Andhra University Series No. 12

FEDERALISM IN GOVERNMENT

BY

M. VENKATARANGAIYA, M.A.

READER AND HEAD OF THE DEPARTMENT OF HISTORY, ECONOMICS AND POLITICS, UNIVERSITY COLLEGE OF ARTS ANDHRA UNIVERSITY, WALTAIR

WALTAIR

1935

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To My Wife,
My Partner In Life's Sorrows
And Joys

INTRODUCTORY NOTE

EVER since the opening of the Indian Round Table Conference in London in 1930, the subject of Federalism has become one of growing importance and interest to the leaders of thought and action as well as to the general public in India. Many are anxious to know the precise meaning and significance of Federalism, its relation to other constitutional systems, the conditions out of which it grew in other countries, the problems for which it tries to supply a solution, the special issues which it raises in its turn and the institutional devices that are adopted in answer to them. There are many standard treatises on political science and on the constitutions of leading federal states like the United States of America, Canada, Australia and Switzerland from which information on all the above topics can be gathered. But there is no one book which serves as an introduction to the subject. It is with a view to satisfy this need that the author has undertaken to write this book. It is based to some extent on the lectures he had to deliver to his students in the Honours Classes of the Andhra University. He hopes that it will be found useful by students in the other Indian Universities who are engaged in making a special study of "Federalism" and also by the public. The author has throughout kept in mind the special features of the conditions in India and has tried to interpret the theory of Federalism in the light of those conditions. A chapter is devoted to an analysis of the prominent characteristics of the new federal experiment in India. As the book passed through the press while the Government of India Bill was under discussion in the British Parliament and before the Bill became an Act, the footnotes and other references in Chapter X on the "Indian Experiment" relate to the clauses in the Bill and not to those in the Act.

The author's thanks are due to the Syndicate of the Andhra University and to Dr. Sir S. Radhakrishnan, M.A., D. Litt., its learned Vice-Chancellor for sanctioning the publication of the book in the Andhra University Series. His thanks are also due to Mr. K. V. Punniah, M.A., (Hons.), his old student and present colleague, for help in preparing the manuscript for the press, in reading the proofs and in preparing the index.

Waltair,
14th November, 1935.

THE AUTHOR.

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CHAPTER I

FEDERAL AND OTHER CONSTITUTIONAL SYSTEMS.

(1)

Federalism in its widest sense.

FEDERALISM may be defined as a constitutional system under which the people of any particular territory are politically united in subjection to the control not of one Government supreme over them in all matters and for all purposes but of a number of governments each supreme in a definite sphere of its own, freed completely from the possibilities of encroachment by the rest. The number of these governments depends on the practical needs of the territory and it cannot be fixed by purely theoretical considerations. They may moreover be organised on a territorial or functional basis, or on a basis partly territorial and partly functional. There may be one central government to manage the political affairs of the people and another to manage their economic affairs without either being subordinate to the other.[1] In addition to these and independent of them there may be a number of local governments with jurisdiction over smaller areas and regions. There may be other autonomous governments with power to regulate particular industries or groups of industries or social services or professions. In all these cases the term 'Government' stands for an organisation which under the fundamental constitution of the state has the power to determine the rights and obligations of persons, to make laws binding on them and exercise coercive authority over them. The distribution of the work of government among a number of organisations related to one another not as supreme and subordinate but as co-ordinate institutions is what makes a system like the one sketched above federal in character. Federalism stands for the diffusion of authority as distinguished from its concentra-

[1] As set forth in 'A Constitution for the Socialist Commonwealth of Great Britain', by Mr. and Mrs. Webb: Part II, Ch. I, Pp. 108 ff.

tion. As such it may be regarded as the dominant note of much of the political theory of recent times.

'Territorial' Federalism—the ordinary meaning of the term.

In its traditional and orthodox form, however, federalism has a narrower meaning and significance. In this form it has reference to only two units of government—Central and Local—both of them organised on a territorial basis. In all countries it is common to find a division of the whole territory into a number of local areas (States, Provinces, Counties, Departments, Cantons, etc.) and separate governments constituted over them. These are known as local governments and stand in distinction from the central government which has jurisdiction over the whole area. Whether the constitutional system of a country is federal or non-federal depends on the nature of the relationship existing between its central and local governments. There are three possible forms which this relationship may assume. The central government may be subordinate to the local governments; or it may be completely supreme over them; or it may be co-ordinate with them in the sense that while it has a well-marked sphere of its own in which it is supreme, it has no control over the local governments which have equally well-defined spheres of their own in which they carry on their work without being subject to the authority of the centre. It is to this last kind of relationship that the name 'Federal' is given and it is only in this sense that the term 'Federation' is being used in current political discussions in India. Its meaning is best brought out in the following definition given by a great authority. "A 'federal government' exists where, in a political community, the powers of government are distributed between two classes of organisation—a central government affecting the whole territory and population of the sovereignty, and a number of local governments affecting particular areas and the persons and things therein—which are so far independent of each other that one cannot destroy the other or limit the power of the other, or encroach upon the sphere of the other as determined by the sovereign in the constitution." [2]

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[2] W. HARRISON MOORE: "The Constitution of the Commonwealth of Australia (1910)—P. 68.

It differs from (a) a confederate system like the Confederation of the United States;

A federal system stands in contrast with a confederate system under which the central organisation is subject to the authority of the local governments. In a confederation the central machinery has no inherent powers of its own and it owes to the local governments whatever influence it possesses. Without their goodwill and co-operation it is helpless in carrying on the work allotted to it under the constitution. History provides us with many examples of confederacies ancient and modern and one of the best known among them is the 'Confederation of the United States of America' (1777—1787). The thirteen colonies which rose in rebellion against England and carried on the war of independence set up a central organisation called the Congress to regulate what they regarded as matters of common interest to all of them. During the ten years of the existence of the Confederation, the people of the United States may be said to have been subject to the authority of two governments—the Congress and the governments of the colonies. But the Congress was entirely dependent on the (local) colonial governments. Membership of the colonies in the confederation was voluntary. Each colony retained its sovereignty, freedom and independence. It had the right to secede at any time and weaken the power of the Congress. The constitution of the confederation could be altered only by the unanimous vote of all its members and it was consequently at the mercy of any recalcitrant colony. More than all these, what made the Congress powerless was the fact that its decisions were only recommendations addressed to the colonial governments which were free to accept or reject them. It had no financial or military resources independently of the contributions that the member-colonies were prepared to make. It had no authority to enact laws directly and automatically binding on the people of the States or to exercise coercion over them. It had its relations with the colonial governments and not with the people. It had not therefore any of the attributes of a 'government' and the only government that was real to the people was the government of the colony to which they belonged. In the words of the *Federalist*, "the great and radical vice in the construction of the existing Confederation is in the principle of Legislation

for States or Governments, in their Corporate or Collective capacities, and as contradistinguished from the Individuals of which they consist..... The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option."[3] In such circumstances it is not appropriate to say that two sets of governments existed in the United States. There was only one real government and that was the (local) government of each colony. It is this feature that makes a confederate system different from a federal system. Wherever the decisions of the central machinery do not automatically operate as laws on the people of the territory but require acceptance by local governments before acquiring legal validity, the constitutional system has no claim to be regarded as federal. It is because of this characteristic that a confederacy is spoken of not as a State but only as an association of States. A clear grasp of this distinction is necessary for understanding the extent to which the proposed union of Indian States with British India is really federal.

(*b*) a unitary system like that of England;

A federal system also stands in contrast with a unitary system under which the local governments are completely subject to the authority of the central government. Most of the countries have the unitary type of government at the present day. In England, for instance, the central government is a sovereign government and its powers over the governments of local areas like counties, boroughs, etc., are absolute and unlimited. It can alter the areas of their jurisdiction, change their constitution, modify the nature of their functions, determine the mode of exercising them and regulate their financial resources. It can even abolish the whole system of local government. The local authorities have therefore to be regarded as mere agents of the central government discharging on its behalf the duties which it lays down for them. Here also, though two governments appear to exist side by side, all real authority belongs only to one of them, viz., the central government. This is the justification for calling this system unitary.

[3] P. 69 (Everyman's Library).

(c) Decentralization, Devolution and Regionalism.

In recent years there have been in many unitary states movements in favour of Decentralisation, Devolution and Regionalism. Although there are differences in matters of detail among them, they may be broadly looked at as attempts at bringing about a relaxation of central control over local governments. In schemes of devolution—as have been proposed for instance in England—the idea is to set up subordinate legislatures instead of mere administrative bodies over large local areas and confer on them more power than is usually granted to local authorities. Under 'Regionalism' which has advocates in France emphasis is laid on the need for taking the economic and the cultural requirements of the people into account in the determination of administrative areas for purposes of local government and conferring on such regional bodies a great deal of legislative and administrative authority. Though under these schemes local governments enjoy a higher status and dignity they continue to be subordinate to the central government. Its control is only relaxed but not abolished. Constitutionally it continues to be sovereign over them. While therefore these movements are akin in their origin to some of the forces that lead to federalism they do not convert the unitary system into a federal system even when their success is complete.[4]

(d) The constitutional system of the British Commonwealth of Nations.

The federal system may also be contrasted with the constitutional system on which that portion of the British Empire known as the British Commonwealth of Nations is at present based. This commonwealth is a unique example of millions of people inhabiting a widely scattered area of an immense extent remaining politically united even though there is no central organ of governmental control over them. It consists of Great Britain and the dominions of Ireland, Canada, Australia, Newzealand and South Africa. In relation to the Commonwealth as a whole the governments of these countries may be styled local. After the passing of the Statute of Westminster they have become completely sovereign. In addition to the King who is the ruler of them all, the only institution which serves as a bond of out-

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[4] CHIAO: "Devolution in Great Britain"—Ch. I.

