



Door 4

THE SEPARATION BETWEEN POWERS IN DEMOCRATIC SYSTEMS

Governments perform three functions: executive, legislative, and judicial. In a political system with a strict separation of powers, these functions or powers are each earmarked to a distinct institution of Government. The major premise underlying the separation of powers is that individuals have the potential to harm others, and potential can become reality when power is concentrated in one person, faction, or institution. Thus, in separating powers, the major aim is to prevent tyranny and safeguard liberty by ensuring that no one can accumulate despotic powers. A further related aim is to ensure that laws are made in the interests of all by giving the law-making power to the people's representatives in Parliament. Another is to ensure the accountability of government. For example, the legislature is accountable to the people for the laws it makes and the executive to the people and/or the legislature for the execution of those laws. A final aim is to ensure that government operates effectively and efficiently.

The rationale is that different types of institution perform different functions better than others. For example, it is often argued that putting laws into effect requires a strong unified hand. Thus, a legislature composed of many individuals with many ideas representing many interests could not effectively execute the laws; a chief executive or President best performs the task.

Writing in the mid-eighteenth century, Montesquieu is usually regarded as the first to identify and argue for a separation of powers. While this is not strictly true, others such as George Buchanan, John Locke, and the English Levelers all previously proposed something resembling his formulation, Montesquieu provided a more profound and systematic synthesis. He developed his argument in his book of "Spirit of the Laws" (1748), after studying the constitution of England. He saw there a distinction, albeit not strict, between making laws and putting them into effect. He applauded the division between the executive (the monarch) and the legislature (Parliament), which itself was divided between the House of Lords (the aristocracy) and the House of Commons (the people).

Such a division of powers should, in theory, prevent a concentration of power and promote liberty, because the making and enforcing of laws are separated and injudicious laws or dangerous actions are prevented. Montesquieu had his greatest influence on the founding fathers of the US, in particular on *James Madison*. Madison famously noted in The Federalist No.47 that "*the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*".

THE SEPARATION BETWEEN POWERS IN A DEMOCRATIC STATE

The freedom to form political parties, especially the effectiveness of an opposition, alongside vibrant public debate and opinion is meant to control those in power and enable

politics to help shape society. Control and public impetus would hardly be possible, were all State power to reside in the hands of one or only a few people. Effective control and influence over the State's power is only possible through State power itself. Therefore, a free society must divide power among different independent State authorities. To this end, they are able to monitor each other reciprocally and prevent a concentration and monopolization of power. Therefore, in a free and democratic State, many of the State's bodies link up with the pluralism stemming from political parties and public opinion. While the process of pluralism is left to the free interplay between the forces in society, the separation of State authority into different, independent bodies is usually written down in a fixed State constitution. The responsibility and duty of each of these State bodies is set down in the constitution. The purpose of the set constitutional separation of State power is twofold. To provide for the reciprocal control of State bodies and to make sure that the activity of the State appliance remains clear and predictable. Separating state power protects citizens against inroads by State, while making it easier for citizens to understand the process of Government.

THE TRADITIONAL THEORY ABOUT SEPARATION BETWEEN POWERS

That the freedom of society can only be secured if State power is divided among different and independent bodies forms one of the core constitutional beliefs of our time. Indeed, the main difference between the freedom offered by democracy and that offered by dictatorship lies in the separation of powers. In a dictatorship the power of decision rests with just one individual or party. Because such systems don't agree a system for controlling power, citizens are left at the mercy of those in power. Montesquieu, the spiritual father of the separation-of-powers theory seemed well aware of this when he wrote: "*There would be an end of 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 that of judging the crimes or differences of individuals*".

George Washington also shared this fundamental belief, when, in 1796 during his farewell address he said: "*The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each Guardian of the Public Will against invasions by the others, has been evinced by experiments ancient and modern*".

These quotes express the issue at the heart of all separation of power. That is, that experience has shown that power has a tendency to be abused. To counter this tendency power has to be restricted and divided. Montesquieu's words also make clear the way in which he feels power should be separated. He identifies three basic functions of a sovereign state: Legislation, the implementation of law and the administration of justice. Montesquieu explained that these three fundamental functions must each be put under the charge of an independent body, if the freedom of the citizens is to be guaranteed. Montesquieu's followers dogmatized his theories. They made a clear dissimilarity and division between the executive, which segregates the government and the administration, from the legislative and judiciary. This triangle of power still lies at the heart of the thinking about today's western democracies.

