RMM LAW COLLEGE SAHARSA

ADMINISTRATIVE LAW

IIIrd Part

Paper -VII

TOPIC- Separation of power

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"Power corrupts and absolute Power tends to corrupt absolutely."

The separation of powers is based on the principle of *trias politica*. The Doctrine of Separation of Power is the forerunner to all the constitutions of the world, which came into existence since the days of the "Magna Carta". Though Montesquieu was under the erroneous impression that the foundations of the British constitution lay in the principle of Separation of Power, it found its genesis in the American Constitution. Montesquieu had a feeling that it would be a panacea to good governance but it had its own drawbacks. A complete Separation of power without adequate checks and balances would have nullified any constitution. It was only with this in mind the founding fathers of various constitutions have accepted this theory with modifications to make it relevant to the changing times.[i]

The Doctrine of "Separation of Powers", a vintage product of scientific political philosophy is closely connected with the concept of "judicial activism". "Separation of Powers" is embedded in the Indian Constitutional set up as one of its basic features. In India, the fountain-head of power is the Constitution. The sovereign power has been distributed among the three-wings:

- Legislature
- Executive
- Judiciary

The doctrine of separation of powers envisages a tripartite system. Powers are delegated by the Constitution to the three organs and delineating the jurisdiction of each.[ii]

The position in India is that the doctrine of separation of powers has not been accorded constitutional status. In the Constituent Assembly, there was a proposal to incorporate this doctrine in the Constitution but it was knowingly not accepted and as such dropped. Apart from the directive principles laid down in **Article 50** which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.[iii]

Historical Background

The tripartite model of governance has its origin in Ancient Greece and Rome. Though the doctrine is traceable to Aristotle the writings of Locke and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded.

The doctrine may be traced to ancient and medieval theories of mixed government, which argued that the processes of government should involve the different elements in society such as monarchic, aristocratic, and democratic interests. The first modern formulation of the doctrine was that of the French writer Montesquieu in *De l'esprit des lois* (1748), although the English philosopher John Locke had earlier argued that legislative power should be divided between king and Parliament.[iv]

Locke distinguished between what he called:

1. Discontinuous legislative power
2. Continuous executive power
3. Federative power.

He included within 'discontinuous legislative power' the general rule-making power called into action from time to time and not continuously. 'Continuous executive power' included all those powers, which we now call executive and judicial. By 'federative power' he meant the power of conducting foreign affairs. Montesquieu's division of power included a general legislative power and two kinds of executive powers; an executive power in the nature of Locke's 'federative power' and a 'civil law' executive power including executive and judicial power. [v]

It was Montesquieu who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois (The Spirit of the laws) published in the year 1748.[vi] Locke and

Montesquieu derived the contents of this doctrine from the developments in the British constitutional history of the 18th Century. In England after a long war between the Parliament and the King, they saw the triumph of Parliament in 1688, which gave Parliament legislative supremacy culminating in the passage of Bill of Rights. This led ultimately to a recognition by the King of legislative and tax powers of the Parliament and the judicial powers of the courts. At that time, the King exercised executive powers, Parliament exercised legislative powers and the courts exercised judicial powers, though later on England did not stick to this structural classification of functions and changed to the parliamentary form of government.[vii]

After the end of the war of independence in America by 1787 the founding fathers of the American constitution drafted the constitution of America and in that itself they inserted the Doctrine of separation of power and by this America became the first nation to implement the Doctrine of separation of power throughout the world.

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*". In France, where the doctrine was preached with great force by Montesquieu, it was held by the more moderate parties in the French Revolution.[viii]

However, the Jacobins, Napoleon I and Napoleon III discarded the above theory for they believed in the concentration of power. But it again found its place in the French Constitution of 1871.

Later Rousseau also supported the said theory propounded by Montesquieu. England follows the parliamentary form of government where the crown is only a titular head. The mere existence of the cabinet system negates the doctrine of separation of power in England as the executive represented by the cabinet remains in power at the sweet will of the parliament.

In India, under the Indian constitution, there is an express provision under **Article 50** of the **Constitution** which clearly states that the state should take necessary steps to separate the judiciary from the executive i.e. independence of the judiciary should be maintained.