locke and James Harrington described these functions as legislative, executive and judicial. 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 (Vishnoo Bhagwan, 2010).



The model was first developed in ancient Greece. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches. The typical division of branches is into a legislature, an executive, and a judiciary. It can be differentiated with the merging of powers in a parliamentary system where the executive and legislature are unified. Theory of Separation of Powers is based on the concept and based on the the idea that for the sake of individual freedom. Cooley emphasizes the prominence of the doctrine of separation of powers as “This arrangement gives each department a certain independence, which operates as a restraint upon such action of others as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guarantees against attempts at tyranny.

The modern design of the principle of separation of powers was elaborated in constitutional theory of John Locke (1632-1704). He wrote in his second treaties of Civil Government as follows: 'It may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they

may exempt themselves from the law, both in its making and execution to their own private advantage'.

Major objectives of the doctrine of separation of powers:

The main objective of the doctrine is to prevent the abuse of power within different spheres of government. In our constitutional democracy public power is subject to constitutional control. Different spheres of government should act within their boundaries. The courts are the ultimate guardian of our constitution, they are duty bound to protect it whenever it is violated. Moseneke CJ also stated that the courts are more likely to confront the question of whether to venture into the domain of other branches of government while performing their functions as entrusted by the constitution. Within the context of the doctrine of separation of powers the courts are duty bound to ensure that the exercise of power by other branches of government occurs within the constitutional context. The courts must also observe the limit of their own power.

Different researchers also rebounded their views on the purpose of the doctrine. Montesquieu stated that 'When the legislative and executive powers are united in the same person, or in the same body of magistrates there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were joined to the executive power, the judge might behave with violence and oppression'.

According to Dicey, the doctrine rests on 'the necessity of preventing the government, the legislature and the courts from encroaching upon one another's province'. Only few countries are attempting to implement the doctrine of separation of powers.

Elements of separation of powers:

It is generally acknowledged that there are three main categories of governmental functions-

1. Legislative
2. Executive
3. Judicial

Likewise, there are three main organs of the Government in a State-

- Legislature
- Executive
- Judiciary.

The theory of Separation of Powers confers all the three organs of the government should be separated from each other. Each department should be assigned to a different set of persons limited to its own sphere of activities having independent jurisdictions from, the other. No organ of the government should release any functions which it is not obliged to do. The theory signified

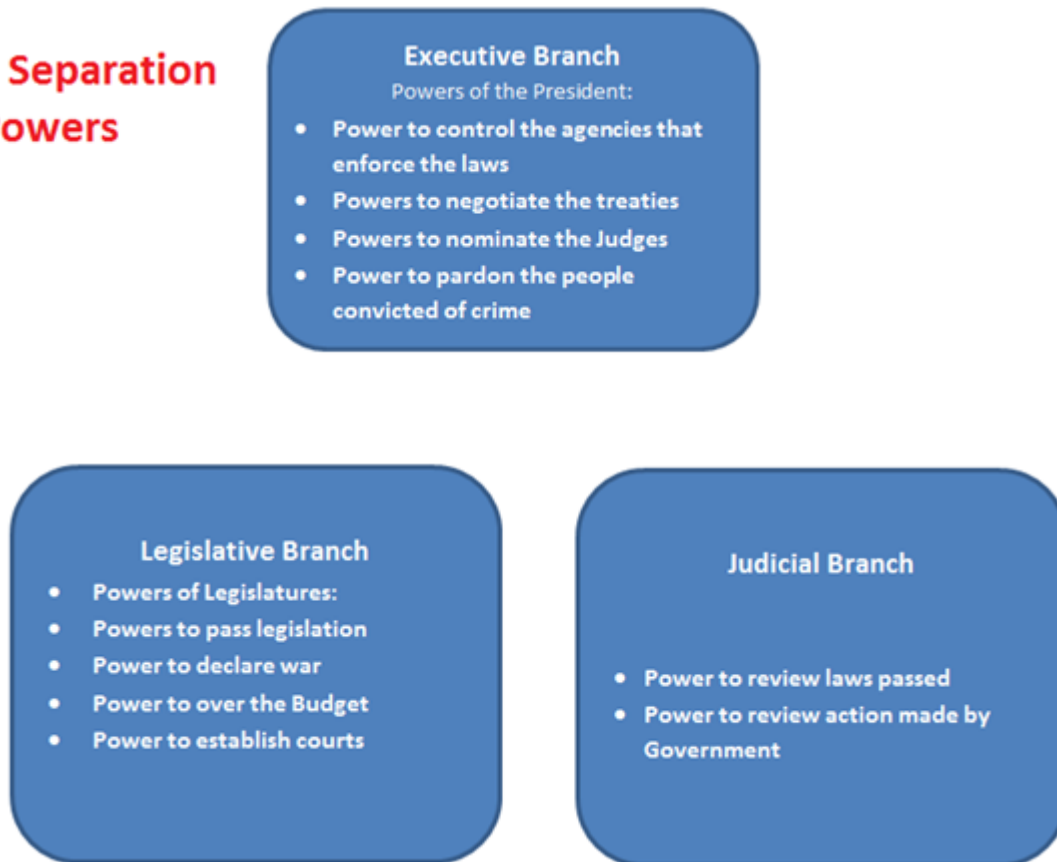
that, each branch of the Government must be confined to the exercise of its own function and not allowed to interrupt upon the functions of other branches. In this way each branch will be a check to others and so single group of people will be able to control the machinery of the state.

