



Declassifying Theory of Separation of Powers and its Inherent System of Checks and Balances: A Comparative Study

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ABSTRACT

The main objective of this article is inspection of the development of the concept of separation of powers to highlight that the powers must not accumulate in one hand and they should be divided among the three main pillars of the state i.e., Executive, Legislature and Judiciary. If the powers accumulate and concentrate in one hand, then the chances of abuse or misuse of power increases which can be dangerous not only for the citizens but also for the integrity of the state. The major purpose of the principal of separation of powers is the betterment of mutual relation among the three branches so that the democracy remains intact and no institution should perform the functions of the other. This article provides in-depth critical analysis of doctrine of separation of powers. It critically inspects its application in America and compares it with other jurisdictions to provide a comparative study.



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INTRODUCTION

Wade and Philips have described the concept of separation of power (SOP hereinafter) in three different ways: Different persons should perform duties in different institutions, no interference of one organ of the state in the functions of the other organ and no control of organs of the state over one another. In this chapter, the author is going to discuss the concept of separation of powers in its basic and original form, the developments that have taken place in this concept with the passage of time, the evolution of this concept, thoughts of Montesquieu upon this concept and the current application of the concept of Separation of Powers.

In this article, the concept of separation of power has been discussed keeping in view the USA as an example. As we know that, in America, this concept is properly and completely implemented and all other states apply this concept by giving a standard example of US. Basically, US constitution also divides the state powers in three main branches i.e., Legislature, Executive and Judiciary. The President is the head of America and America is the super power so, the President also holds a very high position in the International community. He is also the head of executive branch. Despite all these facts, he still does not have unlimited powers and there is a proper check and balance system on his powers too. Moreover, we will also discuss the check and balance system on the powers vested in all the three main branches of the State. We will discuss some constitutional conflicts and their effect on the existing system of checks and balances in the USA.

In this article, the author has analyzed the concept of separation of powers by comparing the enforcement and nature of this doctrine around different democracies around the globe. The author has done a comparative analysis of the concept of separation of powers between Pakistan and USA, Pakistan and UK, UK and USA, China and USA and India and France in this chapter. The working of three main organs i.e., Executive, Legislature and Judiciary is analyzed, in different democracies around the globe.

Thoughts of Montesquieu Upon the Doctrine of SOP

Montesquieu believed that if the concept of separation of powers prevails, then it shall leave a very healthy and positive impact on the political liberty of the state. It shall also pave a way for the natural liberty of the citizens of the state. Safeguarding the political liberty and natural liberty of the citizens of a state is a major achievement which is possible by following the Montesquieu's concept of SOP. Montesquieu further explained that if the doctrine of separation of powers is to be followed in its true sense then it shall also provide safeguard against tyranny (Waldron, 2013).

We are well aware of the fact that if the powers of a state are not divided among different institutions then the power shall be accumulated and concentrated in one hand which shall lead to despotism and abuse of power. This misuse of power can be prevented by adopting the concept of separation of powers in its true sense. Montesquieu also stated that "there must be a system of checks and balances among the institutions. Every pillar of a state must work independently keeping the fact in mind that he shall be accountable for any kind of misuse of power. In this way, abuse of power can be prevented" (Brown, 2022).

Montesquieu defined and described the powers used by the pillars of a state in their simplest form i.e., while exercising the legislative powers, the prince makes new laws and makes amendments in those existing laws which are contrary to the will of the subjects of the state. He can also abrogate the already existing laws (Huq, 2016).

By exercising the executive powers, a prince can protect his state and the subjects of the state from any kind of foreign invasions. He can send and receive ambassadors to other states and can also maintain the security in his territory. By exercising the judicial powers, he can try the civil and criminal cases, protect the life and property of the individuals and can punish criminals. Montesquieu further explained that the system of checks and balances upon the government institutions must be healthy. Unhealthy checks upon the pillars of a state may lead to

the non-performance of the institutions and the institutions may find it difficult to perform their functions independently.

Criticism on Montesquieu's concept of SOP

Although Montesquieu's concept regarding separation of powers was the biggest development in the field of state governance yet it faced a lot of criticism at certain points. Critics submitted that Montesquieu does not understand the English constitution completely. There is no such thing as full separation of powers in the British Constitution. Both legislative and judicial functions are performed by the House of Lords. The Lord Chancellor participates in all the three functions of the state (Waldron, 2013).

The second point of criticism on Montesquieu's concept of SOP was that if all the three institutions of a state perform their functions independently and do effort to safeguard only the interests of their own, there are probable chances that they shall damage the interests of other institutions. In this regard, the existence of complete separation of powers is impossible. In spite of all the inconsistencies in the Montesquieu's concept, it was a major development in the field of state governance (Zaring, 2020).

