



## THEORY OF SEPARATION OF POWER AND ITS APPLICATION: AN ANALYSIS

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### Abstract

Separation of powers theory surmounts the powers of various organs of the government in a state with thin circumference, elasticity of the circumference does not allow any organ to break through and become autonomous or monopolistic in character in an environment. The main object of this research is to discuss the theory of separation of powers created by Montesquieu and its implementation. The paper explains the colors of adaptable inculcation of theory according to the desirables of a state like USA and France. IT enables the comparative study of separation of powers supportive in understanding a political system.

Keywords: Separation of Power, Spirit of Laws, Constitution, check and balance.

Government's functions and operation in states politics is fundamentally shaped according to the design and structure of the governing bodies delineated in the Constitution. One of the key features of the Constitution is amalgamation of principals of theory of separation of powers with democracy (sovereign). The doctrine is embedded in a political philosophy that aims to refrains power from consolidating in any single person or entity, though governing system diffused and divided power. The legislative, executive, and judicial branches are allotted diverse and limited roles under the Constitution, and required to be comprised of different political actors. However, the constitution does not; encase the branches from each other. The Constitution aims to prevent the concentration of power through diffusion and inter-linkages, thus, power diffused to the organs by the Constitution are overlapping and not unilateral.<sup>1</sup>

The separation of powers, also known as trias politica, is a model for the governance

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<sup>1</sup> Matthew E. Glassman (2016) Separation of Powers: An Overview, Crs Report, Congressional Research Service, Pp-1.

of democratic states.<sup>2</sup> The doctrine is rooted in a political philosophy that aims to keep power from consolidating in any single person or entity, and a key goal of the framers of the Constitution was to establish a governing system that diffused and divided power among bodies at equivalence.<sup>3</sup> Constitution frames succeeded in achieving the respective objectives. The legislative, executive, and judicial branches of the government are assigned distinct and limited roles under the Constitution, and required to be comprised of different political actors. The constitutional anatomy does not, however, encase the branches from each other. While the design of the Constitution aims, through separation, to prevent the centralization of power, it also seeks the same objective through diffusion. Constitution clarifies the powers as not unilateral for any one branch; instead they overlap.<sup>4</sup>

### **Government and the separation of power.**

The term government is derived from Old French government term “*governer*”. Govern symbolizes “to direct, rule, guide”. The government is the prime element of the state, which was defined as “a body of citizens sufficing for the purposes of life” by Aristotle.<sup>5</sup>

Government is an agency or element of state, denoted as the concretized form of state, and the visible manifestation of state authority which is abstract and invisible. Government is the association of people, machinery or agency of state, which *governs* (as the political entity) over the politically organized population in a defined territory. Example: Government of India is the government of Indian state.<sup>6</sup> The United Nations Development Programme (UNDP), in its 1997 policy paper, defined governance as “the exercise of economic, political and administrative authority to manage a country’s affairs at all levels.”<sup>7</sup> Government is a body functioning or ruling under state’s sovereignty over a defined population in a definite territory.

Government pledges the accountability towards the governed enforceable through constitution; it functions with authoritative measures delegated by the constitution of the state in regard to constituent and ministrant functions dealing with nation’s security, integrity, tranquility and policy making. The government has enhanced its working through division of powers or functioning among the three organs created

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<sup>2</sup> [Khushi Pandya](https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254941) (2013), Separation of Powers - An Indian Perspective, University of Westminster, Pp. 1-20. [https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2254941](https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254941). Retrieved on 26/07/2018

<sup>3</sup> Somnath Chatterjee (2007) “Separation of Powers and Judicial Activism in India”, Indian Advocate, vol. 34-35. 1-10

<sup>4</sup> Matthew E. Glassman (2016), Separation of Powers: An Overview, CRS Report, Congressional Research Service, 2016, Pg-1.

