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Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan

Tasneem Sultana

Separation of powers or *trias politica* is a model of democracy that involves the separation of political power between the government's three branches – the executive, the legislature and the judiciary. In a system where there is a separation of powers, each branch is constrained from intervening in the area of responsibility of another branch.

The doctrine of separation of powers or checks and balances between independent and co- equal branches of government, is derived from the work of the French political and social philosopher Baron de Montesquieu. The latter in his *Spirit of Law* (1734)¹ defined the principle of separation of powers, based on a system of checks and balances in government.

The phrase check and balance implies that there are competing sovereigns (such as in a federal system in a political structure). 'Check' refers to the ability, right and responsibility of each power to monitor the activities of the other (s), while 'balance' refers to the ability of each entity to use its authority to limit the power of the other.²

In other words, the principle of separation of powers holds that in order to avoid a concentration of power in the hands of a minority in a political system, the three principal constituents of government – the executive, the legislature and the judiciary should be separate and enjoy equal and well-defined powers and independence. It is

¹ Visit at http://www.experiencefestival.com/separation_of_powers_checks_and_balances.

² Ibid.

these checks and balances that protect the people from authoritarian or arbitrary rule.³

Separation of powers is a feature associated more with the presidential system of government. In a typically parliamentary system, fusion of power is more common.

In fusion of power the elected legislature is supreme, while the other branches are subservient to it. In separation of powers, each branch enjoys a considerable degree of independence from the other branches. This independence derives from the fact that each branch is elected or selected independently of the other branches and neither of them is beholden to any of the others for its continued existence.⁴

In a fusion of power system such as that of the UK, the people elect the legislature and the elected legislature then chooses the executive. In contrast, in separation of powers, it is not the national legislature which selects the executive, instead the executive is chosen by other methods, for instance direct popular election, selection by electoral college etc. In a parliamentary system, when the term of the legislature ends the tenure of the executive selected by that legislature also ends; however in a presidential system the executive's term may or may not coincide with the legislature's.

In the American presidential system there are three very distinct branches of government. The executive branch includes the office of the president and his cabinet, who are not legislators. The legislative branch includes the House of Representatives, (the lower house) and the Senate (the upper house). Together they are known as the Congress. The judicial branch encompasses the

³ See <http://www.indianofficer.com/forums/2062-separation-powers-vs-fusion-powers.html>.

⁴ Barrie Axford, Gary K. Browning, Richard Huggins and Ben Rosamond, *Politics: An Introduction*, 2nd edition (London: Routledge, 1997), 345-46.

supreme court system. Each branch of government has unique powers and is also able to influence the actions of another branch.

The Executive

The president who heads the executive branch serves as the head of state, commands the military and makes political appointments under the checks and balances system. The executive branch has the power of veto over the legislative branch. The members of the judiciary are appointed by the executive branch, which also has the power to pardon.

In an authoritarian system such as a dictatorship or an absolute monarchy all the powers of government are assumed by one person or a small group of persons. The separation of powers system is designed to transfer some authority away from the executive branch in order to protect individual liberty from tyrannical leadership.⁵

In a presidential system such as that of the United States, the leader of the executive branch performs a dual role, being at the same time, head of state and head of government. On the other, in a parliamentary system such as that of the UK, the prime minister, a member of the legislature, heads the government, while the role of head of state is assumed by a ceremonial monarch. In other countries with a parliamentary form of government, a president may be head of state.⁶

In a presidential system, the president is in charge of all the affairs of the state. The ministers look after their respective departments and are solely answerable to the president. This is particularly the case in authoritarian presidencies or in military regimes⁷. There are *liberal* and *illiberal* presidential systems and the main difference

⁵ [http://en.wikipedia.org/wiki/Executive_\(government\)](http://en.wikipedia.org/wiki/Executive_(government)).

⁶ Ibid.

⁷ Vernon Bogdanor (ed.), *The Blackwell Encyclopedia of Political Institutions* (Oxford: Basil Blackwell, 1987), 257.

between the two is that in the former bills in the legislature are openly debated and discussed in detail.

