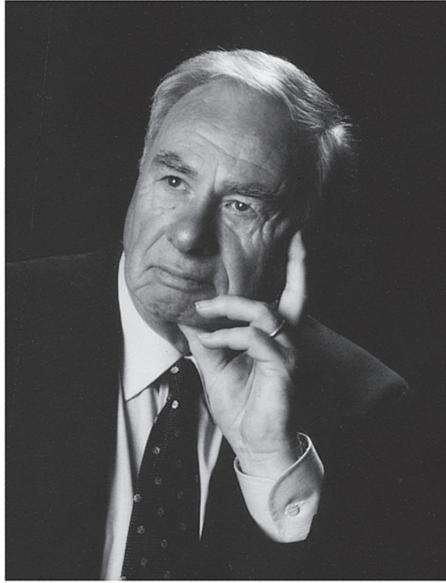


CONSTITUTIONALISM  
AND THE  
SEPARATION OF POWERS



M. J. C. Vile

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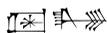
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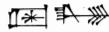
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*For  
John and Richard*

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PREFACE  
TO THE SECOND EDITION

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This work concentrates upon the history and analysis of a strand of constitutional thought which attempts to balance the freedom of the individual citizen with the necessary exercise of governmental power—a dilemma facing us as much today as at any time in our history. I believe that the study of the ways in which this problem has been approached in the past can provide invaluable lessons for today.

In this new edition, appearing thirty years after the first, I have not attempted to revise the text of the original. This is due in part to the fact that so much has been published in the interim and in part because I have since come across a great deal of which I was previously unaware. Thus, any attempt to take all this into account would mean writing a completely new work. At the same time, although I could easily add more material, I do not believe that doing so would necessarily alter the broad outlines of the book, nor would it alter the argument it presents. I have, however, taken the opportunity to add an Epilogue in which the major developments of the past thirty years in Britain and the United States are surveyed, and an attempt has been made to carry the essence of the theory of the separation of powers forward to meet the conditions of government at the end of the twentieth century. I have also added a bibliography, a serious omission from the first edition. Although it can hardly claim to be comprehensive, this bibliography includes many works which were not referred to in the text but which will perhaps assist students who wish to pursue the subject further.

PREFACE TO THE SECOND EDITION

I have the undeserved good fortune to have had the support of my sons, John and Richard, to whom this edition is dedicated, and of my wife, Nancy. For more years than either of us cares to remember, my friend Derek Crabtree has provided advice, criticism, and, above all, bonhomie.

Canterbury

June 1997

CONSTITUTIONALISM  
AND THE  
SEPARATION OF POWERS

## ONE

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### The Doctrine of the Separation of Powers and Institutional Theory

**T**HE HISTORY OF Western political thought portrays the development and elaboration of a set of values—justice, liberty, equality, and the sanctity of property—the implications of which have been examined and debated down through the centuries; but just as important is the history of the debates about the institutional structures and procedures which are necessary if these values are to be realized in practice, and reconciled with each other. For the values that characterize Western thought are not self-executing. They have never been universally accepted in the societies most closely identified with them, nor are their implications by any means so clear and unambiguous that the course to be followed in particular situations is self-evident. On the contrary, these values are potentially contradictory, and the clash of interests to be found in the real world is so sharp that the nature of the governmental structures through which decisions are arrived at is critically important for the actual content of these decisions. There has therefore been, since earliest times, a continuous concern with the articulation of the institutions of the political system, and with the extent to which they have promoted those values that are considered central to the “polity.”

