

Separation of Powers in India, UPSC Notes

August 1, 2026 • vajiramandravi.com



What is the doctrine of separation of powers?

Separation of powers is the division of the **legislative**, **executive**, and **judicial functions** of government among separate and independent bodies.

- The **Legislature** makes laws, the **Executive** puts those laws into effect, and the **Judiciary** administers justice by interpreting the law and ensuring that the law is upheld.
- The purpose of separation is to limit the possibility of arbitrary excesses by the government.
- Separation of powers also prevents misuse of power or accumulation of power in a few hands, which thereby safeguards the society from arbitrary and irrational power of the state.

What is the origin and evolution of the doctrine of separation of powers?

- The first modern formulation of the doctrine of separation of power was given by the French political philosopher **Montesquieu** in *The Spirit of Laws*, 1748. Inspired by the **English constitution**, Montesquieu

argued that liberty is most effectively safeguarded by the separation of powers.

- Later, The **United States** Constitution gave the doctrine of separation of powers in substance for the very first time where its provisions
 - **Article I** granted powers to the legislature.
 - **Article II** gave executive power to the President.
 - **Article III** created an independent judiciary.
- In this spirit, the **Constituent Assembly**, while drafting the **Indian Constitution**, debated on inserting the provision 'There shall be complete separation of powers as between the principal organs of the State-the Legislative, the Executive, and the Judiciary' as one of the **Directive Principles of the State Policies**.
- Finally, **Article 50** was inserted, which gave for the State to take steps to separate the Judiciary from the Executive in the public services of the State.

What are the provisions pertaining to the separation of powers between the three organs of state in India?

The Constitution of India has various implicit provisions for the separation of powers among the legislature, the executive, and the judiciary. However, in most cases, the separation is not **water-tight**, and there are instances of **overlap** in functions to ensure checks and balances.

Legislature and Executive

Separation of powers	Functional overlap
• Constitution has separate provisions for establishing: ◦ Article 79: The Parliament as the legislative body. ◦ Article 74: Article The council of ministers with the Prime Minister as head of the Real Executive. • Also, there are distinct provisions for their functioning: ◦ Parliament (Article 107-117) ◦ Council of Ministers (Article 74 read with Article 53)	• Article 75: India has a Parliamentary form of government, and every Minister should be a member of the Parliament. • Article 53 and Article 79: The President is vested with the executive power of the union, and also, he/she is an integral part of Parliament. • Article 123: The President may promulgate ordinances when the Parliament is not in session. Thus, even the executive can legislate in the form of an ordinance in India. • In India, delegated legislation is allowed, where the Parliament can delegate its legislative powers to the Central or the State Governments for the purpose of making rules.

Table on separation of powers between Legislature and Executive

Judiciary and Executive

Separation of powers	Functional overlap
• Article 50: State shall take steps to separate the judiciary from the executive in the public services of the state. • Accordingly, the Parliament enacted the Criminal Procedure Code 1973, which separated the judiciary and the executive. • Article 361: The President and the Governor enjoy immunity from court proceedings.	• Article 72: In India, the President's clemency powers overlap with the judicial functions. • Article 323a and Article 323b: Tribunals established dispense justice in India. Tribunals consist of both judicial as well as executive members. • The District Magistrate, while acting as a Returning officer, acts in a quasi-judicial capacity where he/she must scrutinize the nomination papers and then decide whether the candidate is fit to contest.

Table on separation of powers between Judiciary and Executive

Judiciary and Legislature

Separation of powers	Functional overlap
• Article 121: No discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his/her duties. • Article 122: Courts not to inquire into proceedings of the Parliament.	• Article 61: The parliament has quasi-judicial powers during the Presidential Impeachment process. • The judiciary may take legislative functions under certain circumstances, which are dubbed as Judicial activism or Judicial overreach. ◦ Example: The Vishaka Guidelines on sexual harassment in the workplace. ◦ People's Union for Democratic Rights v. Union of India (1982) case, which gave for Public Interest Litigation(PIL).

Table on separation of powers between Judiciary and Legislature

What are the various judicial pronouncements on the doctrine of separation of powers in India?

- **Ram Jawaya Kapoor vs State of Punjab (1955):** It was held that the Indian Constitution has not indeed recognized the **doctrine of separation of powers** in its absolute rigidity, but the functions of the different

parts or branches of the government have been sufficiently differentiated.

- **Golak Nath vs State of Punjab (1967):** In this case, the judges observed that the three organs of the government are expected to exercise their functions within their limits and keeping in mind certain encroachments assigned by the Constitution.
- **Indira Gandhi vs Raj Narain (1975):** The Supreme court invalidated a clause of Article 329A inserted to immunize the election dispute to the Office of the Prime Minister from any kind of judicial review. In this case, It is held that the separation of powers is a **part of the Basic structure**.
- **Kartar Singh vs State of Punjab (1994):** It was stated that the function of the legislature is to make the law, the executive is to implement the law, and the judiciary to interpret the law within limits set down by the Constitution.

What are the issues associated with judicial legislation in India?

The term "judicial legislation" refers to the law pronounced, proclaimed, and declared by the judiciary, specifically the Supreme Court. This type of law is sometimes called "judicial law" or "Judge-made law."

- The Supreme Court in **Rattan Chand Hira Chand v. Askar Nawaz Jung (1991)** stated, "The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna".
- Some of the instances of judicial legislation include-
 - The **collegium system** out of The Second Judges case (1993) and the Third Judges case (1998).
 - Legalizing **passive euthanasia** in Aruna Shanbaug v. Union of India, (2011).
 - 'None Of The Above' (NOTA) in elections as a Right in People's Union for Civil Liberties (PUCL) case 2013.
- The Indian Constitution does not strictly follow the doctrine of separation of powers, but the functions of different parts of the government have been differentiated.
- The judiciary is not supposed to indulge in lawmaking, but there are instances where judicial legislation is justified.
- Judicial creativity can be justified in certain situations, such as when there is a peculiar issue at hand or when laws enacted need to fulfill the needs of the people.
- Judges make the law when there is a legal vacuum or no express principles of law. The impact of judge-made law can create credibility and reliability, but it can also create a sense of uncertainty and unwanted strife between the organs of the State.

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