The theory of separation of the powers signifies the following three different things:
That the same person should not form part of more than one of the three organs of the government.

That one organ of the government should not interfere with any other organ of the government.

That one organ of the government should not exercise the functions assigned to any other organ. This is traditional concept of theory of separation of power, which is dissimilar from modern conception. New concept of separation of power has arisen because in those days when these researchers and theorists explained their ideas as the economy was very simple. Furthermore, in earlier period, areas of governmental activities were not broad. Social problems were not very complex and national and international situations were not that tricky.

The Separation of Powers



Major grounds for revival of separation of powers are as under:

The modern state has been forced to increase its activities in the economic field. This has become, unescapable due to technical and industrial re-orientation. Presently, every state particularly developing nations, have realized that planning both at regional and national levels, is unavoidable. It is debated that an economy as intricate as that of a modern State cannot be controlled effectively by a government, based on the theory of separation of powers. In a modern state, it is necessary to combine efficiency with freedom.

Other reason is that throughout the 18th century, it was assumed that the government was a necessary malicious and as such it was most essential that its activities should be checked. Currently, whole concept has transformed. It is now believed that for wealth of the nation, it was most unavoidable that government should be made to function effectively.

The principle of separation of powers is an inseparable fragment of the development of democracy. Democracy edicts a system in which every inhabitant can, without fear of revenge, breathe, express himself, and follow his or her interests. It allows him to live a life of his choice to the extent he does not impinge upon the rights of the other people. It can be presupposed that a system of balances and counter balances exists among the three organs of the government to guarantee a strong nurtured democratic system. The Legislature, the Judiciary and the Executive are the supports of democracy. No democracy indeed anticipates conferment of absolute power in any single authority. According to Lord Acton: "Power corrupts and absolute power tends to corrupt absolutely"

