Doctrine of separation of power analysis

Introduction

The doctrine of separation of powers is not a legal principle, but a political theory. [1] The separation of powers concerns the division of State power as between the executive, the legislature and judiciary. [2] Article 16 of the French Declaration of the Rights of man (1789) states, that ‘’a society where rights are not secured or the separation of powers established has no constitution’’. [3]

The most important aspect of the separation of powers is the way in which the organs of State act to restrain each other and prevent the other institutions from exceeding their powers. There is a general belief that in all societies that there is a natural tendency for an individual to monopolise power. The doctrine of separation of powers attempts to combat this by providing mechanisms to make it difficult for any single power group to dominate and to ensure that government action requires the cooperation of different groups, each of which helps to keep the others within bounds. [4]

One of the functions of government is to protect the rights of individuals, however, historically; governments have been the major violators of these rights that they are meant to protect. The concept of separation of powers is one of a number of measures that have been derived to reduce the likelihood of abuse of power by the government and the violation of individual rights. [5]

If power is concentrated in a single group, they would have unlimited power and they would do as it pleases them.

The French writer Charles Louis de Secondat, Baron Montesquieu is the person, most often associated with the doctrine of separation of power. Writing in 1748, the French jurist, Montesquieu argued that, there can be no liberty and there would be no end of everything if the legislative, executive and judicial powers of government were to be exercised by the same person or authority. [6] The English political philosopher, John Locke had earlier expressed similar sentiments and he wrote in 1690, ‘’it may be too great a temptation to human frailty…for the same person to have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the obedience to the laws they make, and suit the law both in its making and execution, to their own private advantage. [7]

The scope of the doctrine of separation of power is not caste in iron. The doctrine has generated a lot of debate and is capable of different interpretations. Statements about the existence and importance of separation of powers in the United Kingdom should be treated with caution. [8]

This essay will look at the doctrine of separation of power and if the doctrine operates in a satisfactory fashion in the United Kingdom today. I will first look at the origin of the doctrine of separation of powers. I will then look at doctrine of separation of powers in the U. K

Origin of separation of powers.

The doctrine of separation of powers includes a proposition about the functions of government, and discussions of the forms and functions of government may be traced back to ancient Greece. [9]

John Locke recommended that the legislative and executive functions should be placed in separate hand, for the sake of efficiency as well as for the protection of liberty. His classification of functions was in to legislative the executive, and the federative. [10]

Collin Munro, professor of constitutional law at University of Edinburgh wrote that , ‘’another related term, which has as long a history in political thought, is the problem of ensuring that the exercise of governmental power, if it is necessary for the promotion of a society’s values, may nonetheless be subject to limits so that it does not itself destroy those values. That is the principle of constitutionalism, which became central to western democratic tradition government’’. [11]

Another theory, which was first, developed in ancient Greece and Rome was the theory of mixed governments, which proposed that the major interests in society must be allowed to participate jointly in government, so preventing any one interest from being able to dominate entirely. The doctrine, just like the doctrine of separation of powers was aimed at avoiding absolutism by preventing a monopoly of power. [12]

Viscount Bolingbroke presented a clear delineation of the functions of the different arms of government. He wrote, ‘’A king of Great Britain is that supreme magistrate, who has a negative voice in the legislature. He is

entrusted with the executive, and several other powers and privileges, which we call prerogative, are annexed to this trust. The two houses of parliament have their rights and privileges, some of which are common to both, others particular to each other…the supreme judicature resides in the Lords. The Commons are the grand inquest of the nation; and to them it belongs to judge of national expenses, and to give supplies accordingly''. [13]

Bolingbroke, had the vision to see that, ''in a constitution like ours, the safety of the whole depends on the balance of the parts''. [14] In Bolingbrook's writings, he proposed that that no arm of government should have monopoly of power, that was the only way, the rights, and liberty of individuals could be protected.

Montesquieu took on the constitution that Bolingbroke described as his model and explicitly restated the doctrine of separation of powers.

The Separation of Powers in the UK

The separation of powers has been endorsed by contemporary UK judges, e. g. Lord Templeman in M v. Home Office (1993) 3 ALL ER 537. [15]

Lord Diplock in a case concerning an industrial dispute stated, ''At a time when more and more cases involve the application of legislation which gives effect to polices that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of power: parliament makes the laws, the judiciary interpret them''. [16]

Sir John Donaldson MR once remarked, ‘’Although the United Kingdom has no written constitution, it is …one of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial present purposes. It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament…’’. [17] Shortly afterwards, Lord Scarman referred to the doctrine in Re: Nottinghamshire, in explaining why the courts should be slow to intervene over the exercise of an executive power which had been subject to the specific approval of the House of Commons. [18] More recently in the case of M v Home-Office, Lord Templeman remarked that , Parliament makes the law, the executive carry the law in to effect and the judiciary enforce the law’’. [19]

Other judges have recognised it as applying at least between the legislature and the judiciary, e. g. Lords Nicholas and Hope in Wilson v First County Trust (2003) 4 All ER 97. [20] A strict separation of powers in the United Kingdom is impossible, because in strict constitutional theory the three functions of government are derived from the Crown. [21] The Crown has always been an element in the exercise of all three kinds of powers, namely the executive, legislature and judiciary. [22]

There is not, and never has been, a strict separation of powers in the English constitution in the sense that the legislative, executive and judicial powers are assigned respectively to different organs, nor have checks and balances between them been devised as a result of theoretical analysis. [23]

