

RMM LAW COLLEGE SAHARSA

ADMINISTRATIVE LAW

IIIrd Part

Paper -VII

TOPIC- Separation of power

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Date:- 07/07/2020

Montesquieu's Theory

According to this theory, powers are of three kinds: Legislative, executive and judicial and that each of these powers should be vested in a separate and distinct organ, for if all these powers, or any two of them, are united in the same organ or individual, there can be no liberty. If, for instance, legislative and executive powers unite, there is apprehension that the organ concerned may enact tyrannical laws and execute them in a tyrannical manner. Again, there can be no liberty if the judicial power is not separated from the legislative and the executive. Where it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.[ix]

Writing in 1748, Montesquieu said:

“When the legislative and the executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should exact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and the liberty of the subject would be exposed to arbitrary control; for the judge would be then a legislator. Where it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, where the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.”[\[x\]](#)

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

1. The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in Parliament.
2. One organ of the government should not interfere with any other organ of the government.
3. One organ of the government should not exercise the functions assigned to any other organ.[\[xi\]](#)

Now the question in the subject is whether this doctrine finds a place in England? In England, the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that the same person should not form part of more than one organ of the Government.

In England House of Commons control the executive. So far as the judiciary is concerned, in theory, House of Lords is the highest Court of the country but in practice, judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that the doctrine of separation of powers is not an essential feature of the British Constitution.[\[xii\]](#)

Principle of Checks and Balances

The doctrine of separations of powers may be traced back to an earlier theory known as the theory of mixed government from which it has been evolved. That theory is of great antiquity and was adumbrated in the writings of Polybius, a great historian who was captured by the Romans in 167 BC and kept in Rome as a Political hostage for 17 years in his history of Rome.

Polybius explained the reasons for the exceptional stability of the Roman Government which enabled Rome to establish a worldwide empire. He advanced the theory that the powers of Rome stemmed from her mixed government. Unmixed systems of government that is the three

primary forms of government namely, Monarchy, Aristocracy, and Democracy – were considered by Polybius as inherently unstable and liable to rapid degeneration.

The Roman constitutions counteracted that instability and tendency to degeneration by a happy mixture of principles drawn from all the three primary forms of government. The consuls, the Senate and the popular Assemblies exemplified the monarchical, the aristocratic and the democratic principles respectively.

The powers of Government were distributed between them in such a way that each checked and was checked by the others so that an equipoise or equilibrium was achieved which imparted a remarkable stability to the constitutional structure. It is from the work of Polybius that political theorist in the 17th Century evolved that theory of separation of powers and the closely related theory of Checks and Balances. [\[xiii\]](#)

Effects

The doctrine of separation of powers as propounded by Montesquieu had a tremendous impact on the development of administrative law and functioning of Governments. It was appreciated by English and American jurists and accepted by politicians. In his book ‘Commentaries on the Laws of England’, published in 1765, Blackstone observed that if legislative, executive and judicial functions were given to one man, there was an end of personal liberty. Madison also proclaimed: “The accumulation of all powers, legislative and executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny.” The Constituent Assembly of France declared in 1789 that there would be nothing like a Constitution in the country where the doctrine of separation of powers was not accepted. [\[xiv\]](#)

Importance

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having will and whims of the official. Also, another most important feature of the above-said doctrine is that there should be the independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly.

The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power does play a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is the independence of the judiciary.

Also, the importance of the above-said doctrine can be traced back to as early as 1789 where The constituent Assembly Of France in 1789 was of the view that “there would be nothing like a Constitution in the country where the doctrine of separation of power is not accepted”. Also in 1787, the American constitution inserted the provision pertaining to the Doctrine of separation of power at the time of the drafting of the constitution in 1787.[xv]