The checks and balances system distributes power instead of concentrating it in one person or branch. It prevents one branch from ever gaining too much power; for example the American Congress passes laws but the President has the power to veto them or the President can veto laws but the Congress can override the veto with a 2/3 majority. It is also possible that the President and Congress may agree on a law but the Supreme Court declares the law unconstitutional. Likewise, the President can appoint judges and other government officials, but the Senate must approve the appointments.⁸

The Legislature

The legislature is a representative body with the power to make and change laws. Legislatures around the world are diverse in structure, in nomenclature and in power. Legislatures may have one chamber (unicameral) or two chambers (bicameral) and the members of the legislature may be elected or appointed. Legislatures have different appellations, these include parliament, congress, senate, national council or national assembly. There are also country-specific names such as the Sejm (in Poland) the Storting of Norway or the Iranian Majlis.⁹

Contemporary legislatures are the result of a historical process which began in medieval Europe. Originally, the legislatures were assemblies of aristocrats, convened occasionally by kings in order to get people's support for taxation or for waging war.¹⁰ Gradually, they began to be convened regularly and started to provide essential communication between the monarch and powerful groups of their subjects.¹¹ The term legislature for such

⁸ Visit http://www.socialstudieshelp.com/Lesson_13_Notes.htm.

⁹ Barrie Axford, *Politics: An Introduction*, 336-37.

¹⁰ Vernon Bogdanor (ed.), *The Blackwell Encyclopedia*, 329.

¹¹ *Ibid.*

an assembly came into use in seventeenth century revolutionary England.¹²

The legislature became the instrument of liberal democracy in the nineteenth century. Liberal democracy is based on the notion that people should have an important role in government and the representatives of the people should be held accountable for their actions.¹³

However, legislatures do not only exist in democracies, they often play a role in non democratic regimes. The former communist states had legislatures and so do the existing ones. In some third world states where military dictators organize fake elections and announce puppet assemblies, the latter act as rubber stamp for the dictators.¹⁴

In a genuine democracy, the legislature provides an opportunity to the people to be represented in the political system and through this representation, the over all political process draws legitimacy.¹⁵

The main role of a legislature is to make laws. Another role of legislature is to approve and regulate the collection and distribution of government finance in terms of agreeing upon taxation levels, debating and approving the national budget and scrutinizing government expenditure and accounts.¹⁶

The legislature also performs a unique educational role. It is the task of individual legislators to simplify complicated issues and

¹² Ibid.

¹³ Norman Ornstein, "The Role of the Legislature in a Democracy", *Freedom Paper*, no. 3, available at <http://www.ait.org.tw/infousa/enus/media/pressfreedom/freedom3.html>.

¹⁴ Ibid.

¹⁵ Barrie Axford, *Politics: An Introduction*, 337.

¹⁶ Ibid, 339-40.

define policy choices and place them before the nation. They use their resources and expertise to filter information from many sources and resolve conflicting ideological positions. Their constituents are ultimately presented with some clear cut options.¹⁷

However the growth of a strong party system (in particular two party system) has undermined the independence of individual assembly members. It has nearly guaranteed that the party with a majority in the assembly will succeed in passing any legislation that it initiates.¹⁸ Another factor which has affected the role of the assembly is the increasing importance of the electronic media. The commentator and the anchors have now become influential analysts and the populace looks to the media for their contact with politicians. Furthermore politicians are also preferring to address the nation or make policy statements in front of TV cameras rather than in parliament.¹⁹

In Montesquieu's concept of separation of powers there are essentially two pillars of government – the executive and the legislature. Montesquieu considers judicial power as something that rests on the jury, whose members are drawn from the population and return to their routine life, once their work is done. So according to Montesquieu, judicial power in a manner of speaking is invisible and even non-existent.²⁰

Legislative power in principle is the sole representative power, but in reality, the executive also has representative functions. The executive has its supporters, in the first place among those who feel that they are being poorly represented by the legislature. The executive over the years has also gained strength as law makers and policy initiators.

¹⁷ *Freedom Paper*, no. 3.

¹⁸ Barrie Axford, *Politics: An Introduction*, 339.