R. K. GOOCH: "Regionalism in France"—Ch. I, Sec. V.

ward unity among them is the Imperial Conference to which all of them send delegates. It is the one central organisation for regulating the affairs in which the commonwealth as a whole is interested. But it is only an organ for consultation and does not possess the attributes of 'government'. It passes resolutions and makes recommendations for the consideration of the several constituent governments. It does not pass laws binding on the people of the commonwealth. The only government which the people know and recognise is that of the country to which they belong. All this is the case in spite of the fact that the Conference is much more representative of every part of the commonwealth than the Parliament of Great Britain which at one time possessed complete sovereignty over them all and made of them a unitary State. The growth of nationalism in the dominions resulted in the transformation of what was a unitary system into a personal union under a common king or perhaps into a sort of confederacy.[5]

It has no necessary connection with Democracy or Dominion Status.

In view of some misconceptions that prevail in India on the subject of federation it is necessary to emphasize that it is merely an arrangement for regulating the relations between central and local governments within a particular territory and that it has no direct bearing on other fundamental issues like dominion status, central responsibility and democratic representation. The central issue in an All-India Federation is the establishment of a new kind of relationship between the central government in the country and the governments of provinces and the Indian States. This may by some be regarded as a necessary preliminary to the country attaining the status of a dominion. It must, however, be understood that federation by itself may not lead to the democratisation of the internal system of government or alter the nature of relations between the governmental system in India as a whole and the Imperial government in Great Britain. A federal system is as much applicable to a dependency as it is to a sovereign state. It is purely an internal constitutional arrangement. Whether it will strengthen imperial control or weaken it depends on entirely different considerations.

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[5] W. Y. Elliott: "The New British Empire", Ch. II.

For, although all the present day federations are sovereign and independent, there is no inconsistency between the government inside a country becoming federal and the country continuing to be a dependency of an imperial power.

Distinction between the constitution of a Federal State and the federal elements in that constitution.

Misconceptions on matters like these have to some extent their source in a failure to discriminate between the constitutions as a whole of the leading federal States and those elements in the constitutions which make those States federal. Every feature that is characteristic of the constitution of a federal State like the United States of America is not the outcome of its federalism. A constitution has to provide a general frame-work of government and the establishment of a particular kind of relationship between the central and local authorities is only one part of this frame-work. The other parts may or may not be influenced by this. Even when they are influenced, it may not be right to regard them as merely reflecting the principles of federalism. In the construction of the legislature, the executive and the judiciary, and in determining the relations that should exist among them as well as between the government on one side and the individuals and groups inside the State on the other, the framers of constitutions have to take into consideration not merely the need for preserving the autonomy of the central and local governments but also several other equally strong and valid principles. Even in federal States the constitution is the result of the joint operation of a variety of factors. In trying therefore to get at the essence of federalism, it is necessary to analyse with minute care the constitution of every federal state and discover those elements in it which are the direct outcome of its federalism and separate them from those that are the result of other influences. In its exposition of the constitution of the United States the *Federalist* made such an analysis and explained separately the *national* elements and the *federal* elements in it.[6] This procedure deserves to be followed by Indian students of federalism at the present day. Such a study will show that federalism is perfectly compatible with a responsible or a non-responsible government, with a single or plural

[6] Essay, 39.

executive, with autocracy or democracy or with Communism. There is no necessary connection between federalism and these other principles of government.

Federalism often confounded with the historical processes of which it is the outcome.

Reference has to be made at this stage to definitions of federalism which speak of it not in terms of what it actually is in its form and working, but in terms of the historical processes out of which it is *assumed* to have come into existence. They regard federation as an association of states which were previously sovereign. Professor Newton, for instance, states as follows:—"Within modern times states have in certain cases formed permanent associations one with another, wherein, while still retaining some part of their own sovereign power and separate existence, they have resigned a portion of their sovereignty into the hands of a common authority. To such an act of association the term 'federation' is applied."[7] Viscount Haldane gave expression to a similar view. He said, "In Canada there is no federal system..... The provinces were created *de novo*. The provinces did not come together and make a federal arrangement under which they retained their existing powers and parted with certain of them and an imperial statute has got to ratify the bargain ..... The meaning of a federal government is that a number of states come together and put certain of their powers into common custody, and that is the federal constitution in Australia, but not at all in Canada."[8] Referring to the possibilities of a future federal government in India the Montagu-Chelmsford report remarked that, "into the relations of the provincial and central governments the truly federal element does not, and cannot, enter. There is no element of pact..... We must sedulously beware the ready application of federal arguments or federal examples to a task which is the very reverse of that which confronted Alexander Hamilton and Sir John Macdonald."[9] Speaking before the Federal Structure Committee of the Indian Round Table Conference Earl Peel stated that "federal government is an association of units formed for purposes of performing certain functions on behalf

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[7] A. P. NEWTON: "Federal and Unified Constitutions"—P. 2.

[8] W. P. M. KENNEDY: "The Constitution of Canada"—Pp. 408 ff.

[9] P. 78.

of all."[10] All those who argue that until autonomous provinces are in actual working no federation can be formed in India belong to this school of thought.

Unsoundness of the above view

The above view is unsound for a variety of reasons. It is in the first place opposed to common usage. People have been in the habit of calling Canada, Brazil, Austria and several other states federal even though they were not formed from an association of sovereign states. There is no reason why one should depart from ordinary usage in a matter like this. Moreover, the process by which the central and local governments become related on a federal basis does not in any way affect the real character of this relationship when once it is established. In the final result what is of importance is the autonomy of the central government in a particular sphere and the autonomy of local governments in another sphere. Whatever be the antecedent circumstances from which this autonomy results, when once it is achieved it makes no difference to its reality. Different paths may lead to the same resting place and when the goal is reached the path is only of antiquarian interest. Though Canada was formed as a result of the loosening of a previously existing unitary system the provinces in it are not less sovereign in the sphere allotted to them than the states are in the United States. On the other hand they have shown a tendency to occupy a much higher position.[11] It is also misleading to speak of a federation as an association of states. Even in the case of the United States it was only the original thirteen members that were sovereign before the federation was formed. Most of the remaining thirty-five states were carved out of dependent federal territory and elevated to the position of autonomous states. There is a possibility of new states being created in Australia also on similar lines. In the actual working of federations there is nothing to show that they are only states in association. The federal government is an independent entity by itself; it has its own resources and machinery for carrying on its work and it is in no way dependent on the member states. There is no deli-

[10] Report of the Federal Structure Sub-Committee (1930)—P. 129.

[11] W. B. Munro: "American Influences on Canadian Government"—P. 31.

berate coming together of the part-states in the discharge of any of the functions within the jurisdiction of the central government. It may be that some organs of federal government—the Second Chamber for instance—specially represent the states. But as will be shown later, this need not be an essential feature of a federation. Even in unitary states there are second chambers elected by areas of local government or by the members of local bodies. In view of the subordinate position occupied by second chambers in most of the federations no special significance need be attached to this feature.

and the complications arising therefrom.

Not only is the above view of federation unsound on theoretical grounds, but its adoption is sure to lead to a number of complications in practice. It gives an exaggerated importance to the part-states and tends to undermine the strength of the central federal government. It makes the people think that the federation has no individuality of its own. They forget that it is really based on a sense of higher unity and patriotism, and that real federations have been possible because of the development among the people of a feeling of attachment to a larger political community than the part-state. But political superstitions die hard. In the demand put forward by a certain section of the delegates to the Indian Round Table Conference that laws passed by the future federal government should be enacted afresh as laws by the legislatures of Indian States before they become binding on their inhabitants and that federal officers should under no circumstances be employed to administer these laws in the states, the influence of this conception is clearly seen.[12] All this was demanded in the name of the Sovereignty of States even though it was to establish a federal union that the conference was assembled.

Within a constitutional system to which a given territory is subject there may be a number of governments with a variety of relations among them. It is quite possible that the relations between some of those governments are federal and that the relations of these governments with some others are unitary or

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12 Report of the Proceedings of the Federal Structure Sub-Committee, 5th December, 1930.

confederate. The British Commonwealth of Nations is an example of this. The governments of the Dominions and of Great Britain have a sort of confederate relationship one with another. Inside Great Britain the relations between the central and local governments are unitary. The same is the case in the Union of South Africa, Newzealand and Ireland. In Canada and Australia, however, the tie between the central and local governments is federal. Within a Canadian province or an Australian state the relations between the central and local governments are unitary.

Autonomy—the core of Federalism.

A comparative study of different constitutional systems leads to the conclusion that only two conditions require to be fulfilled if a system is to be styled federal. In the first place there must be within the territory in question a central government and a number of local governments with their powers and spheres of work clearly marked out. Secondly these governments—Central and Local—must have complete freedom from mutual control and encroachment in the determination of their powers and the way in which they are exercised. It is this freedom that is the soul of federalism. When we examine the essentials of a federal system, we have to understand by 'essentials' all those political arrangements and institutions which are absolutely necessary to guarantee and maintain this freedom. Anything that is not necessary for this purpose is not an essential of federalism. If we find in the constitution of any federal state some elements which are not required to preserve the freedom of the central and local governments from mutual encroachment, we have to recognise that they are there to satisfy some other needs.

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The mixed character of the present constitutional system of India.