Western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be 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. 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. It stands alongside that other great pillar of Western political thought—the concept of representative government—as the major support for systems of government which are labelled “constitutional.” For even at a time when the doctrine of the separation of powers as a guide to the proper organization of government is rejected by a great body of opinion, it remains, in some form or other, the most useful tool for the analysis of Western systems of government, and the most effective embodiment of the spirit which lies behind those systems. Such a claim, of course, requires qualification as well as justification. The “doctrine of the separation of powers” is by no means a simple and immediately recognizable, unambiguous set of concepts. On the contrary it represents an area of political thought in which there has been an extraordinary confusion in the definition and use of terms. Furthermore, much of the specific content of the writings of earlier centuries is quite inappropriate to the problems of the mid twentieth century. The doctrine of the separation of powers, standing alone as a theory of government, has, as will be demonstrated later, uniformly 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 Western political systems. Nevertheless, when all the necessary qualifications have been made, the essential ideas behind

the doctrine remain as vital ingredients of Western political thought and practice today. To substantiate this view it will be necessary to attempt to define and use terms in a more precise way than has been generally the case in the past, and to review the evolution and history of the doctrine, important enough in itself, in order to understand its significance in the past and its relevance today. In spite of the criticisms which can be made of the idea of the separation of powers, perhaps the most important conclusion to be drawn from such a review is that the problems of earlier centuries remain the problems of today; although the context is different, and the dimensions of the problem have changed, it is nevertheless the continuity of political thought, and of the needs of political man, which emerges as the most striking aspect of the history of institutional thought.

The doctrine of the separation of powers finds its roots in the ancient world, 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 the separation of powers. Their transmission through medieval writings, to provide the basis of the ideas of constitutionalism in England, enabled the doctrine of the separation of powers to emerge as an alternative, but closely related, formulation of the proper articulation of the parts of government. Yet if we define the doctrine in the terms suggested below, it was in seventeenth-century England that it emerged for the first time as a coherent theory of government, explicitly set out, and urged as the "grand secret of liberty and good government."<sup>1</sup> In the upheaval of civil war the doctrine emerged as a response to the need for a new constitutional theory, when a system of government based upon a "mixture" of King, Lords, and Commons seemed no longer relevant. Growing out of the more ancient theory, the doctrine of the separation of powers became both a rival to it, and also a means of broadening and developing it into the eighteenth-century theory of the balanced constitution. Thus began the complex interaction between the separation of powers and other constitutional theories which dominated the eighteenth century. In England, France, and America this pattern of attraction and

1. *A True State of the Case of the Commonwealth*, London, 1654, p. 10; see below, pp. 53-57.

repulsion between related yet potentially incompatible theories of government provided the fabric into which was woven the varied combinations of institutional theories that characterized the thought of these countries in that eventful century. The revolutionary potentialities of the doctrine of the separation of powers in the hands of the opponents of aristocratic privilege and monarchical power were fully realized in America and France, and its viability as a theory of government was tested in those countries in a way which all too clearly revealed its weaknesses. Nevertheless, the separation of powers, although rejected in its extreme form, remained in all three countries an essential element in constitutional thought, and a useful, if vague, guide for institutional development. That this once revolutionary idea could also become in the course of time a bulwark of conservatism, is understandable, for this is the fate of many political ideas.

As the nineteenth century developed the social environment became less and less favourable for the ideas which had been embodied in the pure doctrine of the separation of powers. The attack upon the doctrine came in two waves. First, the group which in earlier years had most fervently supported the separation of powers, the middle class, now saw within its reach the control of political power through the extension of the franchise, and the need for a theory that was essentially a challenge to the power of an aristocracy diminished. However, the lessened enthusiasm for the doctrine took the form, in the period up until the Second Reform Act in England, of a re-examination and reformulation of the doctrine rather than an outright rejection of it. Any suggestion of an *extreme* separation of powers had to be denied, but the importance of the idea as a part of the newly emerging theory of parliamentary government was readily acknowledged. The idea of balance, which was now transferred from the earlier theory of the balanced constitution to become an integral part of the new theory, required still a separation of organs and functions, but with a different set of concepts that had to be fitted into the framework of constitutional theory. The second wave of attack upon the doctrine of the separation of powers came with what Dicey labelled "the age of collectivism." Yet paradoxically it was the middle-class defenders of the mid-nineteenth-century *status quo* who, for reasons which will become apparent at a later stage, laid the ground

for the virtual eclipse of the separation of powers as a coherent doctrine in England. The rise and fall of the classical theory of parliamentary government is, therefore, an integral part of the story of the separation of powers. At the centre of this development stands the figure of Walter Bagehot, whose work represents a turning-point in the history of English constitutional thought.