¹⁹ *Ibid.*

²⁰ Pierre Manent, "Modern Democracy as a System of Separations", *Journal of Democracy* 14, no. 1 (January 2003):120.

The Judiciary

The third pillar of government is the judiciary. In a democratic state, the judiciary has a very important role, i.e. it safeguards the liberties of the individual and enforces the laws made by the executive and the legislature.²¹

The judiciary plays the role of a watch dog in a democratic system. Strong and independent courts can declare an act carried out by the executive or legislature as unconstitutional, invalid or vice versa. The judiciary also keeps the constitution of a country alive by reinterpreting it to adapt to changing socio-economic and political conditions.²²

Owing to these important functions of the judiciary, the United Nations has endorsed the importance of an independent judiciary by adopting the basic principles on the independence of the judiciary at its seventh congress in 1985.²³ Each member state is expected to guarantee the independence of judiciary in its constitution or the laws of the country.²⁴

The modern concept of judicial independence is based on the theory of separation of powers, that enables the judiciary to function independently of the legislative and executive arms of government.²⁵

²¹ Visit at <http://www.bookrags.com/essay-2004/12/4/1558/53663>, accessed on 28 December 2010.

²² Barrie Axford, *Politics: An Introduction*.

²³ General Assembly Resolution 40/146, 1985.

²⁴ Basic Principles on the Independence of the Judiciary, Article 1.

²⁵ Justice F. B. William Kelly, "An Independent Judiciary: The Core of the Rule of Law", available from http://www.icclr.law.ubc.ca/Publications/Reports/n_Independent_judiciary.pdf.

The case of Pakistan

Throughout its history, Pakistan has been an executive dominated state and this trend is linked to the Muslim era and to British rule in India. The Muslim sultan (monarch) was the chief executive, the sole legislator and the chief judge in his dominion. The power of the executive, the legislature and the judiciary were concentrated in him and he ruled by decrees.²⁶ No written constitution is known to have existed during the Muslim rule in the period beginning from the twelfth century till the eighteenth century, when the British became supreme in the subcontinent. The British came to the subcontinent as merchants and slowly held sway of the whole subcontinent, formally disbanding Muslim rule in 1858.²⁷

For governing the sub-continent, the British parliament passed the Government of India Act 1858 and then the Government of India Council Act 1861, the Minto-Morley Reforms of 1909, the Government of India Act 1919 and finally the Government of India Act 1935. The 1935 Act drew from previous Acts with some innovations.²⁸

In the 1935 Act, the position of the Governor General (Viceroy) was unique. As the representative of the British crown in India, he enjoyed final political authority and the widest discretionary powers and special responsibilities. The supreme command of the army, navy and air force was vested in him. The Governor General had extraordinary powers of legislation. He could however, seek the advice of a council in all matters except defence, external affairs and the affairs which involved his special responsibilities. Though he could seek ministerial advice, he was not bound to act thereupon.²⁹

²⁶ Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford Press, 2004), 3-4.

²⁷ Ibid.

²⁸ Ibid, 21.

²⁹ Ibid.

The Act also contained a special provision stating that if the Governor General felt that the government of the federation could not be carried on in accordance with the provisions of the Act, he could declare that his functions now extended to all or any of the powers vested in or exercisable by any federal body or authority, other than a federal court.³⁰

Under the provisions of the Indian Independence Act 1947, the Government of India Act 1935 with certain adaptations became the working constitution of Pakistan. All the discretionary powers of the Viceroy (Governor General) lapsed from August 15 1947.

The Indian Independence Act 1947 created the Constituent Assembly of Pakistan and gave it charge of the nation's affairs as well as the crucial task of drafting the constitution. In the Indian Independence Act 1947 all governmental activities were to be carried out by the cabinet which was responsible to the Constituent Assembly. The Governor General's powers were presumed to be exercised on the advice of the cabinet.

In official parlance, Pakistan emerged as a parliamentary government but in reality it became a virtual administrative state with vice regal traditions.³¹

The Governor General of Pakistan, later president, enjoyed wide and substantial powers. He was the executive head of the federation. He had the right to appoint all the important officials, including the prime minister, the federal ministers, the heads of the armed forces, the governors of the provinces, the judges of the higher judiciary etc. The council of ministers would hold office during his pleasure. He had the power to promulgate ordinances. Thus there was complete centralization of authority.

