Subject Name: Constitution Law
Topic Name: Separation of Power

Table of Content:-

Introduction..... 1
Legislature..... 2
Executive..... 2
Judicial Review and Judicial Independence..... 3
Autonomy and Independence in Governance..... 4

Introduction

Recently, the discourse surrounding the separation of powers has gained momentum, whether it's the government's efforts to shield convicted Members of Parliament or disputes over the appointment of Supreme Court judges, or even disagreements within the judiciary itself. Much of this debate stems from a misunderstanding of the nature of power.

As Seervai aptly noted, there's a mistaken belief that power is akin to property. In reality, power is merely a means to an end, and it should be entrusted to the authority best suited to achieve that end.

In essence, the separation of powers entails a division of functions, and the classical theory of separation of powers is essentially a doctrine of functional specialisation.

However, no one who cherishes political freedom can argue against Montesquieu's notion that the concentration of powers in any one organ of the state leads to tyranny. Thus, some form of separation of powers is necessary, with each authority serving as a check and balance on the others.

The Indian Constitution presents a unique model of separation of powers. While it recognizes legislative, executive, and judicial bodies, it does not explicitly allocate distinct powers to each organ, except for executive powers vested in the President and governors.

Unlike the Westminster model, Indian Parliament is not supreme, and legislation contrary to constitutional provisions is deemed void. Despite assertions to the contrary by the Supreme Court, the separation of powers in India is not equal, with the executive holding dominant powers.

This allocation of powers must be understood in the context of the Constituent Assembly debates, where the focus was primarily on separating the executive from the judiciary. In a parliamentary democracy, the majority in legislative bodies effectively governs the country.

As a result, there's no real separation between the executive and legislative branches in India. However, there is functional overlap among all three branches, with each empowered to perform functions typically associated with the others.

For instance, the judiciary often engages in quasi-legislative or executive actions through its wide powers of judicial review. Similarly, executive functions are delegated to independent authorities like the Election Commission, while legislative functions are granted to statutory bodies. The issue of separation of powers in India has received varied interpretations by the courts, reflecting this lack of strict separation and functional overlap inherent in the Indian constitutional framework.

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Legislature

The Indian Constitution, being written, has firmly rejected the theory of parliamentary sovereignty that exists in England. However, subject to abiding by constitutional limitations enforced through judicial review, Parliament and State legislatures in India have plenary powers to enact laws.

Parliament, for instance, has the authority to legislate on various matters, including the constitution, organisation, jurisdiction, and powers of the Supreme Court and High Courts. State legislatures possess similar powers concerning the district and subordinate judiciary and the jurisdiction of courts within their territories.

Additionally, Parliament can determine the number of judges in the Supreme Court and has the power to remove judges through impeachment, along with regulating their terms and conditions of service.

Legislatures also exercise judicial powers under the Constitution. They can impeach judges and address contempt of legislatures. Speakers/Chairmen, while performing duties under the Tenth Schedule to the Constitution, essentially act as a tribunal. Furthermore, legislatures have the authority to retrospectively validate laws that have been declared invalid by courts, provided the cause for invalidity is removed.

However, there are limitations to legislative actions affecting judicial decisions. No legislature can unilaterally set aside individual decisions and impact rights and liabilities alone. Such actions would be considered as exercising judicial power by the State, conflicting with the separation of powers.

In some instances, legislatures have expanded their powers traditionally reserved for the judiciary. For example, the Constitution's First Amendment Act of 1951 introduced Article 31B and the Ninth Schedule, shielding certain laws from judicial review even if they violate fundamental rights.

The Forty-second Amendment Act of 1976 introduced Articles 323A and 323B, allowing the creation of tribunals by Parliament and State legislatures, respectively, to adjudicate disputes, thereby excluding the jurisdiction of regular courts and, in some cases, limiting the powers of judicial review.