From the point of view of the relations between central and local governments the present constitutional system of India is mixed in character. It does not come under any of the categories previously dealt with. This is due in the main to the existence of two types of local governments holding different

kinds of relationship with the centre. The governments of the provinces of British India belong to one type and their relations with the central government are of the unitary character. The governments of the Indian States belong to the second type; their relations with the central government form a class by themselves to which the name 'paramountcy' is being given in current terminology.

British India is unitary.

Ignoring for the moment those parts which are directly administered by the central government, the rest of British India is divided into what are known as Governor's Provinces. The Central Government of India—the central government for both the Indian States and the Provinces—is vested in the Governor-General in Council. In consequence of the Act of 1919—the act under which the Government of India is now constituted—its control over the provinces was substantially relaxed and a large measure of devolution was introduced. In spite of this the provinces really continue to be subordinate to the centre. The only exception to this is the determination of the general structure and form of provincial governments which is beyond the interference of the central authority. Parliament itself has laid down this structure and form. Under the provisions of the Act each province has a governor who administers the reserved subjects with the help of an executive council and the transferred subjects with the help of ministers. There is also a legislative council in each province. It is only under extraordinary circumstances that the Governor-General has the power to modify the form of provincial government. He is authorised in special cases to revoke or suspend the transfer of subjects to the ministers and thus abolish the ministerial half of it.

In general the Central Government has the power of superintendence and control over the provinces. It can interfere with their boundaries, constitute new provinces, declare any part of a province to be 'a backward tract' or take any part of it under its direct administration. Nothing like this is possible under a federal system.

Under the Act of 1919 it is true that provision is made for a definite allocation of powers between the central and provin-

cial governments. But the actual allocation is not made by the Act itself. It is left to be carried out by means of rules and it is the central government in India that has the rule-making power. This gives to it the authority to define its sphere as well as the spheres of provincial governments. Even after the respective fields are demarcated, doubts that might subsequently arise as to whether a particular subject is provincial or central are settled not by a third party or by courts of justice but by the Governor-General.

Within the sphere allocated to the provinces under the Devolution rules the provincial governments are not absolutely supreme either in legislation or administration. Every bill that is passed by the provincial legislature and assented to by the Governor should receive the assent of the Governor-General also before becoming law. Legislation on certain provincial subjects should not be initiated unless it be with the Governor-General's previous sanction. Over and above this, the central legislature has concurrent powers of legislation over the whole provincial field and any bill on a provincial subject can be introduced into it with the previous sanction of the Governor-General. This shows clearly that there is no reality behind the present distribution of powers. It clearly establishes the constitutional and legal supremacy of the centre.

In administration the provincial governments are under the necessity to employ members of the All-India services over whose recruitment, pay promotion or punishment they have no control. Even in regard to other officers they have to abide by the civil service regulations framed by the central government.

The case with finance is not different. All the revenues—provincial and central—are received for and in the name of the crown and the central government is their custodian. Though there is now a differentiation between provincial and central sources of revenue the division is based on the rule-making power of the central government. Here again provincial financial legislation requires the final approval of the Governor-General in all cases and his previous sanction in some cases. The

provincial governments have no independent powers of borrowing. They cannot raise any loan in India without the previous sanction of the Governor-General in council and this gives the central government all the control that it wants over provincial finance.

Dyarchy, a species of Federalism, intended to modify this unitary character.

All this extensive control exercised by the central government over provincial governments gives a unitary character to the Indian constitutional system so far as British India is concerned. The other striking feature of the British Indian system is the 'dyarchy' introduced into the provincial sphere by the constitutional experiment of 1919, a feature which might have modified this unitary character and which was also intended to do it. For, in its ideal and pure form, dyarchy is based on the same principle as federalism. Its essence is the existence of two independent governments side by side. The originators of this idea thought of establishing two governments in each province, one to consist of the Governor and his executive council and the other to consist of the Governor and his ministers, each to be self-contained in its own particular sphere. The people in the provinces would then become subject to the control of one government in certain matters and of another government in certain other matters. The Governor and his executive council would be in charge of certain subjects called the 'reserved' ones and in administering them they would be responsible to the central government in India and through it to the parliament in England. The Governor and his ministers would be in charge of certain other subjects styled the 'transferred' ones and in administering them they would be responsible to the provincial electorate through the legislative council. Each of the two governments would have separate and independent financial resources to carry on their administration. In this form dyarchy would have introduced relations of a federal character first between the two halves of the provincial government and next between the central government and the provincial government in charge of the transferred departments. In its former form it would have been what may be called federalism of the vertical type—federalism within a particular territorial level—as

distinguished from the traditional horizontal type of it at two different territorial levels—the centre and the parts.

Failure of Dyarchy.

But the dyarchy that was actually established in 1919 and that has been worked all these years was not pure in form. It was very much diluted with several other elements and the result was that the transferred half under the control of ministers became dependent on the reserved half and the provincial government began to work as a single unit. The transferred departments were not given separate and independent financial resources. Expenditure on reserved subjects was a prior charge on provincial revenues. The finance department which naturally controlled both the governments was itself a reserved one and through it the reserved half was able to control the transferred half. The legislative council was not a wholly elected one. It contained an official and a nominated group the members of which generally voted as directed by the reserved half. Among the elected members there were no organised political parties. The consequence of all this was that the ministers had to rely for support on the official and the nominated groups and this gave the reserved half a sort of control over them. In addition to this the administrative agency which the ministers had to employ to carry out their policy consisted of the members of the All-India Services at the top. They were not subject to the control of ministers and it was not possible for the latter to have an alternative agency. In view of all this it is no wonder that the transferred part of the provincial government lost its individuality. The two governments became practically merged into one. To some extent this unification was necessitated by the fact that the provincial legislative council was under normal conditions the legislative authority for the reserved subjects also and the government in charge of these subjects found it desirable to have the co-operation of ministers and their supporters in the council in order that there might be no difficulty in getting the legislation they wanted and avoid the need for frequent use of the weapon of 'certification'. The federalism of dyarchy practically disappeared and the relations between central and provincial governments maintained their unitary form without undergoing any real modification. The history of this experi-

ment of dyarchy is not without its value to the student of political science. It throws a good deal of light on what is essential to maintain a federal relationship between governments, the extent to which each government has to be represented on the other, and the need or otherwise of employing independent and separate administrative and judicial agencies by the several governments.

Paramountcy of the Central Government over the Indian States.

'Paramountcy' is the term used to denote the relationship of the central government in India to the governments of Indian States. It is also distinguished from 'Sovereignty' which is the basis of its relationship with the provinces. In both cases the ultimate incidence of the relationship is on the people of the respective territories. 'Sovereignty' may be spoken of as power which is legislative in form, direct in the method in which it is exercised and immediate in the effects it produces, while 'Paramountcy' is political in form, indirect in the way in which it is exercised and ultimate in its effects. Neither the people nor the territories of the rulers of states are British in law. The Parliament of England and the Central government of India—its agent—are not competent to enact laws binding on the subjects of States. They only obey the laws made by their own rulers, are tried in courts set up by these rulers and they cannot appeal to the English Privy Council. From their standpoint the government which they have to recognise is the government of the state-rulers. The central government is no 'government' to them. In this respect they are like the people of the Dominions within the British Commonwealth or those of the member-states in a confederacy. All this is in contrast with the 'Sovereignty' which the Parliament as well as the Central government have over the people of the provinces who are in consequence bound by their legislation. 'Paramountcy'

(a) It is political in its character;

is political in its form because it is through the exercise of political pressure or influence that the central government carries its authority and power to the people of the states. This political pressure exercised on the rulers of States produces there all the results which sovereign legislation does in the provinces and in this way paramountcy becomes as effective as sovereignty.

(b) indirect in its manifestation:

'Paramountcy' is indirect in the process of its manifestation while 'Sovereignty' is direct. The paramount power has to reach the people of the states through their rulers. The agency of state governments cannot be dispensed with. The central government has guaranteed the territorial integrity of states and the rights of dynastic succession therein. They cannot therefore be brought under the direct control of the central government. In the case of the provinces it is open to the central government in India and the parliament in England to abolish provincial governments and directly deal with the people. This alternative is not open in the case of the Indian states. In this respect the states are like the units in a federation where the central government has no power to interfere with the territorial limits of the constituent units or the general form of their government.

and (c) a reserve power drawn upon occasionally.

'Paramountcy' is again not a power to be exercised every now and then. It is an authority that is kept in reserve and drawn upon as occasion demands. Its effects therefore are ultimate and not immediate. 'Sovereignty' on the other hand is exercised as a matter of course from day to day. It is continuously active. The people in the provinces are therefore intensely conscious of the presence and the fact of British supremacy. Those in the states are not so very conscious of it, although lying as it does firmly in the back ground, it can be evoked into action at any moment.

Division of powers between the Central Government and the Indian States.

The demarcation of the powers of the central government and of the governments of Indian States is quite as rigid as the division of powers in a federal system. The central government is supreme in all external affairs—which include among them the relations with foreign states, defence, posts and telegraph, railways and other means of communication to the extent to which they are required for military and strategic purposes. In all these matters the rulers of states have no hand and they have to implicitly obey the decisions of the central government. A large field of sovereignty has thus been taken away from them. This carries along with it the implication that the paramount power has the constitutional authority to require the rulers of states to do anything which in its opinion is essential to make effective its control of external affairs. It can demand supplies

during a period of war, build forts and cantonments within the state territories, construct strategic railways, obtain military recruits, and lay down its own general policy on all these and similar subjects.

Paramount power's right of intervention in their internal affairs.

