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Session 31: An Examination and Criticism of the Theory of Separation of Powers

Historical trend leading to the theory of separation of powers

The government has acquired the image of a pyramid since the beginning. Aristotle portrayed government as having three 'sides'. One side of government was allotted to the elite group of society. This section which is presently called "legislative power" was composed of those who used to ratify necessary ordinances for the political system by using their intellect. The other 'sides' were equivalents of executive and judicial powers called :

- (1) the governors and administrators of society and
- (2) those who rendered justice.

In the past, Western political philosophers had also subscribed to the triple dimensions of government, and finally, Montesquieu identified the three branches of government, viz. legislative, judiciary and executive. For this purpose, he wrote the book *The Spirit of the Laws*¹ (1748; trans. 1750) in which he elaborately discussed the structure and framework of each of these powers. His intellectual effort and new ideas popularized the theory of separation of power so much so that some have identified him as the founder of the theory.

Nowadays, the constitutions of most countries, including ours, are codified based on the theory of separation of powers, considering the independence of three powers from one another as one of the principles of democracy. Internationally, a country is considered democratic if its legislative, judicial and executive powers are independent and no single power dominates the other two.

Reasons behind the separation of powers

1. The functions and responsibilities of government are complex and multiple and their performance requires awareness, knowledge, experience, and expertise which is beyond the capability of one person, and necessitates division of labor and separation of powers. As such, all the functions performed by the government are classified into three. Of course, most of them belong to the executive branch. For example, taking command of war and defense affairs, attending to deprived members of society, administering training, education, health and medical affairs pertain to executive power. In fact, judiciary engages only in rendering justice and the legislature in lawmaking. Attending to the needs of society are among the responsibilities of the executive.

In view of the extensiveness and enormity of the executive branch, it can be said that placed alongside legislative and judicial powers, executive power is one of the branches of government. However, in the pyramid of power it definitely has more 'sides' than one. At least, in the division of power in which one 'side' of the pyramid is allotted to every power, the scope and extent of executive power is far greater.

The issue to be questioned is this: Can the diversity of responsibilities of government be a sufficient justification for the division of powers and their independence from one another? The answer is that the diversity of responsibilities can only justify the separation and independence of powers. It can never be regarded as the sole reason for the separation of powers. When we examine executive power, we observe different responsibilities which are not related to one another such as war, defense, and health concerns. Yet, they are all within the scope of responsibility of the executive power. If diversity of responsibilities and functions causes the separation of powers, then we ought to have more than ten powers, each assuming a distinct set of responsibilities.

2. The main reason and justification for the separation of powers which prompted Montesquieu to introduce the theory of separation of powers is that man naturally or inherently tends to dominate and oppress others. If all three powers remain under the control of a person or a group, the ground for despotism and abuse of power will be much greater because a single person or group engages in legislation, adjudication and implementation of laws.

The inclination to enact laws, implement them, and adjudicate for personal benefits is greater. In view of this tendency, Montesquieu believed that in order to mitigate this power, combat despotism and abuse of power, the three powers must be separated from one another.

We realized that if the powers are separated from each other and become independent, the ground for abuse of executive power is restricted, because once the judiciary is totally autonomous, all are equal before law, none is immune from punishments, and all are obliged to respond to summons from the judiciary. The judiciary has the opportunity to summon to a court of law even the highest ranking executive officials of the country, and convict and penalize them if they are proven to have violated laws.

Similarly, if the legislative power violates the constitution and Islamic laws in some cases, the judicial power will have the chance to investigate it. In the same way, if the legislature is independent, it will not be influenced by any pressure exerted by the judiciary or executive. During the time of ratifying bills, members of the parliament can think independently and not be dictated by other powers.

The impossibility of totally separating and delineating the powers

Political philosophy theorists opine that the realization of real democracy depends on the independence and separation of powers both in theory and practice. A political system may possibly be established on the basis of separation of powers and pretend that the three branches of government are totally independent and not influenced by the others, but in practice one power, for certain reasons, may interfere in the domain of other powers and attempt to dominate and control them.