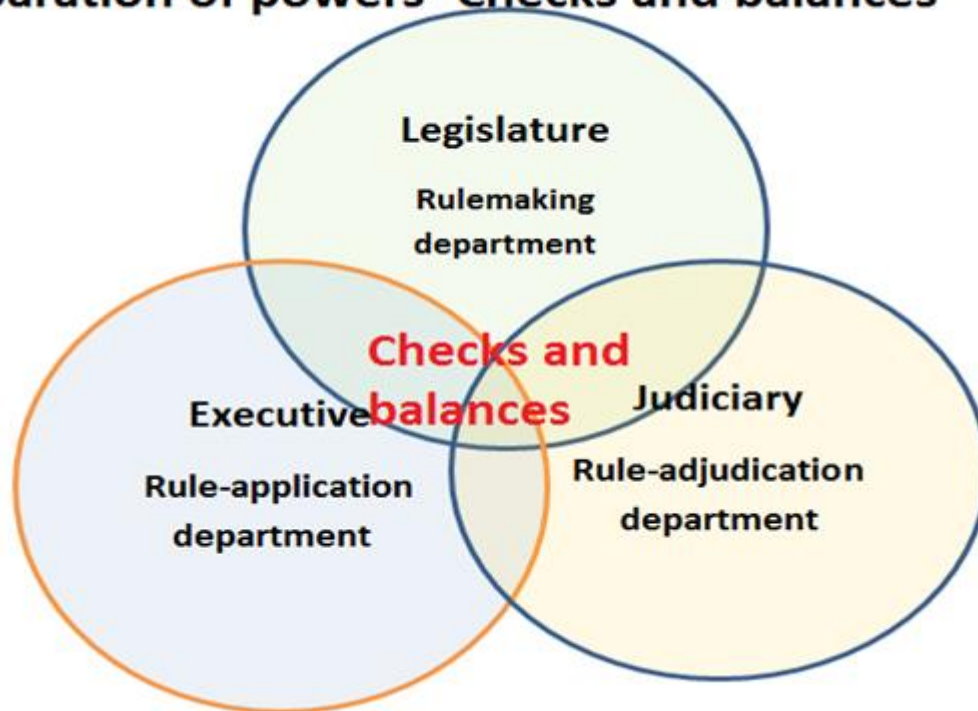
Therefore, the system of checks and balances is one of the most striking aspects of Indian constitutional scheme. The three organs can practically not be segregated into three incontrovertible compartments due to their interdependence on each other to ensure effective governance. They have to work in harmony and in consonance to attain a meaningful sustenance and purposeful progress of inhabitants. Though, minimum infringement is always desirable. Hon'ble Chief Justice Balakrishnan stated that, "the Constitution lays down the structure and defines the limits and demarcates the role and function of every organ of the State including the judiciary and establishes norms for their inter relationships, checks and balances." Therefore, all the three organs are expected to work in concord instead of giving importance to only one of the organs.

Checks and balances on the principle of separation of powers:

The aim of checks and balances is to safeguard that different branches of government control each other internally (checks) and serve as counter weights to the power possessed by the other branches (balances). In simple form, the objective of separation of functions and employees is to limit the power; to make the branches of government accountable to each other. 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 Bill of 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 and not to exercise the power of another specialist.

Separation of power: Check and balance

Separation of powers- Checks and balances



The Legislature:

The Legislature has been considered as high-esteem in the Indian Constitution. It is mainly associated with enactment of general rules of law that are relevant to all aspects of the conduct of its inhabitants and institutions. The Parliament is the Union Legislature of India consists of two bodies such as Lok Sabha and the Rajya Sabha. It passes laws, impose taxes, authorizes borrowing, and prepares and implements the budget, has sole power to declare war, can start investigations, especially against the executive branch, appoints the heads of the executive branch and sometimes appoints judges as well as it has the power to ratify treaties. As it is presenters for the will of the people by safeguarding a true and complete democracy, it can be supposed that it cannot be done all by the Legislature itself. It is an impending threat to democracy if an absolute power is given to the nation's purse holder. By making the executive responsible to the popular house, the Constitution safeguards a proper mechanism of checks and balances to the dogma of separation of powers. The entire system has other facades which can help achieve the same. Therefore, this brings the role of the other two pillars: the judiciary and the Executive.

The Judiciary:

Indian constitution is drafted so precisely that it provides for an independent and unprejudiced Judiciary as the interpreter of the Constitution and as custodian of the rights of the populations through the process of judicial review. This mandates the judiciary to interpret the laws but not to make them. They are not to lay down the general norms of behaviour for the government. Judiciary is an important organ of the government (Harihar Bhattacharyya, 2015). The Supreme Court of India is one of the very powerful courts in the world. Since 1950, the judiciary has played vital role in interpreting and in protecting the Constitution.