In internal affairs the rulers of states are sovereign. But this sovereignty is subject to a serious limitation. The paramount power has reserved to itself the right of intervention in internal matters. It is only on that condition that it guarantees to them their territorial integrity. And in the exercise of this right it is the final authority to decide on the occasions which might demand intervention and the form which it should assume. There have been many cases of intervention to suppress rebellion and disorder, to prevent tyranny and gross misrule, to put down inhuman practices like infanticide, to uphold the principle of religious toleration and to raise the general standards of administration. Intervention has resulted in some cases in the forcible abdication of rulers; in some others in the appointment of British officers as advisors, dewans and administrators.[13] These measures are in addition to the stationing of Residents and political agents to watch the general administration of States and keep the central government duly informed of important events happening there.

All this intervention amounts really to the exercise of a larger amount of control than what obtains ordinarily in a federation. Within a federal system it is always understood that when once powers are divided and assigned to the centre and the parts, the central government should have no control over the local governments as to how their powers should be administered. Each goes its own way without the interference of the other. From this standpoint the position of the states will be altered considerably to their advantage in a real All-India federation.

The indefinite and arbitrary nature of Paramountcy.

The present division of powers between the central government and the governments of states is not based on one definite written constitution. A number of treaties exist between indi-

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[13] K. P. PANIKKAR; "Indian States and the Government of India", Ch. VII.

vidual states and the central government and they form a record of powers surrendered in each case. But numerous conventions and usages have grown in course of time and it is on their basis that the Government of India has been carrying on its relations with states. The question is often discussed as to whether mere usage could confer rights and powers not warranted by a strict interpretation of treaties. Discussions on this subject have been going on but the paramount authority has not felt the need to change its general policy or attitude. This introduces an element of uncertainty and indefiniteness into the constitutional position of states, as much depends on the idiosyncracies of particular Governors-General or the everchanging exigencies of the political situation in the country. In a real Indian federation this uncertainty is bound to disappear. The constitution would be reduced to writing; the powers of the central government and of the governments of states would be clearly defined; and the interpretation of the constitution would be left to the courts and not to the central government as is the case at present.

In its not having the competence to bind the people of states with its own laws the present central government in India is similar to the central machinery in a confederacy; but the analogy does not extend any further. In its constitution as well as in the amount of authority it wields, it is poles apart from a confederate government. Generally the latter is made up of delegates sent by the constituent units which bind them to vote according to instructions and this places the central organisation quite at the mercy of the units. The Government of India has no such connection with the states. The Governor-General in council derives his authority from parliament. On his council there are no representatives of states. The policy which he adopts in All-India matters like defence, external affairs, customs, railways, opium, etc., has serious repurcussions on Indian States but there is no assembly representative of all the states or the more prominent among them to influence his policy. The states have to quietly abide by his decisions. In this respect the provinces in British India with their representation in the two houses of the Indian Legislature have more power and dignity.

Federalism will improve the position of the Indian States.

If a true federation comes into existence the states will have their position considerably improved in this respect. They will have adequate representation in the federal legislature which will give them a share of control in the administration of All-India subjects.

At bottom the present constitutional system is really unitary.

The above analysis of the Indian constitutional system shows how it is mixed in character. It has in it the elements ordinarily found in a unitary, a federal and a confederate system. But these are blended in such a manner that it secures to the central government an irresistable strength and influence through which it is able to reduce the provinces as well as the states to a position of subordination. This is a point to be borne in mind in considering whether and to what extent the authority of the states is going to be adversely affected by the esta blishment of an All-India federation.

Chapter II

THE ESSENTIALS OF FEDERALISM

It has already been pointed out that the one fundamental characteristic of a federal system is the existence of two independent governments within the same area, each supreme in a sphere of its own and each enjoying complete freedom from control and interference by the other. It has also been incidentally remarked that all those institutions and arrangements that are absolutely necessary to secure to each government this freedom from the control of the other constitute what may be styled the essentials of federalism. It is now proposed to examine what those essentials are.

The exact delimitation of the spheres of each Government is the primary essential.

The primary essential is the delimitation or the exact definition of the sphere of each government. This must be done as precisely as is humanly possible so that each may know where its sphere begins and how far it extends and where and when its action will be considered as an encroachment on the other. If there is uncertainty or vagueness in this respect, neither government deserves to be called an independent one as there will always be room for mutual interference consciously or unconsciously. This essential is ordinarily secured by an enumeration of the powers of the central government or of the local governments or of both, or by the adoption of some other device of a similar character. Much of the work of the Indian Round Table Conference and many of the proposals embodied in the 'White Paper' and in the Joint Parliamentary Committee Report refer to this. As the Government of India has been unitary all along, no such enumeration is found in any of the 'Government of India' Acts passed so far, the central government being given the freedom to determine what should or should not be done by the provincial governments. This is no longer possible as it is proposed to have a federal form of government for the country. There are many questions relating to the distribution of powers in a federation—the basis on which it should be done, the distinction between 'exclusive', 'concur-

rent' and 'residuary' authority etc. All this will be considered at a later stage. What requires emphasis now is that a definition of the spheres or powers of the central and local governments is the first essential of federalism.

This requires a *written* constitution:

This essential cannot be secured unless the constitution which forms the basis of the federal system is a written one. A 'constitution' is a body of fundamental principles according to which the government of an area is carried on. In order that there might be no ambiguity regarding the powers which each government has under a federal system, it is necessary that these fundamental principles should be reduced to writing instead of being left in the form of mere understandings. A written document can be made quite precise and definite. This explains why every federal state has a written constitution. This is necessary whether the federation is formed out of a number of previously sovereign and independent states coming together or out of the bonds of a unitary state being loosened. In either case, powers which were concentrated formerly at one point require distribution between two governments, and if disputes between the two governments should be avoided later on, it is essential that the exact terms of the distribution should be embodied in a written document.

though a federal system may be brought about by mere usage and convention;

But this does not mean that a federal system can never come into existence without a written constitution. It is possible for a unitary government to become slowly transformed into a federal one through the growth of mere usage and convention.[1] In some of the unitary states the central government may actually follow a policy of extensive decentralisation with the result that in practice the local governments in them are as autonomous as the units in some of the federal states. The relations for instance between the imperial government in England in the eighteenth century and the governments of the thirteen colonies in North America were of this character. Though there was no written constitution strictly demarcating their powers, usage and convention brought about a real division of

1 ARTHUR W. MACMAHON'S article on "Federation" in the Encyclopædia of Social Sciences.

authority between them so that each government knew what powers it might normally exercise and when its action might be construed as an encroachment on the sphere of the other. The imperial government confined itself to external affairs and affairs where some uniformity was required, while the colonial governments controlled internal affairs; and as observed by an acute writer "undoubtedly the old colonial system was federal in practice".[2] It was similar usage that introduced a federal relationship between England and her self-governing colonies in the period after the introduction of responsible government and before the growth of dominion status.

and the written constitution may itself be modified by such development;

It must also be understood that in spite of a written constitution usages and conventions may grow and modify to a great extent the definition of powers as laid down in it.[3] As circumstances change and as new needs arise, the earlier distribution of powers may be found inadequate, and both the central and local governments may enter into various understandings which do not find a place in the original document and which are perhaps even in conflict with it. Reference will be made later to the tendency in many federations as a consequence of which governments—central and local—are becoming more and more interdependent instead of remaining independent of each other through the growth of systems of grants-in-aid, ministers' conferences, common financial machinery etc.

it is only a normal requirement.

When it is said that a federal constitution must be a written one, it must be noted that that is the normal requirement. Exceptions may be found here or there, but they are not common. This is due to the fact that most of the federations are not the outcome of evolutionary growth but of sudden revolutionary movements. Action had to be taken and decisions had to be reached at a particular moment of time, so that they could not be established except through a written constitution. This was the case in the United States, in Canada, Australia, the German Empire, the German Republic, etc. A similar process has gone on at the various sessions of the Indian Round Table Confe-

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[2] A. P. NEWTON: Op. cit. P. 17.

[3] BRYCE: "The American Commonwealth", Vol. I, Ch. 34.

rence and in the subsequent discussions in the English Parliament. As has already been pointed out, there is even now in India a division of powers between the central government and the governments of provinces and states. In the case of states the division is mainly the result of usage which has not been codified. This has resulted in much vagueness and given room to controversy. It is therefore through a written constitution that the future division of powers will have to be formulated.

It should not be inferred from this that a 'written constitution' is a special characteristic of the federal system. For, it is found now in almost all the states whether federal or unitary. It is the distrust entertained about those who are placed in authority and who are likely to abuse it that is the cause of the growth of written constitutions in many cases. But while it is possible to conceive of a unitary system being worked without a written constitution because the source of all authority is one government, it becomes essential under a federal system as there are two competing governments side by side claiming the right to exercise coercive authority. To avoid mutual conflicts between them a written document is essential, and from the federal point of view the most important part of it is the section devoted to the enumeration of the powers of the central and local governments, the arrangements devised to give due effect to this enumeration and the methods by which these can be altered.

It also requires a *rigid* constitution:

To secure to the governments within a federal system the freedom from mutual control so necessary for their very existence, the constitution should not only be written but should also be made rigid. A constitution is said to be rigid when the process by which it is amended is different from the process by which an ordinary law is changed. In a federal system ordinary laws on certain subjects are changed by the central government and those on certain other subjects are changed by the local governments. If the power to amend the constitution is included among the subjects on which it is competent for either the central or the local governments to legislate, there is the grave danger of their using it to defeat the objects of federalism by each trying to enlarge its sphere of control and encroach on

the sphere of the other. It is therefore clear that neither the central nor the local governments should separately have the authority to change the constitution. What institutional devices are to be adopted for securing this object and how far the devices now obtaining in the leading federations of the world are appropriate for the purpose in view are matters which require consideration at a later stage.

though it is modified by usage and judicial interpretation.

