CHAPTER – 2
SEPARATION OF POWERS: HISTORICAL BACKGROUND

2.1 Introduction

The formation of India's federation has been a long process. Some kind of federation existed throughout her history in the form of sub-divisions. In order to hold the sub-divisions together, the kings in ancient India accepted the autonomy of provincial areas and interfered as little as possible, as long as the powers structure status quo was not seriously threatened. Care was taken to preserve local customs. Spiritual movements also took place to emphasize the oneness of India through her rivers, mountains, flora and fauna and traditions.

India's history is replete with brief periods of political unity and stability followed by spells of dissension chaos and fragmentation. The strongest kingdoms, from time to time, became empires, extending their's way, more or less, to the natural boundaries of the subcontinent, bringing under their suzerainty the local principalities and kingdoms. But, undue centralizations after proved counterproductive and triggered a chain reaction of divisive forces became strong and led to disintegration, sometimes tempting foreign invaders to conquer the country.

The rule of the Maurya and Gupta periods and the Muslim rulers attempted to extend their frontiers to whole of India. But the central authority has also seen the necessity of granting considerable measure of freedom of action to its component principalities. During the Muslim period, the dominant trend, of course, was towards centralization. But they received only partial success in doing so. When the British came, they had rail, road and telegraph. They were able to integrate India politically and distractively. They achieved some success in integrating India also by a common system of English education, a sophisticated army, a uniform civil administration.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual with scholars on the subject to start with the model of the United States, the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of 'federation'. But numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few

will stand the test of federalism save perhaps Switzerland and Australia. Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain whether it is basically unitary or federal, although it may have subsidiaiy variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either unitary or a federal system. That the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar[53] has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments".

To anticipate the Author's conclusion, the constitutional system of India is basically federal, but, of course, with striking unitary features. [54] In order to come to this conclusion, we have to formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

First of all the Montegue - Chamsfood report (1918), envisaged a federal solution for the problem of political freedom for British India as a distant prospect, observing that the conditions for a federation did not exist because the provinces of India were not self-governing states. Which could surrender certain powers to a federal govt.[55]

The Simon commission report quoted this para and said that it remained equally true in 1929. The Simon Commission did not recommend a federal solution, through it envisaged it as a distant goal.[56]

Well known author H.M. Seervai: why Britishers adoped a federal solution under Govt. of India Act, 1935:

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53. Livingstone, Federation and Constitutional Change, 1986, pp. 6-7.

54. This view of the Author has been affirmed by the 9-judge Bench Supreme Court decision in S.R. Bommai v. Union of India, AIR 1994 SC 1918, pp. 6-7.

55. Motontogue Chamsford report (1981) para 120 p. 78

56. Gwyer and Appadorai; speeches and document on Indian constitution, vol. I, pp. 213-214.

"Why then British Parliament provide a federal constitution for India, disregard the views expressed in two reports? First, the British have never been weded to theories of the government, but they tried to establish political institution which would work. Second, the demand for substantial political advance in British India had become almost irresistible, and each political advance brought the full transfer of powers to Indian hands nearer speaking broadly, the provinces of British nearer. Speaking broadly, the provinces of British India were closely linked by a common communication, roads, railways, post and telegraph, telephones by common official language, which was also medium of instruction, by a common system of administration, some of the important executive offices in the provinces were manned by members of all India services; by a common economic policy affecting all the provinces of British India.

Further, the political struggle against British had produced a sense of national cohesion and the desire to be free from foreign rule and to form a united India had taken root. No doubt there were differences of a race, religion and language, but these differences would point to a federal solution as obviously the right one. Therefore to the leaders of the political struggle in British India, a federal solution offered the best chance of an early realization of their goal. Political freedom for whole of India. Thirdly, the British Crown had entered treaties and covenants with Indian rulers under which they acknowledged the crown's soverainty in return for the protection of the British powers against external aggression and internal disorder. These rulers welcomed a federal India, as part of the British Empire, because it offered them the best chance of retaining their autocratic powers which they protected by their tactics with the British Crown.

Besides, by accepting the federal solution the rulers hoped to slow down the agitation for democratization of their states which otherwise would flow irresistibly from British India. Finally, the British had vast interest in India, which they naturally wished to protect, and they saw in the succession of Indian states to a federal India, a conservative element, whose interests coincide with theirs and therefore offered the best prospect of protecting their vast interests in India. Thus the situation existed in which all the parties affected were interested in providing federal solution.[57]

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57. H.M. Seervai, Constitutional Law of India, p. 284-285.

For the above given reasons the Government of India Act, 1935 in its actual working adopted a federal solution for the future.

It was realized that a federal constitution could work satisfactorily in British India. Besides, the second world war and its aftermath and partition favoured a strong, as opposed to a loose federation. No doubt for a while the light of hope shown on the Indian political scene when a constituent assembly was elected according to cabinet mission place.

The Government of India Act, 1935 is nevertheless an important milestone in the history of constitutional devolution of powers particularly from two stand-points. Firstly, it constitutionally distributes powers between the center and provinces. Secondly, subject to certain safeguards, it introduced representative government at the provincial level responsible to the provincial legislature.[58]

But Government of India Act, 1935, never came into effect though it provided a federal solution for the future.

The conditions for a federal solution were more favourable from 1947 to 1949 then in 1935. The two major obstacles to an effective as opposed to loose federal constitution were removed by the creation of Pakistan and by liquidation of the Indian States to some extent.

By the Act, of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of Canada, viz., “by creating autonomous units and combining Government of them into a federation by one and the same Act,”. All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through ‘the Governor’s special responsibilities’ and his obligation to exercise his individual judgment and discretion in certain matters, and the powers of the Centre to give direction to the Provinces.[59]

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

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58. Introduction to Sarkaria Commission Report on Centre-State Relations (Para 1.2.17).

59. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it. the provisions relating to the Central Government and the Provinces were given effect to as stated earlier see under 'Federation and Provincial Autonomy', ante.

> *"Of course in thus converting a unitary State into a federation we should be taking a step for which there is no exact historical precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they. exercise has been in the main devolved upon them under a statutory rule-making powers by the Governor- General in Council. We are faced with the necessity of creating autonomous units and combining them into a federation by one and the same Act."*

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act, of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any compact or agreement between autonomous States. So far as the Provinces are concerned, the progress had been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous, within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935. The Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they

refused to join the federal system of 1935. They lacked the 'federal sentiment' (Dicey), that is, the desire to form a federal union with the rest of India. But, as already pointed out, the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the Independence of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B16 of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A'6). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.[60]

Ultimately, the federal solution was made effective by passing of the Indian Independence Act, 1947.

2.2 Historical Background

The doctrine of separation of powers is of ancient origin. The history of the origin of the doctrine is traceable to Aristotle.[61] In the 16th and 17th centuries, French philosopher John Bodin and British politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois (The Spiriti of the laws) published in the year 1748. The Separation of Power, is a model for the governance of democratic states. The model was first developed in ancient Greece and came into widespread use by the Roman Republic as part of the uncodified Constitution of the Roman Republic. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that no one branch has more powers than the other branches. The normal division of branches is into an executive, a legislature, and a judiciary.

