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No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 - info@iledu.in / Chairman@iledu.in

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EVOLUTION OF THE DOCTRINE OF SEPARATION OF POWER AND JUDICIARY AS A SEPARATE BRANCH

AUTHOR - DR AVINASH BHAGI, ASSOCIATE PROFESSOR OF LAW, GUJARAT NATIONAL LAW UNIVERSITY, GANDHINAGAR, GUJARAT, INDIA

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ABSTRACT

The ultimate objective of a Constitution of a democratic republican country is to make the government a limited government ensuring the rights of its citizens by establishing a rule of law. The doctrine of separation of powers has played a significant role in achieving this objective. In fact, it becomes an inseparable part of a Constitution of any Nation. The scheme of all Constitutions of the world are based upon this doctrine. However, the meaning, scope and application of this doctrine is not the same in all the Constitutions and it differs from country to country as a result of which a lot of confusion is attached to the meaning and application of the doctrine. This is due to the historical reasons and the combination of different theories attached to the doctrine. Due to this confusion and lack of any precise meaning, the questions have been raised from time to time with regard to the significance as well as the practical utility of this doctrine. Therefore, study of the evolution of this doctrine is essential to understand the true meaning of the doctrine of separation of powers and its significance in the contemporary world. This paper carries out the detailed study of the history of the doctrine of separation of powers and traces out the evolution of the doctrine with an objective to understand its meaning in true perspective. The paper further demonstrates the evolution of the three organs of the governments, more importantly, the evolution of the judiciary as a separate branch, which in fact is one of the most important contributions of the doctrine of separation of powers.

I. Introduction

Regulation of the power to govern has posed a continuous challenge to scholars and political thinkers since ancient time. The individual's basic rights depend upon this basic question – who governs them and how they are governed? The necessity of the government and therefore, the governmental power is universally accepted since men himself cannot fully realize his creativity, dignity and whole personality – except with an orderly society. For an orderly society, the exercise of governmental power (which is essential to the realization of the societal values) should be controlled otherwise it becomes destructive of the values it was intended to promote. The great theme of the advocates of constitutionalism, in contrast either to theorists of utopianism, or of absolutism, of the right or of the left, has been the frank acknowledgment of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.[1114]

Of the theories of government which have attempted to provide a solution to this dilemma, the doctrine of the separation of powers has, in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures.[1115] The tripartite division of governmental powers was the result of the doctrine of separation of

[1114] M J C Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Indianapolis, Liberty Fund 1998)

[1115] Vile (n 2) 8.

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powers. The separation of powers doctrine is often assumed to be one of the cornerstones of fair government. It apparently evolved from the desire to limit the concentration of power within any one branch of government, a problem most famously articulated by Lord Acton, 'power tends to corrupt and absolute power corrupts absolutely.'[1116]

II. Historical Foundations

The doctrine of separation of powers grew out of centuries of political and philosophical developments.[1117] Tracing the evolution of separation of powers is a huge task. The doctrine has so many historical parents that its lineage is almost impossible to trace.[1118] The doctrine of the separation of powers, standing alone as a theory of government has failed to provide an adequate basis for an effective, stable political system. It has therefore been combined with other political ideas, the theory of mixed government, the idea of balance, the concept of checks and balances, to form the complex constitutional theories that provided the basis of modern political systems.[1119]

The long history of the doctrine of separation of powers reflects the developing aspirations of men over the centuries for a system of government in which the exercise of governmental power is subject to control. It illustrates how this basic aspiration towards limited government has had to be modified and adapted to changing circumstances and needs.

A. Theory of Mixed Government: Conceptual Foundations of Separation of Powers

The doctrine of separation of powers finds its roots in the ancient Greek and Roman theory of mixed government, where the concepts of governmental functions and the theories of mixed and balanced government were evolved. These were essential elements in the development of the doctrine of separation of powers.[1120] Though the theory of mixed government is not logically connected with the theory of the separation of powers, the former theory provided suggestive ideas which formed the basis of the new doctrine. The similarities between both the theories are that both are concerned with the limitation of power by instituting internal checks within the government. Both these theories have been closely connected with each other over much of their history. The theory of mixed government opposed absolutism by the prevention of the concentration of power in one organ of the State, and the doctrine of separation of powers starts from the same assumption. In the ancient world the theory of mixed government figured principally in the work of Aristotle[1121], Plato[1122] and Polybius[1123].

