

Separation of Power: Analysis of Theory and Practice

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Abstract

Separation of powers means that power should not practice by only one man or one group of people or a single institution. The main object of this research is to examine that what was initial theory of separation of powers created by Montesquieu and why and how Americans implemented this theory? It can provide new knowledge about the separation of powers and check and balance in western political thought and in American system and also the adoption of the theory of separation of powers and its implementation in America. This study will explore new way to look at theory of separation of powers in the field of comparative politics and will helpful to understand political system.

Keywords: *Separation of Power, Divine Right, Politics, Decline of the Romans, Spirit of Laws.*

Contextual Analysis

Separation of powers means that power should not practice by only one man or one group of people or a single institution. The doctrines of exercise of power and governmental functions in the state is as old as the political thought is, many political thinkers and philosophers, ancient and modern, presented their ideas about the practice of power within the state and governmental functions. Many political philosophers presented their opinions about that how the power should be exercised and by whose should exercise it but there is only going to be discussed about Jean Bodin and Montesquieu according to the angle of separation of powers. In his forms of government Aristotle discussed the three functions of the government but he did not separate them, he adopted that classification which was presented by Plato in his book statesmen, both were in favor of the concentration of powers in the hands of a monarch and discussed that a constitutional democracy is second best option and a unconstitutional democracy is the worst type of government. But Plato and Aristotle are different in many of political ideas especially in ideal state. Jean Bodin presented the theory of sovereignty in which a sovereign monarch alone exercises all the powers of government and he was against the separation of powers. Montesquieu presented the theory of separation of powers, in which the powers should divided among three parts of government legislative, executive and judiciary and they should have check and balance on each other. This philosophy heavily influenced the American founding fathers of constitution; this theory influenced the writing of the constitution of United States.

Theoretical Analysis

Many philosophers in Western Political Thought and Muslim Political Thought wanted concentration of all powers and duties in one's hands but many were against it. In this research work only Montesquieu and Jean Bodin is going to be analyzed. Montesquieu who first time described the theory in clear words was against concentration of powers in one's hands and Jean Bodin was against the Separation of powers.

Montesquieu

Montesquieu is founding father of theory of separation of powers, Charles Louis de

Secondat, Baron de Montesquieu was a French political philosopher, and scholar who presented his political ideas about government, corruption, laws, liberty, human rights, slavery, separation of powers, check and balance etc. He was in favor of good governance, rule of law, equality, virtue, liberty, democracy, separation of powers and check and balance, to secure all these things he presented his ideas and views in his books and writings. He was against the despotism, monarchy corruption and such laws and political system which can banish liberty, equality, and human rights. He thinks virtue is the best thing to achieve successful political system.

“He was the counterpart of the universal patriarch in Milton, looking forth not with prophetic, but reverted vision upon the whole history of the race: bringing together from the east and the west, the north and south, all the schemes of the government which have ever prevailed among mankind; weighing, measuring, collecting and comparing them; joining fact with theory and calling in to counsel all the speculations which have fatigued the understandings of profound reasons in all time” (Singh, 1984: 504).

He was first political philosopher who gave the idea of separation of powers of three institutions of government legislature, executive, and judiciary. He originated this doctrine in his book “Spirit of Laws” where he urged for constitutional government. Montesquieu had three famous works The Persian Letters, The Spirit of Laws and his Reflections on the causes of the Greatness and the Decline of the Romans; these books contributed to the spread of his fame as a scientific and historical thinker, but mostly contribution goes to The Spirit of Laws. His Spirit of Laws is a monumental work for which he is famous in the history of political thought. The book was written in French language and published in 1784 and translated into English, German, Spanish, Italian and other language of the European continent, it was very successful book.

The spirit of laws was highly successful. Both its style and content were greatly admired, and the book, according to Montesquieu, went through twenty two editions. There were however severing criticism from both sides of the political arena (Harmon, 1964).

Montesquieu thinks that these three powers should separate from each other and each power should wielded by a different body or person and they should be checked. In his own words he says: “To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits” (www.s.ocserv.mcmaster.ca).

“Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go” (www.s.ocserv.mcmaster.ca).

So Montesquieu thinks that it is man’s nature that he abuse it, according to Lord Acton’s famous saying that power corrupts and absolute power corrupts absolutely and Montesquieu thinks power should controlled by power.

“When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separates from the legislative and executive powers. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers” (www.nirmauni.ac).

According to Montesquieu when legislative powers in hands of one person or in the same body of magistrates there can be no liberty because apprehensions may arise. Montesquieu suggested after his observation that concentration of all powers in one hands

can stop the necessary modifications of laws, and as well as their executions. This situation can lead a danger to liberty.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. 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 of trying the causes of individuals” (www.s.ocserv.mcmaster.ca).

“A bitter critic of the religious intolerance and military aggression carried out under the regime of Louis XIV, Montesquieu presented essays to the Academy on public finance, universal monarchy, and the decline of the Spanish Empire, in addition to his scientific works” (<http://digitalcommons.pepperdine.edu>).

Monarchy in Era of Montesquieu

Circumstances of his environment, conditions of French society leads Montesquieu to think about separation of powers, he visited many European countries and study their political system and institutions, he observed in England a better political system than France, Montesquieu thinks that there is a need of new political system in which powers should separate and they should checked. France had a long history of monarchy. Monarchy for Montesquieu was government by the law, through the recognized channels by which the royal power must flow.

“During his long reign, Louis XIV had attempted the absolute authority of the Crown over all aspects of French life and to make France supreme in Europe Although the Grand Monarch achieved success in many of his endeavors, both his attempt to impose cultural and religious unity and his unsuccessful wars provoked sharp reactions that continued throughout the 18th century. It is within this milieu that Montesquieu must be understood” (<http://www.britannica.com>).

In his treatment of monarchy Montesquieu presented the idea of a separation powers of government agencies and functions and he suggested that power should not concentrated in one hand it should be checked , and one body should have only reserved power.

Spirit of Laws by Montesquieu

In his book Spirit of Laws he represents his theory of separation of powers and check and balance. Montesquieu argues that the executive, legislative, and judicial functions of government should be assigned to different bodies, so that attempts by one branch of government to infringe on political liberty might be restrained by the other branches. Montesquieu spent nearly twenty years researching and writing, covering many things like the law, social life, and the study of anthropology and providing more than 3,000 commendations. This book published in 1784 and translated into English, German, Spanish, Italian and other language of the European continent.

Separation of Powers as Means and Liberty as End

Montesquieu represent the ides of separation of powers and check and balance because in his arena people did not have rights, liberty, and equality. He saw monarchy everywhere, he want a political system that can provide liberty, rights and equality. In his book spirit of law he discussed in detail about liberty. He wanted that people should have rights, equality and liberty; they should have a political system which can provide a better life and security of interests of common people. So he provided a cure of monarchy and despotism in his

writings. His theory's ends were liberty, equality, and security of rights, to achieve them he represent a system which should have separation of powers and check and balance.

“It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty consists only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will” (www.s.ocserv.mcmaster.ca).

“Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty” (www.s.ocserv.mcmaster.ca).

Jean Bodin (1530-1596)

Jean Bodin Was a French political philosopher. He was born at Angers in 1530. He studied and taught law in Toulouse and went to Paris to practice. Jean Bodin was leading character of a party of France “Politiques”, which appeared in the era of Henry III in the result of some religious contradictions and problems between catholic and Protestants Christians of France. Bodin was a part of politiques, this party believed in “Divine Right” theory. This theory of divine right of king's grew out in sixteenth century. “The Politiques moved in the direction of monarchical absolutism, mainly because they could see no other way to achieve their goal of peace and national unity. Dangerous times always contribute to the strengthening of governmental power: the theory of the Politiques was in live with this historical fact” (1964: 207).

