Influence Of The Doctrine Of The Separation Of Powers On The Constitution

According to the principles of a political free nation, the power of the state should be limited. In this place, the doctrine of the separation of powers aims to divide this power into separate institutional bodies, each of which performs different functions. This happens because- according to the constitutional law- . The principles of the separation of powers derives from the political theories of B. Montesquieu, who was one of the first to form the view that power should not be concentrated in only one person, in order not to be abused. He, thus, described the government as having three branches. The legislature (which represents the law-making function), the judiciary (which concerns the settle of legal disputes which arise from the law) and the executive (which is the function of the government administrating provisions for the legislation).

However, the definition of the separation of powers can have several interpretations. On the one side, there is the ‘’pure separation of powers’’, where the institutions are constitutionally detached from each other and perform a specific act. This means that, each member of the organs should not be part of any other organ/institution. For example, courts are prohibited from issuing legislation or performing legislative functions, as it is believed that the parliament makes the laws and the judiciary interprets them. For this reason, the state bodies should be isolated from each other -as to their constitutional functions- and not be confused into each other’s duties.

On the other side, a ‘’less than pure separation of powers’’, argues that government institutions should be linked to each other in a way that they can check and balance each other’s functions. For example, the legislative power is checked and balanced by the judiciary. This means that the mechanism of government requires and expects from state institutions to work together. By this way, it is ensured that the state power will never be abused.

The doctrine of the separation of powers is central to a democratic constitution. The rational behind this principle is to provide an ‘efficient’ government, where the power is not concentrated in only one body and there is a system of checks and balances for all the state operations. As for the independence of the judiciary, there is also a limit on its constitutional role.

In order to avoid or prevent violation of the doctrine, the constitution provided some practical considerations, such as delegated legislation. Thus, any try for breach of the doctrine principles is undermined by constitutional conventions, which are settled to keep the balance in the power of the states and do not let them prevail over each other. For example, the Monarch, even though she is contained in all institutions, she is also governed by other conventions e.g. the Royal Assent.

Historically, the sovereignty has always been the foundational stone of constitution. This means that, as to the judicial review, the courts have no right to challenge any act of Parliament. Therefore, they accept and recognise the role of the parliament in the constitution as the parliament is the one to institute primary legislation. Consequently, court’s only role is the

propriate interpretation of those acts and not the controversy of them. However, in countries as Ireland and the United States, the supreme court can reject legislation passed by parliament (as part of the ‘’checks and balances’’ operation.)

Accordingly, parliament recognises and respects the role of the judiciary through the use of the ‘’sub judice’’. This principle forbids the member of the parliament to discuss or comment any case before the procedure of the court takes place. It also aims to protect the role of the judicial, by making sure that the parliament will not intrude into the constitutional role of the court. Also, MP’s, avoid to take part in the criticism of individual judges, in order not to violate their judicial independence.

Also, the courts -in respect to the law- will abstain from internal proceedings of parliament.

As the judiciary and the legislature are constitutionally separated, parliament cannot be involved in the judicial appointments, although it has the right to deduct the senior judiciary. Contrary, in the US, the supreme court needs to undergo a congressional hearing and then wait for approval before the completion of such action. Also, under the .

Under the , the law lords were transferred into another-separate supreme court because, according to this act, it was prohibited for the supreme court justices to sit in the House of lords. The CRA, was intended to bring a more strict line to the separation of powers of constitution and according to s.3 of the act, the ministers are required to support the judicial independence and are . E.g. the lord chancellor remains a political executive member, but can no longer sit as a judge and is no longer head of the judiciary.

Lastly, as to the interpretation of the legislation, judges have reiterated their limited constitutional role in respect of interpreting statutory provisions e.g.> which illustrates how the court of appeal considers that a statutory provision must be interpreted.

One of the main issues of the separation of powers in constitution is that it is less definite compared to other countries. This happens because of the lack of a codified constitution that includes the fundamental principles of the doctrine. It can be said, that the only sources expressing the separation of powers are the Montesquieu writing and subsequently the US constitution. Therefore, there are several ways in which the constitution does not follow the separation of powers.

A basic principle that derives from the constitutional conventions is that , which lead to an overlap between the executive and the legislative functions, as the union of the executive and the legislative powers is considered by Bagehot as the . This overlap permits the ministers to be responsible directly to parliament and thus the executive can easily dominate the legislature securing office through the current electoral system which ensures a dynamic government. Of course, the feature of a parliamentary executive is not restricted to the UK. Scotland and Ireland also have a parliamentary executive to be constitutionally responsible to. Contrary, the US president is not part of the legislature, as the government sits separately from the congress.

Another way is through delegated legislation. During this process, a law-making power is entrusted to a member of the executive. More specifically, parliament passes an act which provides the minister with the authority to make secondary legislation.

The rationale behind delegated legislation is . It covers in detail the legislation of broad principles and also allows the law to be flexible e.g. update of levels of fines. However, there are both political and legal controls over the application of secondary legislation. The political control covers, for example the Brexit case, where ministers are permitted to make amendments to ensure that the UK law will work properly after Brexit. As to the legal control of delegated legislation, the legislation passed by the executive needs to be within the legal powers provided by the act.

Subsequently, the monarch is constitutionally included in all institutional states. In the legislative function, her royal assent is required, in order for a bill to become an act of parliament. She is part of the executive, as she is the head od the state (her Majesty's government) and head of the armed forces. Lastly, as to the judicial function, she is ''the source and font of all justice'', the judicial appointments are made in the name of the crown and she only acts based on ministerial advice.

Although, each of the houses of parliament can act as the high court and perform judicial functions in order to discipline or punish their members and as parliament is the legislature, any other court is not allowed to question these matters.

Accordingly, the privy council is part of the executive and carries both legislative and judicial functions. It can advices the monarch on her responsibilities or take the role of a court of appeal.

Furthermore, the law officers, which are parts of the legislature, have several duties and responsibilities, such as provide legal advise to the crown and government, responsible for the supervision of the prosecution agencies and work as ''the guardian of the public interest'', where he acts separated from the government, performing 'quasi-judicial' duties, really close to the judge's duties but not a judge at all.

Lastly, judges perform a 'de facto' judicial function in order to develop and interpret the principles of the common law e.g. R v Secretary of state [2002] case, which results in further amendments of this function.

Concluding, the doctrine of the separation of powers has formed and influenced constitution in several ways. The coherent relationship of the three state institutions is essential in order for the constitution and the rule of law to be maintained over time.