



Unit 1

Introduction to Political Institutions



CHAPTER

1

Concept of State

Contents

- I. What is a State?
- II. The concept of State and Article 12 of the Constitution of India
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- VII. Elements of a State
- VIII. Role of a State
- IX. Exercises

Learning Outcomes

Students will be able to:

- Define the term “State” in legal and political context especially international law
- Identify and explain the elements that are required by any political institution to be recognized as a State
- Define, identify and illustrate the various roles played by states in the context of the governmental control being exercised on the citizens
- Evaluate the relevance of Modern Welfare States in today’s global scenario

I. What is a State?

Black’s Law dictionary defines ‘State’ as “*the political system of a body of people who are politically organised; the system of rules by which jurisdiction and authority are exercised over such a body of people.*”

II. The concept of State and Article 12 of the Indian Constitution

Article 12 of the Constitution of India states that, “*in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*”

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As per the definition provided above, State includes the following:

1. The Government and Parliament of India, i.e., Executive and Legislature of the Union
2. The Government and Legislature of each State, i.e., Executive and Legislature of the State
3. All local and other authorities within the territory of India
4. All local and other authorities under the control of the Government of India

Quick Facts about Article 12

Facts about Article 12	
What is Article 12 of the Constitution?	It defines the term 'State' which is used in Part-III of the Constitution while mentioning the application of the provisions of Fundamental Rights of the Indian Citizen.
Is Article 12 a Fundamental Right?	Article 12 in itself is not a Fundamental Right technically, but it defines the term 'State' for the Fundamental Rights that are entailed in Articles 14 to 35.
Is judiciary a State under Article 12?	There is no explicit mention of judiciary (Supreme Courts, High Court, or Lower Courts) as a 'State' in Article 12. However, judiciary cannot make rules that are in itself violative of Fundamental Rights.

III. What is Government?

Black's Law dictionary defines 'Government' as "*the structure of principles and rules determining how a state or organization is regulated.*"

What is the difference between State and Government?

Some of the main differences between state and government are as follows:

STATE	GOVERNMENT
A State has four essential elements—Population, Territory, Government and Sovereignty.	Government is only one element of the State.
Sovereignty is the hallmark of the State. It belongs to the State.	The government exercises power on behalf of the State.
The State has sovereign ownership and jurisdiction over its territory. State is a territorial entity and territory belongs to it.	The government has the responsibility to preserve, protect and defend the territory of the State.



IV. Emergence of the State from Society

The State is usually described as 'society politically organized'. Society is an association of human beings, who live a collective life and form social relations to fulfil their needs of life. These may be physical, emotional, intellectual or spiritual. The presence of the societal institutions like family, clans, tribes, villages, religious institutions, educational institutions, work place associations etc. in a society is a fact, which cannot be denied. Society is the whole web of social relationship based on kinship, affinity, language affinity, religious affinity, common conscience of individuals and territorial affinity. Social relationships are governed by necessity, custom, courtesy, morality, mutual understanding, agreement or even contract.

When a society is governed by common set of laws, rules, regulations, and obey a supreme authority, it qualifies for being a State. The State fulfils the need of political organization of society to realize the purpose of collective living. This is what we understand from the famous phrases used by Aristotle (384-322 BCE) in his treatise Politics, where he observed that 'Man is a social animal; Man is a political animal'.

Thus, the State is formed out of society. The society is the primary association. A State is formed to regulate the political activity of individuals for social order. The State depends on society for its existence, and not vice versa.

R.M. MacIver (1882-1970) in his famous work 'The Modern State' has thus observed, 'There are social forms like the family or church or the club, which owe neither their origin nor their inspiration to the state; and social forces, like custom or competition, which the state may protect or modify, but certainly does not create; and social motives like friendship or jealousy, which establishes relationships too intimate and personal to be controlled by the great engine of the state..... The State in a word regulates the outstanding external relationships of men in society'.

V. Definition of State

According to J. W. Garner, 'state is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent or nearly so, of external control and possessing an organised Government to which the great body of inhabitants render habitual obedience'. The definition given by Garner contains all the elements of the state. The state must possess four elements, namely, population, territory, government and sovereignty.

VI. Theories on the origin of State

Political philosophers have given different theories on the origin of the state.

Theory of Kinship

The theory of kinship on the origin of State is based on sociological facts. The earliest advocate of this theory is Aristotle (384-322 BCE). In his treatise, 'Politics' Aristotle states, 'Society of many families is called a village and a village is most naturally composed of the descendants of one family, the children and the children's children..., for every family is governed by the elder, as are the branches thereof, on account of their relation, there unto.... and when many villages so entirely join themselves together as in every respect to form but one society, that society is state and contains in itself that perfection of government'.

In other words, family was the unit of society at the beginning. The blood relationship and kinship brought the members of the family together and they all accepted the authority of the head of the family. The name of the common ancestor was the symbol of kinship. Kinship created society and

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society in turn created the State. With the expansion of family arose new families and multiplication of families led to the formation of clans. With the expansion of clans, tribes came into existence and ultimately the state came into existence. Family, discipline, command and obedience are supposed to represent the origin of government. This view finds support from the writings of R.M. MacIver (1882-1970) according to which curbs and controls that constitute the essence of government is first seen in the family. There is a difference of opinion among the scholars regarding the nature of kinship.

Patriarchal Theory

According to Patriarchal Theory, in the origin and development of State, the eldest male descendant of the family had an important role to play. The Patriarchal theory finds its support from Sir Henry Maine (1822-1888). In his book 'The Spirit of Laws' (1861), Maine explained that the state developed out of the family as legitimate legal system developed out of the unrestrained autocracy of the family head (patria potestas). Under patria potestas, the eldest male parent of the family had the final and unqualified authority over the family and the household. He expanded the family ties by polygamy and thus created the bondage among the individuals on the basis of kinship to form a state. The congregation of families formed villages, and extension of villages formed tribes or a clan, ultimately to form State.

Matriarchal Theory

Matriarchal Theory finds support from political thinkers like McLennan (1827-1881), and Edward Jenks (1861-1939). According to them, patriarchal families were non-existent in the primitive ages. Polyandry (where a woman had many husbands) was the highest authority of the household. McLennan described mater familias (mother as the head of family) as the martia potestas (mother as the final authority) in matters of possession and disposal of property of the family.