The higher judiciary in India, especially the honourable Supreme Court has become an epicenter of debate over its role in entertaining and deciding public-interest-petitions. In deciding these petitions, the judiciary issues many directions to the Government which includes framing of legislation in many areas. The role of the judiciary should only be limited to inspecting the constitutionality of the legislation and not directing the government to enact legislation. The scope of judicial review does not extend beyond enquiring whether a questioned legislation or an executive action falls within the competence of the Legislature or of the executive authority or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

Independence of Judiciary means that:

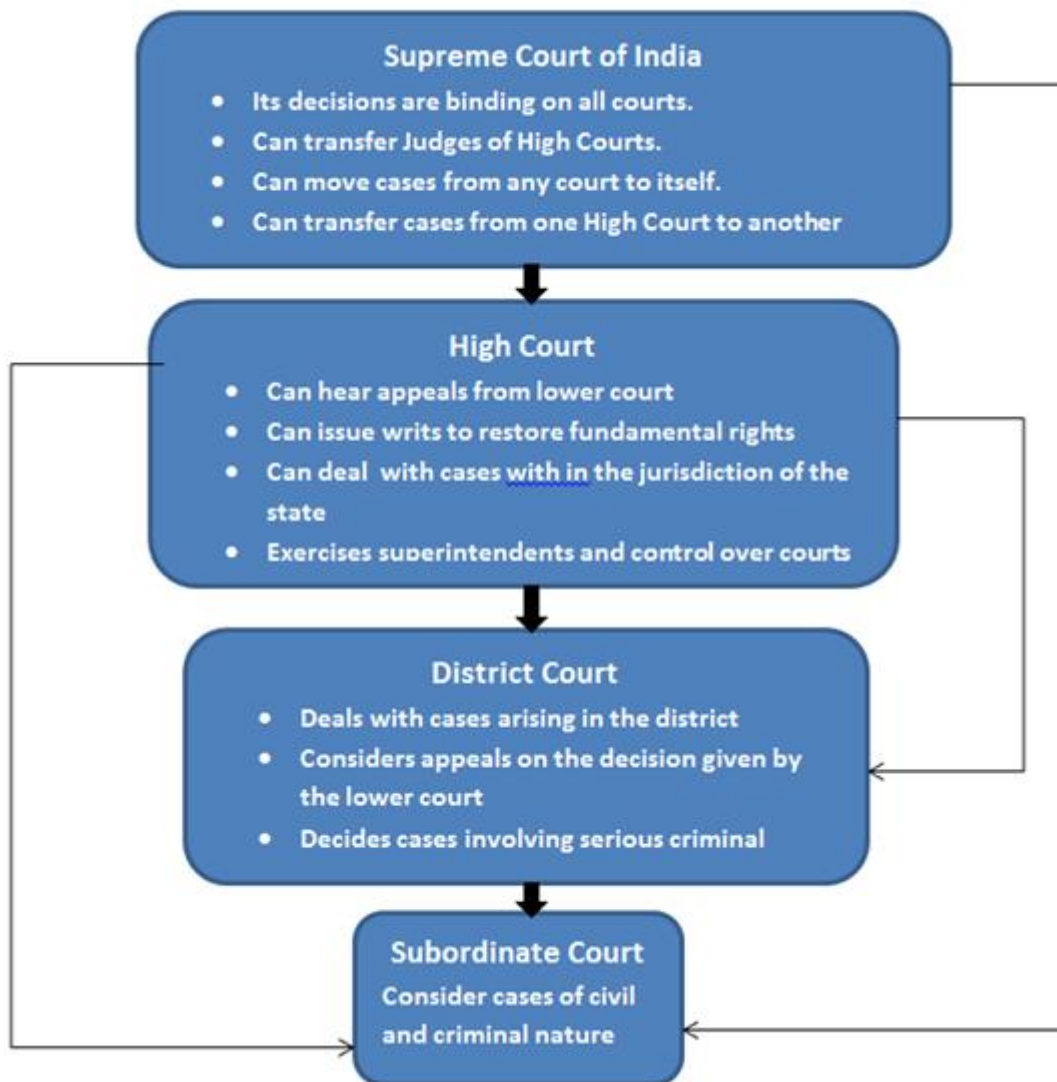
- i. The other organs of the government like the executive and legislature must not restrain the functioning of the judiciary in such a way that it is unable to do justice.
- ii. The other organs of the government should not interfere with the decision of the judiciary.
- iii. Judges must be able to perform their functions without fear or favour.

