

The Separation of Powers

“When the same person or the same public office simultaneously holds both the legislative power and the executive power, there is no freedom.

There is also no freedom if the power to judge is not separated from the legislative and executive power.”

Montesquieu, in *“De l’Esprit des Lois”* (1748)

Introduction

The Constitution of the United Kingdom of the Netherlands of 1815 proclaimed that law is made “in the name and on behalf of the Sovereign Prince”. The French Charter of 1830 also proclaimed that “all justice emanates from the King”. The members of the commission assigned with drawing up a draft Constitution for the newly-founded Belgian State adopted these two Constitutions to a large extent.

The Belgian Constitution, enacted on 7 February 1831 by the National Congress, nevertheless exhibited many differences giving it its own uniqueness. In addition to a long list of freedoms and rights guaranteed to citizens, it also confirmed the principle of the separation of powers. However, the Constitution doesn’t contain a specific provision concerning the separation of powers.

This principle is derived from the Constitution which makes a distinction between three bodies assigned with different functions (legislative, executive, judicial)⁽¹⁾.

Everyone knows that this principle was described by Montesquieu (1689 - 1755) in his famous chapter, “De L’Esprit des Lois” on the English Constitution. What Montesquieu perceptively confirmed was that these three powers being held by one single body was a danger to freedom. These powers have to be divided into three elements in order to avoid totalitarianism. The thinking of Montesquieu had considerable influence on the French revolutionaries. This principle was also adopted by article 16 of the 1789 Declaration of the Rights of Man and the Citizen. The ideal tripartite model outlined by Montesquieu would come to be found in many constitutional monarchies that came into being in Europe, as well as in the federal Constitution of the United States of America.

The separation of powers today

The presidential system of the United States has remained the most faithful to the Montesquieu model, in contrast to other indirect presidential or parliamentary systems, which either involve the subordination of parliament to the government, or a confusion of roles which makes legislation incoherent and government activity rather ineffective.

Moreover, the principle of the separation of powers no longer involves the exercise of power exclusively by three separate and distinct categories of bodies. Strictly speaking, it is more of a functional separation of powers.

It is thus better to speak of the “cooperation” or “interpenetration” of powers rather than the separation of powers. The House of Representatives thus exercises certain judicial functions (indicting ministers, lifting parliamentary immunity, parliamentary enquiries) and acts in the nomination or presentation of candidates for certain functions (judges of Council of State and Conciliation Court).

It should not be lost from view, either, that Parliament is not the exclusive holder of legislative power. The executive is also able to take legislative initiatives in the same way as Parliament.

Other phenomena, such as the federalisation of Belgium which involves the exercise of legislative and executive power by the Communities and Regions, as well as the European integration process, also limit the scope of this principle.

1 Constitution art. 33: “All powers emanate from the Nation. They are exercised in a way established by the Constitution.”
Constitution art. 36: “The federal legislative power is collectively exercised by the King, the House of Representatives and the Senate.”
Constitution art. 37: “The federal executive power belongs to the King, as governed by the Constitution.”
Constitution art. 88: “The King can do no wrong; his ministers are responsible.”
Constitution art. 40: “Judicial power is exercised by the courts and tribunals. The rulings and judgements are enforced in the name of the King.”

Conclusion

The mechanisms on which the principle of the separation of powers is based have undergone many changes in the course of time.

It nevertheless remains that this principle constitutes one of the foundations of our institutional system and is the best defence against totalitarianism.

It may, however, be asked whether the existence of other powers (media, large multinational companies), alongside the powers recognised by the Constitution, will not be one of the major challenges of the 21st century.