Edward Jenks illustrates this process from his studies of primitive tribes in Australia. The Australian tribes were organized in some sort of tribes known as totem group. The totem groups were not organized on the basis of blood relationship but they were united by a common symbol like a tree or an animal. Men of one totem group would marry all the women of their generation belonging to another totem group. Thus, the system of marriage included polygamy as also polyandry. Kinship and paternity in such cases could not be determined but maternity was a fact.

Edward Jenks points out that with the passage of time and beginning of pastoral stage in human civilization, the matriarchal society evolved into the patriarchal one.

Patriarchal and matriarchal theories have been criticized on the ground that the authority of a state as a political institution over its individuals is not by nature but by the choice of individuals. The purpose of forming a state also differs to a great extent from that of a family. The authority to run a state is conferred on the ruler not because of his seniority, but on account of his status and competence.



The Minangkabau is the largest matriarchal society in the world. They are the indigenous tribe of the Sumatra region of Indonesia which is made up of 4.2 million members. Ownership of land, as well as the family name, is passed from mother to daughter whereas men are involved in political matters.

Divine Theory

According to the Divine Theory, state is established and governed by God or some super human power or the King as his agent and the religious scriptures. As God created the animals, plants, trees, rivers, hills and other inanimate objects, the God also created the state for a particular end in view, that is, peace, protection and preservation of creatures on this earth. This theory found support from political thinkers such as James I (1566-1625) and Sir Robert Filmer (1588-1653). This theory implies individuals to obey and support some definite ruler with a high moral status equivalent to God. This theory adds moral character to state functions. Laws backed by religious sanctions appealed more to the primitive man to live under the authority of the king.

Hindus, Christians, Muslims, Jews, and many other faiths of this world hold a similar view, that the origin of political authority had divine sanction. Hinduism considered King Rama and King Krishna as divine incarnations on this world. The Islamic states also seek to uphold the reign of God (Allah) on earth. Christianity also traced the origin of political theory to the will of God.

Social Contract Theory

The Social Contract Theory traces the existence of the State to the mutual agreement and mutual consent of the people, to form a State. Thomas Hobbes and John Locke, both from England, and Jean Jacques Rousseau from France, are the three political philosophers who propounded this theory. They assumed that, to escape from the pre-political condition of society, individuals entered into a social contract. These theories served as the basis for modern democracy. This theory established the obedience to political authority and that ultimate political authority rested with the consent of the people. The pre-political condition of mankind was described as the state of nature.

Thomas Hobbes (1588-1679), an English political philosopher, in his literary work *Leviathan* explains the origin of the state. He explains that prior to the emergence of a civil state, human beings were in the state of nature. Hobbes began his thesis with the concept of a state of nature, which he characterised as the pre-social phase of human nature. Their lives were under constant struggle with nature. The state of nature was a condition of unmitigated selfishness and capacity. It was a condition of perpetual war 'where every man was enemy to every other man'. The life of a human being was 'solitary, poor, nasty, brutish and short'.



<https://www.politicalscienceview.com/the-theory-of-social-contract/>

To evade the state of nature, and for securing their natural rights of life, liberty and property as civil rights, individuals entered into a social contract to establish a state. The people authorized their right of governing themselves to the sovereign, which came into being as a result of the contract. The person or assembly of persons to whom the rights were surrendered became the sovereign and the individuals who agreed to submit to the authority become subjects. Sovereign here meant the King. The ruler was not a party to the contract, and was not bound by any terms of social contract and free to rule as per his whims. The commands of the sovereign were laws for the governed and the sovereign was not accountable to people. People gave their ruler unquestioned obedience.

In the words of R.G Gettle, Hobbes created the all powerful sovereign on account of his belief that without such sovereign power, law, order, peace and security could not be maintained in society.

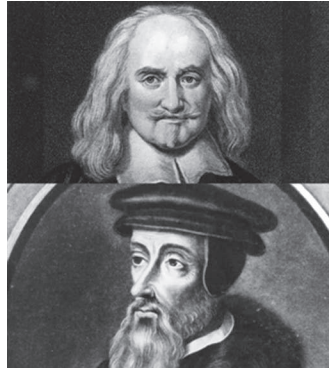


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Hobbes deprived the people of their right to revolt against the sovereign. Hobbes allowed individuals to disobey the commands only when the sovereign deprived them of their right to self-preservation or the ruler got conquered and submitted authority to a new emperor.

According to Hobbes, a change in the government meant the dissolution of the State. Thus, he did not maintain the difference between state and government as a political institution.

John Locke (1632-1704) in his book 'Two Treatises of Government' explained that the state of nature was not a state of war, but a state of peace, natural rights, preservation, goodwill and mutual assistance.



Fact:
Hobbes was named after the 17th-century philosopher Thomas Hobbes, while Calvin's name came from the 16th-century theologian John Calvin.

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Locke's state of nature was pre-political. The people were social and had rights and liberties. The state of nature ensured three rights to individuals relating to life, liberty and property. The state of nature was one of inconvenience. Life was inconvenient because each individual had to interpret the law of nature for himself and had also to enforce it without the help of any other authority. The state of nature did not have the machinery to enforce the natural rights of individuals. To preserve such state of affairs two contracts were made: social and governmental.

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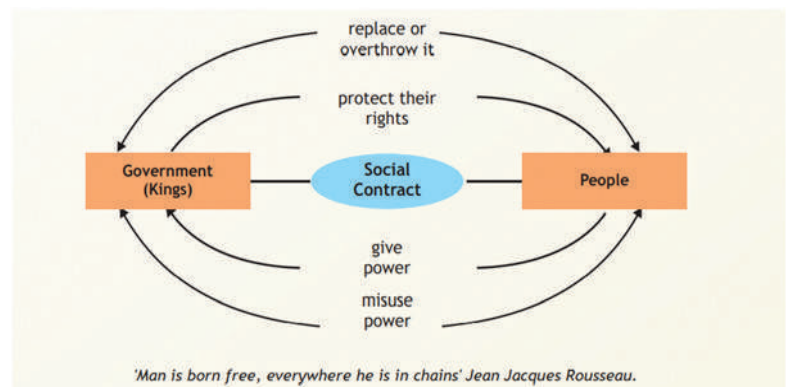
Social contract led to the formation of civil society and governmental contract to the establishment of government. Social contract was among the individuals to surrender their natural rights in exchange of civil rights. Governmental contract was between the individuals and the ruler, to establish a system of law and justice in the form of a State. The ruler was the party to the contract and was bound by its terms. Unlike Hobbes, Locke traces the source of government's authority to the consent of the community.