B. Transformation from Mixed Theory to Separation of Powers

The transition which took place between the two doctrines was not achieved overnight. The major challenge faced in the phase of transition from one to the other is that the three agencies of mixed government, King, Lords (aristocratic assembly) and Commons (popular assembly), do not correspond to the executive, legislature and judiciary in the doctrine of the separation of powers. The transmission took a long time in the development of the theory.

There are two major steps to be noted in the transformation of ancient theory of mixed government into the modern doctrine of the separation of powers. First, the insistence that particular agency should be restricted to particular functions. Second, the emergence of recognition of an independent judicial branch,

[1116] This familiar saying originated as a comment in a letter written by Lord Acton, an English historian who lived from 1834 to 1902 to Bishop Creighton.
[1117] Sam J Ervin Jr., 'Separation of Powers: Judicial Independence' (1970) 35 Law and Contemporary Problems 108-127 https://scholarship.law.duke.edu/lcp/vol35/iss1/8 accessed 20 June 2015
[1118] Paul R Verkuil, 'Separation of Powers, The Rule of Law and the Idea of Independence' (1989) 30 Williams & Mary Law Review (1989), http://scholarship.law.wm.edu/wmlr/vol30/iss2/8 accessed 10 June 2014
[1119] Vile (n 2) 9.
[1120] ibid 9.
[1121] Aristotle, *Politics*, book IV ch 14
[1122] Plato, *The Dialogues of Plato translated into English with Analyses and Introductions by B. Jowett, M.A. in Five Volumes.* 3rd edition revised and corrected (Oxford University Press, 1892). 11/7/2017. <http://oll.libertyfund.org/titles/166> accessed 3 May 2013
[1123] For a full discussion of Polybius see K Von Fritz, *The Theory of the Mixed Constitution in Antiquity* (New York, 1954) also see Vile (n 2).

which will take place alongside King, Lords, and Commons. The first of these, achieved in the seventeenth century and the second is fully attained only in the eighteenth century.[1124] The transition from mixed government to separation of powers began in the seventeenth century.[1125]

III. Evolution of Doctrine of Separation of Powers

A. Ancient Greece-Aristotle (384–322 BC)

An analysis of government into three main divisions was first made by Aristotle. Based on his study of Athens and other Greek city states, Aristotle divided political science into two parts: legislative science, which is the concern of the law-giver, and politics, which is a matter of action and deliberation, or policy; the second part he subdivided into deliberative and juridical science.[1126] The major division here between legislation and action was not the modern distinction between legislative and executive, for the Greeks did not envisage the continuous or even frequent creation of new law which is implicit in the modern view of the legislative function. When he distinguished the three elements in every constitution which the good legislator must consider, Aristotle described them as the deliberative elements, the elements of the magistracies and the judicial element.[1127] But both in the actual operation of the Greek states and in Aristotle's analysis there were no strict separation of functions of these elements, but varied and overlapped a good deal. The assembly deliberated about laws, exercised control over the administration, and gave judgements in important cases. Assembly was at once a Parliament and a government, an executive, legislative and judiciary in one; executive power was comminuted and distributed among a large number of boards, each consisting of many persons and restricted to a few special functions.[1128] There was no proper judicial establishment.[1129]

B. Republican Rome

In republican Rome there was a somewhat similar system consisting of public assemblies, the senate, and the public officials, all operating on a principle of checks and balances. The public assemblies exercised mainly electoral and legislative functions; but also decided important questions of foreign policy, and in early times passed on appeals from death sentences. The senate was legally an advisory body in matters of administration; but its resolutions came to have the force of laws. The public officials usually combined judicial and administrative functions. The threefold division was recognised in the writings of Cicero and Polybius; and the three organs are considered as restraining each other in a mixed constitution, based on the principle of checks and balances.[1130] In the time of the Empire, all the public authorities came to be controlled by the emperor.