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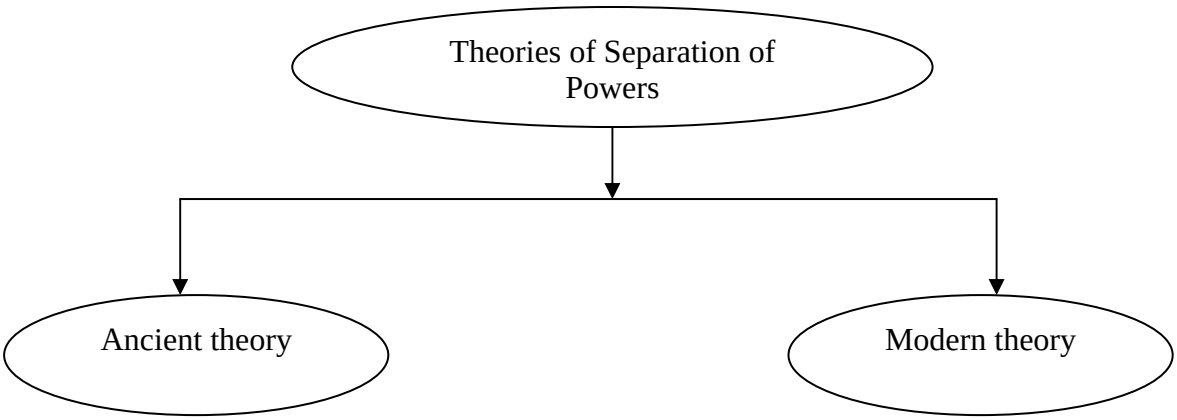
60. Vide Table III, Col. (A)

61 Vanderbilt, The Doctrine of separation of powers and its Present Day Significance, 38-45 (1953).

2.2.1 Theories of Separation of powers



The theory of separation of powers may be divided between two historical periods ancient and modern. The ancient theory can be traced back two ancient greece and philosophical writings of plato, Aristotle and Polybuis. These ancients philosophers and their writings have had a great influence on modern writers. The modern theory can be traced from the Glorious revolutions of 1688 in England and the writings of lock Montesquieu.

2.2.2 Ancient Theory: - Separation of Powers

There has been a historical development of the doctrine which can be traced back to ancient Greece to philosophers such as Plato (427-347 BC), Aristotle (384-322 BC) and later the Greek historian Polybius (205-123 BC). Aristotle was empirically inclined, making a study of 158 Constitutions of Greek city states before formulating his theories of government, while Plato's Republic is a treatise on political theory created by an original thinker's imagination (Fitzgerald 1080). Aristotle criticizes Plato's Laws as a system of government that is neither democracy nor oligarchy but an intermediate form usually called polity and the Constitution in the Laws has no element of monarchy but only elements of oligarchy and democracy with a inclination toward oligarchy in classical political thought, Aristotle recognised different functions of government, which included the deliberative, magisterial and judicial aspects of ruling. Aristotle's answer to the formation of, and competition between factions (such as rich and poor) was the 'mixed regime' or 'polity'. The ancient version of the modern separation of powers is seen in the ancient 'Mixed Constitution'.

The ancient theory of the 'Mixed Constitution' is a mix of and balance between three forms of constitution, according to the number of its ruling body. These

included: monarchy (rule by the one), aristocracy (rule by the few), and democracy (rule by the many). He said there was a cycle of these regimes. According to the Greek historian Polybius these three Constitutions each degenerate, over time, into their respective corrupt forms (tyranny, oligarchy, and mob-rule) by a gradual decline which he calls anacyclosis or "political revolution". Polybius credits the six categories (i.e. the original three forms of simple Constitution and their respective perversions) to "Plato and certain other philosophers". Plato (Laws 712c), however allows for only five of the six forms of constitution because he does not distinguish between democracy and mob-rule. Aristotle on the other hand, mentions the full six, claiming that each of the original three (sovereignty of the one, the few, and the many) splits into two sub-categories, based on whether the ruling authority's motives are selfish or unselfish: Deviations from the Constitutions mentioned are tyranny corresponding to kingship, oligarchy to aristocracy, and democracy to constitutional government [or polity]; for tyranny is monarchy ruling in the interest of the monarch, oligarchy government in the interest of the rich, democracy government in the interest of the poor, and none of these forms governs with regard to the profit of the community.

2.2.3 Modern Theory: - Separation of Powers

The modern reinterpretation of the separation of powers doctrine as purely a system of checks and balances resulted from demonstrable misconstructions of the literature on the subject, particularly the work of Locke (1690), Montesquieu (1748) and Madison (1788).This reinterpretation also enabled the separation of powers (SOP) doctrine's detractors to deny that it was ever a part of the English Constitution.

2.2.4 Montesquieu- The originator

"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 powers be not separated from the legislative and the executive. 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 powers, the judge might behave with violence and oppression.

There would be end of everything if the same man or the same body were to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.

According to Wade and Philips separation of powers may mean three different things :-

(i) *that the same persons should not form part of more than one of the three organs of government e.g. the Ministers should not sit in Parliament;*

(ii) *that one organ of the government should not control or interfere with the exercise of function by another organ, e.g. the judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and*

(iii) *that one organ of the government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.*

2.2.5 Effect of the Theory

The theory of separation of powers as propounded by Montesquieu had tremendous impact on the growth of administrative law and functioning of governments. It attracted English and America) jurists as well as politicians. Writing in 1765, Blackstone[62] had observed that if the legislative, the executive and the judicial functions were given to one man, there was an end of personal liberty. According to Madison: *"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."* The doctrine had influenced the makers of Constitution. Thus, the Constituent Assembly of France had announced in 1789 that there would be nothing like a Constitution in the country where the theory of separation of powers was not accepted. This doctrine in America is the base of the whole structure of the Constitution. In this way it exercised a decisive influence in the minds of framers of the Constitution of United States.

Montesquieu started from a rather gloomy view of human nature, in which he saw man as exhibiting a general tendency towards evil, a tendency that manifests itself in selfishness, pride, envy, and the seeking after powers. Man, though a reasoning animal, is led by his desires into immoderate acts. Of the English,

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62 *Commentaries on the Laws of England. 1765.*

Montesquieu wrote that *"A people like this, being always in ferment, are more easily conducted by their passions than by reason, which never produced any great effect in the mind of man."*[63] In the realm of politics this is of the greatest consequence: *"Constant experience shows us that every man invested with powers is apt to abuse it, and to carry his authority as far it will go."*[64] However, this tendency towards the abuse of powers can be moderated by the constitution of the government and by the laws, for, although by no means a starry-eyed Utopian, Montesquieu, like the Greeks, believed that the nature of the State's Constitution is of the greatest consequence. Thus Montesquieu commenced his work with a description of the three different types of government, their nature and their principles, for if he could establish these, then the laws would "flow thence as from their source."[65] Let us look at the way in which Montesquieu dealt with this problem of the control of powers.