Locke introduced the concept of limited government, in terms of the rulers, their powers, functions and tenure. He believed in limited monarchy. The King was the trustee of the people. If the ruler abused his powers and breached the popular trust, he may be changed by revolt by the people.

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According to **Jean Jaques Rousseau** (1712-1778) 'the general will of the people' led to the creation of the institution called the State. Rousseau in his literary work, 'The Social Contract' described the state of nature as a state of bliss and happiness. With the passage of time, increase in population and disparity of wealth and power, life became intolerable. Simplicity and happiness disappeared. Human beings then started to build their relations on cooperation and dependency. They entered into a 'social contract' to preserve their natural rights without submitting or subordinating to any ruler or authority.

Individuals surrendered their rights to the general will of which individuals themselves were part, and hence they shared rights even after transferring them. Individuals were governed by a new authority in the name of general will (common good) of the people, in the form of direct democracy. Rousseau regarded general will of the people as sovereign. The common good depends on the prevailing circumstances of a society. According to Rousseau, the government is merely the tool to execute the popular will. Thus, popular sovereignty is in continuous



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exercise and there is no scope of revolt in his theory.

This theory is criticized on certain common counts. First, the individuals who were naive to the concept of political authority and civil rights could not, from any particular point of time, enter into an agreement and start living a collectivized civil life. Second, if the existence of state is based on agreement of the members of a society, then the old agreement may be revoked for new in accordance with the self-interests of the members. Thus, a mechanically originated state will run under the constant fear of destabilization.

VII. Elements of a State

A. Population

The state is a human association constituted by the people living there. Population is an essential element of a state. It is the people who make a state, without them there can be no state. The people are the ones who create the state. They also maintain the resources, live on the land, and form the Government. The population must be large enough to make a state and sustain it.

Plato (429-347 B.C.E) in his book 'The Laws' suggested a figure of 5040 citizens for constituting an ideal State. Aristotle (384-322 BCE) states that the population of a state should neither be so large that administration may be inconvenient nor so small that people may not lead a life of peace and security.

Stephen Leacock (1869-1944), an English political writer had stated that the population must be sufficient in number to maintain a state organization, and that it ought not to be greater than the territorial area and resources that the state is capable of supporting.

On the nature of population, it may be homogeneous or heterogeneous in respect of race, religion, language or culture. Countries such as India, United States of America, and Canada have population marked with such diversity. People's Republic of China has a population of more than 1400 million people, whereas the smallest state in the world Vatican has a population of only 821 people.

B. Territory

A state is a territorial institution. The fixed territory and population of a state gives it a physical identity in the eyes of municipal law and international law.

The functions of a state, as a political and legal community of human beings, must first of all be exercised in a given territory. Territory is a geographical area that is owned and controlled by a government or country to exercise state sovereignty. Aristotle (384-322 BCE) favoured the State having moderate size. Montesquieu (1689-1775) said that there is a necessary connection between the size of the state and the form of government best suited to it. The fact is that the states of the world vary in terms of demographic strength. San Marino has an area of 36 sq. miles, whereas the United States of America has a territory of 37,38,395 square miles.

Territory is therefore generally described as land which belongs to the state and individuals, internal waters and territorial sea (straits) which state claims for sovereignty and the airspace above this territory (land, bodies of water, atmosphere and natural resources). Resources such as agriculture, livestock, minerals, oil, natural gas and forestry can be found on land.

Territories constitute the physical basis of the state. Nomads and gypsies can have no state because they lead a wandering life. It is important that a state should possess an undisputed territory of its own over which it should have exclusive jurisdiction. Furthermore, it should have territorial contiguity, i.e., geographically it should be one composite whole. A fixed territory is



not essential to the existence of a state provided that there is an acceptable degree of what is characterized as ‘consistency’ in the nature of the territory in question, and of its population. In fact all modern states are contained within territorial limits.

In brief, a territory does not need to possess geographical unity, and it may even consist of territorial areas which lack connection, or are distant from one another. For instance, islands or other territories which are part of the mainland still constitute of territory of a state.

C. Government

Government is the political and administrative organ of a State. The state operates through its government. The state consists of all its citizens, and is a broader concept. The Government is the sum total of legislative, executive, and judicial activities of a state. It also includes internal bodies, sub-state governing authorities at the local and regional levels, such as the Municipal Corporations, Municipal Councils, Panchayats and Gram Sabhas in India. The government of a state makes provisions for the services of defence, foreign relations, levy of taxes, issue of currency, building of roads, bridges, transportation, communication, water supply, electricity, health education and other types of social and physical infrastructure. The government of a state shall be so organized that it enforces law to maintain order, peace and security. As the role of a state changes, so does the form of government.

D. Sovereignty

Sovereignty is the crucial factor that distinguishes the state from other associations. Without Sovereign there can be no state in the technical sense of the term. Sovereignty is the most essential ingredient and characteristic in the formation of the state. No state can exist without internal and external sovereignty. Internal sovereignty means that the people residing within the territory of the state give their unqualified obedience and support to the authority of the state, and further that the state is supreme in all its internal matters. It is by virtue of its sovereignty that the state makes its laws and decisions and issue commands which are binding on all citizens. The right to use legitimate coercion in its own right is exclusive to a state. Internal revolts or external aggressions may disturb a state, but the state continues to exist so long as it has legitimate sovereignty.

External sovereignty is understood as the freedom of state from external control and influence. The state should be treated at par with other states and should not be assigned any inferior position. The state should be free to enact its own laws as well as foreign policy without any external pressure.

Presently ‘international recognition’ is also considered as an essential element of the state. That implies the recognition of the sovereignty of the state over a given territory and population by other states.

VIII. Role of a State

Political thinkers have different opinion regarding the role of the state. In the words of Professor MacIver, “the state has no finality, can have no perfected form. The state is an instrument of social man.” To many scholars the functions of the state are also different. Some consider state as a moral and ethical institution whereas others consider it as an evil institution. MacIver has referred to different notions of the state such as class organization, legal institution, mutual insurance agency, unnecessary evil, necessary evil, the march of God on earth, welfare system, power system, state as an organism etc.