The greatest contribution of ancient thought was its emphasis upon the rule of law, upon the sovereignty of law over the ruler. It emphasized the necessity of settled rules of law which would govern the life of the State, give it stability and assure justice for equals.[1131]

IV. Transmission of Mixed Theory to Medieval Europe (5th - 15th Century)

Following the fall of the Roman Empire, Europe became fragmented into nation-states and from the end of the Middle Ages until the eighteenth century the dominant governmental structure consisted of a concentrated power residing in hereditary rulers, the sole exception being the development of the English Parliament in the seventeenth century.[1132]

[1124] Vile (n 2) 38.
[1125] Martin H Redish and Elizabeth J Cisar, 'If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory' (1991) 41 Duke Law Journal https://scholarship.law.duke.edu/dlj/vol41/iss3/1 accessed 14 May 2014
[1126] Ethics, VI, 8, translation by J A K Thomson, London, 1955, 181
[1127] ibid 189.
[1128] John A Fairlie, 'The Separation of Powers' (1923) 21 (4) Michigan Law Review< https://www.jstor.org/publisher/mlra> accessed 19 March 2013
[1129] James Bryce, *Modern Democracies* (The Macmillan Company 1921)
[1130] ibid 391.
[1131] "He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast." Aristotle, *Politics*, Book III, 16 146
[1132] Ervin (n 5) 108.

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During the time of Middle Ages[1133] political power was restricted and widely distributed, but on no definite principles. Kings, counts, and other authorities exercised at the same time administrative and judicial, civil and military functions; and the feudal assemblies or councils were at the same time legislative and judicial bodies.

A. Thomas Aquinas (1225 – 1274)

In the thirteenth century, Thomas Aquinas reproduced the Aristotelian concept of mixed government with monarchic, aristocratic, and democratic elements: and distinguished executive and legislative power, but not as completely isolated from each other, the monarchic being preponderant.

B. Marsilius of Padua (1275 – 1342)

In the fourteenth century, Marsilius of Padua, in his *Defensor Pacis*, clearly shows the connection between the emergence of the concept of the legislative and executive functions and the ending of the medieval approaches to the nature of law.[1134]He distinguishes between legislative and executive power, the former belonging to the people, and the latter subordinated to it.[1135] He placed the legislative power clearly in the people, and rejected the view that positive law must conform to a higher law. The legislative power thus becomes a genuine power to make laws, laws which are seen as the commands of the law-making authority.

Marsilius in fact provided a transition, from the classification of the parts of the State by a mere echoing of Aristotle, to a classification of government functions which forms the basis of modern thought, and which remained essentially intact until the time of Montesquieu.

C. Jean Bodin (1530–1596)

In the development of European government from the end of the middle ages, there was also a good deal of differentiation of authorities and division of powers, but nothing like a systematic classification. On the continent, the prevailing tendency until the end of the eighteenth century was toward the concentration of political power in the hands of a single hereditary ruler. A philosophical basis for this tendency was formulated in the sixteenth centre by the French writer Bodin (1576), who supported the doctrine of a single ultimate sovereignty, and opposed its division between independent authorities. Yet Bodin also urged the importance of a separate body of judicial magistrate distinct from the ruling power.[1136]

This is essentially a hierarchical view of government functions in which the over-all judicial function is divided into the legislative and "executive" functions. Such a view naturally tends to inhibit the development of the ideal of a threefold division, with a judicial "power" and an executive "power" ranged alongside a legislative "power", because in one sense judicial and executive are virtually synonymous, and in another sense the executive functions is derived from and subordinate to the fundamental judicial power.[1137]

It took a century, for a threefold division to emerge fully and to take care over from the earlier twofold divisions. However, the notion of an independent "judicial power", at any rate in the sense of the independence of the judges, goes back beyond the seventeenth century, and during the English Civil War the basis was laid for a threefold division which never quite managed fully to materialize.[1138] In the seventeenth century both Philip Hunton and Sidney, among others, asserted the need for an independent judiciary, but the view that there

[1133] In European history, the middle Ages, or Medieval period, lasted from the 5th to the 15th century. It began with the collapse of the Western Roman Empire and merged into the Renaissance and the Age of Discovery. The Middle Ages is the middle period of the three traditional divisions of Western history: Antiquity, Medieval period, and Modern period. The Medieval period is itself subdivided into the Early, the High, and the Late Middle Ages.
[1134] Vile (n 2) 29.
[1135] Fairlie (n 16) 394.
[1136] ibid 394-395.
[1137] Vile (n 2) 34.
[1138] The need for independent judges had, of course, been emphasized in the sixteenth century, by Geroge Buchanan in 1579, and by Richard Hooker who asserted that the King ought not to be the judge in cases of felony or treason, because in such cases he is himself a party to the suit. B Hannbury, *The Laws of Ecclesiastical Polity* (7th edn , London III 1830) 317