He defined three types of government: republican, monarchical, and despotic. In the first the people is possessed of the supreme powers; a monarchy a single person governs by fixed and established laws, in a despotic government a single person directs everything by his own will and caprice.[66] Republican government can be subdivided into aristocracy and democracy, the former being a State in which the supreme powers is in the hands of a part of the people, not, as in a democracy, in the body of the people, in a despotic government there can be no cheek to the powers of the prince, no limitations to safeguard the individual - the idea of the separation of powers in any form is foreign to despotic governments. In an Aristocracy also, though it be a moderate government, the legislative and executive authority are in the same hands.[67] However, in a democracy, Montesquieu argued, the corruption of the government sets in when the people attempt to govern directly and try *"to debate for the senate, to execute for the magistrate, and to decide for the judges."*[68] Montesquieu implied, then, that some form of separation of powers is necessary to a democracy, but he did not develop this point. The relevance of this to modern states is in any case rather slight, as Montesquieu believed that democracy was only suitable to small

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62. The discussion of Montesquieu concept of human nature in W. Stark, Montesquieu: Pioneer of the Sociology of Knowledge, London, 1960, Ch. IV.
64. De I'Espnt des Loix, XIX, 27
65. Ibid., I, 3
66. 22 Ibid., II, 1.
67. 23 Ibid., U, 3
68. 24 Ibid., VIII, 2

societies.[69] The most extended treatment he gives of institutional checks to powers, therefore, is to be found in his discussion of monarchy and of the English Constitution. These two discussions, though obviously connected in spirit, seem to be drawn from quite different sources, and to depend upon different principles. Each system is praised for its virtues, but it is difficult to say that Montesquieu clearly favoured one above the other. Here we have the source of the confusions on this subject.

The different elements in Montesquieu's approach to the control of powers can be attributed to his two major sources of inspiration. On the one hand the influence of English writers, especially Locke and Bolingbroke, is clear.[70] From the time of the Civil War onwards the volume of translations of English works on politics, and of French commentaries on England, had grown, until in the early eighteenth century it reached large proportions. Dedieu points to the importance of the exiled Huguenot journalists, lauding the virtues of the Glorious Revolution, to the writings of anglophile Frenchmen, and to the work of historians who emphasized the role of the English Parliament as a balance to the powers of the Crown.[71] In particular Rapin - Thoyras, in his Histoire d'Angleterre in 1717, emphasized the importance of a balanced Constitution and mixed government. Voltaire in 1734 published a French edition of his English Letters, in which he wrote of the *"melange dans le government d'Angleterre, ce concert entre les Communes, les Lords et le Roy."* These, together with Montesquieu's travels in England, his acquaintance with Bolingbroke, and his knowledge of the writings in the Craftsman, the paper for which Bolingbroke wrote, are the sources of the main ideas to be found in his chapter on the English Constitution.

There are other sources, nearer at home, however, for Montesquieu's attitude towards monarchy. Here, as in his description of the English Constitution, Montesquieu was concerned with the control of arbitrary powers, but in a different way, and in a different context. As an Aristocrat, and President a mortier of the Parliament of Bordeaux, he could look back upon a long tradition of French resistance to the idea of despotism, not along the lines of the English developments, but in terms

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69. 25 Ibid., VIII, 16.

70. On Locke see Dedieu, op. cit, Ch. VI; on Bolingbroke see Robert Shackleton, "Montesquieu, Bolingbroke and the Separation of Powers," French Studies, Vol. Ill, 1949.

71. Dedieu, op. cit., p. 71 for a list of French historical works on England 1689-1748, and pp. 73-74 for a list of English political works translated into French during the same period.

of the powers of the Parliaments, and of the aristocracy and clergy of France as checks upon the royal authority. Bodin, though asserting the indivisibility of the sovereign powers of the King, nevertheless had advocated that the Parliaments should have the powers of remonstrance and of registering royal enactments, so that they might judge these in the light of justice and equity. The Parliaments had from time to time asserted their right to refuse to register royal edicts, especially the Parliament of Bordeaux, of which Montesquieu later became a president a mortier.

One feature of this doctrine is accepted by all the jurists that the judiciary must be independent of and separate from the remaining two organs of the government viz. legislative and executive. In the Report of International Congress of jurists held at New Delhi in 1959, it is stated:

> *"An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or the legislature with*[72] *the exercise of the judicial function".*

Though the doctrine is traceable to Aristotle[73] but the writings of Locke[74] and Montesquieu[75] gave it a base on which modern attempts to distinguish between legislative, executive and judicial powers is grounded. Locke distinguished between what he called :

(i) Discontinuous Legislative Power;

(ii) Continuous Executive Power;

(iii) Federative Power;

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

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72. Vanderbilt, The Doctrine of Separation of Powers and its Present Day Significance, 1958, hp. 51.

73. Arstotle : Politics, IV, p. 14.

74. Second Treatise of Civil Government, Chaps. 12 and 13.

75. L'esprit Des Lois (1948), Chap. 12.

Locke and Montesquieu derived the contents of this doctrine from the developments in the British constitutional history of the early 18th Century. In England after a long war between Parliament and the King, they saw the triumph of Parliament in 1688 which gave Parliament legislative supremacy culminating in the passage of the Bill of Rights. This led ultimately to a recognition by the King of legislative and tax powers of 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.

Writing in 1748, Montesquieu 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 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 powers be not separated from the legislative and the executive. Where it joined with the legislative: the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then a legislator. Where it joined to the executive powers, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions and of trying the causes of individuals.[76]"*

It may be pointed out that in none of these senses does a separation of powers exist in England. The King, though an executive head, is also an integral part of the legislature and all his ministers are also members of one or other of the Houses of Parliament. Furthermore, the Lord Chancellor is at the same time a member of the

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76. The Spirit of the laws (trans. Nugent) pp. 151 - 152, quoted in Thakker, C.K.: Administrative Law, (1992), Eastern Book Company, p. 31.

House of Lords, a member of the government, and the senior most member of the judiciary. Therefore, in England the concept of "parliamentary executive" is a clear negation of the first formulation that the same person should not form part of more than one of the three organs of the government. As regards the second formulation, it is clear that the House of Commons ultimately controls the executive. The judiciary is independent but the judges of the superior courts can be removed on an address from both houses of Parliament. As to the exercise by one organ of the functions of the other organs, no separation exists in England. The House of Lords combines judicial and legislative functions. The whole House of Lords constitutes, in theory, the highest council of the country; in practice, however, by constitutional convention, judicial functions are exercised by specially appointed Law Lords and other Lords who have held judicial office. Again, legislative and adjudicatory powers are being increasingly delegated to the executive. This also distracts from any effective separation of powers.

In America, this doctrine forms the foundation on which the whole structure of the Constitution is based. Article I; Section I vests all legislative powers in the Congress. Article II, Section 1 vests all executive powers in the President of the United States. Article III, Section I vests all the judicial powers in the Supreme Court. It is on the basis of this theory of separation of powers that the Supreme Court of the United States has not been given powers to decide political questions, so that the Court may not interfere with the exercise of powers of the executive branch of the government. The Constitution of America has also not given overriding powers of judicial review to the Supreme Court. It is a queer fact of American constitutional history that the powers of judicial review has been usurped by the Court. However, American constitutional developments have shown that in the face of the complexity of modern government, strict structural classification of the powers of the government is not possible. The President of the United States interferes with the exercise of powers by the Congress through the exercise of his veto powers. He also exercises the law-making powers in exercise of his treaty-making powers. The President also interferes with the functioning of the Supreme Court through the exercise of his powers to appoint judges. In fact, President Roosevelt did interfere with the functions of the Court when he threatened to pack the Court in order to get the Court's support for his New Deal legislation. In the same manner Congress interferes with the powers of the President through vote on budget, approval of appointments by the Senate and the ratification of treaty. Congress also interferes with the exercise of powers by the

courts by passing procedural laws, creating special courts and by approving the appointment of judges. In its turn, the judiciary interferes with the powers of the Congress and the president through the exercise of its powers of judicial review. It is correct to say that the Supreme Court of the United States has made more amendments to the American Constitution than the Congress itself.