³⁰ Ibid.

³¹ Lawrence Ziring, *Pakistan in the Twentieth Century: A Political History* (Karachi: Oxford University Press, 1997), 72-73.

The 1935 Act also permitted the Governor General in certain extraordinary circumstances to dismiss a sitting prime minister without the advice or consent of the council of ministers. These powers were used with impunity by many of the heads of state of Pakistan. Thus the viceregal system which Pakistan inherited at its birth from the British, was not abandoned in succeeding years.³²

From 1947 to 1956, when the first constitution was promulgated, Pakistan saw four successive governors general and three prime ministers. Cabinet members were mostly selected because they were friends and cronies. This was just like in the era of absolutist monarchies.³³

The first constitution of Pakistan promulgated in 1956 abolished the office of the governor general and transferred the same powers to the office of the president whose executive powers exceeded those of the elected prime minister. Though the constitution provided for a parliamentary and federal form of government, the president retained supreme power and the center was more powerful than the provinces.³⁴ In 1958 when the first martial law was imposed in the country, the 1956 constitution was suspended and in 1962 the military government promulgated another constitution. The constitution of 1962 abolished the office of prime minister, granting all executive powers to the president. The constitution also created a non party legislature with some law-making powers. General Ayub Khan, the Chief Martial Law Administrator, became president of the country. He had the power to dissolve the assembly, he reserved the right to promulgate legislation, to issue ordinances when the assembly was not in session and to declare an emergency. The 1962 constitution institutionalized the intervention of military in politics.³⁵

³² Ibid, 161.

³³ Ibid, 176.

³⁴ Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: University Press, 1995), 23.

³⁵ Lawrence Ziring, 266.

With the promulgation of the 1962 constitution Ayub Khan lifted martial law, but while it was apparently civilian rule, all the political institutions, in fact the whole system revolved around his personality.³⁶

The 1962 constitution was suspended and another martial law was imposed in 1969 after Ayub Khan resigned, following a mass movement against him. This was followed by the tragic events of the East Pakistan crisis, the Indo-Pakistan war of 1971 and the secession of the country's eastern wing, which now became Bangladesh. The new Pakistan which emerged after the loss of its eastern wing adopted a new constitution in 1973.

The 1973 constitution created a parliamentary form of government. The prime minister was the chief executive of the country and the president as the formal head of state, was bound to act on the advice of the prime minister. The parliament comprised two houses – the National Assembly and the Senate. The president did not have the power to dissolve the National Assembly. The constitution also provided for four provincial governments and the distribution of legislative power between the federation and the provinces. However, the constitution was not followed in letter and in spirit. The provisions for provincial autonomy were never really implemented fully.

The 1973 constitution made the prime minister all powerful and the latter through amendments to the constitution gained even more power. The parliament therefore was a legislature in form and name, but it lacked substance and possessed few of the powers associated with such institutions.

The then Prime Minister Zulfikar Ali Bhutto who had risen to eminence in a dictatorial regime, established an authoritarian

³⁶ Ibid, 271.

government and one man rule, though the façade was parliamentary.

The civilian, yet autocratic rule ended in 1977 with another martial law. The army chief General Zia ul Haq dissolved the National Assembly and suspended the constitution. The 1973 constitution was not dissolved but suspended because it contained article 6 which stated that any one who abrogated or attempted or conspired to abrogate or subvert the constitution would be guilty of high treason. Zia ul Haq instead of a new constitution issued the Provisional Constitutional Order (PCO). The PCO not only gave the military regime the right to rule but also the right to amend the constitution at will. The Chief Martial Law Administrator introduced the eighth amendment to the 1973 constitution which shifted executive power from the office of the prime minister to that of the president. Under article 58(2)(b) the president had the right to dissolve the National Assembly at his discretion. The president thus enjoyed extraordinary powers equivalent to that of the colonial viceroy. The legislature's power was reduced to that of an advisory body and the judiciary became a docile branch of government.