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were three distinct "powers" of government seems to have emerged during the English Civil War. At this time there was a great deal of discussion both about the position of the judges, and (rather more) about the judicial powers of the two Houses of Parliament.[1139]

D. Sir Charles Dallison (1648)

The most remarkable attempt to refashion the pattern of thought about the functions of government was made in a work dated 1648, entitled *The Royalist Defence*, and attributed to Charles Dallison. Dallison made a clear distinction between the "sovereign power of government", which is in the King, and the authority to judge the law. Dalison avoided the use of the term "executive power", for he was in fact splitting the seventeenth-century executive functions into two parts, the functions of governing and of judging. In addition, Parliament had the function of making the law, so he arrived at a threefold division of government functions very close to that which came to be generally accepted a century later. It is one thing to have power to make laws, another to expound the law, and to govern the people is different from both, wrote Dalison in his work *The Royalist*.

By the time of the English Civil War (1642-1651) one of the fundamental elements in the doctrine of separation of powers, an abstract classification of the functions of government into two or three categories had been developed to a high degree under the impact of the contest between King and Parliament. However, something more was needed before the doctrine of separation of powers could be fully developed, that is to say the idea of these functions must be placed in distinct hands, in those of separate people or groups of people.

The idea that the King should be limited to the exercise of the executive function was now well understood. The divisions within the parliamentary camp were deep and serious. The use of the power of Parliament by one group of its supporters to threaten other groups had shown to men who had previously seen only the royal power as a danger, that a Parliament could be as tyrannical as a King. Men who had previously been Parliament's strongest supporters became its strongest critics.

Therefore, the second stage in this development was the realization that legislatures must also be subjected to restriction if individual freedom was not to be invaded; restricted not so much in the exercise of a genuinely legislative function, but in their attempts to govern and so to interfere with the lives and property of individuals who displeased the members of the legislature.

V. Emergence of Doctrine of Separation of Powers in England

By the year of the execution of Charles I, then, the doctrine of separation of powers, in one form or another, had emerged in England, but as yet it was still closely related to the theory of mixed government. It had been born of the later theory but had not yet torn itself away to live an independent life. The execution of the King, and the abolition of the House of Lords, destroyed the institutional basis of the theory of mixed government. In 1653, the Instrument of Government instituted England's first written Constitution, and in the official defence of this Constitution, entitled 'A True State of the Case of the Commonwealth', we find the doctrine of the Separation of powers standing on its own feet, claiming to be the only true basis for a constitutional government. The Cromwellian Constitution embodied, on paper at least, a separation of persons and functions.

Thus, some thirty years before the publication of Locke's Second Treatise, the doctrine of the separation of powers had been evolved as a response to the problems of the Civil War and

[1139] In 1647 Henry Ireton said that " the two great powers of this Kingdom are divided between the Lords and the Commons, and it is most probable to me that it was so that the judicial power was in the Lords principally….the legislative power principally in the Commons."; the Humble Petition and Advice of 1657 placed limits upon the exercise of judicial power by the "other House"; In 1649 John Sadler said: If I may not grant, yet I cannot deny , Originally Power to the Commons, Judicial to the Lords; Executive to the King."In 1657 the most effective use of the analogy was made by George Lawson who also formulated the threefold legislative, judicial, and executive division of functions.

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the Commonwealth. The doctrine of the separation of powers was well developed by the end of the Protectorate[1140], but it was a relatively unsophisticated doctrine, the bare essentials without much appreciation of the complex inter-relationships of a system of government the functions of which are divided up among several agencies.

VI. Restoration of Monarchy and the Theory of Balanced Constitution: Another Milestone

The doctrine of separation of powers was born and developed in the particular circumstances of the Civil War and the Commonwealth[1141], but with the Restoration, such an extreme theory, which had no necessary place for a King with a share in the legislative power, nor any place for a House of Lords, would of necessity have to be replaced with a view of the nature of government more suited to the restored monarchy. The old doctrine of mixed government, temporarily cast aside, could be rehabilated. But it could never be the same version of the pre-Civil War era.