Though no separation of powers in the strict sense of the term exists in England and America, yet the curious fact is that this doctrine has attracted the makers of most modern Constitutions, especially during the Nineteenth Century. Thus in France, the doctrine has produced a situation in which the ordinary courts are precluded from reviewing the validity not only of legislative enactments but even of the actions of the administration.

Some critics argue that Montesquieu has been misunderstood. According to their alternate view, his real insight was the general principle that powers must be distributed in order to avoid a monopoly of powers being created. They argue that Montesquieu was not advocating a strict separation of powers, rather he cautiously referred to certain distribution of powers as well as the balancing, controlling, tempering and combining of powers in a model of liberal political order where all three are sometimes separated and sometimes combined. This broader view affords a rationalization for the idea of checks and balances thereby highlighting the necessity for restraints and safeguards in order to prevent the monopolization of powers even within anyone department of the government.

It is also important to note here that the separation proposed by Montesquieu did not apply merely to the organs and their functions but in regard to their personnel as well. This according to him was for the reason that, if a person holding office in one wing of the government should wield powers in regard to another wing, it would defeat the purpose of the separation itself.

Montesquieu was convinced that it was only through such a system of separation of powers that a government could be made free from the dangers of capricious or tyrannical rule. Until today, no other system of government has been developed to oppose this notion and hence, it must be inferred that his opinion has proven itself true. Other philosophical contributors left alone, it is the work of Montesquieu that has ensured the lasting influence of the theory of separation of powers.

2.2.6 Criticism of Theory of the Separation of Power

In theory the doctrine of separation of powers was very sound. However, in practice many defects surfaced when it was sought to be applied in real life situations. The defects which were found in this doctrine when applied were mainly the following :-

(i) **Historical incongruity :** Historically speaking, the theory was not correct. His exposition of this theory is based on the British Constitution of the first part of the eighteenth century as he understood it. In reality there was no separation of powers under the Constitution of England. In British Constitution, this doctrine was never adopted. Professor Ullman rightly says, "England was not the classic home of the separation of powers." Similar is the observation of Donoughmore Committee. "In British Constitution there was no such thing as the absolute separation of the legislative, executive and judicial powers."

(ii) **Division of functions :** The assumption behind the doctrine is that the three functions of the government, namely, legislative, judicial and the executive are divisible from each other. The fact, however, is that it is not so in reality. There are no watertight compartments. There is overlapping with each other. As Friedmann and Benjafield say, "The truth is that each of the three functions of the government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in government".[77]

(iii) **Practical difficulties in its acceptance :** It is difficult to take certain actions if this doctrine is accepted in its entirety. In practice it has not been found possible to concentrate powers of one kind in one organ only. The legislature does not act merely as a law-making body, but also acts as an overseer of the executive, the administrative organ has legislative function. The judiciary has not only judicial functions but also has some rule-making powers.

(iv) **Adherence to it not possible in welfare state :** The modern state is a welfare state and it has to solve many complex socio-politico-economic problems of a country. In this state of affairs it is not possible to stick to this doctrine. As Justice Frankfurter says:

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77. Principles of Australian Administrative Law, 36 (1962).

"Enforcement of rigid conception of separation of powers would make modern government impossible."

(v) Organic separation : Basu's view[78] is that "in modern practice, the theory of separation of powers means an organic separation and the distinction must be drawn between 'essential' and 'incidental' powers and that one organ of government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental function thereof".

Thus, the position is that the doctrine of separation of powers in the strict sense is undesirable and impracticable. Therefore it is not fully accepted in any country of the world. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of the enormous powers of the executive.[79] The goal of the doctrine is to have "a government of law rather than of official will or whim."[80]

***Marbury v. Madison Case*[81]**

The difference between this view of judicial powers and that of Chief Justice Marshall in *Marbury v. Madison,* fifty-five years later, is of great interest although it is true that Montesquieu elsewhere saw the French parliaments with their rights of remonstrance as checks to the legislative powers.

The relationships between the executive and legislative branches, however, exhibit clearly the characteristics of the idea of checks and balances that we saw in the English theory of the balanced constitution. The executive officer ought to have a share in the legislative powers by a veto over legislation, but he ought not to have the powers to enter positively into the making of legislation. The executive should have the powers of calling and fixing the duration of meetings of the legislative body. In this way the executive branch will be able to prevent the encroachments of the legislature on its authority, thus ensuring that the legislature will not become despotic.

The legislature should not, however, have the right to stay the executive, but it should have the powers to examine the manner in which its laws have been executed. Whatever the results of this examination, the legislature should not be able to judge the person, or the conduct of the person, who executes the law. However, (he counsellors upon whose advice unwise policies are adopted may be punished, and for

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78. Administrative Law, 1986, p. 24.
79. Indian Law Institute, Cases and Materials on Administrative Law in India, 1966 p. 71.
80. Report IV CI. 1 (1960).
81. 68 (1803) 2 Law Ed 69: 1 Cranchl 38.

this purpose the powers of impeachment must lie in the legislature, with the Lower House accusing, and the Upper House judging. "Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive powers, as the executive is by the legislative." Montesquieu, though he had great faith in the powers of constitutions to mould the public character of a State, was nevertheless sufficiently aware of sociological necessity to see the importance of having the essential parts of the State as representative of different interests in society; and so he adapted the theory of mixed government to the underpinning of a system of divided powers, in order that the varying "passions and interests" of the different classes of society should ensure that no one man or group of men gained arbitrary powers. This does not mean that he threw overboard the notion of the separation of powers. It still remained as the foundation of the constitution of liberty, as he frequently reasserted, but certain quite specific and limited powers were attributed to the executive to enable it to control the legislature, and to the legislature to control the subordinate members of the executive. These control mechanisms did not constitute a "fusion" of powers; they were links between the branches of government, each restricted to the exercise of its appropriate function. The practical problems of these controls, the extent to which they embodied an opportunity for co-ordination, or alternatively for deadlock, between the branches, was not yet clearly perceived, although Montesquieu at a later stage devoted some time to a discussion of the nature of party politics in England, with its division of the legislative and executive powers. Thus Montesquieu clearly did see a broad separation of functions among distinct agencies of government, with a separation of personnel, to which was added the need for a set of positive checks to the exercise of powers by each of the two major, permanent, agencies of government to prevent them from abusing the powers entrusted to them. The ideas of independence and interdependence which Bolingbroke developed are useful here for the understanding of this system. Without a high degree of independent powers in the hands of each branch they cannot be said to be interdependent, for this requires that neither shall be subordinate to the other. At the same time a degree of interdependence does not destroy the essential independence of the branches.

Montesquieu was aware of the problem of ensuring that a system of government so nicely balanced should not result in complete deadlock, that the three

bodies, King, Lords, and Commons, by being poised in opposition to each other should not produce merely a state of "repose or inaction." But he dismissed the problem by arguing that in the nature of things they are forced to move (par le movement necessaire des choses), and forced to move in concert. The question of whether he saw the State as an organic unity in which the articulated parts formed a single unit exercising the sovereign powers, or whether he destroyed the unity of sovereignty by dividing it up into parts which were to be distributed among quite distinct, autonomous bodies, related to each other in a mechanistic fashion only, is probably impossible to answer, because it is doubtful if he ever formulated the problem in either of these ways lie seems to have a unitary view of the supreme powers when he is discussing his three forms of State in the initial books of De 1'Esprit des Loix, but there is little clue to his attitude in Book XI, Chapter 6. On the question of same position that we attributed above to John Locke. The legislative function is logically prior to the rest in the sense that the executive and judicial functions are concerned with putting the law into effect; but the legislative branch must be limited in its powers to interfere with the acts of the executive branch, otherwise the former will be able to wield arbitrary powers. Montesquieu does not, however, emphasize the supremacy of the law, or of the legislative function, to anything like the extent Locke had done, and as a consequence there seems to be a good deal more disagreement between them on this point than was probably the case. legislative supremacy he seems, though less explicitly, to hold much the case.[82]

As stated by Madison, "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". And it is in the prevention of this tyranny that the doctrine of separation of powers holds its greatest importance.

