SEPARATION OF POWERS: A COMPARATIVE ANALYSIS

INTRODUCTION

The separation of power, although by no means universal, is widely regarded as one of the pillars of a liberal constitutional democracy. Article 16 of the French declaration of rights of man 1789, states that a society where rights are not secured or the separation of powers established has no constitution**.**

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial and Locks categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power. "Continuous executive power" implies the executive and the judicial power, "discontinuous legislative power" implies the rule making power, and "federative power" signifies the power regulating the foreign affairs.[1] The French Jurist Montesquieu in his book L. Esprit Des Lois (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That's why he is known as modern exponent of this theory. Montesquieu [2]said;

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehension may arise, least the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if judicial power be not separated from the legislative and the executive power. Where it joined with 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. Miserable indeed would be the case, where the same man or the same body, whether of the nobles or of the people, to exercise those three powers,

[1] I.P. Massey: Administrative Law, Edn. 1970, p. 35.
[2] The Sprit of the laws (trans.nugent) `151-152

that of enacting laws, that of executing the public resolutions and that of judging the crimes or difference of individuals."[2]

In 18th century, there was complete and full-fledged monarchy in France. Louis XIV was wellknown for his absolute and autocratic powers. The king and his administrators were acting arbitrarily. The subjects had no right or liberty at all. On the other hand, Montesquieu was very much impressed by the liberal thoughts of Locke and he also based his doctrine on analysis of the British constitution during the first part of the 18th century, as he understood it. According to him, the secret of an Englishman's liberty was the separation and the functional independence of the three departments of the government from one another.in federalist 47, James Madison has explained the above statement and had stated thus; the accumulation of all powers-legislative, executive and judiciary-in the same hands, may justly be pronounced as the very definition of tyranny. montisque who is generally credited with this claim does not mean that ought to have no partial agency in, or no control over, the act of one department is exercised by the same hands which possess the whole power of another department, the fundamental Principe of free constitution are subverted.[3]

It is generally accepted that there are three main categories of governmental function, viz., the legislative, the executive and the judicial. Likewise there are three main organs of the government in a state i.e., the legislature, the executive and the judiciary. According to the theory of serration of powers, these three powers and functions of the government must, in a free democracy, always be kept separated to be exercised by the three different organs of the government. Thus the legislature cannot exercise judicial or administrative function; the executive cannot exercise judicial function nor can the judiciary exercise legislative or administrative function of the government.

According to Wade and Phillips[5]separation of powers may mean three different things;

1. That the same person should not form part of more than one of the three organs of government, e.g. the minster should not sit in parliament

2. That one organ of the government should not control or interfere with the exercise of its functions by another organ ,e.g. the judiciary should not independent of the executive or that minsters should not be responsible to parliament

---

[2] C.K.Takwani; Administrative law,Edn.2014,p.33
4. ibid at 34.
[3] Nuzhat parveen khan; comparative constitutional law,edn2015 p.p260
[5] AIR 1973 SC 1461

3. That one organ of the government should not exercise the functions of another, e.g., the minster should not have legislative power.

In the case of kesavananda bharati case[4] C.J Sikri observed that "separation of powers between the legislature, the executive and the judiciary" is the basic feature of Indian constitution which cannot be amended or altered. Shelat and Grover JJ, also observed that the "Demarcation of power between the legislature, the executive and the judiciary" is the basic feature of Indian constitution which cannot be amended.

The doctrine of separation of power as propounded by Montesquieu had tremendous impact on the functioning of government.it was appreciated by English and American jurists and accepted by politicans.in his book commentaries on the law 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, 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.[7]

[4] Supra note 3. p34