The battle between King and Parliament had resulted in two fundamentally important modifications of this doctrine. Firstly, the King, although he still had powerful and important prerogatives, must acknowledge the supremacy of the law, and, therefore, of the legislature. It is true that he formed an essential part of the legislature, and could at least have a veto upon the proposed laws to which he would have to conform, but the principle of legislative supremacy was, by the end of the seventeenth century, a firmly established fact of English government and of English political thought.[1142] Secondly, the basic ideas of the doctrine of separation of powers were part of the general currency of English political thought. The "pure doctrine" had, naturally, to be rejected, but its main points were not forgotten. They had to be woven into the constitutional theory, which became a complex amalgam of mixed government, legislative supremacy, and the separation of powers. It was the achievement of the years between 1660 and 1750 that they were blended into a widely accepted theory of English government—the theory of the balanced constitution.

This theory dominated the eighteenth century in England and formed the basis for the views Montesquieu put forward in his chapter of the *Esprit des Loix* on the English Constitution.

VII. Re-Appearance of the Three Branches of Government: John Locke (1689)

With the birth of Parliament, the theory of three branches of government reappeared this time embodied in John Locke's *Two Treatises of Government* (1689), where these three powers were defined as "legislative", "executive", and "federative".[1143] Locke completed the bridge between the ancient theory of mixed government and the modern doctrine of separation of powers.[1144] The Inter-relationship of the "powers" of government may be considered to be one of the central considerations of Locke's theory.[1145] Executive power referred to the work of internal affairs, including the judges and the justices of the peace, who at this time besides judicial duties controlled almost the whole of local administration. Federative power had to do with external affairs—war and peace, leagues and alliances. Locke considered these three powers to be distinct, but did not consider it necessary to place them in the hands of independent authorities. The Legislative power was the

[1140] The Protectorate was the period during the Commonwealth when England which at that time included Wales, Ireland and Scotland were governed by a Lord Protector. The Protectorate began in 1653 when, following the dissolution of the Rump Parliament and then Barebone's Parliament, Oliver Cromwell was appointed Lord Protector of the Commonwealth under the terms of the Instrument of Government. In 1659 the Protectorate Parliament was dissolved by the Committee of Safety as Richard Cromwell, who had succeeded his father as Lord Protector, was unable to keep control of the Parliament and the Army. This marked the end of the Protectorate and the start of a second period of rule by the Rump Parliament as the legislature and the Council of State as the executive.

[1141] The Commonwealth was the period from 1649 onwards when England and Wales, later along with Ireland and Scotland, was ruled as a republic following the end of the Second English Civil War and the trial and execution of Charles I.

[1142] The installation by Parliament of William and Mary was an impressive confirmation of the extent of the power of the legislature.

[1143] J Locke, *Treatise of Civil Government and Letter Concerning Toleration* (Sherman edn, 1937) 97-99

[1144] Redish & Cisar (n 13).

[1145] Vile (n 2) 64.

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supreme power; while the executive and federative powers should be under one control, since they could hardly be separated and placed in different hands.[1146]

Locke's theory of government embodied the essential elements of the doctrine of separation of powers, but it was not the pure doctrine. The legislature, in its widest sense, included person had the sole executive power. This did not mean, however, that there was a "fusion of powers" in the system. The basic division of function was clear. The King could not legislate, but only accede to legislation. The Parliament supervised the execution of the law, but must not itself execute. This was the basis of the theory of the balanced constitution, a theory which is labelled as a partial separation of functions, for there was a sharing of the legislative authority, but a fundamental division of function between executive and legislature

A. Three Rationales Developed for Separation of Powers by the End of 17th Century

By the end of the seventeenth century, three main rationales had been developed for the separation of powers. One was efficiency: Because legislators could not act with the unity, speed, and secrecy necessary to govern effectively, and executive with these attributes was required. The other justification focused on preserving liberty and avoiding tyranny. First, dividing power promoted the rule of law- "a government of laws and not of men." To ensure that the law was impartially administered and that no official was above it, those who made the laws could not execute or judge them- as reflected in the maxim "no man can be the judge of his own case." The prohibition against legislative or executive revision of judicial orders was critical to preserving the rule of law. Second, separation of powers established balanced government, thereby discouraging rash or arbitrary action and encouraging consultation and cooperation. Balanced government was related to the ancient theory that mixing the basic forms of government- monarchy, aristocracy, and democracy (e.g., King, Lords, and Commons) - ensured stability and protected liberty.[1147]