Bodin's Theory of Sovereignty and Power of King

Bodin's work in field of political thought is his six Lives de la Republique, is a book, which published in 1577. Bodin presented the theory of sovereignty, his theory is considered a great work and contribution in political thought because he was first philosopher who presented and defined the sovereignty. He presented this theory as a care of religious was in his country France, because the two groups of Christians the Catholics and protestant were fighting with each other on theological differences in their religious believes. Bodin wants to restore the unity and peace in his country. Bodin started his theory with origin of the state and he considered the natural community of mankind is the family. Family is the unit of society a state come existence with the family. Which is consisted with the man his wife, children and property. Father has complete power over children, wife and property etc. Bodin considered property is important as human; it is a power of the society. According to Bodin theory father exercise absolute power and if any disorder occurs in family level at any state so consequently the state will suffer disorder. Where a number of societies has some mutual interests and some purpose for example protection against enemies then they united and make a state.

“At any rate, a state exists when sovereignty, complete power to make and enforce laws, is recognized” (Ibid: 210).

He describes sovereignty as an end and unity and making a state as means, through which severity can be achieved and people make state to securing there interests. Like Montesquieu and Plato, Bodin also gave importance virtue. According to Bodin if in a state the sovereign power exercised without virtue and people also don't know anything about virtue so that is not a well ordered state. Virtue is a necessary element for the state and exercise of power.

The Powers of Monarch in Bodin's Philosophy

Bodin was in favor of monarchy. The exercise of power and powers of government are discussed in political thought by many philosophers, some of them are in favor of

monarchy and concentration of power in one's hands like Plato, Aristotle, Bodin, Machiavelli etc. and some of them are in favor of to spread It more than one's hand or institutions like Montesquieu. Bodin was not in favor of equality, the citizen are the subjects of sovereign and he gave them ranks and positions sovereign power bears upon them according to their position. Bodin was also not in favor of giving the citizen so much liberty, they should have only religious freedom and the feelings of that they are not slave. "Bodin does not advocate religious toleration on moral grounds" (Ibid: 212).

Bodin's views on separation of powers

Bodin was not in favor of separation of powers he only preferred monarchy and use of power in the hands of sovereign. He describes three possible holders of sovereignty these are three governmental forms monarchy, aristocracy, and democracy. They may exercise sovereignty but there cannot be anything in which they can share powers among the branches of the government. According to Bodin only concentration of powers in the hands of one king can make good government possible and can solve all the problems of government. Bodin discussed about advantages and disadvantages of three forms of government and first time he describes about separation of powers. "For Bodin no situation can exist in which the advantages of all three governmental forms may be realized and their disadvantages minimized by the division of power" (Ibid: 211).

But like Plato he strongly recommended the monarchy because from him monarchy was the best option for the good government and division of power also can make some problems in good governing and states unity. "One of the principal causes of the troubles he was attempting to overcome and he was convinced that only the concentration of authority in a single agency could be effective. Bodin strongly preferred a monarchy" (Ibid: 211).

Bodin was in favor of necessary check and balance and separation of powers he wanted a political system that can provide unity, peace, necessary liberty, human rights and a stabilized system in which welfare of the nation could be possible. He also wanted a judicial system that can fulfill the necessity of justice; to him the judicial system should supervised by the sovereign. A judicial system should provide justice according to the country's law and laws should practice fairly. Sovereign is the source of law he make laws and he should have an able administration, which should be wise and educated. The monarch should have effective executive, the judges of the courts should choose by the merit and good judicial abilities rather than offer such position for sale. There are some contradictions in the philosophy of Bodin about the exercise of power of sovereign and government in first he make ruler absolute and all citizens are subjects and he is a supreme power over them unrestrained by law but after words he put some limitations on exercise of power in taxation, user of property and he could only choose by the election and by lawful manners. In this context the sovereign is also can exercise the power in lawful manners, he should himself obey the law. Second contradiction is in religious freedom, Bodin wants some religious freedom to solve the problems between sects of religion but to terminating any group of a specific religion can make more problems. According to Bodin he had no idea of merits and demerits of separation of powers in three forms of government but he admits that sovereignty can be exercised by them. Bodin uses the word "Sovereignty" to explain the word power. But he also feared that an abuse of sovereign power would harm the national interest, he placed restrictions upon it.