After the death of General Zia in a plane crash in 1988, Pakistan embarked on a decade of democracy, in which Benazir Bhutto and Nawaz Sharif served as prime minister for two terms each, but neither of them could serve a full term, for both were dismissed by the president on charges of corruption and misgovernance. The incumbent presidents used their authority under the eight amendment to dissolve the assemblies. The army remained the actual power broker behind the scenes.

In 1997, the then Prime Minister Nawaz Sharif through the thirteenth constitutional amendment had the discretionary power of the president to dissolve the National Assembly and other powers removed. Parliamentary sovereignty was thus restored.

A continuing pattern in Pakistan has been that every head of state and government wants to have all executive power concentrated in his/her hand. Nawaz Sharif was also determined to gather all power in his hands. When policy differences arose with the army high command, the fourth direct military rule began in the country in late 1999.

General Musharraf's coup, the declaration of emergency and issuance of another PCO were all validated by the Supreme Court, on the basis of the 'Doctrine of State Necessity'. Musharraf got himself elected as president for five years through a referendum in April 2002. The same year he introduced the Legal Frame Work Order (LFO) which revived all the clauses of the eighth amendment and the executive (president) became more powerful, being again vested with discretionary powers to dissolve the National Assembly, appoint the Chairman Joint Chiefs of Staff Committee, the services chiefs and the governors of provinces. The seventeenth constitutional amendment (2003) reduced the parliament to the level of a rubber stamp.

In the period 2002-2007 legislative initiative rested solely with the executive (president). The National Assembly was able to pass only 51 bills whereas 134 presidential ordinances were promulgated in the same period.³⁷ During a period of crises in 2006-2007, General Musharraf who had retained the post of chief of army staff alongwith president began to lose his grip on power.

In February 2008, general elections were held and the Pakistan People's Party on a wave of popular sympathy owing to the assassination of Ms. Benazir Bhutto got the majority of the seats. However, these were not enough for the PPP to form a government on its own; so a coalition with other parties was formed. Again in this new government, the president enjoyed formidable powers, but since the PPP's election manifesto had promised to strike down

³⁷ SDPD, UNDP Parliament Matters, January 2008.

these special powers, on April 8, 2010, the National Assembly passed the eighteenth amendment to the constitution which removed the power of the president to dissolve the parliament unilaterally. It also removed the bar on a prime minister serving more than two terms. Courts would no longer be able to endorse the suspension of the constitution; a judicial commission would appoint judges and the president would no longer be able to appoint the head of the Election Commission or declare emergency unilaterally.³⁸

The parliament also passed the 19th amendment to the constitution which was signed by the president on January 1, 2011. This created a new system for appointment in the superior courts aimed at neutralizing a probable source of conflict between the judiciary and the executive.³⁹

The amendment also raised the number of senior judges as members of the judicial commission from two to four. Also, the recommendation for the appointment of ad hoc judges to the superior courts would be made by the Chief Justice in consultation with the Judicial Commission.⁴⁰

Moreover the amendment envisaged that in case of dissolution of the National Assembly, the members of the parliamentary committee which give final approval of the appointment of judges would be drawn from the Senate only.⁴¹ The main objective of the 18th and 19th amendments is to avoid clash between state institutions.

Judiciary, the third pillar of the government has played an important role in determining the country's political fate. Its rulings on constitutional issues in the past, undermined the

³⁸ *The New York Times*, 9 April 2010; *The Sunday Telegraph*, 9 April 2010.

³⁹ *Dawn*, 2 January 2011.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

sovereignty of the parliament. Its validation of coups d'état in the name of the "Doctrine of Necessity" not only weakened democratic institutions but also diminished its own authority and independence. In the past, judges have fully supported undemocratic acts of governments in power and have accepted constraints on judicial autonomy.

Judicial power first began to erode in 1955 when the then Governor General Ghulam Muhammad dismissed the government of Prime Minister Mohammad Ali Bogra and the federal court declared that "that which otherwise is not lawful, necessity makes lawful". This so-called doctrine of necessity was used many times by subsequent higher courts to justify military coups.⁴²

Conclusion

The doctrine of separation of powers rests upon the recognition of the universal truth that the concentration of absolute power in one man or one body inevitably leads to exploitation and tyranny. Lord Acton's dictum warns that: power tends to corrupt and absolute power corrupts absolutely. Thus democratic states distribute powers of the state to different organs namely the executive, the legislature and the judiciary.