<sup>5</sup> F. Copleston, (1946) S.J., A History Of Philosophy, Vol. I, Maryland, The Newman Bookshop, Pp. 20-21

<sup>6</sup> S.B.M. Marume, (2016) R.R. Jubenkanda, C.W. Namusi, N. C. Madziyire, An Analysis Of Essential Elements Of The State, International Journal Of Engineering Science Invention, Volume 5 Issue 3 , Pp.24

<sup>7</sup> Definition Of Basic Concepts And Terminologies In Governance And Public Administration, Report Of Committee Of Experts On Public Administration, Economic And Social Council, Uno, New York, 2006, Pp-3

under it<sup>8</sup>. The conceptual roots of separation of powers are usually attributed to ancient Greek and Roman writers. Aristotle is typically credited with articulating the first conception of government as divided into three basic functions or “powers,” which he labeled “deliberative,” “magisterial,” and “judicial,” and which roughly correspond to the contemporary notions of legislative, executive, and judicial roles of government.<sup>9</sup> Legislature the Law making organ, Executive the implementing organ of the law prepared, both supported by interpreter Judiciary, makes the government an essential element of state for its survival and development in all aspects. The segregated functional area of all the three organs of government supported by the theory of separation of powers compliments their efficiency and signifies their accountability while governing or functioning in their defined area.

The modern conception of separation of powers developed largely among 17th and 18th century. Although many writers were active in this area, John Locke and Montesquieu are usually given credit for articulating the philosophy. In the Second Treatise on Government, Locke argues that a division between the legislative and executive powers is fundamentally necessary to secure the liberty of the people. If the two functions are fused into a single person or entity, the likely result is tyranny. Locke also explains the concept of a “mixed government,” in which multiple forms of governing—monarchy, oligarchy, democracy—are simultaneously used.<sup>10</sup> John Locke, the famous English theorist, also envisaged a threefold classification of powers in his book “Second Treatise of Government (1689)”, he distinguished three types of power: legislative, executive, and federative.<sup>11</sup>

In Indian context the Smritis, source of law i.e. Dharma, also talks about separation like in Narad Smriti time, Deewan as the head of the Executive wing, Senapati as the implementing agency of law and order and Kaji as the judicial head. It also talked about subordinates to the King. King was the supreme, who makes the law and therefore he was similar to present form of legislature.<sup>12</sup>

Baron de Montesquieu also known as Charles Louis de Secondat, served as a provincial French nobleman and parliamentary magistrate for the French state. His experience while functioning contributed to the scripting of political theory, L’Esprit des Lois (e Spirit of the Laws) it was the documented experience collected while travelling in Europe between 1728 and 1731. The book got published in 1748. The proceedings in the court of George II and moving in political circles are the

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<sup>8</sup> S.B.M. Marume, R.R. Jubenkanda, C.W. Namusi, N. C. Madziyire, (2016)An Analysis Of Essential Elements Of The State, International Journal Of Engineering Science Invention, Volume 5 Issue 3, , Pp.27

<sup>9</sup> Aristotle, Benjamin Jowett, And H. W. Carless Davis (Translators),(1920) Aristotle’s Politics, Oxford: Clarendon Press, Pp. 84-87.

<sup>10</sup> Matthew E. Glassman (2016),Separation Of Powers: An Overview, Congressional Research Service Report,Pp-4.

<sup>11</sup> [https://Blackwells.Co.Uk/Extracts/9780199232857\\_Parpworth.Pdf](https://Blackwells.Co.Uk/Extracts/9780199232857_Parpworth.Pdf) Retrieved On 26/07/2018

<sup>12</sup> [Khushi Pandya](https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254941) (2013), Separation of Powers - An Indian Perspective, University of Westminster, Pp. 1-20. [https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2254941](https://sci-hub.tw/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254941). Retrieved on 26/07/2018

foundations to the book. His book is the reflection of English political life and functioning of the government.<sup>13</sup>