He wanted absolute power over the all political system which can control it for the welfare of their state and he also wanted a constitutional government and laws which could be obeyed and implemented.

Bodin does not explain that where sovereign takes the powers but after the election a sovereign ruler takes the oath before the God to fulfill his responsibilities. Bodin was not in favor of separation of power because it can weak the government's and state's efficiency of

progressing. In his philosophy it seems like that the sovereignty is end and state is a mean to preserve and exercise it. But he described a demerit of separation of power that it can weak the government system. He was not in favor of separation of powers of government.

Practice

Americans adopted theory of separation of powers in their political and governmental system. The constitution provides basis of this governmental system. Americans adopted this theory to stop abuse of power and a successful governmental and political system.

America have 52 units which are called states, it has a vast territory to control and maintain and a big population too. America is super power now in the world, it has presidential form of government and a federal system in which 52 states have their own local government and it has a central government too. The central government is based on legislature, executive and judiciary. Legislature which is called congress have two houses means it is bicameral, the house of representatives in which members are elected according to the population and senate it has fixed members from every state. Executive is commanded by president; it has a cabinet and civil servants to work. “The executive branch, the President, enforces national laws; the legislative branch, the Congress, makes national laws; and the judicial branch, the Supreme Court and other federal courts, applies and interprets laws when deciding legal disputes in federal courts” (<http://photos.state.gov>).

Separation of Powers in Provisions of Constitution of United States of America

First three articles of constitution describe the Separation of powers and check and balance. First article describes about legislature, second is about executive, and third is about judiciary.

“The Constitution's adaptability to new conditions has made it a lasting frame-work of government. It has permitted perhaps even encouraged, discussion over the proper role of each branch of government, or of government itself. Through the first two centuries of federal government, the Constitution has served to moderate change in government. It has also ably guarded those freedoms that we the people have entrusted it to preserve. But some writers discussed that it is a rigid constitution because amended process is very difficult; an amendment not only needed approval of central government the but also the approval of 52 states” (<http://photos.state.gov>).

“Functionalism and Formalism is offering examples of the Courts’ use of broadly purposive reasoning under each approach. That the Constitution does not adopt a freestanding separation of powers doctrine. Formalist opinions, in contrast, assume that the constitutional structure adopts a norm of strict separation which may sharply limit presumptive congressional power to structure the government. Less well known is the fact that formalists also assume that the Constitution embodies a freestanding separation of powers doctrine. Formalists sometimes locate that prohibition not in any specific understanding of a discrete structural clause, but rather in a general norm of strict separation derived from the document as a whole” (www.harvardlawreview.org).

In American political system, Legislature, Executive and Judiciary each perform different duties and they have check on each other but each of them also very powerful. But check and balance influenced their powers and it can stop abuse of power. This theory plays a vital role to make American system successful but it also can create delays in decision making and law making process. This theory advocates independent role of three institutions of government but in American political system each three institutions have power to interfere in the powers of others; for example President has powers veto the laws purposed by the congress and judiciary has power of judicial review. Many decisions are made by consensus of both

President and Congress. These powers created hurdle in law making process.

“This aspect of formalism makes itself felt in so-called “encroachment” cases, which deal with the claim that Congress has violated the separation of powers through its regulation or oversight of the executive or judicial powers. Because the Necessary and Proper Clause, as noted, gives Congress at least some authority to prescribe and thus to shape and channel the means by which all the branches carry their powers into execution, one cannot demonstrate impermissible legislative encroachment merely by showing that a statute regulates or structures the exercise of another branch’s powers” (www.harvardlawreview.org).

American implemented this theory as much as they needed, Montesquieu who presented this theory, he also did not want complete separation; he only wanted that all powers should not concentrated in the hands of single authority. He wanted that there should separate organizations in France to perform different duties; for example a legislature for making laws, executive executing them and a free judiciary for providing justice. He wanted a government of law rather than will of single authority. In 1789 constituent assembly in France admired the theory and agreed that there would be nothing like a constitution in the country where the doctrine of separation of powers is not accepted.