Separation of Powers in USA

American power is actually distributed among three branches. All of these branches are individually responsible for the performance of their duties and responsibilities. It is one of the duties of each branch to monitor the functioning of the other branches. In this way, the misuse of power can be avoided. If any kind of misconduct or mistake of one branch is being observed by the other branch, then this branch has the power to take complete action to stop the misconduct (Huq, 2016).

American president is elected by the people of America. As we know that American president carries a great place in the International community and he is also the head of Executive branch of the state, still he has a check upon his powers. "Executive branch consists of President, Vice President, Cabinet and Executive Departments. The powers of Executive Branch (President) are limited in many ways. In order to pass a budget, executive branch has to take approval of the Legislature (Congress)." America cannot engage in the war unless and until congress declares the war. The president needs the confirmation of Senate to choose a candidate for Supreme Court (Brown, 2022).

The president can be impeached for any wrongdoing. The Chief Justice of Supreme Court preside the trial but it requires two third majority votes of the Senate to convict the President. Thus, we came to know that, each branch of Government performs its functions by keeping a check on the functioning of the other branch. Moreover, this check is a kind of cooperation and coordination among the three organs. It leaves a very healthy and positive impact on the people of the state. They are well aware of the fact that the decisions that are being made in their country are not unchecked. Each and every decision, from giving privileges to the people to the declaration of war, is properly discussed, debated and properly approved (Waldron, 2013).

As compared to governing systems of Pakistan, where Legislature includes Parliament, Judiciary Includes Supreme Court, High Courts, District and Civil Courts and all other kind of tribunals and where Executive includes administration and law-enforcing agencies, American Governing system includes President, Vice President, Cabinet and Executive bodies in Executive

branch, Supreme Court and Civil Courts in Judicial branch and Congress in Legislative branch which consists of Senators and representatives. It is a Triangular-Shaped system (Mohar, 2004).

Constitutional Conflicts and Separation of Powers

Sometimes the actions of one branch unconstitutionally or unintentionally intrude the function and actions of other branches. In such cases, constitutional conflicts arise. Constitutionally, there is no such provision which shows that all the three branches of the state are completely separated and occupy completely separate powers. No provision shows the explicit nature of the powers. James Madison, once proposed an amendment in the constitution which focused on making the separated powers implicit in nature but the fellow congress member had not given their consent on this proposed draft because they thought that implicit nature of separated powers is more beneficial than the explicit nature (Brown, 2022).

The first article of the constitution vests all the legislative powers in the congress, second article vests all the executive powers in the president and the judicial powers are vested in the Supreme and District Courts by virtue of third article of the constitution. The main goal is to prevent the concentration of power in one hand. Each branch performs its functions independently, keeps a check upon the activities of the other branches and also has powers to fight with the unconstitutional encroachments of other branches. Constitutional conflicts can be of various types i.e., Executive Encroachments, congressional encroachments on executive and judicial branches etc (Vermeule, 2015).

The past presidents of US followed two different views regarding the exercise of executive powers. One view is named as “Strong President” which states that a president can take any step or make any decision which is not prohibited in the constitution. Other view is named as “Weak President” which states that a president can only exercise those powers which are specifically mentioned in the constitution. These differences in the exercise of executive powers sometimes give rise to conflicts with the congress and these conflicts are called Executive Encroachments (Huq, 2016).

Sometimes, congress may nullify any action of the executive branch which is thinks unconstitutional and against public interest by utilizing its power of “Legislative Veto”. This conflict is called Congressional Conflict. Congress can utilize its power of Legislative veto against Judicial as well as executive branch. Where it utilizes this power against judiciary, it is called Congressional Encroachment on Judicial Powers. Where it utilizes this power against executive branch, it is called Congressional Encroachment on Executive Branch. Moreover, all these branches also enjoy certain kind of immunities against such encroachments.

System of Checks and Balances in USA

Each branch in the US governmental structure checks and balances the functions of other branch. Executive branch keeps a check on legislative branch. Executive branch also keeps a check upon Judicial branch. Similarly, Legislative branch keeps a check upon executive and judicial branch. In the same way, judicial branch checks and balances the functioning of executive and legislative branch. Where we always try to learn about the check and balance of one branch over the powers of other, it is worth mentioning that there are certain powers of these branches which go unchecked. We are going to discuss the checks of these branches over the other branches systematically.