2.3 Historical Development of Financial Federal Relations in India

Before we pass on to discuses the financial relations between the centre and the states under the present constitution it is pertinent to make a study of the evolution and development of the federal financial relations in India prior to the framing of the

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82 *Stark, op. cit, Ch. I, discusses this problem, arguing that Montesquieu had a semi-organic rather than a mechanistic concept of the State*

present constitution. This is necessary on present constitution are the reward of the various development's in the financial field prior to its framing.[83]

The history of the federal financial relations in India closely follows the constitutional developments in the country. Basically, all the changes brought about in the Indian Constitutionional system, untill independence, assigned a pre-eminent reflected in the financial powers of the Centre and the States over this period. Except, a small period in early twenties, when the provinces were required to contribute to the central budgetary deficits, it had been the central Government, which used to transfer the revenues to the provinces for their financial needs. The post-independence developments and the constitution itself have not changed this position except the fact that the quinquennial review by a finance commission has made the sharing of revenues a constitutional responsibility at the centre. This would be studied under the following heads :

(A) Evolution and development from 1850 to 1919

(B) Evolution and development from 1919 to 1935

(C) Evolution and development from 1935 to 1950

2.3.1 Evolution and Development From 1850 to 1919

Originally the Centre had full control over the revenues and the expenditures collected and distributed by the various agencies. This powers were derived from the Act,s of 1853 and 1858 which treated the revenue of the whole India as one and gave the powers to the Governor-General-in-Council to spend them for such purposes, as the body thought fit.[84] The provinces were only to raise the revenues and to handover the same to the Central Government. From 1870 onwards fixed grants were given to the local governments to maintain their specific services like police, jails, educations and medicinal services etc. This arrangement continued till Lord Lytton (1876-801) time, when it was decided to delegate to the provincial Governments. This control of expenditures on all provincial services.

The Central Control over the provincial finances was relaxed to some extent under the financial reforms introduced in 1871 by Lord Mayo. Under these reforms, the Provinces were made responsible for the administration of certain services (except modicinal establishment) registration, education etc. A fixed luspsum grant was also

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83. The financial arrangement's made under the present constitution is almost the game as it was under the Government of India Act, 1935.

84. A. Kriasawary: "The Indian Union and the States" 1904 p. 24. A study in subentry and integration.

assigned to each of province, in addition to the receipts from the departments concerned, in order to enable its Government to carry out its responsibilities. Bombwell has remarked with respect to this arrangement that "true the arrangement was of an informal character and the Government of India retained their statutory powers of control and supervision, at the time small and limited measure of decentralization was significant as a first step towards reshaping the basis of central-provincial relations in India."[85]

This particular arrangement continued till Lord Lytton's (1976-80) time. Lord Lytton, made an attempt to remove some of the defects of Lord Mayo's system and further to widen the area of relatively autonomous provincial action, in 1877. His Government delegated the financial control of the remaining provincial services i.e. services not under the direct control of administrative services, like Land revenue, Law and Justice and general administration to the Provinces.

The next step in the financial devolution to the provinces was taken in 1882 by Lord Cromer during the Viceroy ship of Lord Rippon. The reforms introduced by him further carried the principles underlying the Lytton's performed, by abolishing the annual grants. A new system of allocation was introduced. The main trouble with the system of quinquennial settlement existing at this time, was that at the end of each five years period, the balance standing to the credit of a province was resumed by the Government of India. As a result of this, there was an uneasily tendency on the part of Provincial Governments to incur ill considerated or needless expenditures for no better reasons than to prevent their savings from elapsing to the centre.[86] This defeat was partly removed, when Lord Curzon's Government made the settlement quasi-parmanent giving to the Provincial Governments a more independent position and a more substantial and more enduring interest in the management of their resources than was given previously. The system of Provincial Settlements which was made 'quasi-parmanent' in 1912. This made the Provinces less dependent on fluctuating grants from the Centre.[87]

Hence the financial devolutions to the Provinces were made before the advent of Mount-Ford-reforms Act, 1919, through a gradual process. The first step in this direction was to give to the provincial Governments a share in certain specific heads

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85 Raman Sombwall, 'Federal Financial Helaticns in India', 1968,p. 13.
86. Report of the Royal Commission on decentralization in 1909 para 60.
87. P.B. Dhawans "Pvolution of Federal Financial Relations in India" Article Published in Journal of Constitutional and Parliamentary Studies, Oct.-Oct. 1974, p. 549.

of tax and non-tax revenues. The list of taxes which were given to the states in whole or in part included excise, licence fees, provincial rates, stasp duties and registration. The funds so allecated to the provinces were insufficient to fulfil their financial requirements thereof are the necessity arose for supplementing their revenues through a share in central taxes. Therefore the system of 'divided heads of revenue' was introduced. Uptil about 1900, the main resources of central revenues were land revenue, custom duties, salt-tax and receipts from opium. Since land-revenue was collected in the Provinces, the central Government agreed to give a share of collection in each province to that province. Other sources of revenue, viz., stamps, excise duties, income-tax and irrigation receipts were divided between the centre and the provinces. This allocation of sources of revenue came to be known as 'divided needs of revenue. Along with the system of 'divided heads of revenue' the system of paying cash reassignments was also prevailing. This led to the sharing arrangement called 'Provincial Financial Settlements'.

In fact, the process of the decentralization in the financial field, which was done Grom time to before the advent of Government of India Act, 1919, was not with the intention to give more and more autonomy to the States in this field. Whatever was done, that was done to serve certain almost cotives of the central Government. The Central control over the provincial finances was perfectly maintained. The provinces were still to seek the Central grants to fulfil their all requirements. Bosbwall has rightly remarked in this regard, "that the measure of financial decentralisation upto 1919, was of an informal and business character and did not effect either Government of India's responsibility for the solvency of the provinces or its statutory control over them. Provincial budgets continued to require the superior Governments / approval. In the administration of their financial affairs, the provincial Governments had to confers erectly to the rules and regulation formulated by Government of India.[88]

The Provinces had no independent powers of taxation. Every proposal for a provincial levy was required to be sanctioned by the Government of India. According to the provision of section 45 of the Government of India Act, 1919 Governor General

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88 Reman Bombrall "Federal Financial Relations in India," 1968, p. 13.

had the powers to issue 'instruction' to the provinces to submit their taxation proposals for sanction of the Governor General.

R. Coondoo has remarked in respect of the financial reforms that "the reforms no doubt fell short of assuming a federal characters, as the essential principle of a centralized administration remained unaffected.[89]

2.3.2 Evolution and Development from 1919 to 1935

The further significant developments in the Central provincial-financial-relations occurred under the Government of India Act, 1919. The provinces were given some more autonomy in the financial matters. Other developments occurred in the financial spheres. Under the various awards and the reports of the committees before the enactment of the Act, of 1935.[90] We would study this head under the following sub-heads :

(a) Government of India Act, 1919.