One question that incidentally arises in this connection is whether rigidity by itself will maintain intact the scheme of the distribution of powers as laid down in the original constitution. Reference has already been made to the growth of usage and conventions which have a tendency to modify the scheme. There is also the possibility of the constitution undergoing a change through judicial interpretation, as courts are given in most federations the right to interpret it. As a matter of fact, in almost all federal states central and local governments are now in possession of many powers not referred to at all in the constitution either because they were deliberately omitted, or they could not be conceived of in the circumstances of the time when the constitution was framed. In some cases a new meaning had to be given to the old powers so that their exercise might be in harmony with the changing needs of the state. The result is that though there has been no formal amendment of the constitution, the way in which it is actually worked from day to day is different from the way in which its founders wanted to have it worked. Much of this is brought about through judicial decisions. Technically the constitution is rigid, but it is all the while undergoing a process of silent modification sometimes to the advantage of the central government and sometimes of the local governments.

But it should not be concluded from this that there is no need to make the constitution rigid or no use in doing so. There is nothing specially peculiar in the constitution unconsciously undergoing a change through the instrumentality of courts. It is the characteristic of every law and the constitution is one of the laws of the land and is therefore subject to the same influence. Certainty and definiteness which are the advantages associated with written law do not cease to be such simply be-

cause the judges give to it a new meaning in the light of a changing environment. We do not conclude from this that written laws are unnecessary. The same is the view which we have to take in respect of the rigidity of the constitution. For, it is always understood that judges are reasonable in their interpretation, and do nothing which is fundamentally opposed to the underlying federal principle or antagonistic to its spirit. Moreover as the courts are independent and are not the mere creatures of either the central or the local governments, there is no reason to suppose that they will have any thing more than the normal human bias in favour of the one government or the other. It is therefore best to make the constitution technically rigid.

An independent tribunal to interpret the constitution is the next essential.

The next essential of federalism is a tribunal with power to interpret the written constitution and keep the governments within their allotted spheres. For, the mere enumeration of powers and the rigidity of the process of amendment are not adequate to secure this. In the first place, no exhaustive enumeration of powers is possible. As new circumstances emerge, new powers will have to be exercised by governments and the question as to which of the two governments has a legitimate claim to do it will arise. There must therefore be an impartial tribunal to decide such issues if conflicts between the governments are to be avoided. Even when a new contingency has not to be faced, it may be that knowingly or unknowingly either government may be trying to obtain jurisdiction in matters not permitted to it by the constitution and thus encroach on the sphere of the other. Honest doubts also may arise as regards their powers. There is nothing unusual in all this. Much of the private litigation in a country is of this character. Conflicting claims are put forward under the same law by private individuals even though the intention of the law-maker is to make the law quite clear and definite. Similarly conflicting claims may be raised by the central government or a local government as to which of them has the legal right to exercise jurisdiction over a particular subject, and if there is no tribunal to reconcile them, there is the danger of one government encroaching on the field of the other and interfering with its freedom.

The danger is all the greater, as it is not merely the question of the powers and the prestige of the two governments that is involved, but also the burdens to which individual citizens become subject in consequence of such disputes. The citizen will not be in a position to know whose law he has to obey in a particular matter; obedience to one government may make him the victim of the other. It is therefore essential that there should be a tribunal which will have the authority to decide such disputes and make clear to the citizen which law is really valid for him.

On the point that such a tribunal should as far as possible be independent of both the central and local governments, there is not much room for difference of opinion. In most federations the constitution itself has created a supreme court and entrusted it with such a power. The exceptions to this are the German Empire (1871—1919) and Switzerland. The issues that have to be decided are legal in their nature. They generally relate to whether a law made by the central or a local government falls within the sphere allotted to it under the Constitution. For, neither of them has an inherent authority of its own. Whatever power they have, they derive it from the constitution; and it is not an unlimited power to legislate on any subject they like but a limited authority restricted to particular matters. It is only those that generally deal with complicated legal questions that will be best fitted to handle issues like these and it is therefore appropriate that the courts are entrusted with this power. They are free to declare a law made by the central government or the local government invalid on the ground that it comes into conflict with the enumeration of powers in the constitution; and by such action they succeed in protecting each government from encroachment by the other.

The significance of the position of courts in a federal system is understood when it is contrasted with what happens under other constitutional systems. There are unitary states whose constitutions are written and rigid; there have been confederacies possessing similar constitutions. But courts do not hold the same important place in them. It is possible that a law made by the government in a unitary system interferes with the

fundamental rights granted by the constitution to the individual citizen. But courts do not question the validity of such a law. For, it is generally understood that these rights are merely expressions of ideals and that their actual scope and content should be left to be determined by the government of the country so that the legal rights the citizen has are not the 'fundamental' rights found in the constitution but only those which are recognised as such by his government. Moreover, the issue is only between the government and the individual and no untoward political consequences will arise even if all the laws passed by the government are assumed to be valid under all circumstances. So also in a confederate system the individual states are sovereign and if they find that the central organisation is perpetually encroaching on their freedom, they have the remedy of withdrawing from the union. Courts with power to interpret the constitution are thus not quite essential to systems other than federal.

Any other arrangement does not serve the same purpose.

Some other devices have been suggested as being more appropriate than courts in fulfilling this object of protecting governments against mutual encroachment but none of them is equally effective or consistent with the federal principle. There is, for instance, the declaration in most constitutions that national laws are superior to state laws if both refer to a subject on which the central and local governments have concurrent jurisdiction.[4] But this is of no avail when the issue is whether a subject belongs to the sphere of concurrent or of exclusive jurisdiction. Such disputes will necessarily have to come before courts. The above declaration may be regarded more as a rule of guidance for courts than as a substitute for them. In some states the central legislature itself decides any dispute arising as to the constitutionality of the laws enacted by it. This is the case in Switzerland. But this is not a model to be followed by other federal states. This gives too much power to the central government and makes the interested party the judge in the case. It is tolerated in that country because through referendum and initiative there is really an

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[4] Commonwealth of Australia Act, Sec. 109.
Constitution of the German Republic, Art. 13.

appeal from the legislature to the people themselves.[5] Even there the courts have the power of pronouncing on the validity of the laws made by the cantons. In Canada the central government is empowered to disallow or veto the laws passed by the provincial government.[6] This gives it an opportunity of keeping the provinces to their legitimate sphere. But at present the veto is exercised very rarely as being inconsistent with the federal idea of provincial independence, and it has therefore no constitutional significance.[7] Moreover, this affords no solution of the problem of keeping the central government within proper limits. It is sometimes suggested that the veto on provincial legislation as well as the power to decide generally on the constitutionality of federal legislation might be left to the second chamber in the central legislature as it is generally representative of the units as such. It is argued that this will prevent any abuse of authority, as a chamber so constituted will care for the interests of local governments. This was the procedure adopted in the German Empire (1871—1919) where the *Bundesrat* consisting of the delegates from the member-states decided disputes between the Federation and the States. But where the veto of such a chamber is really effective, it would undermine the autonomy of the individual states and encourage the gradual encroachment of the provincial sphere by the centre.[8] The other alternative would be for such a chamber to look at disputes from the point of view of local governments whose representative it happens to be and weaken the authority of the centre. It would also lead to a good deal of mutual bargaining among the member-states and decisions would be based more on expediency than on strict legal principle.[9] Another suggestion has been that the federal executive might be given the power of vetoing federal laws whenever they show a tendency to encroach on the sphere of local governments, and thus come into conflict with the fundamental constitution. But

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[5] R. C. Brooks: "Government and Politics of Switzerland"—P. 177.
[6] B. N. A. Act, Sec. 90.
[7] Kennedy: "The Constitution of Canada"—Pp. 415 ff.
[8] Finer: "Theory and Practice of Modern Government," Vol. I, Pp. 281-2.
[9] *Ibid.*

this is much more harmful than the action of courts. The executive is generally a more partisan body and its views will be guided more by party considerations than by the strict construction of law. Where the executive is independent of the legislature as in the United States, it would embitter the relations between them to a greater extent than is ordinarily the case and introduce complications into the working of the constitution as a whole. Where there is responsible government as in Canada or Australia, there is no chance of the executive vetoing any bill passed by the legislature. It is however interesting to note that in a few cases the Governor-General is empowered in the proposed Federal constitution for India to validate by his previous sanction or his subsequent approval, laws passed by the Federal or the provincial legislatures which otherwise would be invalid as being beyond their constitutional competence, although the normal authority for the purpose is the judiciary.[10]

Misconceptions about the doctrine of judicial review.

