



## **Separation of Power: An Elusive Dream**

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### **ABSTRACT**

*This article describes the basic doctrine of separation of power to highlight how this doctrine has evolved. Then, this article inspects whether this doctrine is practically viable or an elusive dream. To this end, this research article utilised qualitative research methodology and focuses on the nature and effectiveness of the doctrine of separation of power. The article investigates whether the separation of power is a pure or genuine concept to pinpoint its complex nature. Then, this article critically analyses the less purity in Montesquieu's concept of separation of power. In the end, this article scrutinizes and finds the pure concept of separation of power.*



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## **INTRODUCTION**

Separation of Power is an elusive dream or a practical reality. It is a theoretical framework or a stable principle is a main controversial question. Because the practical application of separation of power is a myth and the determination of the realm for a check and balance system is a matter of mere words. Thereby, with an aim of scrutinizing the solidified practical permanence of the

doctrine, there is a need to have appropriate surgery of the doctrine with qualitative research tools. This article has been divided into various segments. The second segment critically analyses the purity in the doctrine of separation of power and highlights the evolution of this doctrine with time. This segment inspects whether the existence of separation of power among the branches of the state is necessary or not. The third segment investigates the complexity of the nature, effectiveness, and base of the doctrine. This segment inspects the hypothetical nature and less practicality of the doctrine. The fourth segment describes the less purity in Montesquieu's concept of separation of power by comparing the perspective of Montesquieu with the concept of Vile. The fifth segment inspects and finds the pure doctrine of separation of power and describes its components which are the separation of personnel and separation of the institution. In the end, there is a justified conclusion.

### **WHETHER SEPARATION OF POWER IS A PURE OR GENUINE CONCEPT**

It is an essential question why there must be the existence of separate power among the branches of the government. Whether no one wants that a single ruler would have the power of making all the decisions of the government. If it is true then why is this? What will be obtained if the power is separated among the branches of government? Is it simple to answer all these questions?

These questions has been discussed and answered over time. The classic era answered that separation of power is a necessary essence as it helps in averting the risk of oppression, tyranny, totalitarianism, and dictatorship. Moreover, it helps to avert the abuse of power as well. Montesquieu said that "constant experience shows us that every man interested in power is apt to abuse it, and to carry his authority as far it will go (Albert, 2010)."

Separation of power ensures that no organ is omnipotent, at the same time as instantaneously permitting them to sanction and check each other. The organ will check and sanction the other when it will be required. Consequently, the main role of the separation of power is to curb the abuse of power and protect its concentration (Magill, 2001).

There must be the existence of a reasonable correlation between all the organs. But this correlation must be reasonable and meaningful. If it is assumed that the main and only function of the separation of power is to prevent the concentration of power in one organ, then this dream will be fulfilled when the power will be dispersed in various organs. If the only problem was the concentration of power, then its solution is the dispersion of power. Moreover, if the main aim of the separation of power is to check and sanction, this problem will be resolved by the introduction of institutional checks.

This concept, however, does not rest well with the concept of one branch, one function, and separation as a confinement view. Both these concepts prove that each branch or organ of government has to perform its function and it is not permitted to disturb or encroach on the realm of another (Magill, 2001).

It can be discussed from the constitutional point of view that it is "reluctant to accept that powers should be allocated to different branches on a random basis. It matters a great deal who gets to decide what in constitutional law. Not only do we want to ensure that the right decisions are made by the institutions which govern us, but we also care about whether the right decisions have been made by the right body (Waldron, 1993)." It is submitted that our constitutional approach is quite sensitive regarding jurisdictional matters that are a very critical determinant of

political legality. Hence, there is a need for a positive and authenticated justification for the allocation of power to the specific organ with an aim to avoid the concentration of the power. Now, the question is whether this justification exists.

The first justification is based on the “nature of governing and multitasking (Green, 2007).” It is a fact that a good government performs multitasking in any complex and civilized society. It is also a fact that a government needs an executive for making policy decisions. However, most importantly and beyond this, a good government needs a body making prospective, open, steady, stable, and effective general principles for the public. H. L. A. Hart states “any complex legal system needs a means of resolving disputes about the rules and their application (Hart, 2012).” Additionally, the government also requires a body that must be independent for the settlement of disputes as well (Barbar, 2011).

Hence, there is a need for three organs that could effectively run a good government. These organs must have the division of labour as well. There is a need to disperse the power among these organs with the aim that the concentration of power must be avoided. This will be done when the power will be dispersed in an accurate fashion and by discouraging the randomness in the dispersion of power. In this way, the legislature, judiciary, and executive will be the three organs. Now, the main issue is the allocation of the power and assigning of the task to the organ best suited to carry and reasonably deal with such responsibilities efficiently. The second task is to protect the state from abuse of power. Practically, when the power will be dispersed into the organ, will they effectively work within the ambit of their power? That is why; separation of power is an elusive dream because it is difficult to believe that an organ will not intervene in the ambit of others and will perform only its task.

