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Topic Separation of Power

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Introduction

Recall that the concept of separation of powers was propounded by Baron de Montesquieu. It states that the three arms of government – the legislature, executive and the judiciary – must be separate and independent in terms of personnel, functions and powers. In other words, the personnel in the legislative arm of government must not be the same as those in the executive or the judicial arm of government. Also the members of the legislature must not have the same functions and powers as those in both the executive and the judiciary.

Meaning

Montesquieu the French jurist, who lived in England from 1729 until 1731, has developed the doctrine of separation of powers. He based his exposition on the English constitution of the early eighteenth century as he understood it. He followed attempts by Aristotle and Locks in dividing the power of government.

He explained that, in order to prevent the abuse of powers, the power of the government should not be left entirely to one body or person; instead it should be separated or divided in some way. He went further and divided the power of government into three major functions. These were: law-making function (the legislative), Law-applying function (the executive) and law-enforcing function (the judicial). This separation of powers is perceived in the United Kingdom among the Monarch, Parliament and the Court of Law.

One branch of government must not exercise the power of another, for instance executive should not legislate. However, if it is to be

found that there was an abuse of power there can be no political liberty?

In addition, a complete separation of power would probably be unworkable as a system of government and would seem presidential. It would also bring the government to a standstill, especially that executive and legislative in the United Kingdom are connected in Parliamentary system.

The three branches of government should “check and balance” on each other. It would allow one branch to limit another and to prevent one from becoming supreme, but one branch must not exercise the whole power of another, nor obtain control over another branch, for example the executive should not be able to vote legislative and decide when a new legislation should be elected.

Due to the absent of a written constitution in the United Kingdom, there is no separation of powers. However, when comparing it to the United State versions the three functions of separation of powers are clearly stated.

Although in United State constitution the three branches are systematically split between the executive (the president), the legislative (congress) and the judiciary (the Supreme Court), it is not a complete separation of powers. Each body or person can be exercised in isolation from each other and for balance to occur between them no function can become more powerful than the other two. However, in France, the separation of powers has manifested itself very differently from the American version. The ordinary Courts should have no jurisdiction to review the legality of acts of legislature or executive. Instead, the Conseil d’Etat for administrative courts may review the constitutionality of new laws.

However, the three branches of government will be discussed individually.

The legislation function:

The legislative function is the making of a new Law and the existing Law alternative or repeal. It involves the enactment of general rules determine the structure and powers of public and authority and regulation the conduct of citizens and private organisation.

In the United Kingdom the Queen in Parliament is the Sovereign Law making body. Formally expressed, Parliament comprises the Queen, the House of Lords and the House of Commons. A Bill must be passed in each House and receive Royal Assent. However, legislation can sometimes be enacted even if it has been rejected by the House of Lords under the Parliament Act.

The executive function:

The role of the executive or administrative function is that to formulate and implement government policy across all governmental activities. In formal terms, the sovereign is the head of the executive. Members of government are primarily elected Members of Parliament who sit in the House of Commons; although a number of government ministers also sit in the House of Lords.

The executive function has become extremely wide. It comprises all official and public authorities. It involves the provision and administration or regulation of a vast system of social service, public health, assistance for the sick and unemployed, transport, education and so on.

The judicial function:

The judicial function consists disputed questions of the facts of particular cases and Law according to the Law laid down by Parliament and expounded by the Courts. It is the branch that adjudicates upon conflicts between State Institution, between individuals and between state and individuals.

This function is mainly exercised in Civil and Criminal Courts by professional judges who are appointed by the crown.

However, in matters of Community Law, judicial functions for the United Kingdom are exercised by the European Court of Justice and Court of First Instance, under the Human Rights Act .

However, as noted above that the United Kingdom is one of only countries which does not have a written constitution, and because of the absent of such a constitution it can be said that there is no strict separation of powers in the British constitution.

The three functions are often exercised by persons or bodies which exercise more than such power. The three branches of the government are closely connected and the relationships between them will be discussed below.

The legislative and the executive:

Walter Bagehot argued in the English Constitution that, the close relationship between executive and legislative does not negate the constitutional distinction between them.

Ministers of the Crown, including the Prime Minister are Members of Parliament and the majority of them sit in the House of Commons. Therefore, the executive is present at the heart of Parliament.

It has to be said that, there is no formal limit on Parliament's power to delegate legislation powers to the government.

The executive and judiciary:

The judicial functions are exercised by the judges, but the Courts are the Queen's Courts. In law, it is the executive which appoints all senior judges, although judicial independence of the executive is secured by Law, Constitutional custom and by Professional and public Law . It was held in the case of *M v Home Office* .that one emanation of the Crown could be in contempt of another.