Congress has the power of “Legislative Veto”. Executive (President) has the power to keep a check on this power of Legislature. We know that it is the function and power of the legislature to make new laws but executive branch has the power to propose new laws to Congress. Executive branch has the power to submit budgets to the House of Representative. Executive branch also appoints the law-enforcing officials. Appointment of judges of Supreme Court is the task of Judiciary but the power to nominate those judges is vested in the executive. Moreover, if a person is convicted of crimes, the President has the power to grant him pardon (Chen, 2018).

Legislature also has the power of checks and balances over executive and judiciary. Two-third presidential votes from both chambers can be overridden by the congress. Proposed treaties can be rejected by senate with two-third votes. In the same way, senate has the power to reject federal officials’ presidential nominations. Legislature also has the power to impeach the president and remove him. To serve this purpose, House serves as prosecution and senate serves as Jury. Creation of courts is the power of Judiciary but congress or legislature has the power to create lower courts. “The judges of the lower federal courts can be impeached by Legislature.” If the Supreme Court has given any decision on any matter and the congress deems it to be inappropriate, then it has the power to make amendments in the constitution so that the decision of the Supreme Court can be overturned (Mohar, 2018).

Similarly, Judicial branch also has certain kind of checks and balances over the executive and legislature. We know that legislature is the law-making authority and its function is the formulation of laws. Whenever the Judiciary deems any law made by the legislature to be inappropriate, it can utilize its power of judicial review and can rule such law as unconstitutional. Similarly, presidential actions taken by the executive can be ruled as unconstitutional by the judiciary, using its power of judicial review. Certain kind of treaties made by the executive can be declared as unconstitutional by the judiciary, using its power of judicial review, if such treaties are inappropriate (Lawrence, 2021).

To sum up, concept of separation of power in America is considered as the ideal structure gauging this doctrine. Not only all the institutions are able to perform their functions and duties independently but also they have the power to keep a check upon other institutions and the power to fight the unconstitutional encroachments of other branches (Huq, 2016).

Dependence of Legislature on Executive:

The legislative branch is responsible for creating laws and making policies. The legislature is made up of elected representatives who are responsible for representing the interests of their constituents. The primary responsibility of the legislature is to ensure that the laws they create are fair, just, and do not infringe upon the rights and freedoms of individuals. The legislature is dependent on the executive branch to enforce the laws they pass. Without the executive branch's support, the legislative branch would be powerless to ensure that the laws they passed are enforced (Driesen, 2022).

Dependence of Executive on Legislature:

The executive branch is responsible for enforcing the laws and policies created by the legislative branch. The executive branch is made up of elected officials, including the president or prime minister, who are responsible for making sure that the laws are enforced fairly and justly. The executive branch is dependent on the legislative branch to provide funding for the

programs and policies they implement. Without the support of the legislative branch, the executive branch would be unable to fund the various programs and initiatives it wishes to carry out (Sultana, 2012).

Dependence of Judiciary on Legislature:

The judiciary branch is responsible for interpreting and applying the law. The judiciary is made up of judges who are responsible for interpreting the law impartially. The judiciary branch is dependent on the legislative branch to create laws that are clear and consistent with the Constitution. Without clear and consistent laws, the judiciary would be unable to interpret and apply the law appropriately (Kyritsis, 2007).

The legislative branch is also responsible for confirming judicial nominees. The confirmation process ensures that judicial appointees have the requisite qualifications and experience to serve effectively. Without the support of the legislative branch, the judiciary would be unable to appoint qualified candidates to serve as judges (Lawrence, 2021).

Interdependence of Institutions:

The three branches of government are interdependent and rely on each other to function effectively. The separation of powers ensures that no single branch can become too powerful, but it also means that each branch is dependent on the others. For example, when the judiciary interprets a law, it relies on the legislature to create clear and consistent laws that are compatible with the Constitution. Similarly, the executive branch relies on the legislature to fund the programs and initiatives it wishes to carry out. Without the support of the other branches, each branch would be powerless to carry out its functions effectively (Brown, 2022).

Moreover, the separation of powers is not meant to create a completely independent system. Although the branches are separate, they must work together to ensure that the system functions effectively. This is evidenced by the fact that the president or prime minister, as the head of the executive branch, must work with the legislative branch to pass laws and to secure funding for the programs and initiatives they wish to carry out (Manning, 2010). Without the support of the legislative branch, the executive branch would be powerless to carry out its functions effectively. Similarly, the judiciary relies on the other branches to create and enforce the laws it is responsible for interpreting. The creation of laws is an essential function of the legislative branch, and the judiciary cannot fulfill its role without the support of the legislative branch. The interpretation of laws by the judiciary is an essential function of the judiciary, and the other branches must respect and accept the interpretation of the law provided by the judiciary (Hood, 2015).