### **THE COMPLEXITY IN THE SEPARATION OF POWER DOCTRINE**

Separation of Power throughout its life has been praised effusively and brutally with opprobrium in equal measure (Carolan, 2009). However, what is its requirement? It is not easy to answer because the phrase Separation of Power is actually ambiguous, intricate, and complex in its meaning. The word power could refer to any institution or any lawful authority to perform or not to perform any certain act. Power can also permit or stop any authority to legislate, execute or judge any matter (Munro, 2005).

However, the term separation varies in form, degree, and extent. Separation can be partial, entire, or absolute. Moreover, it is a fact that partial or incomplete separation permits the existence of interconnection (Marshall, 2005). Due to these ambiguities, the term separation of power generally refers to various ideas for their implication and application. It is necessary to examine whether the evolved idea from the term separation of power is reasonably correct or not. If it is not correct then it may cause agitation in the legal, social and political systems.

One inference that is generated from the term separation of power is “a triad of mutually exclusive functions; a prohibition on plural office-holding; the isolation, immunity, or independence of one branch of government from interference from another; or a scheme of interlocking checks and balances (Marshall, 2005).”

The most influential articulation of the separation of powers concept is made by Maurice Vile. Vile has given a pure concept of separation of power that requires: “the government should be

divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, with no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State (Barendt, 1997).”

Vile concedes that the doctrine of separation of powers is a dream which is elusive. That means the doctrine is more hypothetical than practical. The high of his concept is that this doctrine in its extreme form is inapplicable. However, the pure doctrine is an ideal concept which is why the alternative concepts are generally assessed (Maleson, 2010). The pure doctrine emphasises the distinction between the three branches regarding their functions and roles; however, it encapsulates “the traditional understanding that governmental activities can be classified under three functional headings legislative, executive, or judicial with each function associated with one of the three branches of government (Merrill, 1991). A strict separation along functional lines is thought to lie at the heart of the classic doctrine of the separation of powers (Magill, 2001).”

### **THE LESS PURITY IN MONTESQUIEU’S CONCEPT**

Remarkably, the pure doctrine of Vile is compared with Montesquieu. Moreover, Vile’s concept is repeatedly associated with Montesquieu (Tomkins, 2003). It is submitted that the association between both concepts is a subjective approach on the ground that Montesquieu has not clearly established or demonstrated the functional theory of separation.

Furthermore, Montesquieu has no specialized concept of separation of power in its pure form. His idea, specifically his concept of tripartite distinction, has faced extreme criticism because it was overly simplistic (Claus, 2005). It is really important to pinpoint the gaps in the idea of Montesquieu. How his idea was overly simplistic and whether his given concept rests well and is capable of being applicable today.

However, it is ordinary to describe that the classical concept of the separation of power was a concept that divided the three different functions (Heun, 2011) which have a reflection of the concept of Montesquieu and that the doctrine restricts any intermingle of functions (Marshall, 2015). So forth the reality and actuality of its intellectual or intelligent attribution, (Dicey, 1915) the pure concept of separation of power has had a lasting and persistent influence on the thinking about what is the requirement of the doctrine of separation of power (Corwin, 1953). It is submitted that this understanding has orthodoxy that what is the need or requirement of the concept of separation of power. Hence, there is still a gap that requires the construction of an unobstructed road that could eradicate the orthodox understanding at first and provide a stable understanding in the second step.

### **FINDING THE PURE CONCEPT OF SEPARATION OF POWER**

There are three essentials that the pure concept has that are: first, the separation of personnel second, the separation of institutions and third, the separation of functions (Kyritsis, 2007). This

research will scrutinize the issue regarding all these three separations. Moreover, it will inspect the requirement of functional separation.

The functional separation has great significance because one to one correlation between the three branches of the government and their actual role is posited by it (Kyritsis, 2007). To this end, each of the branches has a function on behalf of which it has a certain name. This approach is called “one branch one function. The second feature is the requirement that each branch must be confined to the exercise of its own (single) function and should not encroach upon the functions of the other branches. For it to assume any other function would be ultra vires. We can call this the separation as confinement view (Merrill, 1991).”

These two approaches are really problematic (Lord, 1999) as “the claim that there is separation as confinement and one-to-one correlation between function and branch is impossible to sustain in any modern state. As is well known, the executive typically carries out a significant legislative function in the form of delegated legislation. Indeed, in many countries, the executive has a predominant role in primary legislation as well. Executive power is strikingly multifunctional (Gwyn, 1989).”

It is difficult to confine each organ to perform a single function and when multifunction will be performed by any organ then these two approaches will be failed. There is a need for permitting the organ to perform multifunction but the power should be reasonably dispersed in them. Moreover, the power should be dispersed in a way that may discourage the abuse of power and concentration of power. Thereby, there is a necessity to check whether this doctrine is practically applicable or it is only an elusive dream (Dworkin, 1985).