Changing ideas about the role of government and its structure were accompanied by a changing emphasis in ideas about the nature of sovereignty. In earlier centuries the stress upon the necessity of a single, omnipotent source of power was in general the resort of theorists of absolutism, strongly rejected by liberal constitutionalists. The defenders of liberty against arbitrary government stressed the division of power, and the limitations upon power imposed by the constitution or by a higher law. Rousseau's association of the idea of unlimited sovereignty with the people, rather than with a monarch, led, however, to a reorientation of ideas. If absolute power were in the hands of the people, or their representatives, then it could be stripped of its associations with arbitrary government and formed into an instrument of democratic power. If the franchise could be restricted to those with a stake in the community then the idea of an unlimited, indivisible sovereign power became for the liberal individualist not a threat, but a safeguard. It became, in the hands of Bentham and Austin, not a means of arbitrary rule but an instrument for the reform of government which would *increase* the freedom of the individual. That it could equally well become the instrument of another class, and of a different philosophy of government, was a possibility that, if they acknowledged it, did not prevent them from attacking the earlier ideas of the division and limitation of power. It is one of the great ironies of intellectual history that those who were most concerned to establish *laissez-faire* busied themselves with the fashioning of those weapons which were to be used most powerfully to destroy it.

The general context of political development during the nineteenth and early twentieth centuries provided, therefore, the framework for a sharp reappraisal of the doctrine of the separation of powers, but there were other equally important, and related, intellectual challenges to the doc-

trine. The desire for a unified system of government, whether to achieve reform or for purposes of positive State action, led to a rediscovery of the role of discretion and prerogative in government. The idea of a "mere executive power" which had never been wholly accepted in England, except by extreme radicals, was now specifically rejected. The attack upon the Montesquieu formulation of the triad of government powers, initiated by Bentham and Austin, was taken up by the writers on parliamentary government, and further developed in Germany, France, and America, so that by the early decades of the twentieth century the beautiful simplicity of the eighteenth-century view of the functions of government lay mangled and shattered. And yet, although the attack seemed overwhelming, it was so far a merely negative criticism that no coherent formulation of the structure of government and the articulation of its parts rose up to take the place of the earlier theory. As a result the vocabulary of an earlier age continued in use *faute de mieux*. It was much more than a problem merely of usage, however, for the persistence of the concepts and terminology of an earlier age reflected the fact that Western society in the mid twentieth century continued to value the ideas which had been an integral part of constitutionalism for three centuries, but wished to modify them in the light of new conditions, and new needs. The result of this critical onslaught was, therefore, to leave unrelated fragments of earlier constitutional theories without a new synthesis to fill the gap.

The realization that the functional concepts of the doctrine of the separation of powers were inadequate to describe and explain the operations of government was heightened by the emerging awareness of the nature of bureaucracy. The impact of Prussian bureaucracy upon the nineteenth-century writers, the establishment of a non-political civil service in England, the dissatisfaction with the spoils system in the United States, and the development of the Weberian theory of bureaucracy, led to a complete reassessment of the "executive" function. Thus the demand for the establishment of "harmony" between legislature and government, which characterized the theory of parliamentary government in Britain and France, and the Progressive movement in the United States, was accompanied by a new "separation of powers"—that between the "political" branches of gov-

ernment and the bureaucracy. The distinction between "*Regierung*" and "*Verwaltung*," or between "politics" and "administration" was, paradoxically, to open a new chapter in the establishment of semi-autonomous branches of government in an age which stressed unity and cohesion.