(b) Maston-Award.

(c) Taxation Inquiry Commission.

(d) Indian Statutory Commission 1930.

(e) Peel Committee Report.

(f) Percy Committee Report.

(g) Second Peel Committee.

(h) White Paper on Constitutional Reforms.

2.3.2.1 Government of India Act,. 1919

The Government of India Act, 1919 was an Act, of the Parliament of the United Kingdom. It was passed to expand participation of Indians in the government of India. The Act, embodied the reforms recommended in the report of the Secretary of State for India, Edwin Montagu, and the Viceroy, Lord Chelmsford. The Act, covered ten years, from 1919 to 1929.

The Act, received royal assent on December 23 1919. On the same day the King-Emperor issued a proclamation which reviewed the course of parliamentary legislation for India and the intent of the act:

"The Act,s of 1773 and 1784 were designed to establish a regular system of administration and justice under the Honourable East India Company. The Act, of

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89 R. Coondoo, "The Division of Powers in the Indian Constitution", 1964, p. 39.

38. P.S. Dhawant "Evolution of Federal Financial Relations in Indian", Article published in Journal of Constitutional and Parliamentary studies, Cat - Dec. 1974, p. 550.

1833 opened the door for Indians to public office and employment. The Act, of 1858 transferred the administration from the Company to the Crown and laid the foundations of public life which exist in India to-day. The Act, of 1861 sowed the seed of representative institutions, and the seed was quickened into life by the Act, of 1909. The Act, which has now become law entrusts the elected representative of the people with a definite share in the Government and points the way to full responsible Government hereafter".

The Act, provided a dual form of government (a "dyarchy") for the major provinces. In each such province, control of some areas of government, the "transferred list", were given to a Government of ministers answerable to the Provincial Council. The 'transferred list' included Agriculture, supervision of local government, Health and Education. The Provincial Councils were enlarged.

At the same time, all other areas of government (the 'reserved list') remained under the control of the Viceroy. The 'reserved list' included Defence (the military), Foreign Affairs, and Communications. The Imperial Legislative Council was enlarged and reformed. It became a bicameral legislature for all India. The lower house was the Legislative Assembly of 144 members, of which 104 were elected and 40 were nominated and tenure of three years. The upper house was the Council of States consisting of 34 elected and 26 nominated members and tenure of five years.

It was the Act, of 1919, which demarcated for the first time the field of administration into two distinct categories viz. Centre and the Provincial. The significant achievement of this Act, in the financial field was that it dispensed with the system of 'divide heads of revenue' existing already and assigned specific heads of revenue wholly either to the Centre or to the Provinces. In this way, under this Act, some autonomy was given to the provinces in the financial field. The Central Government retained customs, income tax, commercial stamps, salt and opium while land revenue, excise, judicial stamps were given in entirety to the provinces.

Provincial Finances, did not lesson. Some other developments were occurred in the shape of federal financial relations before the enactment of the Government of India Act, 1933, which we may summarily discus as under :

2.3.2.2 Maston Award

Under the provision of the Act, of 1919, the land-revenue collected in the Provinces was wholly assigned to the provinces. This resulted in the substantial flow of resources to the agricultural provinces and the industrial provinces were deprived of this benefit. Even the Central Government itself suffered a big loss on account of the transfer of the proceeds from land revenues to the provinces. In order to solve this problem the central Government decided that the provinces should contributes for balancing the central budget. These contributions were fixed by what is known as Master Award. As these contributions were a source of constant friction between the centre and the provinces who made such contributions, therefore, the system was partly avoided between 1925 to 1928 and was completely abolished in 1029.

2.3.2.3 Taxation Inquiry Commission

The inadequacy of the existing resources both to the Centre and the provinces, and a search for new items of taxation, led to the first systematic inquiry into the whole field of Indian taxation, by the Indian taxation Inquiry committee 1934-25. This committee examined the structure of the financial relations between the centre and the provinces and also the division of resources between the two.

2.3.2.4 Indian Statutory Commission, 1930

The next important review of the Indian financial arrangement was made by the Indian statutory commission in 1930. This commission suggested that in order to meet the claims of the industrial provinces, a substantial part of the revenue from the income tax should be assigned to provinces and the super tax should remain entirely with the Centre. The commission also recommended that the exemption of agricultural incomes from income taxation should be abolished and the whole proceeds from the taxation of these incomes should be assigned to the provinces. The commission also recommended for the formation of a 'Provincial Fund', out of the proceeds collected from the excises on cigarettes and matches, for distribution among the provinces on a per-capital basis.

2.3.2.5 Peel Committee Report

The problems of the allocation of resources between the centre and the Provinces was again considered in 1931 by a sub-committee of the Federal Structure Committee of the second Round Table Conferences. This committee made suggestion

for the transfer of the total proceeds of income-tax, to the provinces after the formation of the Indian Federation. However, the collection and the administration of this tax was suggested to be with the centre. The committee also made recommendation for the transfer of the total proceeds of income-tax, to the provinces after the formation of the India Federation. However, the collection and the administration of this tax was suggested to be with the centre. The committee also made recommendation for the appointment of an expert committee, to allocate the income-tax proceeds between the centre and the provinces and the share of each provinces in such proceeds.

2.3.2.6 Percy-Committee Report

In pursuance of the recommendation made by the Peel Committee, the Percy committee was appointed in 1932. The committee recommended that the corporation tax, tax-paid by residents in federally administered areas and tax paid on salaries of federal officers should be retained by the centre. From the point of view of stability of provincial budgets, the committee suggested that the share of income tax due tot he provinces should be reviewed every five years in the light of figures of personal income tax for the previous quinquennium. The Committee also suggested that the federal government should have the powers to impose a surcharge for its own purposes on any tax levied by it for the benefit of the provinces.

2.3.2.7 Second Peel Committee

The second Peel Committee was appointed in 1932. This committee suggested that the federal Government should be entitled to a share based on the proceeds of heads of tax, which were not derived from the residents in British India, such as corporation tax, tax on federal officers, taxes in federal areas, the whole of the remaining proceeds from income tax were to be assigned to the provinces. The committee suggested subventions from the centre to the provinces, in selected cases, to enable them to balance their budgets.

2.3.2.8 White Paper on Constitutional Reforms

The white paper on the proposal for Indian Constitutional Reforms, issued by M/s Majesty's Government in December 1931, contemplated that a prescribed

percentage, not being less than 50 percent and not more than 75 percent of the not revenues derived from taxes on income, other than apicultural income, on a prescribed basis. It also proposed that both the centre and the provinces should have the powers to levy surcharges on income tax for their own purposes. The white paper proposals also as powersed the federal legislature to assign to the units the whole or the part of the yield of salt duties, excise duties and export duties.

The joint Parliamentary Committee on Indian Constitutional Reforms 1933-34 almost agreed with the proposals in white paper. However the committee did not agree with the suggestion to powers the provinces also to impose sure here person personal income tax.

2.4 Evolution and Developments from 1935 to 1950

The most significant development in the centre-provincial financial relations occurred under the Government of India Act, 1935. The two tier-federal system was introduced in India with the complete division of the powers and the functions between the Centre and the provinces. The more significant devices were incorporated under the Act, for the more co-ordination between the Centre and the provinces in the financial field. The further more developments occurred in the central provincial financial relations after the Act, of 1930, under the various awards and the reports of the committee created for the financial problems. The would discuss the evaluation and development of the financial relations between the centre and the provinces from 1935 to 1950, under the following sub-heads :

(a) Government of India Act, 1935.