The theory of separation of powers propounded by Montesquieu demands clear identifications of powers to be exercised by three organs of the government with adjoint powers, to keep an eye on each other's activity.<sup>14</sup>

When we talk about the assimilation of the theory by states, On one hand the first two principles of Montesquieu; No concentration of powers and division of powers among the organs, have cemented the government structure as the constituent features of political system of USA<sup>15</sup> and India<sup>16</sup> and on the other hand the threat to tyrant functioning by any organ while exercising their independent powers, can be countered by the third principal of the theory; to check and balance, which is also said to be the antidote to despotism to maintain balance or equilibrium.<sup>17</sup>

For Montesquieu, the influential executive restraint on the legislature is the veto; the "power of rejecting" legislation. The limit of the legislature is the annual power of the purse, for if "the executive power [were] to determine the raising of public money ... liberty would be at an end."<sup>18</sup>

Its justification could be dragged from the natural law philosophy of Plato and Aristotle and later fine-lined by the Philosopher of France Jean Bodin and British politician John Locke in the 16th and 17th centuries. Finally, the doctrine was systematically and scientifically articulated by Baron-de-Montesquieu in *Esprit des Lois* (The Spirit of the Laws) published in 1748.<sup>19</sup>

#### **Separation of power and liberty: justifications**

M.J.C. Vile in his great piece of work, "Constitutionalism and the Separation of Powers" quotes a pure definition, which justifies separation of power and identifies liberty as the prime. He says " 'pure doctrine' of the separation of powers might be formulated in the following way:" "It is essential for the establishment and maintenance of liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial." <sup>20</sup>He also quotes "It is essential for the establishment and maintenance of political liberty."<sup>21</sup>

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<sup>13</sup> [https://Blackwells.Co.Uk/Extracts/9780199232857\\_Parpworth.Pdf](https://Blackwells.Co.Uk/Extracts/9780199232857_Parpworth.Pdf) Retrieved On 26/07/2018

<sup>14</sup> Charles De Secondat, Baron De Montesquieu, and Thomas Nugent, *Spirit Of Laws*, (1899), The Colonial Press, New York, Pp. 151.

<sup>15</sup> Outline Of U.S. Government (2013) Bureau Of International Information Programs U.S. Department Of State, United States, Pp-14,17

<sup>16</sup> The Constitution Of India, Government Of India Ministry Of Law And Justice, New Delhi, Pg-24

<sup>17</sup> Ibid

<sup>18</sup> Charles De Secondat, Baron De Montesquieu, and Thomas Nugent, *Spirit Of Laws*, (1899), The Colonial Press, New York, Pp. 160

<sup>19</sup> P.J. Kabudi, *The Doctrine of Separation of Powers and Its Application in Tanzania: Success, Challenges And Prospects*, <http://www.utumishi.go.tz/utuweek/SOP.pdf>. Accessed On 04.03.2017

<sup>20</sup> M. J. C. Vile (1998), *Constitutionalism and the Separation of Powers* (Indianapolis, IN: Liberty Fund), p. 14.

<sup>21</sup> Jeremy Waldron, (2013), *Separation of Powers in Thought and Practice*, New York University Law School, Law Journals at Digital Commons @ Boston College Law School, Boston, Pp.433-467.

## **Dynamics of assimilation of concept by political systems.**

### **USA**

Referring to Separation of Power American context, The U.S. Constitution is the blueprint for the American system of government. Ratified in 1788, the Constitution defines three separate branches of government (legislative, executive, and judicial), their powers, and how positions in each are to be filled. One defining characteristic of the Constitution is the system of checks and balances it created to distribute power among the three branches. Each branch exercises some form of power over the others. For example, justices of the Supreme Court (judiciary) are appointed by the President (executive), but subject to the consent of the U.S. Senate (legislative). Likewise, the judiciary can strike down as unconstitutional laws passed by Congress and signed by the President. These and other checks and balances ensure that no single branch of government exercises too much power.<sup>22</sup>