The credibility of the doctrine of the separation of powers, particularly in the extreme forms that had characterized the Constitution of Pennsylvania in 1776, or the Constitution of France in 1791,<sup>2</sup> already diminished by these social and institutional developments, was further undermined by the new approaches to the study of politics which characterized the twentieth century. If not everyone was prepared to relegate the study of political institutions to the sphere of mere "superstructure" that Marxist thought seemed to demand, the new concentration upon the "real forces" of politics, upon economics and class interest, led to a discounting of theories that seemed concerned only with constitutional and legal considerations. The now discarded theory of mixed government had at least had a social basis for its view of a desirable governmental system, whereas the separation of powers had, quite deliberately, been formulated as a constitutional theory devoid of class bias. There was a diminution of belief in the efficacy of constitutional barriers to the exercise of power, and students of politics demonstrated how legal rules could be evaded or employed to produce an effect directly opposite to that intended. A concentration upon the facts of "politics" rather than of law, leading to a concern with political parties and pressure-groups, directed attention away from the role of constitutions in the political system. The general attack upon "political theory," which suggested that it was merely the expression of opinion or prejudice, tended to depreciate those theories that historically had been strongly empirical in content, along with more metaphysical philosophizing. It was suggested that it was not possible to deduce from a general theory of politics specific unequivocal solutions to particular problems, and that therefore it was probably more fruitful to adopt a pragmatic approach to these individual problems, rather than to attempt wide-ranging generalizations.

The weight of the attack upon the doctrine of the separation of powers

2. The role of the separation of powers in these Constitutions is discussed in Chs. 6 and 7 below.

was thus seemingly overwhelming. Yet the examination of the history of the doctrine is not merely an academic exercise, of historical interest only. In spite of the attacks upon the form, and upon the content, of the doctrine there is a sense in which the problems the theorists of the separation of powers set out to solve are more than ever critical today. The recognition of the fact that modern society must meet demands unknown in earlier centuries may make the form of the earlier doctrine irrelevant, but the values it represented are still an essential part of the content of "Western democracy." An examination of the history of the past centuries reveals that for all its inadequacy there is a stubborn quality about the doctrine of the separation of powers. It persistently reappears in differing forms, often in the very work of those who see themselves as its most bitter critics. As will be suggested at a later stage, this is no mere coincidence; it is a recognition of the fact that in some form, a division of power, and a separation of function, lie at the very heart of our systems of government. An idea that finds its roots in ancient constitutionalism, and which in the seventeenth century became a central feature of a system of limited government, has obviously to be reformulated if it is to serve as an instrument of modern political thought, but it can only be rejected altogether if we are prepared to discard also the values that called it into being. The study of the history of constitutional theory can show us, therefore, the extent to which the doctrine remains important, and the extent to which the concepts upon which it rests have become outmoded. The importance of such an investigation hardly needs to be stressed, when we recall that the current institutional structures of two of the three countries with which we are here concerned are overtly based upon the acceptance of the doctrine of the separation of powers; and it will be argued that an approach to the study of British government that rules out all reference to the "separation of powers" is an inadequate one.

But what is "constitutional theory"? It is at once both more than and less than the study of political institutions. It is based upon the assumption that not all States are "constitutional regimes," for in the constitutional State there must be a set of rules which *effectively* restrains the exercise of governmental power. "Constitutionalism" consists in the *advocacy* of certain types of institutional arrangement, on the grounds that certain ends will be

achieved in this way, and there is therefore introduced into the discussion a normative element; but it is a normative element based upon the belief that there are certain demonstrable relationships between given types of institutional arrangement and the safeguarding of important values. Thus on the one hand constitutional theory has to grapple with the problems of the existence of nominal or façade constitutions, and on the other with the assumptions implicit in the extreme versions of the modern behaviourist approach, which, with its emphasis upon informal processes, tends to suggest that formal structures have little or no significance.<sup>3</sup> It is therefore a type of political theory that is essentially empirical, yet which overtly recognizes the importance of certain values and of the means by which they can be safeguarded. Yet in this respect perhaps constitutionalism and constitutional theory are not so far removed from the general stream of political science as might at first be supposed. In the twentieth century the study of politics has become more empirically oriented, less overtly concerned with the justification of particular patterns of values. Nevertheless, the close relationship between the description and explanation of political institutions and of the justification of the values they reflect is an inescapable one. However strong the urge towards objectivity on the part of the student of politics, it is impossible for his work to be wholly detached from the problem of what is a "just," "desirable," or "efficient" political system, for the work must inevitably reveal the values that infuse the politics of the countries he studies and the results which their political systems produce. The more theoretical and general his approach the more likely he is, even if only through the means of classification he adopts, to take up a stance of approval or disapproval. This can be seen very clearly in many modern American works on political science.<sup>4</sup> There is, in fact, a complex inter-relationship between the study of political institutions and the justification of particular types of governmental systems.