DETERMINATION OF SEPARATION OF POWERS

One approach for re-determining the separation-of-powers theory is based on the observation that the State's many functions cannot be encompassed by the terms legislation, implementation and the administration of justice. Parliament busies itself with a great deal more than legislation and government is implicated in much more than just implementation of laws.

Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The

intent is to prevent the concentration of power and provide for checks and balances. The traditional characterizations of the powers of the branches of government are:

- * The legislative branch is responsible for enacting the laws of the State and **appropriating** the money necessary to operate the government.
- * The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.
- * The judicial branch is responsible for **interpreting** the constitution and laws and applying their interpretations to controversies brought before it.

Forty state constitutions specify that government must be divided into three branches: legislative, executive and judicial. Some authors illustrate this approach; "*The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as **empowered** by the Constitution.*"

While separation of powers is a key to the workings of government, no democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Governmental powers and responsibilities intentionally **overlap**; they are too complex and interrelated to be neatly **compartmentalized**. As a result, there is an inherent measure of competition and conflict among the branches of government. Throughout American history, there also has been a flow of **preeminence** among the governmental branches. Such experiences suggest that where power resides is part of an evolutionary process.

Because Government and Parliament have to come together and make joint decisions, if State business is to progress, it is only right that **institutionalized** links and connections are established. The system of parliamentary government makes **allowances** for this cooperation between Government and Parliament, as far as the making of basic political decisions is concerned. There should, of course, be a strict division between the formulation of political decisions and their implementation. This is where law provides for the principle of **incompatibility**, that is, the incompatible nature of belonging to the civil service and being a Member of Parliament. It is for this very reason that civil servants become ministers only in the most exceptional of circumstances. This also underlines the fact that the office of Minister and the office of Parliament are equally **geared** towards making basic political decisions.

NEW WAYS OF SEPARATING POWERS IN THE 20TH CENTURY

Thought about democracy came right to the fore during the 20th century and put an end to the sharp division between the executive and legislative. However, this has not changed separation of powers, fundamental status as the basic principle on which democratic systems are based. Only the forms by which separation of powers is **characterized** have changed. This development is characterized most clearly by the special role now performed by the administration of justice. In the form of constitutional jurisdiction it controls both Parliament and Government.

Montesquieu didn't consider this development. A special form of administrative jurisdiction developed in parallel with **the expansion** of administrative duties and became an especially important form of control. It became more and more relevant from decade to decade. The job of monitoring the Government, which Montesquieu regarded as being the task of the legislative, is often carried out by the courts today. Because it is **convoluted** with Government, Parliament performs only a limited amount of control over the executive on administrative issues.

Still, new forms of separating powers have developed in other areas. Many modern democratic systems are organized according to a federal system. The relative independence and internal legitimacy of some of these very artificially designated member States is derived from the separation of powers, especially where there is no historical foundation for their sovereignty. The expansion of the right to autonomy by communities and other territorial authorities serves in **splitting up** the concentration of State power and allows the citizen to participate at more levels of State activity. Of course, this **multi-tracked approach** also forms an element of control and reciprocal checks upon state bureaucracy in the federation, individual member States and the community. It also serves in making clear the way in which specific aspects of separation of

powers both serves democratization and is motivated by it. By separating powers in this way, more opportunities for co-determination and participation are created for citizens.

CONCLUSION

The conclusion to be drawn from all this, then, is that the dogma that prescribes a strict separation of powers between the executive, legislative and judiciary no longer exists. Nonetheless, modern democracies do attempt to prevent a strong concentration of power building up in one area. Cooperation and opposition between the political powers is carried out on five levels:

- The electorate and public opinion,
- Associations and political parties,
- Parliament in its two chambers,
- The executive as the Government and administration,
- And the judiciary all play a part in the formulation, implementation and control of basic political decisions, albeit with differing amounts of influence.

All the parties involved in this process remain tied to the basic constitutional principles and have to stick to the rules and regulations, drawn up to regulate this interplay. All parties must also be open to reciprocal control by the others. In this way, State power in a democratic State is limited by a complicated system of limitations and by weights and counterweights. According to thinking on modern democracy, the guardian of it all is the standard set by the rule of law, which must be monitored and controlled by an independent judiciary.

QUESTIONS:

- TRANSLATE THE UNDERLINED TERMS INTO ARABIC.
- GIVE AN ABSTRACT (IN ARABIC) TO THE TOPIC.