Andrew Heywood, an English political writer in his book Politics, classifies the role of the state based on the functions or responsibilities that are fulfilled by the state and the ones that are left to private individuals. It will be instructive to examine the following classifications:



A. Minimal States

The ideal of minimal states is a contribution of classical liberals. Names of political thinkers such as John Locke, Jeremy Bentham, J. S. Mill, Herbert Spencer, Robert Nozick, Friedrich Von Hayek and Milton Friedman are generally associated with this approach. The idea is to ensure the widest possible individual liberty. People who ascribe a minimal role to the state believe that a laissez-faire ('let it be' or 'leave it alone') approach to the economy is most likely to lead to economic prosperity. States' role is to protect individuals from interference in their liberty and that transactions between private individuals are voluntary and free. According to John Locke's theory, 'state acts as a night watchman' whose services are called upon when orderly existence is threatened. The state must exercise the basic role of providing protection from external attacks, enforcing agreements and maintaining domestic order. Minimal states play a minimum role in interfering with the social and economic life of the subjects.

B. Developmental States

A developmental state is characterized by having strong state intervention, as well as extensive regulation and planning. The term 'developmental state' describes the states' essential role in harnessing national resources and directing incentives through a distinctive policy-making process. The first person to seriously conceptualize the developmental state was Chalmers Johnson (1931-2010). Johnson defined the developmental state as a state that is focused on economic development and takes necessary policy measures to accomplish that objective.

C. Social Democratic States

Social democratic states are the ideal type of states viewed by modern liberals and democratic socialists. The state functions on the principle of fairness, equality and equal distribution of wealth to achieve social, political and economic justice, equality and empowerment of its people. The state is considered necessary to promote economic growth and social well-being of its people.

D. Collectivized States

They undertake the control of economic life, by bringing common ownership of all economic resources under their own control for the welfare of all. The state makes laws to control the private property of their citizens. People's Republic of China follows such a policy. The state takes care of the economic needs of its citizens i.e. provides food, shelter, employment and the citizens must not act against the government policies.

E. Totalitarian States

Philosophers like Hegel and dictators such as Hitler and Mussolini held that the state must have absolute powers and individuals have no right against the state. According to this view, the state can do no wrong. The whole life of an individual is within the jurisdiction of the state.

F. Modern Welfare State

Irrespective of the classification, functions of a modern welfare state include the maintenance of law and order, establishment of justice, defence, public security and foreign relations, maintenance of public health and sanitation, water supply, transport and communication system, supply of power, electricity and essential commodities, control of banking, currency and inflation, preservation of forests, checking of trading and control of prices and measurements etc. Other functions include the removal of social exploitation and establishment of social unity, provision of economic and other benefits to weaker sections, social security to old age people, widows, orphans and disabled, protection of workers by regulating minimum wages, pension, education

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of the masses, encouragement of art and literature, scientific and technological research and cultural exchanges to increase the spirit of cultural unity and harmony among the masses.

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IX. Exercises

Based on your understanding, answer the following questions:

Q-1 Write short notes on the following-

1. Patriarchal Theory
2. Developmental States
3. Social Contract Theory
4. Totalitarian States
5. Article 12 of the Constitution of India

Q-2 Write one point of difference between the following-

1. Internal and External Sovereignty
2. Matriarchal and Patriarchal theory of State
3. Minimal and Collectivised State
4. Social Contract theory by Hobbes and Locke
5. State and Government

Q-3 Answer the following questions briefly-

1. List down the various theories on the origin of State.
2. Briefly explain the elements of a State.
3. What are the various states on the basis of its role?

Q-4 Answer the following questions in about 200 words

1. Explain the comparative views on social contract theory.
2. Define State.
3. Explain the emergence of State.

Q-5 Hobbes stated 'Man is born free, everywhere he is in chains'. In light of this statement, in which type of state would a man be chained the most and why? Give an example of such a State. If given a choice of residence, in which type of state would you like to reside? Give reasons.

Q-6 Patria, a locatable place on the world map, having a considerable territory under its control, consisted of a population of 1 million people. It was ruled by Col. George, however, the place did not gain any international political recognition as one of the major elements was missing. Identify and explain all the elements of state.

Q-7 How has the concept of state been defined in the Constitution of India? Why do you think it has been included in Part III of the Constitution?

Q-8 How would you differentiate between India as a state and the various states of India?

Q-9 Imagine yourself living in a state of nature. Which aspects of your life would you want to give up and what would you expect in return? What kind of social contract would you enter into and with whom?



CHAPTER

2

Forms and Organs of Government

Contents

- I. Introduction to the Organs of Government
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 - C. Dictatorship
 - D. Democracy
- III. Main Organs of Government and its Functions
 - A. General Functions of Legislature as Organ of Government
 - B. General Functions of Executive as Organ of Government
 - C. General Functions of Judiciary as Organ of Government
- IV. Exercises

Learning Outcomes

Students will be able to:

- Construct the political system which forms the foundation of our legal system
- Describe all forms of government seen globally with relevant examples
- Differentiate between all forms of government
- Recall organisation of legislature globally and their advantages
- Identify the organs of government
- Explain the functions of legislature
- Enumerate the functions of executive and link it to modern welfare state
- Explain the functions of judiciary
- Evaluate the overlap in functions of all organs

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I. Introduction to the Organs of Government

In the preceding chapter, we discussed 'Government' as an essential element of the 'State'. Government can be said to be a set of institutions that exercises control through legal devices and imposes penalties on those who break the law. A government normally functions by distributing its functions between its organs with each organ performing some specific functions. It primarily performs three functions: making the laws, enforcing the laws and adjudicating disputes. These three essential functions are termed legislative, executive and judicial functions.

A government achieves the purpose of a state through the performance of the above functions. These functions constitute the minimal requirements of any form of government. The legislature makes laws, the executive implements them and the judiciary interprets laws and adjudicates disputes. This system of distribution of powers among the three organs of a government is called 'Separation of Powers'.

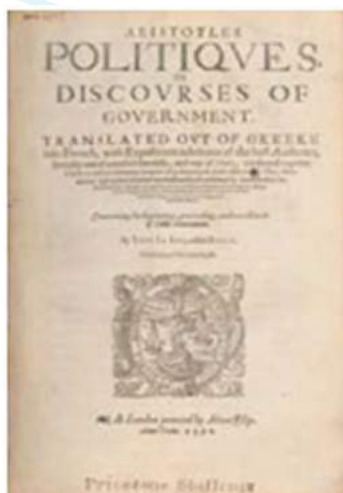
II. Forms of Government

A. Monarchy

Monarchy is the oldest form of government. The state machinery worked according to the commands and rule of the monarch. Monarchy is thus a form of political regime in which the supreme and final authority is in the hands of a single person wearing a crown, irrespective of whether his office is hereditary or elective. It is the will of one person which ultimately prevails in all matters of governance.