The theory that each of the three branches of our government must perform only a single function and remain limited to only one role does not seem strong enough to survive in the present situation where the “multifunctionality of the institutes” is increasing with the passage of time. All three branches that are legislation, executive, and judiciary are associated with playing their roles. On the basis of fact, the importance of multifunctionality cannot be ignored. Any branch cannot play its role perfectly if it does not carry out the related tasks of the other two institutes.

The theory of “one branch-one function” should be modified to some extent considering the facts above and maintaining a realistic approach. Although every branch is centralized around one major goal it must be considered that the branch also performs some other roles to some extent. For the proper functioning of a government, they will have to interfere with each other’s functions. Otherwise, every branch will consider itself irresponsible for any task that is not included in its periphery and it will result in the arousal of many difficulties in running the government. The reason behind this is that the functions of these branches are not totally different (Irvine, 1999).

These are somewhat merging into each other and we cannot draw a clear border line between them that can distinguish them. The “concept of multifunctionality” eliminates the “concept of the exclusive function” by assigning primary and secondary roles to a branch. But then multifunctionality is also not perfect for implementation. The reason is that the functions of branches are interlinked to a large extent and these functions which we think are secondary to a branch become hard to ignore. That is why these secondary functions start playing a significant

role, the same as primary and basic functions. For example in a number of states, the executive branch is expected to impose the policies designed by the legislative branch but on the other hand, the same executive branch is initiating the policies while its basic function is execution rather than initiation. We are aware of the basic core function of the judicial branch (Lawson, 1994).

No doubt, its role is to decide the cases of different kinds of disputes and practice the law. But the same judicial institute is also managing the functions of other departments. Anyone can confidently say that the function of legislation is to legislate but the experts of political science are having a debate on this point of view. They claim that legislative institutes of governments are linked with other functions. In spite of making legislative decisions, these legislative institutes are also acting as an approving authority of the legislation made by the executive branch. In simple words, we can say that 'to legitimate' is also a role of the legislative branch (Norton, 2013).

So, what is the conclusion of the above discussion? It shows that the "multifunctionality of branches," again, is not a complete solution to the issues created by the "exclusive functionality" of the branches. Now, let us consider the idea of "separation as confinement". No doubt it will again result in the same difficulties as created by the concept of the "One branch-One function" concept. Hence, it is an inevitable truth that all three branches are clearly interdependent on each other. Each branch depends upon the other branch for the achievement and completion of its goals. Take the example of the legislative branch (Raz, 1989).

For the disposal of any legal norm, the legislature depends upon some legislative instruments. It has to make a legal network consisting of other bodies, most courts, so that after the disposal of the statute, the legislature may not face any kind of issue related to that statute. In the reign of Joseph R.Z, He had divided the legislative powers to the subordinate or lower institutes, governors, and courts and gave them the legislative authority required for the attainment of expected goals. This example certifies how important the division of labour among the institutes is. The legislation is not only the work of the legislature but many other bodies are often playing major roles in its modification and disposal (Kavanagh, 2004).

In the same way, the judicial branch is also dependent on the legislature. It is a common fact that the judiciary must have to practice the laws and statutes proposed by the legislation. It is a misconception that the role of the judiciary is only practicing the law; the legislature has given the judiciary the authority of modifier of law as well. There are many areas of law that are decided by both judiciary and legislature and therefore this coordinated working of both branches result in better disposal and implementation of the law. It will not help to say that branches of the government must restrict themselves to a single exclusive mode of function and not interfere with any function that falls in the area of other branches (Barak, 2006).

## **CONCLUSION**

With reference to the importance of interdependent and coordinated working of the branches, it is submitted that we must give up the pure doctrine concept about the working of institutes. There are two main points that illustrate how the pure doctrine concept should be modified so that the problems that arose from the previous "exclusive-functionality concept for the separation of power." First, instead of separating the branches on the basis of exclusive and basic functions,

the power should be separated in such a way that each and every branch will perform its distinguished role in the framework of the constitution. There should be a division of labour among the branches and their functions and roles should be coordinated in a systematic way for the achievement of the expected goals. Second, we must abandon the way of seeing these departments as isolated institutions with clear borderlines between them. This fact should be considered that the functions of these branches are actually merged into each other and cannot be separated. It is actually a complex network where each branch is actually playing its own roles which are showing mostly positive and supportive effects in the periphery of the other branches. Every branch is incomplete and imperfect without the other. This concept of power separation lessens the strictness of separation between the branches as was illustrated in the “one branch-one function” concept that was inapplicable at all. However, this reality cannot be denied that the pure doctrine concept is providing a simple and easily understandable way of distinguishing among the branches.

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