VIII. Charles Louis de Secondat, Baron de Montesquieu (1689 -1755)

The name more associated with the doctrine of separation of powers is that of Charles Lous de Secondat, Baron Montesquieu. Montesquieu did not invent the doctrine of the separation of powers, and that much of what he had to say in Book XI Chapter 6 of the Esprit des Lois (Spirit of the Laws) was taken over from contemporary English writers, and from John Locke. Madison described his contribution in the following words, "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."[1148]

Montesquieu contributed new ideas to the doctrine; he emphasized certain elements in it that had not previously received much attention, particularly in relation to the judiciary, and he accorded the doctrine a more important position than the previous writers. Montesquieu's approach to the definition of the functions of government resembles a review of the history of the uses of these concepts. Chapter 6 of Book XI begins: "In every government there are three sorts of power, the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[1149]

Furthermore, Montesquieu announces that he will call the third power, by which the magistrate punishes criminals or decides disputes between

[1146] Fairlie (n 16) 394-395.

[1147] Robert J. Pushaw, 'Justiciability and Separation of Powers: A Neo-Federalist Approach' (1996) 81 Cornell Law Review 393, 403-404

[1148] The Federalist Papers : No. 47 available at http://avalon.law.yale.edu/18th_century/fed47.asp accessed 6 November 2017

[1149] This is clearly a restatement of Locke's division of government functions, except that Montesquieu does not use the term "federative power" for the executive power in regard to external affairs.

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individuals, the "power of judging". However, when he goes on to use these terms, he drops both definitions and uses them in a very much more modern way; the three powers are now "that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals," clearly including internal as well as external affairs in the executive power. It is in this final sense that Montesquieu discusses the relationships between the powers of government, and it is, of course, basically the modern use of these terms.

By 1748, therefore, he had formulated the tripartite division of government functions in a recognizably modern form. To legislate is to make the law; to execute is to put it into effect; the judicial power is the announcing of what the law is by the settlement of disputes. These functions exhaust all the "powers" of government, and they can be clearly differentiated from each other. Every government act can be put into one or other of these categories. He also established the idea of three branches of government—the executive, the legislature, and the judiciary. He maintained that each function should be exercised by the appropriate agency of government, and that he furthermore believed that the personnel of the three branches should not coincide. He was quite explicit here:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.... Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Montesquieu believed that the various functions of government should be entrusted to distinct agencies of government, which would be largely independent of each other in the exercise of these functions.

A. Emergence of Judiciary as a Separate Branch: Montesquieu's Contribution

Not only does he bridge the gap between early modern and later modern terminology, but he also obscures one of the basic problems of a threefold definition of government functions.

The most important aspect of Montesquieu's treatment of the functions of government is that he completes the transition from the old usage of "executive" to a new "power of judging", distinct from the putting of the law into effect, which becomes the new executive function. However, it is in his treatment of the "power of judging" that Montesquieu's great innovatory importance lies. He treats the *puissance de juger* as on a par, analytically, with the other two functions of government, and so fixes quite firmly the trinity of legislative, executive, and judicial which is to characterize modern thought. He detaches the judicial power from the aristocratic part of the legislature and vests it unequivocally in the ordinary courts of the land, although the noble house of the legislature is to have the role of a court of appeal. However, he still does not give the courts the position they were soon to achieve in American thought; he does not accord the judicial branch an exactly equal status with the legislative and executive branches, although he clearly intends the judiciary to be independent of the other two. He sees these two agencies as permanent bodies of magistrates, which represent the real social forces, the monarch, the nobility, and the people. The judiciary, however, "so terrible to mankind", should not be

annexed to any particular class or profession, and so becomes, in some sense, no social force at all-"*en quelque facton nulle*"— representing everyone and no one.[1150] The judiciary, therefore, is to be wholly independent of the clash of interests in the State, and this emphasis upon judicial independent is extremely important for the development of the doctrine.

B. Contribution to the Separation of Powers

What then did Montesquieu add to seventeenth- and early- eighteenth-century English thought on the separation of powers? Clearly his view of the functions of government was much closer to modern usage than his predecessors'- he was one of the first writers to use "executive" in a recognizably modern sense in juxtaposition with the legislative and judicial functions. His emphasis upon the judicial function and upon the equality of this function with the other functions of government, though by no means altogether new, was nevertheless of great importance. The judiciary had a position of independence in his thought greater than that of earlier English writers, and greater than it was in practice at that time in England. He had a more realistic, more articulated system, with an amalgam of seventeenth- and eighteenth-century ideas woven into a new fabric. By changing the emphasis that English writers of the preceding half century had placed upon legislative supremacy and the mixed constitution, he paved the way for the doctrine of separation of powers to emerge again as an autonomous theory of government. This theory was to develop in very different ways in Britain, in America, and on the continent of Europe, but from this time on, the doctrine of the separation of powers was no longer an English theory and it had become a universal criterion of a constitutional government.