Structure of the judiciary:

The Constitution of India provides for a single assimilated judicial system. This means that India does not have separate State courts. The structure of the judiciary in India is pyramidal with the Supreme Court at the top, High Courts below them and district and subordinate courts at the

lowest

level.



The Supreme Court of India is most powerful courts anywhere in the world. However, it functions within the limitations imposed by the Constitution. The functions and responsibilities of the Supreme Court are defined by the Constitution. The Supreme Court has specific jurisdiction or scope of powers. It has been recognized that the judiciary is trusted with the job of protecting rights of individuals. The Constitution provides two ways in which the Supreme Court can remedy the violation of rights. First, it can restore fundamental rights by issuing writs of Habeas Corpus; mandamus etc. (article 32). The High Courts also have the power to issue such writs (article 226).

Secondly, the Supreme Court can declare the concerned law as unconstitutional and therefore non-operational (article 13). It can be said that the role of the judiciary in modern society is to assist in delivering justice. The major role of the judiciary is to apply the law to factual situations and provide a just resolution for the parties as well as for society.

The three organs have to perform their functions keeping in mind certain constitutionally assigned impingements. Therefore, if any of the three organs attempts to expand its jurisdiction, it would follow an inevitable conflict and affect the harmonious effectiveness of the tripartite system of government. No organ has to supervise over the exercise of powers and functions of another, unless the Constitution strictly so mandates. The Honourable Supreme Court has itself interpreted that the concept of Separation of powers is a “basic feature” of the Constitution. So if one encroaches

the territory of the other it would be a clear violation of the basic structure of the Constitution and judiciary is not an exception to the same.

Executive:

The Executive can refuse laws, can command of the military, makes verdicts or declarations and disseminate lawful regulations and executive orders, can reject to spend money allocated for certain purposes, can appoints judges, and has the power to grant pardons to convicted criminals. The Executive is strong support of democracy and equally expected to be free of intrusions from the other two organs of constitution. It is established that Executive is independent of the two but the incongruity persists. It is completely eroded in actual practice. The reason is that each time the executive is questioned for its actions by the judiciary and the Legislature. This weakens the independence of the Executive to the maximum. It is not that the question of responsibility pops up only in the case of executive. The judiciary and legislature are equally answerable but in their cases, a built-in system from within would be available for discharging those functions. This is the real state of affairs, which exists in practice.

Though the Indian Constitution allocates executive powers to the President and Governors (Article 53 (1) and Article 154 (1)), they are authorised with certain legislative powers (Articles 123, 213 and 356) and certain judicial powers (Articles 103 and 192). Likewise, the legislature exercises certain judicial functions (Articles 105 and 194) and judiciary exercises few legislative and executive functions (Articles 145, 146, 227 and 229). However, the judiciary is made separate from the executive in the public services of the State (Article 50). In some states, complete separation of judiciary from executive has been accomplished through legislation.

According to Article 52 and 53 of Indian constitution:
52. The President of India - There shall be a President of India.

53. Executive power of the Union. - (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(3) Nothing in this article shall-(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or (b) prevent Parliament from conferring by law functions on authorities other than the President.

Executive powers: All the executive actions of the Union government are taken in his name. He assigns officials of the Union Government, Prime Minister, and Council of ministers at the advice of the Prime Minister, Chief Justice and judges of Supreme Court and High Court at the advice of the Chief Justice of India. He appoints the chairman of UPSC, Comptroller and Auditor general of India, Attorney General of India, Chief Election Commissioner and other Election Commissioners, Governor of the states, members of Finance Commission and ambassadors.

Judicial powers:

The President appoints the Chief Justice of the Supreme Court and other judges on the advice of the Chief Justice. The President enjoys legal protection. He can grant pardon, reprieve, and respite or remission punishment. The President can terminate the judges by two-thirds majority of the

members present in two houses. If they consider a question of law or a matter of public importance which has arisen, they can ask for the advisory opinion of the Supreme Court. However, they may or may not accept that opinion.