However, the concept of separation of powers has never really worked in Pakistan. It has been the executive which has been the decision making authority. Pakistan has been an executive dominated state in presidential as well as parliamentary setting.⁴³ Decision making and power most of the time has been concentrated in the hands of one person whether under military or civilian rule. Thus no matter what the constitution says, separation of powers has never existed in Pakistan in practice, nor has the checks and balances system prevailed in the country.

⁴² Stephen Philip Cohen, *The Idea of Pakistan* (Lahore: Vanguard Books, 2005), 58.

⁴³ <http://www.ahrchk.net/statements/mainfile.php/2007statements/1037/>.

In any constitutional democracy, the powers of the government are divided, so that the legislature makes the laws, the executive implements them and runs the day-to-day administration, while the judiciary interprets the laws and operates independently. Pakistan's founding father declared that the country would have a parliamentary form of government, but at various times in the country's history executive power has either been vested in the office of the head of state or the head of government. The 1973 constitution and the 13th, 14th and 18th amendments to it, empowered the prime minister whereas the 8th and 17th amendments shifted executive power to the president.

Thus, the seesaw between presidential and parliamentary forms of government has complicated the situation regarding the separation of powers. In a purely parliamentary form of government, the prime minister and his cabinet ministers form the executive, but if in a parliamentary system, the president is the chief executive, then it undermines the legislators' power to keep a check on the executive.

Pakistan has had long stretches of military rule: from 1958-1969 led by Ayub Khan, from 1969-1971 under General Yahya Khan, from 1977-1988 headed by General Zia-ul-Haq and from 1999 October to August 2008 led by General Pervez Musharraf. In the remaining years, civilian governments have fumbled through their respective tenures, unable to prove their ability to govern firmly and honestly. The legislature and the judiciary have been merely rubber stamps or acquiescent institutions for most of Pakistan's history.⁴⁴

It has often been pointed out that provincial autonomy, which upholds a federation was never really implemented in Pakistan,

⁴⁴ http://neutralobserver.blogspot.com/2007_10_01_archive.html; Kamaal Zaidi, Promoting an Independent Judiciary as a Rule of Law Principle: A Brief Commentary on the Supreme Court of Pakistan, available from http://works.bepress.com/kamaal_zaidi/.

though the constitution provided for it.⁴⁵ This has led to disenchantment and discontent in the federating units. A major cause of the secession of East Pakistan was the feeling among its people that they had not been given their due share in power nor their due economic rights. Even after this tragic loss of its eastern wing, the ruling elite in Pakistan has not paid enough attention to the matter of provincial autonomy and the implementation of the federal principle in a credible manner. This can lead to further problems in the country. Though authoritarian systems such as that of the former Soviet Union and the Federal Republic of Yugoslavia also claimed to be federations, democracy and federalism are closely connected. The eventual failure of the federation in Yugoslavia was to a great extent owing to lack of democracy.

In Pakistan, after every long era of military rule there have been short lived periods of civilian rule. Civilian leaders have shown marked authoritarian tendencies. Laurence Whitehead has pointed out that liberalization does not automatically lead to democracy.⁴⁶ The opposition of a dictator is the product of the oppressive regime it has succeeded.⁴⁷ Such an opposition cannot automatically become democratic after getting power. Democratization can only be achieved through regular, free and fair elections and accountability of the political leadership. In the context of Pakistan, while sticking to the parliamentary system, there should be a separation of powers, with checks and balances, to ensure that untrammelled executive power does not emerge.

⁴⁵ http://www.cfr.org/publication/15657/pakistans_constitution.html.

⁴⁶ Laurence Whitehead, *Democratization: Theory and Experience* (Oxford University Press, 2002), 60.

⁴⁷ Peter Rada, "The Rubik's Cube of Democracy", *Pakistan Journal of International Relations* 1, no. 11 (Spring 2010): 103.