Comparative Analysis of the Concept of SOP Between USA and Pakistan

The United States has a clearly defined separation of powers with a federal system of government and strong checks and balances in place. On the other hand, Pakistan's separation of powers is not as clearly defined, and there is often overlap between the branches of government. The legislative branch of the United States government is responsible for making laws. It is comprised of two houses i.e., the Senate and the House of Representatives (Mollers 2013). The main function of Congress is to create, debate, and pass laws that govern the country. The Parliament of Pakistan is responsible for making laws. "It consists of two houses i.e., the

National Assembly and the Senate. The National Assembly is the lower house, and the Senate is the upper house. The members of the National Assembly are elected through direct elections while the members of the Senate are elected indirectly” (Christopher, 1997).

The President of Pakistan is the head of state, but his role is largely ceremonial. The real power in the executive branch lies with the Prime Minister, who is appointed by the President. The Prime Minister is responsible for running the government and overseeing federal agencies. The President of the United States heads the executive branch of the government. The President enforces the laws passed by Congress and oversees the work of the federal government agencies. The Vice President, the Cabinet, and other executive branch officials also play an important role in the governance of the country (Manning, 2010).

The judicial branch of USA interprets and applies the law. “It includes the Supreme Court of the United States and other federal courts. The Supreme Court has the final decision on the interpretation of the Constitution and has the power to strike down laws it deems unconstitutional.” The judiciary in Pakistan includes the Supreme Court, which is responsible for interpreting and applying the law. There are also lower courts, such as district courts and high courts, which hear civil and criminal cases (Hood, 2015).

The United States has a clearly defined system of checks and balances that ensure a balance of power between the three branches of government. The Constitution outlines the powers and responsibilities of each branch and establishes limits on what each branch can do. The Supreme Court plays an important role in interpreting the Constitution and preventing the other branches from overstepping their bounds. In comparison to the US, there is more overlap between the three branches of government in Pakistan. The Prime Minister, for example, is a member of the legislature and can influence the law-making process. Additionally, the President has some power over the appointment of judges, which can sometimes lead to political interference in the judiciary (Freeman, 2019).

Comparative Analysis of the Concept of SOP Between UK and Pakistan

The United Kingdom has an unwritten constitution which means that its legal principles are derived from various sources including common law, statutes, and conventions. The British constitution does not explicitly mention the separation of powers but rather relies on a system of checks and balances between the executive, legislature, and judiciary. The judiciary, which is independent of the other branches of government, has the power to interpret laws and protect individual rights (Saifullah 2017). In contrast, Pakistan has a written constitution that explicitly lays out the separation of powers between the three branches of government. Article 2 of the constitution establishes “Pakistan as a federal parliamentary democratic republic with a president as the head of state and a prime minister as the head of government. The constitution also provides for an independent judiciary with the power of judicial review.” However, the constitution has been amended several times to grant greater powers to the executive branch, particularly during periods of military rule. The UK constitution is so much flexible. It is said that they can make any law at any time and can do anything expect making a man, a woman (Raza, 2004).

Comparative Analysis of the Concept of SOP Between UK and USA

In the United States, the separation of powers is enshrined in the Constitution. The Constitution establishes three separate branches of government: the legislative branch, the executive branch, and the judicial branch. Article I of the Constitution provides for the legislative branch, which consists of the Senate and the House of Representatives. “This branch is responsible for making laws. Article II of the Constitution provides for the executive branch, which consists of the President, Vice President, and the Cabinet (Marshall, 2005). This branch is responsible for implementing and enforcing laws. Finally, Article III of the Constitution provides for the judicial branch, which consists of the Supreme Court and other federal courts. This branch is responsible for interpreting the law.” One of the key features of the separation of powers in the United States is the system of checks and balances. This means that each branch of government can limit the power of the other branches. For example, the President can veto laws passed by Congress, but Congress can override the President's veto with a two-thirds majority in both houses. Similarly, the Supreme Court can declare laws unconstitutional if they violate the Constitution (Michaels, 2015).

In the United Kingdom, the separation of powers is not as clear-cut as it is in the United States. Instead of having a written constitution, the UK has an unwritten constitution, which is based on a combination of statutes, common law, and conventions. The separation of powers in the UK is therefore based on convention rather than law. The judiciary in the UK is independent of the other two branches of government. The highest court in the UK is the Supreme Court, which is responsible for interpreting the law. However, unlike in the United States, the Supreme Court does not have the power to declare laws unconstitutional (Mollers 2013).