It is now clear that under a federal system there must be an institution having the authority to enquire into the validity of the laws passed by the central and local governments and that the courts are best fitted for that purpose. But there is a good deal of criticism on this doctrine of judicial review and it is strongly condemned by several thinkers and statesmen especially in the United States. They point out that this vests in a small number of persons constituting the supreme court a vast authority of vetoing all legislation, that it is inconsistent with the doctrine of popular sovereignty, that the court is really a third legislative chamber, that judges in pronouncing their verdict are swayed by political and not legal considerations and that what influences them is not the constitution of the country but their prejudices. There is some truth in this condemnation but no other alternative more satisfactory and less defective than courts has been suggested to carry out the work of interpreting the constitution so fundamental to the maintenance of the federal system. Moreover, it has to be recognised that much of the opposition in the United States has not centred round the decisions given by the supreme court in matters affecting the

[10] Report of the Joint Committee on Indian Constitutional Reform (1934) —P. 32.

distribution of powers between the union and the states. Very few of the most debated cases are concerned with it.[11] It is disputes arising out of the other clauses in the constitution, especially those dealing with private property and 'due process of law' and the decisions of the courts in respect of them, that have been responsible for the most heated controversy. The peculiarity about these clauses is that they form part of the body of "the fundamental or the natural rights of man" which were incorporated into many constitutions of the eighteenth and the nineteenth centuries, both federal and unitary. It has already been noted how in unitary states the courts have not been empowered to question the validity of the laws on the ground of their coming into conflict with these 'Natural' rights. But no such precaution was adopted in the United States. No distinction has been made between limits imposed on governments to prevent their mutual encroachment and those imposed on them to safeguard the rights of the individual. The supremacy of the courts in the United States is not based merely on the requirements of the federal system but also on the theory of separation of powers, the sacredness of private property and the distrust of democracy and many other similar views held by the founders of the constitution. It is not the attempt of the courts to uphold federalism that is at the bottom of the attacks on judicial review; it is on the other hand their efforts to give effect to the other political views of the eighteenth century which have become thoroughly antiquated in subsequent times. The defect lies therefore, not in the doctrine of judicial review so far as it relates to the distribution of powers, but in its application to those parts of the constitution where it is irrelevant or harmful. What is therefore necessary is to restrict the powers of the judiciary to the interpretation of only those clauses which have a bearing on the enumeration of powers. In other respects and with reference to the rest of the constitution, the position of the judiciary under a federal system need not be different from what it is under a unitary system. Here is an illustration of the evils arising from a failure to distinguish in the constitution of a federal state between what is essential to federalism and

[11] BROGAN: "The American Political System"—P. 20.

what is essential to maintain the remaining parts of the general frame-work of government.

To maintain the federal characteristic of a constitutional system, nothing more is essential than an exact delimitation of the powers of the central and local governments, a constitution which is written and rigid, and a tribunal preferably judicial, to keep the governments within the limits laid down for them in the constitution. Where these factors are present, there is no danger of either government losing the independence which it should have under federalism. They furnish in themselves all the institutional and mechanical devices necessary for the successful working of the federal idea. Institutions are not the only conditions on which the success of a political principle in practice depends. There must be present an appropriate human material with confidence in the principle and willingness to give effect to it. Given this, it may be asserted that no institutional arrangements besides those referred to above are necessary for preserving a federal system of government.

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The assumption that a bicameral legislature is an essential.

In most of the current discussions on federalism it is taken for granted, that it requires as one of the essential conditions of its success a bicameral legislature with a lower house elected by the people to represent the principle of unity and an upper house (or a second chamber) elected by the constituent parts (local areas) as parts to represent the principle of diversity, federalism being understood as one aspect of the general principle of unity in diversity. Though there have been a few dissentients from this view in the discussions at the Indian Round Table Conference, the general consensus of opinion was on the whole in favour of a second chamber to represent the units as units. This is partly due to the influence exercised on them by the study of the federal institutions in the West and partly to their failure to critically examine the conditions in India which are moulding the character of the future institutions—their structure, their functions and their status in the new Indian constitution.

It is relevent only in case of a real representative form of Government.

The above assumption is relevant only in case it is decided to have a real and an effective representative form of government in any federal state. It is then that the question will arise whether the legislature should consist of one house or two houses. It is again only when the lower house is the real governing body that the question whether a second chamber is not necessary to prevent hasty and ill-digested legislation becomes important. Where the lower house is an advisory or a consultative body and where the power of final decision lies with some other institution, no purpose is served by having a legislature of two houses.

A Federal system may be completely based on autocracy.

In theory, it is possible to conceive of a federal system completely based on autocracy—one autocrat being supreme over affairs common to the whole area and other autocrats ruling over particular portions of it and enjoying supremacy in local affairs. There would then be two sets of governments each sovereign in a sphere of its own. There may be a sort of written agreement among all the rulers defining how the powers of government should be distributed and how disputes arising out of the terms of the agreement should be settled without recourse to arms. Such an arrangement would have all the essentials of federalism and there would be no question of a single or double chamber. The autocrat at the centre would be independent just because in the administration of the central affairs the local autocrats have no hand; and the local autocrats would similarly be independent because the central ruler has no hand in the administration of local affairs. No one could argue under these circumstances that to maintain the independence of the local rulers their representation on a central council would be necessary.

The establishment of a central 'Federal Council'.

But history does not give us examples of a federal system dominated by autocrats except perhaps the German Empire. The fact that autocrats are willing to enter into an agreement and peacefully abide by its terms shows that they have faith in what may be called a constitutional form of government though not in democracy. Willingness on the part of those in authority to work in conformity with some rule instead of arbitrarily is the essence of constitutionalism. When autocracy is prepared to

place itself under such a limitation, its natural outcome will be the establishment of a central federal council consisting of the local rulers or their agents and the management of all common affairs like defence, tariffs, currency, etc., by it instead of by the central ruler alone. A unicameral federal council thus comes into existence. But the exact significance of such an institution from the federal standpoint has clearly to be understood. Primarily it should be regarded as a step to make the central administration more constitutional and perhaps more efficient than before. Its importance to the federal system is only secondary and incidental. The central ruler ceases to be a despot. He finds himself compelled to abide by the verdict of the council. It is possible that this might lead to greater efficiency as legislation and administration in regard to central matters will be based henceforward on a larger and more varied experience which the members of the council, coming as they do from different localities, bring along with them. The decisions of such a council will be more acceptable to all the parties concerned than those of the despot.

Its value to Federalism.

From the point of view of federalism, such a council serves an indirect purpose. It has already been seen that the independence of the local rulers from the control of the central government is the essence of federalism. Even in the absence of a federal council like the one under consideration, the local rulers enjoy complete constitutional independence in local matters. Encroachments on their authority is not possible because of the existence of a definite agreement and of an independent tribunal to decide conflicts of jurisdiction. So long as the central ruler is prepared to act strictly according to the terms of the agreement, there is no possibility of any encroachment on the freedom of local governments. And our hypothesis assumes that he is so prepared. The institution therefore of a council does not make the system more federal. But it secures one incidental advantage. It acts as a check on the disposition of the central ruler to act unconstitutionally, or to disregard the decisions of the judicial tribunal, or to use his military forces for crushing local independence. A representative council will therefore serve as a constitutional brake on the vagaries of the central

government and prevent it from any course of arbitrary action which is likely to interfere with the freedom of local authorities. To that extent therefore it serves a federal purpose and it may be consequently regarded as one of the safeguards of the federal system.

Especially in giving adequate consideration to local interests.

It has also value from another point of view. Though the central authority under a federal system is entrusted with control over matters which are of importance to the area as a whole, it is necessary that in passing legislation on them as well as in administering them, their bearing on the interests of the several localities constituting the total area should not be lost sight of. It is true that such matters should be decided with reference mainly to their effects on the general welfare of the community even though they might prove to be harmful to particular areas here or there. But this does not mean that no attention whatever should be paid to their local consequences. A council consisting of delegates belonging to different local areas will be in a position to give adequate consideration to the effects that a proposed measure might produce on particular localities and there is no likelihood of the point of view of any area not being represented before final decisions are taken at the centre. It has, however, to be noted that the council should not be regarded merely as representing local interests and that it does not stand for general interests. What happens in such a body is that each member in considering matters which have a bearing on the whole area does neither cut himself off wholly from his local attachments nor swayed entirely by them to the exclusion of his attachment to the wider interests of the whole. He represents both points of view, and the single council may be said to stand for the central interests and also for the local interests in so far as the latter have a bearing on the former. The function therefore of a representative central council in a federal system is primarily to legislate for and administer the central subjects, and secondarily to serve as a safeguard against arbitrary encroachment by the central authority on the freedom of local governments and to bring up for consideration any local point of view which is relevant before a decision on a central subject is finally taken.

The above conclusion is not affected in any way by a change in the general foundations of the polity. It applies equally to a democracy or autocracy, to a fascist or a communist state. It is the failure to understand the basis of the distinction between central and local subjects and a misreading of the psychology of an elected representative that is responsible for the idea that two chambers are required to work federalism in a democracy.

The subjects on which the central legislature has to make laws are generally such as are of equal concern to all the inhabitants of the territory irrespective of the particular locality or the province in which they happen to live. They are of equal concern either because all the people are equally affected by it, or because it is not possible in their case to measure the effects they produce on each province. Defence, Currency, Banking, the Post and the Telegraph fall under this category. In the consideration of these subjects there cannot be anything like the views of a particular province as province, and there is no possibility of a province impressing its individuality or its unique experience on any legislation proposed with regard to them. There are other subjects which fall within the control of the central legislature but which are likely to affect one province in one way and another province in another way. A tariff, for instance, may produce adverse effects on the agricultural provinces and favourable effects on the industrial provinces. It is necessary in such cases that the views of each province as province should be heard by the legislature before any measures are passed and there must be provision for it in the constitution.

A unicameral legislature can discharge these functions in a democracy.