J.W. Garner (1871-1938) stated "In its widest sense, any government in which the supreme and final authority is in the hands of a single person is a monarchy, without regard to the source of his election or the nature and duration of his tenure. In this sense, it is immaterial whether his office is conferred by election (by parliament or people) or is derived by hereditary succession, or whether he bears the title of emperor, king, czar, president or dictator. It is the fact that the will of one man ultimately prevails in all matters of government which gives it the character of monarchy."

With the development of Republican and Democratic forms of government, monarchical form of government declined. In some cases, as in the United Kingdom, monarchs are merely retained as the 'ceremonial' or 'nominal' heads of government, devoid of key political powers. As observed by C.C Rodee, "Constitutional monarchs are loved and respected by their people as the symbols of unity of the nation or empire, but are devoid of political power."





B. Aristocracy

The word 'Aristocracy' originates from the greek word 'aristo' which means 'the best' and another greek word, 'kratein', which means 'to rule'. In aristocratic form of government, political power of the state is vested in the hands of a few people. It is a form of government in which relatively small proportion of people determine the policies of the government. It can be a combination of priests, soldiers, professionals, landowners or men of wealth.

As defined by Garner, Aristocracy is the form of Government "in which relatively a small portion of citizens have a voice in choosing public officials and in determining public policies." Those few people are chosen from among the people of the state on varied basis, such as wealth (land owning class), education (nobles), religious positions (priestly class), family, succession, physical force etc. The ruler is considered as a class separate and superior from the ruled.



C. Dictatorship

In the words of Alfred Cobban (1901-1968), "It is the government of one man who has not obtained the position by inheritance, but either by force or consent or a combination of both. He possesses absolute sovereignty, that is all the political power emanates from his will and it is unlimited in scope. It is also exercised in an arbitrary manner by decree rather than by law. The authority of the dictator is not limited in duration, is not subject to any other authority, for such a restriction would be inconsistent with his absolute rule".

Dictatorial form of Government is the rule by a single person or a determined set of individuals. He controls and exercises the political powers of the state. He occupies the position by force, invasion, intervention and militarism, in contrast to a monarch. His dictates are law of the country. He implements them and adjudges according to his will. He holds the absolute power. He is not accountable or answerable to the citizens of the state. Modern Dictatorship plays the role of totalitarian states.

D. Democracy

Pericles (495-429 B.C.) the Greek leader defined democracy as a form of Government in which people are powerful. Bryce defined democratic form of government as one where the ruling power of the state was vested not in a particular class or classes but in the community as a whole. Democratic form of Government is the most popular form in the modern civilized states. The word, 'democratic' originated from the Greek word 'Demos' meaning people and 'Kratia' meaning rule, i.e. rule by a popular vote.

Abraham Lincoln (1809-1865), a former President of the U.S., in his speech at Gettysburg defined democracy as a 'government of the people, by the people and for the people'.

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‘Government of the people’ implies equal distribution of political powers and influence among the citizens of the state, ‘government by the people’ implies participation of all citizens in forming a government, ‘government for the people’ implies the rule of government for the promotion of public welfare.

Democracy exists in two major forms: **Direct or pure democracy and indirect or representative democracy.** As defined by Garner, ‘A pure democracy so called is one in which will of the state is formulated or expressed directly and immediately through the people in mass meeting or primary assembly, rather than through the medium of delegates or representatives chosen to act for them’. The political power is in the hand of the citizens of the state as a whole to enact legislations, to administer regulations and the citizens, by common vote, elect their public officers. This is referred to as initiative, plebiscite or referendum.

This form of democracy operated in Greek city state, Athens during 4th and 5th century BC and in Rome during the early stages of the Roman polity, as an ideal system of popular participation. This form of democracy is not possible in the states having large population and territory. In contemporary times, this form of democracy is prevalent in the provinces of Switzerland. The voters meet in open air Parliament known as Federal Assembly, to deliberate upon and decide public affairs by way of Initiative, where a specified number of voters prepare a bill for acceptance or approval by legislature or general public. If approved it becomes law. Referendum is where the bill passed by the legislature is forwarded to the voters for final ratification. The term plebiscite is used where an important issue could not be decided by the government, and is decided by the votes of people. Voters recall their elected representatives when they are not satisfied by their conduct.

The other form is Representative or Indirect Democracy, on the basis of universal suffrage. In this form, citizens of the country elect their representatives on the basis of popular votes. The will of the state is formulated and expressed through the representatives. The representatives form a law making and law-executing agency for a fixed term. On the matters of governance, the representatives are accountable and answerable to the public in general. As observed by Garner, ‘this kind of democracy resembles its pure form in the sense that political power remains vested in the people, but the two differ in respect to their exercise’. Thus all the citizens of the state have equal opportunity of participation in the political affairs of the state in contrast to monarchy or dictatorial form of Government. The political power remains in the hands of people.





Presidential and Parliamentary form of Government

In Parliamentary system the legislature and the executive are related to each other, by way of membership in the two bodies and their accountability. This form of government is well prevalent in India and United Kingdom. The executive body, while implementing laws and discharging its responsibilities like health, education, food and public distribution, defence, police services etc., is responsible to the legislature.

As stated by Professor M.P. Jain, “A notable principle underlying the working of parliamentary government is the principle of collective responsibility which represents ministerial accountability to the legislature. The principle of collective responsibility means that the Council of Ministers works as a team, as a unit and is responsible as a body for the general conduct of the affairs of the government. All the Ministers stand or fall together in Parliament, and the government is carried on as a unity.”

This form of Government is also termed as Cabinet Government by Sir Ivor Jennings (1903-1965), an English lawyer and academician, and Prime Ministerial Government by Richard Crossman (1907-1974), an English author and politician.

In the Presidential system, executive branch of the government is independent of the legislature for its tenure and actions. In the words of Garner, “Presidential government is that form in which the chief executive is independent of the legislature as to his tenure and, to a large extent, as to his policies and acts. In this system the nominal head of the state is also the real executive.”

This form of government is prevalent in United States of America and Argentina. The President is elected by the people, whether directly or indirectly, for a fixed period unless removed on impeachment by the legislature on the grounds stated in the Constitution of the country. This system works on the principle of ‘separation of powers’ and ‘checks and balances’.

