



Separation of power in India

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Abstract

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government. Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executive, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

Keywords: government, montesquieu, decentralization, power

Introduction

Separation of power A theoretical model for governance, common in democratic states, which features the division of sovereign power into at least three organs of state in order to forestall tyranny, by preventing the acquisition of a monopoly of power by a monarch or oligarchy. Separation of powers is a political doctrine originating from the writings of Montesquieu in *The Spirit of the Laws* in which he urges for a constitutional government with three separate branches of government. Each of the three branches would have defined powers to check the powers of the other branches. This idea was called separation of powers. This philosophy heavily influenced the writing of the United States Constitution, according to which the legislative, executive, and judicial branches of the United States government are kept distinct in order to prevent abuse of power. This United States form of separation of powers is associated with a system of checks and balances.

In *The Spirit of the Laws* (1748), Montesquieu described the separation of political power among a legislature, an executive, and a judiciary. Montesquieu approach was to present and defend a form of government which was not excessively centralized in all its powers to a single monarch or similar ruler. He based this model on the Constitution of the Roman Republic and the British constitutional system. Montesquieu took the view that the Roman Republic had powers separated so that no one could usurp complete power. In the British constitutional system, Montesquieu discerned a separation of powers among the monarch, Parliament, and the courts of law. Montesquieu did actually specify that "the independence of the judiciary has to be real, and not apparent merely". "The judiciary was generally seen as the most important of powers, independent and unchecked", and also was considered dangerous.

Montesquieu was not the first scholar to develop the theory of separations of powers. Its origin can be traced back to Aristotle, the father of Political Science. Of course he did not discuss the issue in great details. He only analyzed the functions of the three branches of government, the deliberative, executive and the judiciary without suggesting their separation. Besides many other philosophers at a later stage from thirteenth century onwards gave some attention to the theory of separation of powers. Jean Bodin one of the earliest thinkers of the modern period sees the importance of separating the executive and judicial powers. But actually it acquired greater significance in eighteenth century. John Locke was one of the eighteenth century philosophers to pay greater attention to the problems of concentration of governmental power. He argued that the executive and legislative powers should be separate for the sake of liberty. Liberty suffers when the same human being makes the law and executed them.

Montesquieu's theory of separation of powers

Though the history of the doctrine of separation of powers is traceable to the ancient times of Aristotle, and subsequently 16th and 17th century philosophers such as John Bodin and Locke. It was the French Jurist, Montesquieu who gave it a systematic and scientific formulation. In his book 'Esprit de Lois' (The spirit of laws), Montesquieu, for the first time, extensively discussed the doctrine and its form. According to Montesquieu theory, it means that no one person or body should be vested with all three types of powers. In every state there are three kinds of powers, the legislative power, the power executing the matters falling with the law of nations, and the power executing the matters which fall within the civil law.

There must be a division of functions on the following basis:

the legislature should make laws but not administer or enforce them, the executive must administer the made laws but neither influence the legislature in the making of the laws nor stand in judgment of the same and the judiciary must determine rights and uphold justice without taking over the functions of law-making or administration. He further said that such separation is necessary in order to ensure that justice does not become arbitrary and capricious. Montesquieu states that “when the legislature and executive powers are united in the same persons or in the same body of magistrates there can be no liberty, because apprehensions may arise, lest the same monarch or separate should enact tyrannical laws. There is no liberty if the judicial power is not separated from the legislative from the legislative and executive.

Principles of the theory of separation of powers

- No concentration of powers.
- Diffusion of powers needed
- System of checks and balances
- In short, the theory of the separation of powers merely means that a different body of persons is to administer each of the three departments of governments and that no one of them is to have a controlling power over either of the others.
- Such separation is necessary for the purpose of preserving the liberty of the individual and for avoiding tyranny.

Criticism

It is not desirable because if there is complete separation of powers, the different organs of the government will not be able to work in co-operation and harmony. As a result, there would be frequently deadlocks which may bring the governmental machinery to a standstill. According to Mill, “the separation of powers will result in a clash between the three organs of government, as each one will take interest only in its own powers”. If all branches are made separate and independent of each others, each branch will try to safeguard its powers and will not protect the powers of other branches. In such case administrative efficiency cannot be attained. The theory of separation of powers makes a mistake in assuming that the three branches of government are equally powerful and can be independent of one another. The growth of administrative adjudication is another development which is against the doctrine of separation of powers. The executive is being vested with judicial powers as well as other duties otherwise the officers do not feel secure while performing their duties.

Importance of the theory of separation of powers

- It aims at individual liberty.
- It is a safeguard against despotism.
- Its basic principle that concentration of powers leads to dictatorship is true for all time and ages.
- The separation of powers saves the people from the arbitrary rule of the executive.
- This theory lays down the principle that governments should act according to certain well established rules or law.
- Each organ acts as a check upon the others.

- It is desirable for maintaining the efficiency in the administration.

Applicability of the theory in India

Despite there being no express provision recognizing the doctrine of separation of powers in its absolute form, the Constitution does make the provisions for a reasonable separation of functions and powers between the three organs of Government. Since ours is a parliamentary system of governance, though an effort has been made by the framers of the constitution to keep the organs of the government separated from each other, but a lot of overlapping and combination of powers has been given to each organ. In India, there are different branches to carry out the different activities of the government. The legislative and executive wings are closely connected with each other due to this; the executive is responsible to the legislature for its actions and derives its powers from the legislature

The head of the executive is the president, but a closer look shows that he is only a nominal head and the real power rests with the Prime Minister and his Cabinet of ministers. The judiciary can perform administrative and legislative functions. The parliament too may perform judicial functions. It is important to note that the separation of powers is still an important guiding principle of the constitution. Most noteworthy is our judicial system which is completely independent from the executive and the legislature. The High Courts and Supreme Courts have the power of judicial review which empowers them to declare any law passed by the parliament unconstitutional if it so decides. As in regard to the judges, they are extremely well protected by the Constitution, their conduct is not open to discussion in the Parliament and their appointment can only be made by the President in consultation with the Chief Justice of India and the judges of the Supreme Court. But it is clear that the Separation of Powers doctrine has not been neither implemented in its strictest format in our country nor been given Constitutional status but a diluted and modern approach is followed to aid and guide our parliamentary system of governance.

Conclusion

In the modern world, the Separation of Powers has come to not only mean organs such as the Executive, the legislature and the judiciary but also institutions such as the press and academic institutions. Thus, in a modern society, implementation of Separation of Powers doctrine in its strictest sense, the way Montesquieu envisaged it to be in his book *The Spirit of laws* is an extremely difficult task. Even civil institutions wield a lot of power in all spheres of governance.

In India, the separation of powers theory has been used as a guiding philosophy to separate powers as much as possible but not completely, so that the organs of government are alienated from each other. In our parliamentary form of governance a lot of cooperation is required and thus each organ must correspond to the other on some level so as to function smoothly. Hence though the doctrine of separation of powers is a theoretical concept and may be very difficult to follow completely a compromised version of it is used in our country. For example, judicial review and activism functions of the

judiciary is an important element of our system of justice to keep a check on the legislature who are new makers of the land , so that they do not exceed their powers and work within the allowances that the constitution has made for them.

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