(b) Niemeyer Inquiry Report

(c) C.D. Deshmukh Award

(d) Krishnamchari Inquiry Commission

(e) Sarkar Committee Report

2.4.1 Government of India Act, 1935

Indians had increasingly been demanding a greater role in the government of their country since the late 19th century. The Indian contribution to the British war

effort during the First World War meant that even the more conservative elements in the British political establishment felt the necessity of constitutional change, resulting in the Government of India Act, 1919. That Act, introduced a novel system of government known as provincial "dyarchy", i.e., certain areas of government (such as education) were placed in the hands of ministers responsible to the provincial even for those areas over which they had gained nominal control, the "purse strings" were still in the hands of British official.

The intention had been that a review of India's constitutional arrangements and those princely states that were willing to accede to it. However, division between Congress and Muslim representatives proved to be a major factor in preventing agreement as to much of the important detail of how federation would work in practice.

Against this practice, the new Conservative-dominated National Government in London decided to go ahead with drafting its own proposals (the white paper). A joint parliamentary select committee, chaired by Lord Linlithgow, reviewed the white paper proposals at great length. On the basis of this white paper, the Government of India Bill was framed. At the committee stage and later, to appease the diehards, the "safeguards" were strengthened, and indirect elections were reinstated for the Central Legislative Assembly (the central legislature's lower house). The bill duly passed into law in August 1935.

As a result of this process, although the Government of India Act, 1935 was intended to go some way towards meeting Indian demands, both the detail of the bill and the lack of Indian involvement in drafting its contents meant that the Act, met with a lukewarm response at best in India, while still proving too radical for a significant element in Britain.

The Act, of 1935, contemplated a two tier federation, one with respect to the provinces which were earlier parts of single entity and the other with respect to Indian states. The powers with respect to the latter were only those which they agreed to surrender by the Instrument of Accession.

The Government of India provided for the important adjustments in financial relations between the centre and the provinces. These adjustments made under this Act, improved the financial position of the province and added a measure of elasticity to their resources. The most significant achievement of this Act, in the improvement of the financial relations between the centre and the provinces was that besides a clear demarcation of sources of the revenue between the centre and the provinces the system of tax-sharing was introduced.[91] Income-tax was one of the sharable tax between the centre and the provinces.

P.S. Dhawan has remarked that under the structure of financial arrangements embodied in the Government of India Act,., 1935, the Central Government retained a strong financial control while the Act, introduced 'Provincial autonomy' yet it ensured that the provincial Government should not be allowed to go to for in financial matters.[92]

Under the provisions of the Act, the Central Government retained the more elastic resources while the provinces were given the inelastic and static sources of revenue. The Act, also provided that the duties on salt federal duties of excise and export duties which were livable by the Central Government would if an Act, of federal legislature so provided be assigned wholly or in part to the provinces and the states. The Act, also provided for the grants-in-aid of the revenues to the provinces in need of assistance. The system of compulsory and permissive tax charging was also provided under the Act,.

According to Masani, a critic of the system of distribution of the resources under the Act, of 1935, the sources of revenue were so distributed that provincial prosperity and development were consciously subordinated to the central security.[93] On the other hand, Bosbwall has remarked that the "Act, indeed made a significant improvement in the financial status of the provinces by giving them a measure of

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91. Section 138 of the Government of Indian Act, 1935.

92. P.S. Dhawan "Evolution of Federal Financial Relation in Article published in Journal of Constitutional and Parliamentary Studies, Oct-Dec. 1974, p. 553

93. C.Y. Chuntesani and M.B. Masani : Indian Constitution at work 1940, p. 39.

independence in raising their revenues and ordering their expenditures. This injected some fineness into the financial backbone of the provincial autonomy.[94]

Inspite of some defects and disparities in the Act, of 1935, it cannot be ignored that the system of allocation of financial resources was highly flexible. There was an extensive field for co-operation in financial masters between the centre and the units.[95]

2.4.2 Niemeyer Inquiry Report

To fill in details in respect of income tax, jute expert duty and grants under the Government of India Act, 1935, an expert Sir Otto Mieceryer was appointed in 1936 to make recommendations which were to be implemented by an order-in-council. In making his recommendations he took of a great need to place the provinces on a workable financial basic without adversely effecting the ability and credit of the central Government. He recommended for the distribution of 50 percent of the dividable pool of income tax proceeds among the states. In order to give time to the centre to stabilize its own position, he suggested that for the first five years the centre should keep a part of the share, which was asp marked for the states, in such a way that this snare along with the contributions to general revenues from railways would amount to rupees thirteen Crores, and from the six years the amount refunded from the Stat's share should be reduced by 1/6th year so that the states at the end of 10th year will get exactly half. In suggesting his plan for allocation of the income-tax proceeds, among the provinces, he fixed the scale of distribution partly on the basic of residence of the assesses partly on the basis of population.

As part of assistance for the jute-growing provinces, Sir Otto recommended that the provinces, share of the Jute export duty be raised by 12% to 62% of the next proceeds of the duty. The various recommendations made by Sir Otte Nlemeyer Inquiry Report were accepted by the Government and were embodied in the Government of India (Distribution of Revenues Order 1936) which continued regulating the financial relations between the Centre and the units upto the partition of India in August 1947.

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94. Rasan Bosbewall : Federal Financial Relations in India", 1968, p. 23-24.
95. Ray Bharti : "Evaluating of Federalism in India", 1967, p. 81.

2.4.3 Deshmukh Award

The necessity was felt for the adjustments of the financial arrangements affecting the distribution of the income tax and Jute export duty, after the partition in 1947. The share of income tax was reduced in proportion to the population of the divided states like Bengal and Punjab. The provincial share were refixed after distributing the lapsed quets among the Union Provinces including West Bengal and Panjab according to population. As regards the jute export duty, the provincial shares were reduced from 62% to 20% roughly in proportion to the duet growing area which came to India. The old basis of distribution of shares remained undisturbed.

Some of the States were not happy with the financial arrangement introduced after the partition for the distribution of income tax and jute export duty. Shri C.D. Deshmukh was appointed as an arbitrator to lack into grievances of the distributed state and further to (a) determine the shares to be taken from Bengal, Punjab, and Assam, in respect of part of these provinces included in Pakistan, (b) re-allocate among the part A states their lapsed percentage as wall as the percentage formerly prescribed for South and North West Frontier Province. Shri C.D. Deshmukh gave more weight age to population in his financial arrangement for the distribution of income tam and jute export duty. This award remained in force form 1950 to 1952.

2.4.4 Krishnamachari Inquiry

Some of the Indian states did not join the financial arrangement made for the whole of country after the independence. But after last than two years of independence, a significant development occurred in the sphere of the financial integration of these Indian states. Within this period most of the states had either integrated into a big unit or had charged into the neighboring provinces. In order to establish financial integration of these states with the rest of the country, an Inquiry commission was appointed in 1948, under the Chairmanship of Shri Krishnamachari. These states surrendered to the Union Government, those very union subjects which they already had with them and in lieu of it eh Union Government agreed to pay 'revenue gap grants' to these states in order to compensate their financial lessees. According to this financial integration the part B states were entitled to secure 50% of

the net proceeds of income tax from the central Government which was levied and collected in that States.[96]

2.4.5 Sarkar Committee Depute

When the present constitution of India was being drafted, the constituent assembly examined the financial relations between the centre and the units afresh. The constituent Assembly was of the opinion that a more thorough examination was required in relation to financial and borrowing powers under the Government of India Act, 1935 and the result of their working during the decade of 1937-47. This led to the appointment of a Financial Expert Committee under the Chairmanship of Shri N.R. Sarkar.