Unitary and Federal form of Government

The Unitary form of Government is one where the whole state with all its units and provinces is organized under a single central Government. The local/provincial Governments are created by the central Government as its subordinates for better administration. The central Government delegates powers and authority to the local/ provincial Government. As remarked by Garner, “Where the whole power of Government is conferred by the constitution upon a single central organ or organs from which the local governments derive whatever authority or autonomy they may possess, and indeed their very existence, we have a system of unitary government. It is the characteristic of this form of government that there is no constitutional division or distribution of powers between central government of the state and subordinate local governments.”

As remarked by Garner, “Federal Government as distinguished from a unitary government is a system in which a totality of governmental power is divided or distributed by the national Constitution or the organic act of Parliament creating it, between a central Government and the governments of individual states or other territorial sub divisions of which the federation is composed. Local/ provincial Government is considered as part of central Government with full autonomy.” As listed in the Seventh Schedule of the Constitution of India, the matters concerning national importance like international relations, war and peace, atomic energy, etc. are dealt with by the Central Government.

The matters of regional and local importance listed in the state list can be legislated by the state governments. There are matters on which both the Central and State governments are authorized to make laws which are included in the Concurrent list. Constitution of India despite having adopted federal features does not claim to establish India into a federation of states. In the words of K.C. Wheare, India’s system of Government is federal in character and unitary in spirit.

During recent periods, the governments of most States have combined different forms stated above.



For instance the British Government combines Monarchy, Democracy, and Parliamentary forms. India is a Democratic Republic with Parliamentary form of government with Unitary and Federal features.

Composition of the Legislature

facts about parliament

- Parliament of India is circular which represents “Continuity”
- 2 houses are horse shoe in shape
- Lok shaba - Green Carpet that represents agriculture, Rajya shaba-Red Carpet royalty and sacrifice done by the freedom fighters
- library - 2nd Largest in India
- Circumference – 1/3 of a mile i.e..536.33m

Legislature may be organized as Bicameral or Unicameral Legislature. In a Bicameral System, there are two houses or chambers. Indian Parliament is a bicameral legislature, its houses being the House of People (Lok Sabha) and Council of States (Rajya Sabha). In the States of the Indian Union, the legislature consists of the Vidhan Sabha (lower house) and Vidhan Parishad (upper house). However, certain states have only one house. The House of People (Lok Sabha) consists of the representatives of citizens of the entire country living in states and union territories. Council of States (Rajya Sabha) consists of the representatives elected by the Legislative Assemblies of the states, and other nominated members from the field of art, culture, academics, sports, literature science and social service. The purposes and functions of the second chamber are to check hasty and ill-considered pieces of legislations, with the sober advice of experts and eminent persons. Thus, it becomes possible to examine issues from different standpoints, and to safeguard the interests of states in a federal system.

Unicameral legislature implies one legislative house. This system of legislature is seen in Turkey, which is known by the name of Grand National Assembly of Turkey; in Bangladesh by the name of House of Nation, etc. This system is supported by the reason that the legislative body representing people's interest must be one, failing which delays and conflicts may arise in the enactment of legislation.

India has 28 States and 8 Union Territories.

There are 24 states which have a unicameral structure.

The list of these states are given below:

1. Arunachal Pradesh
2. Assam
3. Chhattisgarh
4. Delhi
5. Goa
6. Gujarat



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7. Haryana
8. Himachal Pradesh
9. Jharkhand
10. Kerala
11. Madhya Pradesh
12. Manipur
13. Meghalaya
14. Mizoram
15. Nagaland
16. Odisha
17. Puducherry
18. Punjab
19. Rajasthan
20. Sikkim
21. Tamil Nadu
22. Tripura
23. Uttarakhand
24. West Bengal

The names of the six states having bicameral legislature are:

1. Andhra Pradesh
2. Bihar
3. Karnataka
4. Maharashtra
5. Telangana
6. Uttar Pradesh

Difference between Unicameral Legislature and Bicameral Legislature

Difference	Unicameral	Bicameral
Number of House	One	Two
Sharing of Power	Concentrated in one house	Shared between two houses
Decision-Making	Flexible and efficient as bills are introduced and passed in only a single house	Time-Consuming as both the houses have to pass the bill hence, their approval is a tedious task
Suitability	A unicameral legislature is best suited to smaller states.	Bicameral legislature is more suited to larger states



III. Main Organs of Government and its Functions

Let us now try to learn about the three main organs of government (the legislature, the executive and the judiciary), their functions and various related provisions. Here we also try to explain the relationship between various organs of a government.

A. General Functions of Legislature as Organ of Government

Parliament, Assembly and Congress are the synonyms used for the term 'Legislature' in various countries. The word 'Parliament' is derived from the French word 'parler'. Parliament means meeting for discussion. The following are some functions of this organ:

1. Expressing and formulating the will of the state and enactment of laws

The legislature formulates and expresses the 'will of the state'. The 'will of state' in a representative democracy is the will, opinion and sentiments of its citizens and the public issues concerning them. In a monarchy or dictatorial Government, the 'will of the state' is the interest and objectives of its ruler.

Laws when enacted are called 'Acts'. These Acts are the direct source of law to control and regulate the institutions running in a state and society. All legislations are enacted for the achievement of certain objectives and purposes. For example, the Indian legislature enacted the Consumer Protection Act, 1986 with the purpose of protecting the interest of consumers and the speedy settlement of their disputes.

2. Ensuring accountability of the executive

Article 75(3) of the Constitution of India states that the Council of Ministers shall be collectively responsible to the House of the People. Parliament exercises check and ensures executive and administrative accountability through its control over finances. Parliament assesses governmental policies and performance of administration through procedures like questions, calling attention motions etc. Motion of No-Confidence may be moved and passed against the Council of Ministers, in the Lok Sabha.

Parliamentary procedure and enactment of laws

A Bill is a statute in draft and cannot become law unless it has received the approval of both the Houses of Parliament and assent of the President of India. A Bill can be introduced either by a Minister, when it is called a Government Bill; or a member other than a Minister, when it is known as a 'Private Member's Bill'.

The legislative procedure for introduction and passing of Bills is laid down in Articles 107 to 108, in the Constitution of India, in the case of ordinary Bills; and in Articles 109-110 in the case of Money Bills. Article 111 provides details of assent to Bills by the President.