If we examine the political systems established under the name of democracy in the world, we will find that it is rare to find a government in which the three powers are totally independent, or the judiciary and legislature are not somehow influenced by the executive. Once the budget and facilities are at the disposal of the executive, and elections are conducted and supervised by it, chances that those who are in the executive will gain the upper hand over their rivals in multiparty elections. Maintaining power after the elections, the other branches of government will also come under their control.

For this reason, we see executive power and its high officials openly or secretly interfere in other branches of government and exert pressure on them. This is especially true in countries with a parliamentary form of government, where the high-ranking officials of executive power are also elected by parliament from among the deputies or MPs. That is, the MPs are directly elected by the people and then through a majority vote the executive officials and ministers are elected from among the MPs.

In presidential systems, in which people directly elect the president, executive power is totally in the hands of the president. The executive also interferes and influences the legislature and judiciary. This is especially true in many countries where the constitution has granted the president the power to veto and nullify certain ratified bills of the congress and cabinet. This means that the legislature does not impose its views on the executive and control it. The members of parliament who have the legislative right sit together and ratify a bill through a majority vote after holding discussions and deliberations, but since the constitution itself grants the president this veto power, a ratified bill of congress can be rendered null and void.

I do not know any country whose three branches of government are totally independent and not under the influence of each other, and in which one branch does not somehow interfere in the affairs of other branches. As such, the separation of powers stipulated in the constitution is only on paper. In actual practice, there is no such thing as separation of powers or their independence from one another. The

executive actually overshadows the other two.

In view of this interference among powers, it is worth reflecting on the real possibility of delineation of functions and scope of responsibility of each of the three powers; the separation of essentially legislative issues from the executive power, and reciprocally, the separation of essentially executive issues from the legislative domain. We can see in our country as well as others that some functions of legislative nature have been entrusted to the government, i.e. the executive.

For example, within the framework of the constitution, the cabinet passes a bill and implements it as a law. Of course, the said bill also requires the approval and signature of the head of the legislature but sometimes just informing the parliament is sufficient. In some forms of government, there is no need of even that. The mere fact that executive orders and bylaws are ratified and issued by cabinet legally makes them binding and subject for execution. But even in cases where the approval and signature of the speaker is considered a requisite, that approval or signature is essentially ceremonial. In practice, whatever the cabinet ratifies or issues will be approved by the speaker of the house. Assuming that the signature of the speaker is not ceremonial in essence, with his approval will it not be considered ratified by members of parliament?

Some issues and functions are legislative in nature but because they are urgent and need to be implemented immediately, they are included in the functions of the executive, and the constitution has granted authority to the executive to ratify them. Meanwhile, some functions are essentially executive in form but because of their vital role and importance, the constitution stipulates that their implementation depends on the endorsement and approval of the legislative. For example, signing of international treaties and pacts on military and economic issues and granting of rights to foreign companies to explore and exploit ground resources have executive underpinnings, but as stipulated by the constitution, they must be approved and ratified by the legislative body. Our point is that theoretically the total separation of functions of the legislative from the executive is an incorrect and illogical venture.

Furthermore, in various forms of government, apart from the parliament there are other parallel councils and assemblies which perform legislative functions. For example, in our country the Supreme Council of Cultural Revolution² passes bills which are treated as laws.

The nature of these laws requires that they be ratified by the deputies to the Islamic Consultative Assembly (Majlis), but because of the importance of cultural issues for our political system legislation of major cultural matters must be entrusted to those who have the required expertise in formulating cultural policies and resolutions. There are also other special institutions which are considered an integral part of the executive. Their officials give decisions as law enforcers and have no legislative functions. For instance, the Supreme National Security Council and Supreme Economic Council are composed of experts who, compared to others, are more talented with profounder insight in their relevant fields and meticulously study, examine and identify the key strategic issues and make important decisions for the country.