The doctrine of the separation of powers was for centuries the main

3. See the discussion by Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *A.P.S.R.*, Vol. LVI, No. 4, Dec. 1962.

4. See the discussion of Almond and Coleman, *The Politics of the Developing Areas*, in Ch. 10 below.

constitutional theory which claimed to be able to distinguish the institutional structures of free societies from those of non-free societies. It was by no means a value-free or neutral theory of politics, but it did claim to be based upon a demonstrable empirical proof. In the mid twentieth century, however, the doctrine has largely been rejected, either as a prescription for the creation of an efficient, free system of government suited to modern circumstances, or as a set of concepts which provides a useful vocabulary for the investigation and description of systems of government. Yet little has been offered in place of this relatively coherent body of political doctrine as a framework for the analysis of political systems. Indeed, the modern attempts to provide generalized statements about the articulation of the parts of government depend very heavily upon just those concepts of function and balance which characterized earlier constitutional theories. Clearly, however, the extent to which these earlier constitutional theories concentrated attention upon the formal structures of government, especially upon the formal relationships between executive, legislature, and judiciary, made it impossible to handle effectively the problems of distinguishing nominal from effective constitutions, and failed to give a complete picture of "constitutional government" in operation. A discussion of the nature of a limited government must encompass parties and groups, and the results of behavioural studies, as well as the operation of those structures which have traditionally occupied political theorists. At the same time we must not minimize the importance of these political institutions. The emphasis upon the study of certain aspects of behaviour has been taken, at the extreme, to suggest that "institutions" are merely formal and insignificant pieces of window-dressing, whereas in fact political institutions are the framework of rules within which the actors in political situations must normally operate and which students of behaviour tend to take for granted.

The history of the doctrine of the separation of powers provides a panorama of the complex evolution of an idea, and of the role it has played, and continues to play, in the political systems of Western countries; but, equally important, it helps us better to understand the concepts still in use today in the discussion of government, even though many of the assumptions which originally gave rise to these concepts have changed. We

still talk of the legislative function or of the relation between legislation and execution, although the meaning we attach to such concepts is very different from that of earlier ages. To understand the way in which these concepts developed is an essential prerequisite for a critical reappraisal of them, in order more clearly to understand how we can best approach the analysis of political systems. Thus the idea of "function," an essential element in the doctrine, has given rise to considerable confusion in the past, and has been bitterly attacked, yet it still plays a part in our everyday vocabulary of political analysis. The apparent rejection of the doctrine of the separation of powers cannot hide the fact that many practical problems of twentieth-century government are essentially problems with which the doctrine claimed to deal, and we have seen the emergence of terms such as "quasi-judicial," "delegated legislation," or "administrative justice," which represent attempts to adapt the older categories to new problems. The truth is that we face today serious problems, both in political analysis, and in matters of practical significance in the field of government functions and their division among the agencies of government, as well as in terms of the relationships between these agencies. We are not prepared to accept that government can become, on the grounds of "efficiency," or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships. Some broad ideas about "structure" must guide us in determining what is a "desirable" organization for government.

Yet it is not simply the need to attain an academic "understanding" of the ideas and institutions of contemporary Western society that may lead us to explore the history, and analyse the content, of the doctrine of the separation of powers. For today there are practical problems of the control of government every bit as important and difficult as in the days of Locke, Montesquieu, or the Founding Fathers. Although we may be much more sceptical than they were of constitutional theories which claim to be able to set limits to the exercise of governmental power, nevertheless we cannot merely accept without question the view that the continued concentration of power into the hands of cabinets and presidents is inevitable and cannot be restrained. The concentration of *more* power into such hands, or