- Ordinary Bills may originate in either House of Parliament.
- A Money Bill contains provisions for imposition, abolition, alteration or regulation of any tax, custody of the Consolidated Fund or Contingency Fund of India, payment of money into or withdrawal of money from any such Fund and related matters. However, a Money Bill shall be introduced only in the House of People and not in the Council of States.
- Annual Financial Statement is the annual statement of estimated receipts and expenditure of the Government for the ensuing financial year. Article 112 of the Constitution of India states that the President shall cause the statement to be laid before both the Houses of Parliament. The Members of Parliament debate on the provisions of the proposed Bill. Generally, a Bill is passed after three readings.



3. Legislature and its judicial functions

The Legislature performs judicial functions while hearing and trying cases of impeachment (removal from office before term). The Constitution of India lays down the procedure for impeachment of President and Vice President of India, Judges of the Supreme Court and High Court and the Chief Election Commissioner. It performs judicial function while deciding on the privileges of the Members of the House.

4. Legislature and its Administrative functions

In India, the elected members of both Houses of Parliament and elected Members of the Legislative Assemblies of the States form an electoral college to elect the President. The Vice-President is elected by an electoral college comprising of Members of both Houses of Parliament. The members of the Lok Sabha elect two members as the Speaker and Deputy Speaker, while the members of the Rajya Sabha elect the Deputy Chairman of the Rajya Sabha.

B. General Functions of Executive as Organ of Government

Executive is often referred to as the 'government' of a state. In a representative democracy, the term 'Executive' has a broad meaning.

The following are the functions of the executive organ:

1. Internal and External Administration of the State

The chief function of the executive is the maintenance of internal and external administration - law and order, financial matters, infrastructure and industrial development, welfare and development of the people (health, education, labour, employment, rural and local development), environment and forests, natural resource management, trade and commerce etc., on the internal front and defence, foreign affairs, international relations etc on the external front.

2. Executive and its Legislative functions

The executive performs certain legislative functions.

Delegated Legislation

Delegated legislative functions are performed by the executive. Delegated legislation is an enactment made by an individual or body other than Parliament. By delegating the power to make a legislation to the Executive, the Parliament empowers different people or bodies to integrate more details to an Act of Parliament. Parliament along these lines, through essential enactment (for example an Act of Parliament), authorises the executive to make laws and guidelines through delegated legislation. It frames orders, rules, regulations, ordinances, by-laws, and circulars. They carry equal force of law if framed within the sphere and policy of the parent legislation.

Ordinance

Under Article 123 of the Constitution of India, the President has the power to promulgate an ordinance during the recess of the Parliament. An ordinance is a law that is promulgated by the President of India only when the Indian parliament is not in session. President promulgates an ordinance on the recommendation of the union cabinet. Using ordinances, immediate legislative actions can be taken. However, it must be noted that for an ordinance to exist, it should be approved by the Parliament within six weeks of being introduced. Parliament is required to sit within 6 weeks from when the Ordinance was introduced.



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3. Executive and its financial functions

The executive imposes and collects taxes and incurs expenditure on the various activities of the state. It prepares budget of the financial year, maintains accounts of government departments and prepares national policies. It also arranges financial grants from international entities like International Monetary Fund, World Bank etc.

4. Executive and Judicial functions

Judicial functions of the executive include power to grant pardon (Presidential), to suspend or lessen the punishment on special grounds or to exchange one form of punishment for another, on the petition of a person convicted of any offence by the court.

C. General Functions of Judiciary as Organ of Government

1. To Hear and Decide disputes

The first and the foremost function of the judiciary is to hear and decide a case, according to the substantive and procedural laws of the land. The role of the judiciary is expanding with the expanding role of the executive. Disputes may arise among citizens of a state, between citizens and state, among the federal units, between the various departments of the executive and in international relations, calling for intervention by the judiciary.

Dispute settlement and adjudication require the independent functioning of judiciary, without political influence or interference. Impartial and time-bound justice delivery are essential requirements for the judiciary.

2. Judicial Review

Judicial review is the power bestowed upon the judiciary by the constitution, by virtue of which the judiciary can examine legislative enactments and executive orders of the governments, be it state or central, and declare them null and void if they contravene the provisions of Constitution.

Judiciary and its Jurisdiction

Judiciary refers to the set of courts having civil and criminal jurisdiction. With the expansion and diversification of state and its agencies, and expansion of arbitration and conciliation, tribunals and various for a have also become part of the conventional judicial system, such as the Motor Accident Claims Tribunal under Redressal Forums under the Consumer Protection Act, 1986 etc.

The judiciary exercises jurisdiction on the basis of territorial limits, pecuniary/financial limits, appealable matters, matters for review and revision. The judiciary consists of Magisterial courts, District and Sub-District Courts at the lower level and the higher judiciary comprising of High Courts and the Supreme Court. Decision given by them is known as 'judgment', 'decree', 'order', or 'award'.

3. Interpretation of laws

Wherever the law is ambiguous (confusing) or not clear or silent or appears to be inconsistent with other laws of the land, the courts after proper analysis determine or interpret the intent, purpose and meaning of the provisions of law.

4. Advisor to the President

The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution.

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5. Role of Judiciary as an activist

In India, perhaps the first instance of the activist role of the judiciary was after the Emergency, when the Supreme Court came up with public-interest litigation (PIL), a tool meant to ensure justice for the under-privileged and the marginalized.

6. Legislative and executive function of the judiciary

The judiciary has been empowered to frame rules and execute them for the smooth functioning of its own administration. This is also done to ensure independence of the judiciary.

IV. Exercises

Based on your understanding, answer the following questions:

Q-1 Provide one point of difference between the following-

1. Monarchy and Democracy
2. Parliamentary and Presidential form of government
3. Direct and Indirect democracy
4. Lok Sabha and Rajya Sabha
5. Unicameral and Bi-cameral legislature

Q-2 Give an example for the following-

1. A country where unicameral legislature exists
2. A country where presidential form of government prevails
3. A country where the monarch enjoys the absolute power
4. A country where direct democracy exists
5. A country where constitutional monarchy exists

Q-3 Write brief notes on the following-

1. Money Bill
2. Annual Financial Statement
3. Democracy
4. Unitary form of government
5. Judicial function of executive

Q-4 Explain the role of the following organs of Government.