IX. William Blackstone

The most important of Montesquieu's disciples in England were Blackstone. Blackstone expounded the idea of a partial separation of persons and functions which for him was the basis of a balanced constitution, and a few years later, with some change of emphasis, basically the same doctrine was used by Madison to explain the nature of the federal constitution of the United States. It can perhaps hardly be claimed that Blackstone made a great contribution to political theory here. But he has adapted the traditional English theory to the language of Montesquieu and has formulated more precisely than any of his predecessors the essential kernel of this constitutional theory.

The most important "domestication" of Montesquieu's theory, however, came in the sphere of the judicial power. The independence of judges had been a matter of concern to Englishmen for well over a century and a half before Blackstone, and that the idea of a separate "judicial power" had begun in mid-seventeenth-century England. However, the early-eighteenth-century writers on the Constitution placed this "power" in the House of Lords. It was left to Montesquieu to assert again the importance of an independent judicial power, separate from the legislature and from the executive alike. But Montesquieu had an equivocal view of the position of the judiciary. Only when discussing his monarchical form of government did he see the judiciary as a standing body of professional judges. Blackstone gathered up the threads of Montesquieu's varying statements and firmly combined them into an affirmation of the necessity for an independent judicial power, along the lines of that which actually existed in England. The courts were "the grand depositories of the fundamental laws of the kingdom,"[1151] a phrase which Montesquieu had used only for the parliaments. In England the courts were staffed by professional judges learned in the law, and Blackstone emphasized the importance of the status and tenure conferred by the Act of Settlement upon the English judges, whereas Montesquieu had

[1150] Vile (n 2) 97.

[1151] 1 Bl Comm 7 267

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defended the venality of judicial office in the French monarchy. Finally, Blackstone roundly used the term "judicial power" to describe the function of the judiciary, whilst Montesquieu, in Book XI, Chapter 6, had used simply the term, le *pouvoir de juger*, the power of judging, because the courts in his constitution of liberty had merely to announce the law. Blackstone's judges had behind them the whole weight and majesty of the common law of England developing through judges-made precedents, and the function of the judges was to decide "in all cases of doubt".[1152]

Thus Blackstone wove the judicial power into something different from, and greater than, Montesquieu's conception of it, and different also from the "judicative power" of his compatriots of the early eighteenth century. "In the distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but nor removable at pleasure by the Crown, consists one man preservative of the public liberty which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and from the executive power."[1153]

This was the basis laid for the position of the judiciary in the Constitution of the United States. Blackstone was an essential link between Montesquieu and Chief Justice Marshall, for although he did not advocate judicial review of legislation, the American view of the judiciary owes more to Blackstone than it does to Montesquieu.

He made an essentially English interpretation of Montesquieu, and gave new direction to aspects of English thought which were to play an important part in American constitutional development.

X. The Doctrine in America: Colonial Developments

With the Constitution of Virginia adopted on 29 June 1776, twenty-eight years after the publication of the *Spirits of the Laws*, was the beginning of the era of revolutionary constitutions based upon the separation of powers. It began with the resounding declaration that the good people of Virginia ordain that "The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other, nor shall any person exercise the powers of more than one of them at the same time, except that the justices of the country courts shall be eligible to either House of Assembly."

This declaration, which the framers of the Constitution of Virginia considered to be the basis of their system of government, was the clearest, most precise statement of the doctrine which had at that time appeared anywhere, in the works of political theorists, or in the pronouncements of statesmen. All its major elements were set out, but of greater importance is the fact that in the Constitution of Virginia it stood as a theory of constitutional government in its own right for the first time since the Instrument of Government over one hundred and twenty years earlier.

In the same year as Virginia did, Maryland and North Carolina made similar declarations in their Constitutions, although they were less thoroughgoing than the Virginians and in 1777 Georgia followed suit. Clearly this is an important moment in the development of the doctrine of the separation of powers. In many respects they differed considerably, but they all adhered to the doctrine of separation of powers.