“The separation of powers in the United States is based on a written constitution, which provides clear guidelines for the roles and responsibilities of each branch of government.” The system of checks and balances ensures that no single branch has too much power. In contrast, the separation of powers in the UK is based on convention rather than law (Michaels, 2015). While the UK Parliament is responsible for making laws, the head of state also plays a role in the process. Another key difference between the two systems is the role of the judiciary. In the United States, the Supreme Court has the power to declare laws unconstitutional. This means that the judiciary plays a major role in ensuring that the other two branches of government do not overstep their bounds. In contrast, the judiciary in the UK is not as powerful. While the Supreme Court is responsible for interpreting the law, “it does not have the power to strike down laws that are considered unconstitutional” (Barnes, 2007).

Comparative Analysis of the Concept of SOP Between China and USA

China's separation of powers is different from that of the USA. China practices a constitutional system of governance known as "Socialist Democracy." Under this system, the Communist Party of China (CPC) is the sole ruling party and exercises political power through various organs, including the National People's Congress (NPC), the State Council, and the judiciary. There is no clear separation of powers between these organs, and they function under the leadership of the CPC. In the USA, the Congress is the primary lawmaking body, and its powers are specifically enumerated in the Constitution. “Congress has the authority to pass laws, declare war, and regulate commerce.” In China, the NPC is the highest organ of state power, and it has the authority to enact and amend laws, elect and remove public officials, and supervise the

work of the government. However, the NPC's role is limited mainly to endorsing policies that have been predetermined by the CPC (Michaels, 2015).

The judiciary is another area where the separation of powers in China and the USA differs. In the USA, the Supreme Court is an independent body responsible for interpreting the Constitution and ensuring that the law is applied fairly. The judges are appointed by the President and confirmed by the Senate. They have lifetime tenure and can only be removed through impeachment. In China, the judiciary is subject to the CPC's leadership and decisions. The Supreme People's Court is the highest court in the land, but its decisions are often influenced by the CPC's policies and interests. There are also some similarities between the separation of powers in China and the USA. Both countries have a bicameral legislative branch, with the USA's Congress consisting of the Senate and the House of Representatives, and China's NPC comprising the National People's Congress and the Chinese People's Political Consultative Conference. Both countries' leaders are chosen through a combination of democratic and non-democratic processes. In the USA, the President is elected through an Electoral College system, while in China, the CPC selects the country's leaders through a series of internal party processes (Goziev, 2021).

Comparative Analysis of the Concept of SOP Between India and France

In India, the judiciary is an independent body that interprets the law and ensures that the government functions within the limits set by the Constitution. The Supreme Court is the highest court in the country, and its decisions are binding on all other courts. There are also high courts in each state, which have jurisdiction over lower courts within their respective states. France has a similar judicial system, where the judiciary is an independent body that upholds the rule of law. The highest court in France is the Court of Cassation, and its decisions are also binding on all other courts. Additionally, France has a system of administrative tribunals that handle disputes between citizens and the government (Driesen, 2022).

The Indian Parliament consists of two houses, the Lok Sabha (lower house) and the Rajya Sabha (upper house). The Lok Sabha has 545 members, while the Rajya Sabha has 245 members. The lower house is elected directly by the people, while members of the upper house are elected by the state legislatures. The parliament's primary function is to make laws and approve budgets. In France, the parliament consists of the National Assembly and the Senate. The National Assembly has 577 members, while the Senate has 348 members. Like India, the lower house is directly elected by the people, while the upper house is indirectly elected by local and regional councils. The parliament's primary function is also to make laws and approve budgets. India has a federal system of government with high courts in each state while France has a centralized judicial system with a single highest court. France has an administrative tribunal system that handles disputes between citizens and the government, which India does not have (Goziev, 2021).

CONCLUSION

The main purpose of conducting this research is to unleash the concept of dependence, independence and interdependence of any institution of the state on the other branches keeping in

view the doctrine of Separation of Powers. Every country has its own way of implementing this doctrine. The doctrine of separation of powers is still incomplete in many states including Pakistan and there is a dire need to redefine this doctrine. The focus of the institutions should be towards effective functioning of the state rather than trying to make themselves superior than the other institutions. In Pakistan, where establishment is gradually becoming the forth pillar of the state by continuously interfering in the political practices there is a need to put a curb on such activities. Like US, the institutions in Pakistan must be given the power to fight the unconstitutional encroachments of other institutions, in addition to having the power to keep checks on the functioning of such institutions. The high intensity overlapping among the institutions in Pakistan must be decreased and US model of the functioning of institutions should be adopted. The author hopes that this research project shall contribute to the further development of the Doctrine of Separation of Powers.

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