“The historical record reveals that the founding generation had no single baseline against which to measure what “the separation of powers” would have required in the abstract. The historical record, moreover, reveals no one baseline for inferring what a reasonable constitution maker would have understood “the separation of powers” to mean in the abstract. In so doing, they reason from general structural inferences to specific limitations on legislative power. Rather, the challenged arrangement must somehow affect those powers in a manner or to a degree that the Constitution otherwise prohibits. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted whole sale, the Constitution adopts no freestanding principle of separation of powers” (www.harvardlawreview.org).

“In framing a government which is to be administered by men over men, by great difficulty lies in this: you must first enable the government to control the governed; and in the next place to oblige it to control itself” (www.answers.com).

Both Montesquieu and Bodin were in favor of check and balance but they had different opinions about separation of powers. Montesquieu wrote in his book *Spirit of Laws* that:

“To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits” (www.s.ocserv.mcmaster.ca).

Montesquieu’s doctrine suggested that three distinct departments of government should practice three distinct powers or duties. And power should be checked by the power. Montesquieu thought that system could make a successful government. Bodin was against the separation of powers because he thought that separation of governmental system could make the political system weak which could create instability. He suggested that a sovereign monarch should practice all powers alone. But he also suggested that monarch should not taxed people without their permission and sovereign had no right to banish their property rights.

Conclusion and Recommendations

The discussion about functions of government had been discussed before Montesquieu in history of political thought but first time he preferred to separate them. Montesquieu who first time described the theory in clear words was against concentration of powers in one’s hands and Jean Bodin was against the Separation of powers. According to Montesquieu theory in a state, governmental functions should divide in to three organizations. In which the legislative makes laws, executive executes laws, and judiciary

interprets laws. He wanted that power should check with power. He presented this theory to stop the abuse of power.

Montesquieu who presented this theory, he did not want complete separation; he only wanted that all powers should not concentrate in the hands of single authority. He desired that there should separate organizations in France to perform different duties; for example a legislature for making laws, executive executing them and a free judiciary for providing justice. He wanted a government of law, rather than will of single authority. He also wanted that power should check with power. Montesquieu presented the theory of Separation of Powers as means to securing the liberty as an end. Montesquieu nor ignore the govern neither governed. His philosophy surrounds needs and necessities of ruling class and common people.

Jean Bodin also was a French political philosopher. He was against the separation of powers because he thought it weakens the government. In his book *Republique* he presented the theory of sovereignty, in which a sovereign monarch practice absolute powers; he makes laws; he is a source of all laws, he execute them and also responsible for provide justice. But Bodin wanted some check and balance in his theory. Jean Bodin ignored the governed and only concentrate to who is governing. The end of his philosophy is stability and mean is concentration of all powers in one's hands.

The philosophy of Montesquieu deeply influenced the American constitution makers. They needed a new political and governmental system. After revolution their first government was a confederation and they had not a separate federal judiciary and executive. Federal congress of confederation was so much weak and had no powers and there is neither separation of powers nor checks and balances. So they adopted the theory of separation of powers and check and balance as much as they needed. This Theory of Separation of Powers is working successfully in United States of America with the system of Checks and Balances; so Separation of powers is a practicable theory with the check and balance system in various branches of government in United States of America. The constitution of United States of America describes congress a law making organization, executive headed by President and a free judiciary. These three has their defied powers and separate organizations. To stop abuse of power there is also a system of check and balance. These three branches have check on each other.

There is not complete separation of powers in Unites States of America. In United States of America each department link to others through the system of checks and balances. The system of Checks and balances plays an important role to overcome the alarm of corruption. This system prevents abuse of power in U.S.A. Americans adopted this theory to stop abuse of power and a successful governmental and Political system. They adopted it because they needed it.

There should be a special Claus of Separation of Powers in constitution of United States of America because absent of a clause creates contradictions. Separation of powers is a practicable theory as it is successfully working in United States of America with the system of checks and balances; it should implement in the other countries of the world. It is not necessary that complete separation should be adopted; only as much separation should adopted as needed in any political system. There should some link between all branches of the government because complete separation can make hurdles and to run a government. Check and balance is an essential part of government and political system every state in the world should have this system.

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