The separation of powers had emerged in 1776 as the only viable basis for a constitutional system of limited government. In 1777 the New York Constitution showed a definite movement away from the extreme position of the earlier state constitutions towards some recognition of the need for checks and balances. It was in the Massachusetts Constitution of 1780, however, that the new philosophy of a system of separated powers which depends upon checks

[1152] Vile (n 2) 114.
[1153] ibid.

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and balances for its effective operation was first implemented. It was against this background of this experience with the separation of powers that the Federal Convention met in Philadelphia in 1787.

By the time that the Convention met, important sections of opinion among its members had already accepted the two central positions of modern constitutional thought. The separation of powers was by this time, in the words of a contemporary pamphleteer, "a hackneyed principle", or a "trite maxim".[1154]The idea of checks and balances was considered an essential constitutional weapon to keep all branches of government, and especially the legislature, within bounds. In the Convention Madison clearly stated the relationship between these two ideas in the following words:

> "If a constitutional discrimination of the department on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security and that it is a necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper."[1155]

In giving a defensive power to each department of government they were not blending them together, on the contrary, effective barriers were thus erected in order to keep them separate. The two doctrines, drawn from different sources, as a result of the very conflict with each other, were now to become interdependent, combined into a single, essentially American doctrine, which still provides framework of political life in the United States.

XI. Conclusion

The entire history of the doctrine of separation of powers and its related constitutional theories is indicative of the fact that neither a complete separation nor a complete fusion of the functions of government, nor of the procedure which are used to implement these functions, is acceptable to men who wish to see an effective yet controlled use of the power of governments. The 'pure' doctrine of separation of powers, which implies that the functions of government could be uniquely divided amongst the branches of government in such a way that no branch ever exercise the function of another, has failed to provide an adequate basis for an effective and stable government.

In practice such a division of function has never been achieved, nor indeed is it desirable that it should be, for it would involve a disjuncture in the actions of government which would be intolerable. In fact, no government can function on the basis of pure doctrine. Prof. Garner has rightly said, "the doctrine is impracticable as a working principle of Government."[1156] The observation of Frankfurter is notable in this regard. He said "enforcement of a rigid conception of separation of powers would make government impossible."[1157] The doctrine of separation of powers has therefore been combined with other political ideas, the theory of mixed government, the idea of balanced constitution, the concept of checks and balances.

Regarding its role in the World Constitutions, the "Pure" doctrine of separation of powers cannot be applied in any modern government. In the United Kingdom there is no strict separation of personnel particularly between the legislature and the executive. The Constitution Reform Act 2005 attempts to strengthen the separation of powers by creating a Supreme Court to replace the Appellate Committee of the House of Lords, injecting an independent element into judicial appointments and removing the Lord Chancellor's roles as head of the judiciary and Speaker of the House of Lords. It could be that aspects of these reforms, particularly in relation

[1154] Vile (n 2) 168.
[1155] ibid 169.
[1156] Frankfurter – The Public and its Government (1930) quoted by Bernard Schwartz, American Constitutional Law (Cambridge 1955) 286
[1157] Frankfurter—The Public and its Government (1939) quoted by B. Schwartz, in American Constitutional Law, 1955, 286

to the Lord Chancellor, strengthen institutional separation but weaken checks and balances.

In the United States the rigid application of rules to attempt, however imperfectly, to maintain a distinction between those who make, those who apply, and those who interpret the rules, has produced considerable difficulty in the working of that system of government, and many Americans are today impatient with the restraints it imposes.

The Constitution of India does not contemplate separation as embodied in the "pure doctrine". The doctrine of separation of powers which is contemplated in the Indian Constitution is the amalgamation of theory of mixed government and principles of checks and balances. Despite being evident that the Constitution nowhere expressly vested the powers in different organs like USA Constitution, it is one of the most characteristic features of our Constitutional scheme.[1158] As Chief Justice Subba Rao in *I C Golak Nath v State of Punjab*[1159], observed:

> "It [the Constitution] demarcates their minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them… No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land."

[1158] In Keshavananda Bharati v State of Kerala, AIR 1973, the Hon'ble Supreme Court has held that doctrine of separation of powers is the basic structure of the Indian Constitution.
[1159] AIR 1967 SC 1643