The functions assigned to this Committee were firstly to review the financial provisions existing under the Government of Indian Act, 1935 and to recommend to the Constitution Assembly their capability to be incorporated in the new constitution. Secondly the Committee was to suggest the list of the taxes which should be included in the federal and the state lists separately. The Committee was required to suggest the method of the distribution of these taxes between the Centre and the states. Thirdly the Committee was also to recommended the principles on which the grants should be given to the states.

The committee affirmed that it would be impossible to avoid 'divided heads of revenue' and there fore suggested to have a few 'divided heads' under the constitution.[97] The committee also recommended that income tax including corporation tax and income tax on federal emoluments, should be shared between the centre and the states except to the extent of the yield attributable to the centrally administered areas. The committee also suggested that not less than 60 percent of the net proceeds of income tax and succession and estate duties should be divided among the provinces. The committee further suggested for the appointment of a Finance Commission to deal with the matters of grants-in-aid, tax-sharing between the centre and the States, and either financial matters referred to it by the president.

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96. P.B. Dhawans "Article in Journal of Constitutional and Parliamentary Studies, "Dec. 1974, p. 557.

97. A. Krishnamachari "The Indian Union and the States", A study in Autonomy 1964, p. 30.

The constituent assembly accepted cost of the suggestions of this committee when the report was presented to it. The assembly agreed with the suggestion of the committee for the appointment of a finance commission but the suggestion for the plan of allocation of income tax was rejected by the constituent assembly. The scheme of the division of the sources between the centre and the states was kept substantially the same as it was under Government of India Act, 1935.

The conclusion which one can draw from the aforesaid discussion is that originally the finances were solely under the control of the central Government. The Provinces had no independent powers to raise revenues to fulfill their requirements. They used to get the cash assignments from the centre. With the passage of time the central provincial financial relations continued developing. The financial devolutions were made to the provinces to make them autonomous in that field. However, significant developments occurred under the Government of India Act, 1919, and 1935. Result of these developments the framers of the present Constitution adopted almost the same financial arrangements as under the Act, of 1935.

2.5 Application of the Doctrine of Separation of Powers in Modern Time

In the modern context, the doctrine of separation of powers is no longer a mere philosopher's theoretical conception. It is a practical concept, determining the structure and organization of the day to day functioning of governments. Beginning the analysis from the evolution of the doctrine itself, the rationale behind its creation.

The separation of powers, in practice if not in form, is considered to be a prerequisite for the effective functioning of a democracy. It is a concept that, like the 'rule of law', has superficial simplicity as well as a deeper complexity. Broadly speaking, it is based on the idea that governmental powers are divisible into three categories - executive to promulgate laws, legislative to make laws and judicial to apply and interpret the laws. This idea of separation of functions stems from the logical conclusion that if the law-makers should also be the administrators and dispensers of law and justice, then the people at large will be left without a remedy in case any injustice is done as there will be no superior authority.

The doctrine of separation of powers was a method formulated by English jurists in the middle of the century in order to restrain such abuse of governmental powers. The theory of separation of powers was then further developed by John Locke in his Second Treatises and ultimately granted a more systematic form by the French jurist Montesquieu in his book The Spirit of Laws. John Adams, in agreement with his predecessors, has also highlighted this doctrine as the means to protect a nation from the broad spectrum of ills of passionate partiality, absurd judgments and ambitious, self-serving behavior.

A doctrine of separation of powers can be put into service for different purposes. It may be used in support of a principle of allocation of functions to the most appropriate body in the State, whether a tribunal, a court, an elected assembly or a body of elected or appointed officials. On the other hand, the separation of powers may also be invoked in support of arrangements for preventing the abuse of powers in situations where public powers are distributed amongst different institutions in such a manner that each has the necessary freedom for its own actions and simultaneously possess a concurrent capacity to check the actions of other powers-holding bodies in the event of a misuse of their powers - a system of checks and balances. The doctrine enables the creation of a merged and balanced government, with safeguards to check excesses no matter where they arise. As stated by Vile, this "diffusion of authority among different centers of decision-making is the antithesis of totalitarianism and absolutism".

Whether accepted by express provision or necessary implication, the doctrine of separation of powers, in its essence, has become an integral part of the governmental structures of numerous states. However, based upon the circumstances and manner in which it has been incorporated, the doctrine may differ in its practical application in the governance of a particular nation. In theory, the doctrine of separation of powers has been traditionally supposed to require a threefold classification of functions and corresponding institutions. But as a result of being placed in the context of the diverse and complex nature of a modern state, where the process of law making, administration and adjudication are neither clearly demarcated nor assigned to separate institutions even the previously existent boundaries of

separation are becoming more blurred. As this is a matter of allocating functions and powers in such a way that they can be operated with the greatest possible effectiveness, the need for absolute separation has been upstaged by the need for efficient, regulated and non-arbitrary governmental administration.

2.6 Present Scenario

Separation of powers has again become a current issue of some "controversy concerning debates about judicial independence and political efforts to increase the accountability of judges for the quality of their work, avoiding conflicts of interest, and charges that some judges allegedly disregard procedural rules, statutes, and higher court precedents.

It is said on one side, separation of powers means that powers are shared among different branches. That is, no one branch may act unilaterally on issues (other than perhaps minor questions) but must obtain some form of agreement across branches. That is, it is argued that "checks and balances" apply to the Judicial Branch as well as to the other branches.

It is said on the other side that separation of powers means that the Judiciary is independent and untouchable within the Judiciaries' sphere. In this view, separation of powers means that the Judiciary alone holds all powers relative to the Judicial function and the Legislative and Executive Branches may not interfere in any aspect of the Judicial Branch.[98]

An example of the first view is the regulation of attorneys and judges, and the establishment of rules for the conduct of the courts, by the Congress and in the states the legislatures. Although in practice these matters are delegated to the Supreme Court, the Congress holds these powers and delegates them to the Supreme Court only for convenience in light of the Supreme Court's expertise, but can withdraw that delegation at any time.

An example of the second view at the State level is found in the view of the Florida Supreme Court that only the Florida Supreme Court may license and regulate attorneys appearing before the courts of Florida and only the Florida Supreme Court

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98. Judicial Challenges, Frontline, February 9, 2007.

may set rules for procedures in the Florida courts. The State of New Hampshire also follows this system.[99]

India's democratic system also offers a clear separation of powers under Lok Sabha (lower house of parliament), Rajya Sabha (upper house of Parliament), and the President of India, who overlooks independent governing branches such as the Election commission and the Judiciary. Under the Indian constitution, just as in the British system; the Prime Minister is a head of the governing party and functions through a selected group of ministers. The framework of government outlined in the constitution of India presupposes the separation of powers, gives expression to it, and in so doing further refines the meaning of the doctrine. The separation of powers both imply constitutional limits on state powers, either through the functional or territorial division of governmental roles and offices.[100]

99. *The Federalist (Hamilton, Madison and Jay 1982 (1788).*

100. *The distinction between functional and territorial division of powers is based on Stein Rokkan. See Peter Flora, ed. State Formation, in Europe: The Theory of Stein Rokkan (Oxford: Oxford University Press, 1999), pp.5-7.*