It should have become clear from our discussion that total or absolute separation of the three powers, especially the separation of responsibilities and functions of the executive from the legislative is theoretically onerous and practically unrealistic. In most countries, the executive openly or secretly interferes in functions of the legislature and judiciary. Therefore, in order to limit and control this interference and meddling, there is a need for a sort of contract and agreement.

Need for an institution that coordinates and supervises the three powers

Even if absolute separation of the three powers is really possible and we can have an autonomous legislature, executive and judiciary, in terms of policymaking and administering the country we will face a serious problem splitting up the political system. It would seem as if there are three governments ruling over a given country, each of which administers a part of national affairs and whose jurisdiction has nothing to do with that of the other two.

In a nutshell, the necessity of maintaining the cohesion of its political system, a country requires the existence of an axis in the government which maintains the unity and solidarity of the system, cooperation between the three powers and supervises the performance of each power.

There is a need, therefore, for a supreme coordinating institution which can solve differences, frictions and clashes among the powers, and at the same time, be the axis of unity in society; for, a society ruled by three autonomous powers may not be treated as a unified society and it may willy-nilly lead to dispersion and disunity.

In a bid to solve the abovementioned problem we shall deal with the approaches represented by Islam.

Wilayah al-faqih as the unifying axis of society and the political system

In the Islamic system the best way of solving the abovementioned problems is to make sure that an infallible person occupies the highest position in the political hierarchy. Naturally, once such a person occupies the highest government post, he will serve as the pivot of unity and the coordinator of the different powers and solve any friction, differences and discord among the powers. Moreover, being immune from any form of egoism, profit-seeking, and partisanship, he will never be under the influence of ungodly motives and intentions. (Of course, as we said earlier, the ideal form of Islamic government will only be realized during the time of an infallible Imam.

In the second and lower form of Islamic government, the person who occupies the highest government post is the most similar to the infallible Imams (‘a). Apart from his possession of the required qualifications, he has the highest level of piety and sense of justice after the Infallibles (‘a). That person

who is to be recognized as the *wali al-faqih* is the pivot of unity of society and government, the coordinator of the three powers, and the observer of the performance of public servants. He is the overall guide of government and the chief policymaker.

In order for power-holders not to abuse their authority, Montesquieu and others advanced the theory of the separation of powers which is universally accepted and effective to some extent. But it does not solve the main problem. If government officials in the three branches do not have true piety and moral integrity, corruption in society and government will also mutate and permeate the three branches of government. In this case, if we observe that the corruption in the executive branch has decreased, it is because the said branch has been limited, constituting only one of the three powers. But we should not think that corruption in the government has decreased, because it has permeated the judiciary as well as the legislature which is usually under the sway of the executive.

Therefore, the only way to prevent corruption and one power's interference and meddling in other powers' affairs is that we should lay more emphasis on piety and moral virtue. Every administrator or official who shoulders a particular set of responsibilities must have a certain degree of piety commensurate to the importance and level of his position.

Naturally, the person who occupies the highest government post is supposed to be the most pious of people, officials and administrators. Similarly, he must be preeminent in knowledge of laws and management. Thus, if there are shortcomings and deficiencies in the three powers, through the leader's lofty efforts and blessings, affairs will be set right and problems will gradually be solved. As an example, throughout the twenty years³ of existence of the Islamic government in our country, we have witnessed and do witness the vital, pivotal and enlightening role of the Supreme Leader.

¹. Charles de Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1988). An electronic text of the book is available online at

<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/montesquieu/spiritofl...> [1]. [Trans.]

². Imam Khomeini issued a decree on Khordad 23, 1359 AHS (June 13, 1980) on the formation of the Cultural Revolution Headquarters. On Adhar 19, 1363 AHS (December 10, 1984) he made a directive regarding the formation of the Supreme Council of the Cultural Revolution to replace the Cultural Revolution Headquarters. [Trans.]

³. It is almost three decades now. [Trans.]

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