Legislative powers:

The President summons both houses of the Parliament and prorogues the session of the two houses and can dissolve the Lok Sabha but uses these powers according to the advice of the Council of Ministers headed by the Minister. The introductory speech of the Parliament at the beginning of the first session each year is delivered by him where he outlines the new policies of the government. A bill that the Parliament has passed can become a law only after the President gives their agreement to it. He can return a bill to the Parliament for reconsideration but this is not so in case of money bill. But in case the Parliament sends it back for the second time, the President is obliged to sign it. The President can promulgate ordinances when the Parliament is not in session but must get it approved within six weeks. Furthermore, this is so only in case of the Union and Concurrent list.

Separation of Powers: Each branch of the federal government (legislative, executive and judicial) operates independently of the other branches.

Legislative	Executive	Judicial
The main duties of the legislature branch are to write, debate, and pass bills that are then passed up to the President for approval	The executive branch enforces the laws of the country	The Judicial branch is led by the Supreme court.

It is important to uphold the separation of powers between the executive and the legislature is where the legislators exercise executive powers. Legislators exercise their check over the executive many a times through their power to head executive boards and agencies of various descriptions, the capacity to contribute in executive committees which award contracts or select beneficiaries of various welfare schemes. Furthermore, the grant of an annual fund to the legislators to carry out activities in their constituency gives them executive powers in disguise which leads to corruption over a period of time. Article 74(1) make it clear that the executive head has to act in accordance with the aid and advice given by the cabinet. Certain constitutional provisions also provide for Powers, Privileges and Immunities to the MPs, Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent.

The executive and the judiciary in the Indian constitution:

The rapport between the judiciary and the executive has always been sensitive. A society governed by Rule of law always demands for separation of the judiciary from the executive. The rule of law is always exposed to the risk of being intruded by the executive. Therefore, proper functioning of a democracy requires a clear separation of the two. The primary function of the judiciary is the administration of justice and justice can never be rightly administered without the fear or favour

unless there is a separation of the judiciary from the executive. Article 50 of the Constitution provides that “The State shall take steps to separate the judiciary from the executive in the public services of the State.” The intention of the developers of the Constitution was to bring about changes wherever possible and shall be done immediately, without any delay, and where immediate operation of this principle is not possible, it shall however be accepted as an imperative responsibility.

The judiciary and the legislature under the Indian constitution:

According to Article 122 of the Indian Constitution, the Court shall not call validity of any proceedings in Parliament in question on the basis of any alleged irregularity of procedure. And Article 212 provides that the Court should not investigate into the proceedings of the Legislature. But certain judicial irregularity has been felt in the recent past. The most noticeable and popular Jagdambika Pal case of 1998 involving the Uttar Pradesh Assembly and the Jharkhand Assembly case of 2005. The Interim Order of the Supreme Court in both the cases is a clear violation of the principle of separation of powers between the Judiciary and the Legislature. The judiciary blames Legislature for not doing anything worthwhile over the past three decades, whereas Legislature accuses Judiciary of doing the job of the legislature. At a glance, the doctrine of Separation of Powers is accepted in India.

In I.C.Golak Nath v. State of Punjab, it was perceived: “The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.”

Studying the constitutional provisions carefully, it is evident that the policy of Separation of Powers has not been recognised in India in strict manner. In India, not only there is functional overlying but there is personnel overlapping also. The Supreme Court has power to declare annulled the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. The executive can affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. One can go on listing such examples yet the list would not be exhaustive.

In Indira Nehru Gandhi v. Raj Narain, it was perceived: “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 or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of doctrine of Separation of Power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of Separation of Power is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour.”

It can be said with the observation of Mukherjee, J. in Ram Jawaya v. State of Punjab: “The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

It can be concluded that the conception of Separation of Powers is a model for the authority of independent states. The three branches of the government that include the legislative, the executive and the judiciary are the three separate activities in every government through which the will of the people are communicated. The legislature devises laws, the executive applies them and the judiciary applies them to the specific cases arising out of the breach of law. Therefore, it has become a model for the governance of democratic States. This model is also called as Trias Politica, which in the non-political context means 'separation of duties'. Advocates of the separation of powers believe that it shields democracy and forestalls tyranny. Whereas, the others say that there occurs considerable overlap of powers in parliamentary democracies.