The Lord Chancellor, who is a Member of the Cabinet, has exercised the three forms of power: legislative, executive and Judicial. He remains in the cabinet under the Constitutional Reform Act 2005 with the executive branches in connection with the system; however, he has lost his right to sit as a Judge

The Legislation and judiciary:

The supreme Law making body within the United Kingdom is Parliament. The judges are under a duty to apply and interpret the Laws enacted by Parliament. The effect of their decisions can be altered by Parliament both prospectively and retrospectively if necessary. Constitutionally, judges have no power to question the validity of legislation. It was held in *Pickin v British Railway Board* that the Court could not inquire into whether Parliament's rules of procedure had been followed

However, by the European Communities Act in dealing with matters of Community Law, the Courts are required to follow the case of the European Court of Justice. The superior courts under the Human Rights Act may declare an Act of Parliament to be inconsistent with European convention rights but may refuse to apply it

However, the benefits of the doctrine of separation of powers are as follow: the separation of powers ensures that there is no abuse of powers and that the three branches are unable to interfere with one another, prevents tyranny between the functions, and provides the ability for each branch to check and balance on each other to prevent one from becoming supreme

The weakness on the other hand, is that the power is centralised in the executive arm of government. The executive has exceeded its legitimate role in government. They can even declare a war without the approval of Parliament, as the executive function exercises unwarranted influence over Parliament

However, it has to be concluded that, Montesquieu put down his theory of the separation of powers in the British Constitution. The doctrine of separation of powers meant that the power of government should be divided up into legislative, executive and judicial. Each function of government must not exercise the power of another. However, in order to prevent one from becoming supreme the branches must check and balance on each other which would allow one to limit another.

In addition, strict separation of powers did not operate in the British constitution specially that the executive and legislative functions are connected in a Parliamentary system. It however has operated in the American constitution although not a complete separation. The French constitution is an example of a mixed constitution.

Merits of the Theory of Separation of Powers

1. Protection of Liberty and Rights:

liberties and rights of the individual, and protects him or her from different forms of despotism and oppression.

2. Increase in Government's Efficiency:

As powers are distributed among the government departments, these departments gain deep knowledge about the matters they are concerned with, and become more efficient. The functions that are involved in governance can often be enormous for one arm of government to perform. So, separation of powers helps to reduce the workload on any particular arm of government.

3. Promotes Order in Governance:

All the three arms of government are allocated their separate functions. A strict application of the principle would ensure that each performs its role and that only. This ensures that there is order in the management of the state.

4. Prevents Abuse of Power:

Separation of powers accompanied by check and balances is an effective check against abuse of power and arrogance of power. As powers are distributed among different departments, these departments enjoy only limited powers which prevents rise of dictatorship. The concept is good in the sense that it is able to

check tyranny on the part of those in government. The concept ensures that too much power is not concentrated in one arm of government. This prevents the temptation of abuse of power.

5. Ensures Judicial Independence

Judicial independence is the concept that the judiciary should be independent from the other branches of government. In almost every constitution, the judiciary is clothed with the powers to have the final say in all constitutional disputes and to be able to declare null and void the actions of the other arms of government. The concept of separation of powers helps to strengthen the independence the judiciary has to perform its functions.

Demerits of the Theory of Separation of Powers

This theory, though adopted by most countries, has not escaped criticism. It has been criticized not only as impossible but also as undesirable. According to Sabine, "Montes was guilty of oversimplification. He united his theory to a hasty and superficial analysis of the constitutional principles of liberty." Finer said that it was futile to rigidly apply the theory of separation of powers to modern conditions. The theory of separation of powers has been attacked on the following grounds.

1. Wrong Reading of British System:

By the time Montesquieu developed his theory of separation of powers, there had come into being the Cabinet system of government. The separation of powers did not exist in Britain at the time. On the contrary, there was a concentration of responsibility. Having witnessed the British people enjoying liberty, Montesquieu wrongly concluded that in Britain there was a separation of powers. He misread British politics.

2. Not Fully Attainable:

This theory is not fully attainable. The executive has some role in rule-making, and the legislature also performs some judicial functions. For example, impeachment which is judicial in nature is done by the legislature.

3. Administrative Complications:

Separation of powers results in administrative complications. It becomes difficult to forge cooperation, coordination and harmony among the organs of government. The smooth working of modern governments demands not so much separation of powers as a “co-ordination” of powers.

4. Could Lead to Confusion and Deadlock:

Separation of powers sometimes leads to jealousy, suspicion and friction among the organs of government. While producing disharmony and confusion, it may paralyze the administration. As a result, the administration often fails to take quick decisions even at a time of crisis. According to Finer, the theory of separation of powers throws “governments into alternating conditions of coma and convulsion.” Another scholar is of the view that “separation of powers means confusion of powers.”

5. Inequality of Powers:

This theory is based on the principle of equality of powers, but this principle is flawed. In the parliamentary system, the legislature which represents the people is most powerful while the executive is most powerful in the presidential system.

6. Not the Sole Factor of Liberty:

Separation of powers may contribute to liberty, but it is not the only factor of liberty. Liberty also depends a lot on the psyche of people, their outlook, their political awareness, customs and traditions, fundamental rights, rule of law, independence of judiciary and economic equality.

7. Could Disturb the Balance of Power:

The government, performing various important functions, has become increasingly powerful. Besides being the problem-solver and crisis-manager, it is also required to provide welfare for the people. All this has made the executive very powerful, and has disturbed the balance among the three organs of government. Planning, security and welfare demand not so much separation of powers as their “fusion”.

Conclusion

Increased concern for welfare and security has been responsible for transfer of more powers to the executive, though liberty is significantly dependent upon balance among the three organs of government. In an ideal system, there should be equal interest in the liberty of the individual as well as in his or her welfare and the security of state. This, no doubt, would require a strong government but this would also call for separation of powers coupled with checks and balances.