Let us suppose that the legislature consists of only one house the members of which are elected by the people on a fairly wide franchise. Where the whole country forms one constituency and where there is no system of proportional representation, it is in theory possible to conceive of a legislature being elected without any members from a particular locality or province on it. In such a case there would be none to express the views of that area. But nowhere is such an electoral system in vogue. As a matter of fact the territory is divided into a number of constituencies and each province has its share of representation so that there will be in the legislature members repre-

senting every province. These members are elected to represent the views of the constituency on any subject coming up for consideration in the central legislature. If a measure before that body adversely affects the interests of his constituents, the representative is sure to bring to its notice its harmful effects. Self-interest, his desire to get himself re-elected as well as his attachment to his province—all this will impel him to give expression as effectively as he can to the point of view of his electorate. The same will be done by the other members of the legislature elected from other provinces so that there is no danger whatever of the views of any province, as province being left unheard. In countries where the representative has to be a resident of the constituency which elects him, there is a guarantee that nothing will be done without opportunity being given to local views making their influence felt.

The psychology of an elected representative.

It is not correct to assume—as it is often assumed—that representatives elected to the lower house of a legislature by the citizens of a province like Madras cease to be Madrasees the moment they take their seats on it and look at every question from the national standpoint, and that similar representatives elected directly or indirectly by the same citizens to the second chamber cease to be national in their outlook and look at every question only from the point of view of their province. But it is on such an assumption that the argument for a second chamber is based. In a democratic federation there is in every citizen a sort of balance between his attachment to the country as a whole and to the particular province to which he belongs. It is this that makes the federal system both desirable and possible. There are no citizens who are wholly national and others who are wholly provincial. What is true of the citizens is also true of their representatives. A single chamber which is adequately representative of the people is sure to discuss questions from the national as well as the provincial standpoint.

There are subjects which have to be looked at entirely from the provincial standpoint. Local conditions and local experience have to be the only deciding factors in their case. The needs of the other provinces or of the nation as a whole have no bearing on them. It is such subjects that are generally classed as

provincial and in making laws on them the provinces are independent. As the central legislature has nothing to do with them, there is no question of the views of the provinces as provinces being represented on it so far as these subjects are concerned. It is through their achievements in this field that the provinces will be able to impress their individuality on national life.

A Second Chamber unnecessary to prevent central encroachment

It has also been argued that a second chamber is necessary to safeguard the rights of part-states or provinces against encroachment by the central authority, and that in its absence more and more power will be transferred to the centre and the part-states will be reduced to the position of local areas within a unitary system. But neither theory nor the history of second chambers in the existing federations lends support to this view. A democratic federation has its roots in the desire of the people to have two independent governments ruling over them. It is they that decide what powers each of the two governments should have. Without their consent it is not easy for the centre to enjoy more authority than what is permitted to it under the constitution. If public opinion is favourable to an increase of the powers of the centre, there is no reason to suppose that the second chamber will be able to oppose it more successfully than the first one, as both are elected by the people. The electorate will not send to the lower house persons who will be in favour of the centre and to the upper house persons who will be against it. Moreover, upper houses in the United States or Australia or Canada or in any other federal state have not been the champions of state-rights. Among their members there have always been many favouring a policy of centralisation, just as among the members of the lower houses there have been many in favour of the extension of the authority of the part-states. The all-pervasive influence of party organisations without which no democracy can work leads to the disappearance of any real distinction between one chamber and another.[12] Sooner or later the second chamber becomes a copy of the first and ceases to fulfil any of those special functions for which it might have been originally established. Experience has also shown that where the part-states in a federation are of unequal size, the

or to protect the smaller against the bigger states.

[12] FINER: Op. cit.—Pp. 289—91.

second chamber does not stand always as the protector of the smaller ones. Most of the questions coming up for discussion before it do not affect the bigger states in one way and the smaller ones in another way. There is no instance of the members belonging to the bigger states forming themselves into one party and fighting against those from the smaller states.

It may therefore be safely concluded that a second chamber is not one of the essentials of federalism. All the purposes which it is generally expected to serve are as effectively served by the first chamber. If in spite of this a second chamber is established, numerous complications are bound to arise, as it will function not only in matters concerning the relations between the centre and the parts but in all legislative affairs.

It is specially unnecessary in the new Indian Federation.

There are two special reasons why a second chamber is unnecessary in an All-India Federation. The lower house of the Indian Legislature is not a purely 'national' body as in other federal states. Members are not elected in territorial constituencies on a uniform basis. The interests which a second chamber is supposed to protect receive adequate representation in the first chamber itself. The Indian States, the Muslims, the other religious and racial minorities, all possess separate representation. There is therefore no point of view which has to be specially represented in a second chamber. Moreover, the Indian Legislature is an advisory or a consultative body in matters of fundamental importance. It has not the power of final decision on them. The Viceroy and the Governor-General is supreme in most of them and has over-riding powers in almost every field. The mere multiplication of advisory bodies introduces unnecessary complications into the machinery of government without adding to its usefulness.

CHAPTER III

THE FORCES BEHIND FEDERALISM

Forces bringing about a federal form of Government.

FEDERAL systems are now found in several countries like the United States of America, Canada, Australia, Russia, Switzerland, Austria, Brazil and a few other Latin American Republics. Germany had such a system from 1871 to 1933, first as an Empire and then as a Republic. In India it is now proposed to institute a federal form of government and if it succeeds, it will be a unique achievement as it will affect a population of three hundred and fifty millions, far more numerous than the population of any other federal state. A history of federalism shows that in some cases it is the result of a union of states which were previously sovereign or independent of one another, that in a few cases the union was preceded by an intermediate stage of confederate government, and that in some other cases it grew out of a previous unitary system. There are examples of federal states which, as a result of altered circumstances, became transformed into unitary states, and some in which there is at present a strong movement in favour of unification. In some federations the units are so dissatisfied with the conditions and results of union that they are anxious to secede and become independent, just as there are some unitary states of recent formation in which there is a feeling that unification was rather a hasty step and that it would have been much better if federalism had been established.[1] From a study of the history of the subject, it is possible to discover the forces which are favourable to the organisation and the smooth working of a federal form of government and those other forces which necessitate the substitution of an alternative form in its place.

In this connection it is best to regard federalism as one aspect of the principle of political unity coupled with limitation of authority. The forces analysed should explain the conditions

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[1] EDGAR H. BROOKS: "The Secession Movement in South Africa" in *Foreign Affairs*, January 1933.

favourable to unity as well as those which necessitate the limitation of the authority of the governments established. The federal type of unity may be the outcome of either of two processes. In one case it is created in an area where formerly there was no unity at all and where the inhabitants were living under different sovereigns or independent governments; here a new central government comes into existence and the old governments become local. The condition under which the unity is effected is that the old governments become restricted in the exercise of authority to a limited field and the new central government gets a part of their old authority transferred to it. They do not, however, become subordinate to the centre in regard to the powers they retain. What requires explanation in this case is why unity is felt to be desirable, why the desire for unity does not result in the concentration of all authority in one central government and why autonomous local governments continue to work. In the second case, the federal type of unity replaces another kind of unity which previously existed in the area. In addition to the central government a number of independent local governments are established. The former which enjoyed unlimited authority up till then parts now with a portion of it in favour of the latter so that its authority gets limited. Here again what requires explanation is why the unity becomes loosened, why the process of loosening does not result in complete disruption and the creation of a number of independent governments without any central authority over the whole area, and why limitations have to be placed on the power of the central government for the sake of strengthening the local governments. Political unity is of different kinds and of different degrees of strength and intensity; and federal unity is unity of a particular kind and degree. Outwardly it is characterised by the existence of two governments each enjoying only a limited authority. The creation of unity where it was previously absent and its continuance in a modified form where it formerly existed are subject to the condition that a new set of autonomous governments—central or local—should be established and that the old set of governments should place themselves under certain limitations with a view to get some authority conferred on the

They should explain the two important characteristics of Federalism:— (a) unity, with (b) limitation of authority.

new ones. This is the real significance of the phenomenon associated with the creation of a federal, in place of a non-federal, type of polity.

Factors promoting unity—

The answer to the questions

(1) Why political unity comes into existence where it was previously absent,

(2) why it is maintained in a modified form, and

(3) why it is accompanied by limitation of authority

is furnished by a study of the desires, the hopes and fears of those who have the power and influence to frame federal constitutions. A constitution is merely an enbodiment of the various influences that operate on the minds of those that are responsible for framing it. It is the realisation by them that union would bring along with it a number of advantages—military, economic and political—that was the strongest force that drove the founders of the constitution of the United States of America, Canada, Switzerland, the German Empire, etc., towards a federal form of government. It was the need of common defence against England that first brought the thirteen colonies of the United States together into a confederacy; it was the feeling that unless the unity grew stronger, the independence obtained at the end of the war against England could not be preserved intact, that made the leaders of the thirteen states bring about the federal type of government. A similar motive prompted the founders of the German Empire in 1871. It was to defend the independence of the individual German states from the attacks of France or Austria and to make Germany the leading military power in Europe that they established the German Federation. The appearance of the foreign menace in the Pacific after 1883 was a powerful factor in strengthening the federal movement in Australia.[2] The fear that the United States would be able to annex Canada in case each province continued to lead an isolated life of its own, and the realisation of the truth that only by concerted action among all the provinces such a danger could be overcome were responsible for the growth of

The need of common defence.

[2] QUICK and GARRAN: "The Annotated Constitution of the Australian Commonwealth"—P. 110.

the federal idea in Canada.[3] In the case of every other federation the military factor was a decisive one.

Economic advantages.

Next only in importance is the economic factor. When there are a number of areas contiguous to each other but politically independent, there is a difficulty in making the best use of the economic resources of the territory as a whole. Each government naturally builds a tariff wall round its frontiers and impedes freedom of trade. Markets would become narrowed; there will be no outlet for surplus products or capital or labour. Means of communication would remain undeveloped as no area would by itself be rich enough to improve them. Under such circumstances political union among the contiguous areas is sure to provide an extensive market and bring about improvements in communications, in the free mobility of labour and the profitable investment of capital.[4] There would be no opportunities for areas favourably situated—on the coast, or on the highways of communication—to exploit those less favourably situated.[5] All tariff war would come to an end. In almost every federation it was the need for freedom of trade and extensive markets that acted powerfully in inducing the previously independent states to merge themselves in the larger whole. In the United States and in Australia, in Canada and in Germany, it was one of the strongest forces that was at work.