Additionally, the power of impeachment of judges is vested in Parliament, although its outcome depends on parliamentary majorities.

Executive

Under the Indian Constitution, while the primary responsibility for making laws rests with Parliament and State legislatures, the executive plays a significant role in the legislative process. Bills originate from the executive, and with majority support in legislative bodies, the executive largely influences legislative outcomes.

Executive orders, under Articles 73 and 162, hold the same force as legislative acts and cover a wide range of areas, including taxation, statute extension, and price fixing. Delegated legislation grants the executive broad powers, often used when there is no existing legislation.

Ordinances promulgated by the President or Governors bypass regular legislative processes and have equal legal standing as acts of Parliament or state legislatures.

The executive exercises judicial powers in various capacities. It has the authority to decide on matters such as disqualification of Members of Parliament, grant of pardons or modifications to sentences, and conducting inquiries into charges against civil servants.

Additionally, administrative authorities adjudicate on issues like licensing, taxation, or duties, and staff administrative tribunals set up under Article 323A and other relevant articles.

The executive holds significant control over the judiciary's composition and functions. It decides the number of judges to be appointed to high courts, has final authority on judicial appointments, and regulates the appointment and service conditions of district judges.

Moreover, the executive has the power to prosecute judges for offences under specific laws, further asserting its influence over judicial conduct and integrity.

Judicial Review and Judicial Independence

The Indian Constitution grants the Supreme Court and High Courts extensive powers of judicial review to ensure that legislative and executive actions comply with constitutional provisions.

Part III of the Constitution safeguards fundamental rights, prohibiting any law that abridges these rights.

The judiciary's role in interpreting and applying constitutional provisions, especially regarding legislative powers, is vital and far-reaching. Judicial review extends to actions within legislative bodies, ensuring adherence to constitutional mandates, principles of natural justice, and preventing abuses of power.

Historically, the judiciary faced challenges to its independence from the legislative and executive branches, which sought to exert control over judicial functions.

However, the judiciary asserted its independence both functionally and administratively.

In 1993, the Supreme Court strengthened judicial independence by prescribing procedural norms for judicial appointments and transfers, reducing executive influence. Administrative independence of the judiciary was upheld through various judicial pronouncements, ensuring the separation of powers doctrine.

Judicial independence has been a subject of debate, particularly concerning tribunals' composition and functioning. Courts have interpreted constitutional provisions strictly, refusing to allow legislative or executive encroachments on judicial jurisdiction.