There is clear overlap between the three organs of government in the United Kingdom both in terms of personnel and between functions. The principal overlaps in personnel are that the majority of government ministers will be members of the House of Commons, while other ministers will have seat in the House of Lords. The Lord Chancellor presided over the House of Lords prior to the Constitutional Reform Act 2005 in its legislative capacity. He was also the head of the judiciary and a cabinet minister. However, by virtue of Part 2 of the Act, the Lord Chancellor ceases to be a member of the judiciary and loses the judicial functions traditionally associated with the office. Future Lord Chancellors may be drawn from either the House of Lords or the House of Commons. [24]

The principal overlap in functions are that government ministers direct the activities of central government departments and, as it has been alleged, through their majority in the House of Commons exert a controlling influence over its timetable, business and legislative output. [25] The Law Lords exercise both judicial and legislative functions, although this dual rate will end when the Supreme Court is established. The Lord Chancellor will continue to be involved in the process of judicial appointment, notwithstanding that his judicial functions were removed by the 2005 Act. [26] The Home Secretary exercises the prerogative of mercy, and the Attorney General may enter a nolle prosequi to a prosecution on indictment. [27]

In R. v Home Secretary ex. p Fire Brigades Union [28] , Lord Mustill referred to the ‘ peculiarly British conception of the separation of powers that

Parliament, the executive and the courts each have their distinct and largely exclusive domain.' [29] Most writers on constitutional law unanimously agree that separation of powers is not a feature of the British Constitution. W. A Robson, likened Montesquieu's doctrine to ' a rickety chariot' and claimed that, '' ...the division of powers enunciated in this theory, and their allocation to separate branches of the government has at no period of history borne a close relation to the actual grouping of authority under the system of government obtaining in England''. [30] In Halsbury's Laws of England, Sir William Holdsworth denied that the doctrine of separation of powers had ever ' to any great extent corresponded with the facts of England'. [31] S. A de Smith equally towed the line of other writers, arguing that the doctrine has no place in the British constitution. In his textbook on Constitutional and Administration law, he wrote, ''No writer of repute would claim that it is a central feature of the modern British constitution''. [32]

The doctrine of separation of power is susceptible to a variety of meanings. There appears to be a consensus amongst academics that , the doctrine is not a central feature of British constitution and that a strict separation of powers is impossible in the United Kingdom, however some leading judges seem to have an opposite view. What the judges seem to have in mind is a version of the doctrine, which would require that the persons who exercise one kind of governmental function should not also exercise another. [33]

Conclusion

There is no absolute separation of powers in the United Kingdom. The Crown has always been a part in the exercise of all three kinds of powers, namely the executive, legislature and judiciary. There has never has been, a strict separation of powers in the English constitution in the sense that the legislative, executive and judicial powers are assigned respectively to different organs. There is clear overlap between the three organs of government in the United Kingdom both in terms of personnel and their functions.

There are substantial and not merely trivial links between the legislature and the executive, however, this does not mean that the separation of powers doctrine has been without effect. [34] The doctrine of separation of powers, no doubt has shaped our constitutional arrangements and thinking, and continues to do so. [35] The doctrine is not absolute in the United Kingdom; nevertheless, it should not be dismissed lightly.

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Footnotes

[1] Munro, C. R (2005) p. 295

[2] Martson, J & Ward, R (1997) p. 219

[3] Alder, J (2005)p. 145

[4] Alder, J (2005)p. 145

[5] Landauer, J & Rowlands, J (2001)

[6] L'Espirit des Lois, 1748 citied in Carroll (2007) p. 37

[7] Second Treatise of Civil Government, 1690, citied in Carroll (2007) p. 37

[8] Marstson, J & Ward, R (ibid) p. 219

[9] Munro, C. R (2005) p. 295artso

[10] Munro, C. R (ibid) p. 298

[11] Munro, C. R (ibid) p. 296

[12] Munro, C. R (ibid) p. 296

[13] Remarks on the History of England (1743) p. 84 cited in Munro, C. R (ibid) p. 299

[14] the Craftsman 27 June 1730 cited in Munro, C. R (ibid) p. 298

[15] Alder, J (2005)p. 150

[16] Duport Steels Ltd v Sirs (1980) 1 ALL ER 529 at p. 541

[17] R v HM Treasury, ex p Smedley (1985) QB 657 at p. 666 quoted in Munro, C. R (ibid) p. 306

[18] (1986) AC 240 citied in Munro, C. R (ibid) p. 307

[19] (1994)1AC 377 at 396

[20] Alder, J (2005)p. 150

[21] Marstson, J & Ward, R (ibid) p. 219

[22] Jackson & Leopold (2001)p. 26

[23] Jackson & Leopold (2001)p. 26

[24] Carroll (ibid) p. 38-43

[25] Carroll (ibid) p. 39

[26] Carroll (ibid) p. 39

[27] Jackson & Leopold (2001)p. 26

[28] (1995) 2 AC 513

[29] (1995) 2 AC 513 at p. 567

[30] W. A Robson (1951) p. 16 cited in Munro, C. R (ibid) p. 304

[31] Halsbury’s Law of England (1932) p. 385 Munro, C. R (ibid) p. 304

[32] SA de Smith & R Brazier (1998)p. 18 citied in Munro, C. R (ibid) p. 305

[33] Munro, C. R (ibid) p. 307

[34] Munro, C. R (ibid) p. 329

[35] Munro, C. R (ibid) p. 332