It has been assumed that the applicability of the theory has been questioned as an messy application, resulting in great chaos and confusion while studying the powers of the organs. It is questioned that how a clear separation of power can be maintained if one organ has a interfering check authority Example: At one end the legislature is the authority to legislate or make laws and policies, on the other hand the single executive the President veto's the legislation, although the veto can be overridden by the legislature still it creates delay and supremacy of executive for a while through veto. Terms like "quasi-judicial," "delegated legislation," or "administrative justice," also pings the applicability of separation of powers. But if the check is not effective this may loosen the hold over each other. Functioning and survival of Governments of India and USA till day, supports applicability of Theory of separation of power as an effective doctrine.

It also talks about achievement of political liberty, by preventing the concentration of all power in the hands of a single body of men.

The doctrine diffuses governmental authority, preventing absolutism, arbitrary and tyrannical powers of the state, and to allocate each function to the institution best suited to discharge it putting a check against tyrant character of any organ through checks and balance.

Government is the face of nation-state carrying out the will of state and functioning for the survival, progress and welfare of the governed sustaining the permanency of the state.

*Comparative example:*

The French political system calls for direct election of the President (seven year-fixed tenure) , but obliged appointment towards Premier (of the president), enjoying the majority National Assembly. As the renewal of the Assembly's electoral mandate within a five-year interval is mandatory, a system of staggered elections is quoted in

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[https://www.law.ox.ac.uk/sites/files/oxlaw/waldron\\_separation\\_of\\_powers\\_in\\_thought\\_and\\_practice.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/waldron_separation_of_powers_in_thought_and_practice.pdf). Retrieved on 26/07/2018

<sup>22</sup> About America: How United States Is Governed (2004), The Bureau Of International Information Programs, Braddock Communications, Virginia, Pp-4.

the Constitution— with the relationship between the President and the Premier as a course of the outcome of the most recent election to the Assembly. If the members who are elected by the voters are in the supports of the President, he will operate (more or less) in the mode of full authority, thus the Premier will function as his principal subordinate, Vice-versa in case of President's opponency majority, he counters a problem broadly corresponding to the one superseding when an American President like Bill Clinton confronts a antagonistic Speaker of the House like Newt Gingrich or an oppositional Senate Majority Leader like Trent Lott. Till date, France has managed the rowdy Madisonian panache.<sup>23</sup>

In comparison to American conceptual applicability, French assimilation of separation of powers seems relatively weak. The French President concentrates upon hostility from the National Assembly, as the French Senate is not very powerful (unlike America). Calling a new Assembly election by the president, at a time of his own choosing can help to regain full authority. In the case of American the terms as two-, four-, and six year are fixed for the House. President, and Senate is much more commanding, need for further elections before a rising political movement is in the hands of the lawmaking power. The separation of power is not proportionally distributed by political systems among the organs as per the dynamics of democracy, demography and course of time.

### **Conclusion**

Is the doctrine both practically and normatively coherent if it is to operate? The aforementioned analysis shows that the doctrine has not been followed rigidly i.e. in its absolute sense nowhere in the world. As per our observations, in a democratic country, goals are enshrined in the Constitution and the state machinery, it can be seen that the constitutional provisions are made in a manner which supports a parliamentary form of government where the principle cannot be followed rigidly. The principle reiterates a hypothetical idea whose practical implementation in its entirety can be detrimental to the prosperous functioning of the society. Having said that, it's evident that the principle does hold a strong footing in the Indian and American Constitutions respectively. The coherence of these principles with the need of the society is a fallacy. However, parts of the principles are necessary to keep up order. Lastly, yes the principle of separation of power exists like peace exists in the world, in parts and parcel and at the convenience of human beings.

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<sup>23</sup> Bruce Ackerman(2000), THE NEW SEPARATION OF POWERS, HARVARD LAW REVIEW, Havard Law review Association, US,Pp.1-93