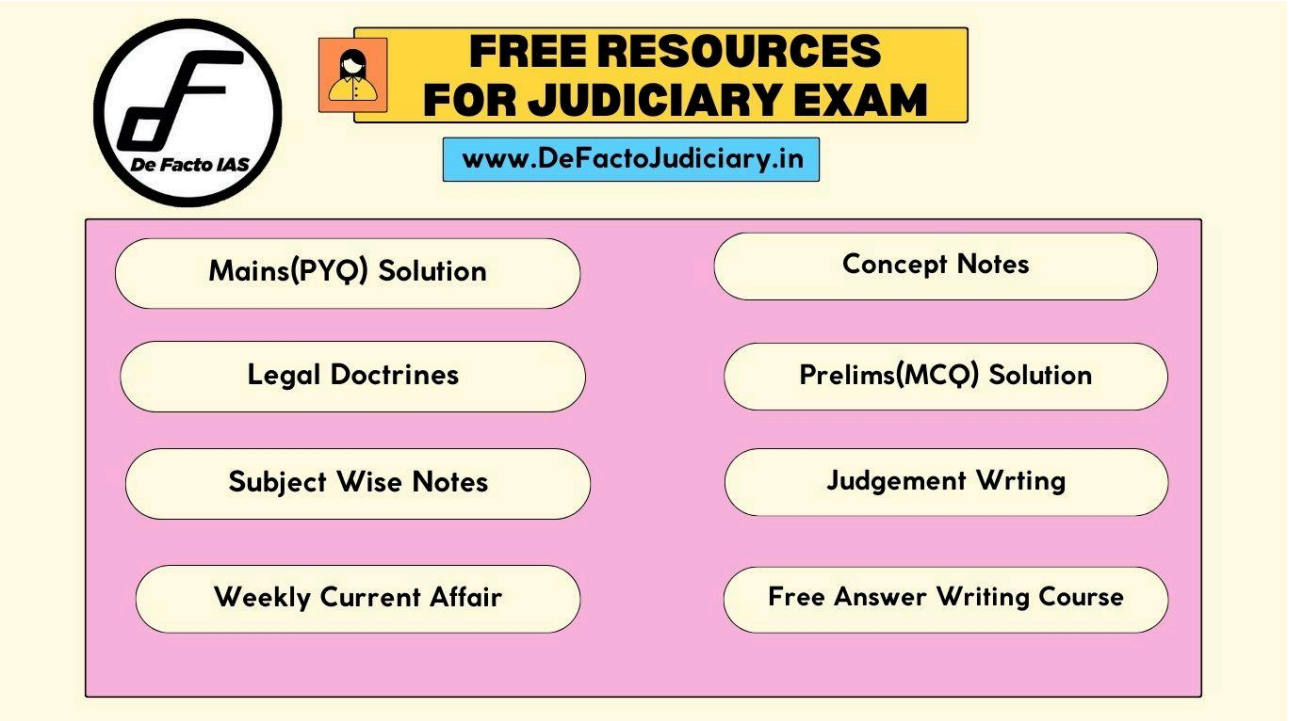
Notably, the judiciary has defined limits to legislative powers, such as the Kesavananda Bharati case, which introduced the concept of the "basic structure" of the Constitution, beyond the reach of amendments.

The judiciary has also introduced the principle of "due process of law," allowing it to invalidate arbitrary or unreasonable actions by the government.

Recent decisions, such as the right of voters to know candidate details and the disqualification of legislators upon conviction, demonstrate the judiciary's commitment to upholding constitutional principles and protecting citizens' rights.

In cases of legislative vacuum, the judiciary has issued binding directives under Article 142 until appropriate legislation is enacted.

While courts have been cautious in exercising this power, directives have often influenced subsequent legislation, highlighting the judiciary's significant role in shaping legal frameworks.



Autonomy and Independence in Governance

The Indian Constitution emphasises functional separation of powers, allocating governance-related functions to independent authorities distinct from the executive and legislative branches. These bodies are vested with significant powers to ensure their autonomy and impartiality.

1. Election Commission:
   - Created under Article 324, the Election Commission oversees elections independently, free from executive interference.
   - It possesses executive, quasi-judicial, and legislative powers, including the authority to postpone elections under exceptional circumstances.
   - Despite constitutional safeguards, executive obstruction often impedes the Election Commission's functioning, leading to disputes resolved through judicial intervention.

2. Comptroller and Auditor General (CAG):
   - The CAG, tasked with auditing government finances, plays a crucial role in ensuring fiscal accountability.
   - Unlike the judiciary, the CAG lacks complete independence:
     - Its appointment lacks a constitutionally prescribed criterion, relying on the Prime Minister's recommendation.
     - The CAG lacks tenure assurance, unlike judicial officers.
     - It cannot take independent action based on its reports; its recommendations must be presented to Parliament or State Assemblies.

- Despite these limitations, the CAG's reports can trigger judicial review and investigative actions, as seen in cases like the 2G spectrum scandal.

3. Other Autonomous Bodies:
   - Various autonomous bodies, such as the Union Public Service Commission and the Finance Commission, aid executive functioning.

   - While advisory in nature, these bodies offer recommendations on crucial matters like civil service appointments and fiscal distribution.

   - Courts seldom interfere with the recommendations of such bodies, acknowledging their role in facilitating governance.