1. Legislature
2. Executive
3. Judiciary

Q-5 A country, Amerintina was governed by representatives on behalf of the citizens. Another country, Plicia was governed by the citizens themselves by various methods. Identify the above two forms of government and differentiate between their processes.

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Separation of Powers

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- II. Historical Background and Evolution of Montesquieu's Doctrine of Separation of Powers
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- III. Evaluation of the Doctrine of Separation of Powers
 - A. Key Benefits and Advantages of The Doctrine of Separation of Powers
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- IV. Separation of Powers in Practice
 - A. Separation of Powers in Britain
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 - C. Separation of Powers in India
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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.

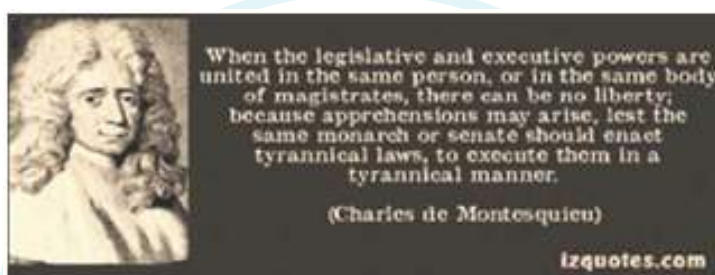


During his time, he saw the oppressive and despotic rule of French King Louis XIV (1661-1715). The ruler enjoyed the absolute powers of State, and the prevailing dictum was, 'I am the State'. Liberty of the people was suppressed under the despotic rule of the King and his administrators.

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.

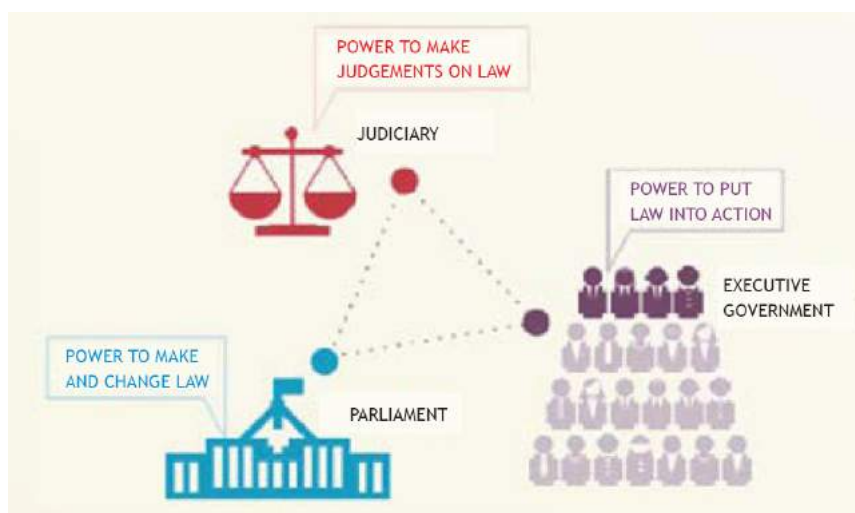
The doctrine of the separation of powers emerged as a distinct doctrine in his famous book 'Esprit Des Lois' (The Spirit of Laws) published in 1748.

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



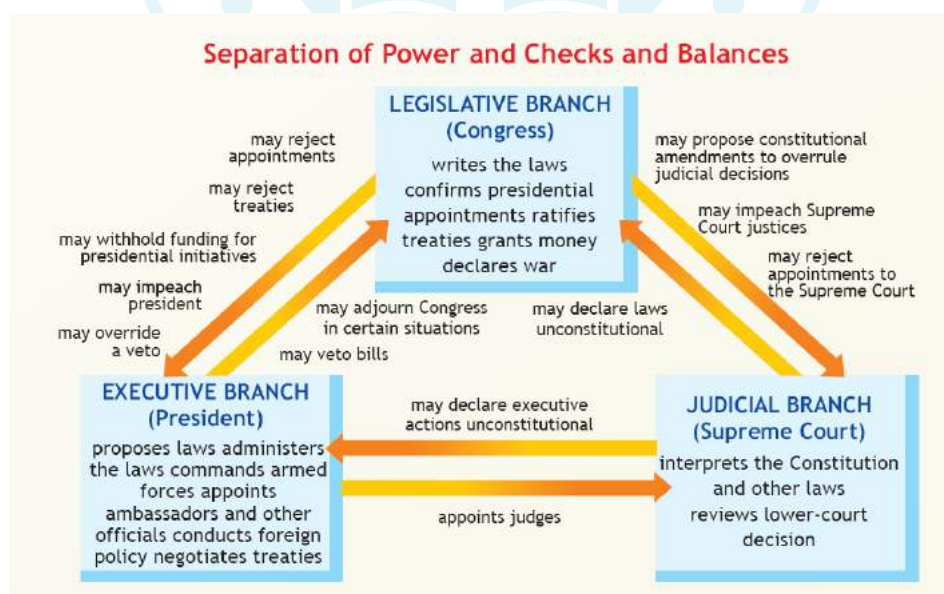
1. Montesquieu proposed the theory of separation of powers. He advised that the division of powers is necessary in between the legislative, the executive and the judicial system.
2. Different departments must exercise the three powers of the government with their respective personnel. He provided the 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'.

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.



- 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.

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.

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.

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 uncoded 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".



- 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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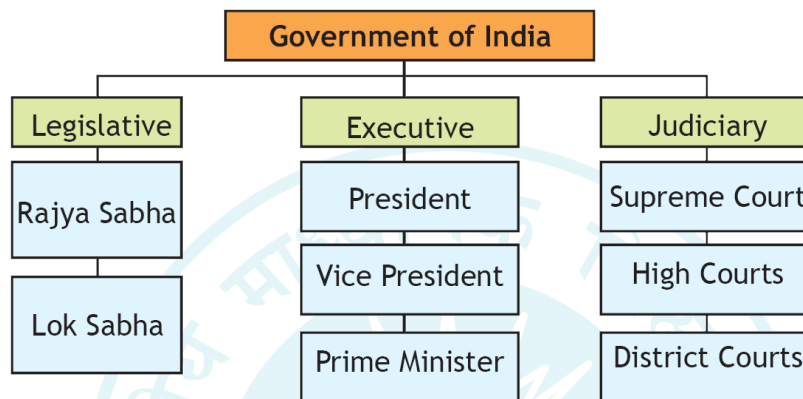
UNIT V



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



- 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.

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?