Political advantages.

The political advantages of a union are also felt to be most invaluable. The new federal state would be more extensive; it would command greater prestige and power; it could play a more influential part in international affairs. Other states would be slow to give offence to it. And above all, the vision of a great and powerful nation which would give opportunities to men of talent and ability not available in a small state, though independent, is always an attractive one.

It is, however, not necessary to give an elaborate description of the military, the economic and the political advantages

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[3] TROTTER: "The Canadian Federation". P. 45—6.
Cambridge History of the British Empire—Canada: P. 447.

[4] QUICK and GARRAN: Op. cit.—Pp. 100 ff.

[5] "The Federalist"—Pp. 214—15.

that flow from the union of a number of neighbouring areas under a common government. These have been responsible for the creation of all the federations of the modern world. No pages of the 'Federalist' are so full of eloquence and sound wisdom than those devoted to an account of the defects of a confederate government and the inestimable benefits that would result from a more perfect union.[6]

These mechanical forces by themselves have very little of momentum.

A union of the federal type is not the result of the operation merely of a number of mechanical forces. There must be a spiritual element behind them to make them move in the federal direction. For, if it were merely the advantages in the matter of defence, of freedom of trade and larger markets that are responsible for federal forms of government, there is no reason why France and England, or France and Germany, or even all the countries in Western Europe might not become federally united. Such a union would solve the problem of disarmament; it would put a stop to all commercial warfare; it would make the civilisation of Europe more of a blessing to mankind than what it is at present. But no kind of federal union involving as it does the subjection of the peoples of all these countries to a common government is conceivable. It is a matter fit for an Utopia. The reason for this is that there is no 'Spirit of Community' among those that are in charge of the governments of these countries.

They must rest on a 'spirit of community',

'A Spirit of Community' has as its essential feature a feeling of oneness among those whom it animates, as a consequence of which the welfare of any of them comes to be regarded as a part of the welfare of all, and it is open for all of them to participate in the benefits accruing to particular sections among them. Whenever a large area is taken, there is bound to be within it a diversity of interests. Some are agricultural, others are industrial; some are poor and others are rich. A particular policy might prove burdensome to some interests but beneficial to some others. Where a 'Spirit of Community' exists, each section among the people is willing to bear coolly the burdens thrown upon it, and to make sacrifices in the cause of the

[6] Essays 9 and 10.

whole; for it knows that every other section will do the same when its turn comes and that it is possible to devise ways and means by which all can participate in the benefits obtained by the community as a whole.

It is necessary to note that this spirit should animate those who are in charge of the governments of the various areas which it is proposed to unite. Where the rulers are the elected representatives of the people and the basis of government is democratic, such a 'Spirit' will pervade the people themselves and the rulers will only be reflecting it. But there may be cases where the 'people' are not at all a factor in the making and the unmaking of constitutional forms. The federal union might be the outcome of negotiations among autocrats or interested parties and factions. Even then, unless there is among the parties concerned a sort of community-spirit, the establishment of a common government will become an impossibility. It may be that the bond which unites them is the common desire to maintain their autocracy, or the satisfaction of the interests of several parties or factions. But so long as they are prepared to work together for a common purpose and make the sacrifices necessary for it, they must be credited with the possession of the 'Spirit of Community' on which lie the true foundations of a federal state.

which in a democracy becomes a true national spirit.

When the federal system is democratic in character, this 'Spirit of Community' becomes a true national spirit. It is the growth of a real national feeling among the people of Canada, the people of Australia and of Switzerland that made it possible for the inhabitants of the different provinces, colonies and cantons to enter into an organic federal union. The separatist tendencies that characterised the life of the people of the thirteen colonies in the United States had to be overcome before they could be brought together into a federation. In the words of the *Federalist* the union was possible and desirable because, "As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states."[7] While it is true that the

[7] P. 6.

organisation of a federal form of government will strengthen the bonds of nationality, a real federal system cannot be built unless there is some feeling of oneness among the people at its start.

The conditions necessitating a limitation of authority—

The above is an explanation of the working of the forces that bring under one common government the inhabitants hitherto living as subjects of different independent governments. It now remains to consider why such a union is accompanied by a limitation of the authority of the governments established. It

of the local governments in the interests of the centre :

is clear that the advantages expected from unity cannot be realised, unless a limit is placed on the authority of the old governments which now become merely local. It is only when they resign into the hands of a new central government the right to make war and peace, to organise defence, to regulate tariffs, to manage currency, etc., that the objects of the union can be obtained. It is because the separate and isolated action of the individual governments in respect of these matters proved to be harmful that the union is effected and it naturally follows that powers relating to these subjects should naturally go to the central government. This accounts for the limitation of the authority of the local governments and the restriction of the sphere in which they are supreme.

of the central government in the interests of the local governments.

But the central government also does not enjoy unlimited authority under a federal system. It shows that those who have a hand in framing the constitution and those who have the political power to dictate to them feel that a central government with unlimited authority to regulate all affairs would prove as dangerous as sovereign local governments proved previously.

Distrust of majority rule.

The origin of such a feeling is to be traced to the dislike and distrust of majority rule. Whether federal government is a government of autocrats and their delegates or of the representatives of a democratic electorate, it is this distrust that is at the root of all restrictions on the authority of the central government. This is not the place to discuss the merits and defects of majority rule. It may, however, be stated that the decisions of political majorities are accepted, not because they are necessarily right or just, but because it is conducive to practical convenience. When conclusions have to be reached through discussions in a central assembly—of autocrats or popular representatives—and

when the object of the discussions is not the discovery of absolute truth but the laying down of a plan of action, debates cannot be carried on endlessly. Sooner or later—sooner in most cases—a course of action has to be decided upon and the only convenient basis for it is voting and a resolution by the majority. Government is an organisation for planning and taking action and not for debating.

Men are so constituted that, while they are prepared to abide by the decisions of the majority in certain matters or in certain situations, they are not prepared to do so in regard to all matters or in all situations. They want to have a field reserved for them, where they are free to adopt a course of action which they consider to be right or good, whatever be the view of the other individuals. They are matters which each individual regards to be so sacred or so personal that he is resolved to be a master unto himself in regulating them, and he would feel dictation by others, however powerful or numerically strong they might be, to be oppression and tyranny. This is true of even ordinary men and women and it is all the more true of those who are in authority when they find that an outside power is trying to interfere with them.

Historical 'Particularism'.

When a federation is established in an area where independent governments previously existed, it is not likely that those who in the past were in enjoyment of unlimited power would part with all of it to a central government, however representative it might be. They would naturally try to reserve to themselves a certain field in which they would be able to call themselves absolute masters, especially in view of the fact that even administrative convenience does not require the regulation of all affairs from one centre. In addition to power over such affairs, many of them, if they happen to be individual rulers or monarchs, would like to have under their control some 'symbol' of their former authority and some 'relic' of their past splendour.

The demands of 'cultural minorities'.

This unwillingness to part with all power is all the stronger, if there are among the people in the area what may be called 'cultural minorities or groups'. A 'cultural minority' consists

generally of people who differ from the other inhabitants in their general conceptions of life due to differences of race, language, religion, history or traditions. Matters connected with culture, language, education and religion are among those which are regarded as sacred by all. Each group having such an individuality will be anxious to preserve it and will naturally prefer to retain that amount of political power in its hands which would be necessary for that purpose. No such group would like to resign the regulation of such affairs into the hands of a majority of people drawn from other groups. A democracy in an area consisting of cultural minorities must necessarily be organised on federal lines implying thereby that the authority of the central government should become limited.

The operation of the political factor illustrated from the formation of U. S. A., Australia, and the German Empire;

History affords examples of the operation of both these influences in limiting the authority of the centre. The thirteen states out of which the federation of the United States was organised were in enjoyment of sovereign authority before 1787. The Australian colonies had absolute power in all non-imperial matters before the establishment of the commonwealth. The German princes were sovereign rulers of their kingdoms before 1871. In all these and many other similar cases, there was a natural unwillingness on the part of these governments to abdicate completely all their authority in favour of the new central government. They therefore transferred to it only that much of authority which they regarded as essential for giving strength to the federal state and kept the rest to themselves. Love of power for its own sake is a strong instinct in most men. Whether in an autocracy or a democracy, there are always individuals and parties who have the capacity in them to come into places of power, if only opportunities are available. The existence of a number of independent states in the same area provides them with such opportunities. And when political exigencies require the merging of all of them in a new federal state, they would not like to forego all the opportunities they had in the past. Such motives also play their part in reserving to the old local governments a portion of their power.

The part played by the existence of cultural groups is illustrated by the history of Canada, Switzerland, and Germany. In

Canada there has always been a clear-cut cleavage between the French minority and the English majority. The French form a distinct group by themselves with their culture, their Catholic religion, language, literature and their system of civil law. A central government with unlimited authority to legislate on all matters including education and the laws of property will in Canada mean the regulation of all aspects of the lives of the French by the English majority who are not in a position to appreciate the value of French traditions and culture. If the French and the English are to remain united together as members of one political community, it can only be on condition that in matters which they regard as peculiarly their own they should be left independent. This naturally implies the withdrawal of such matters from the jurisdiction of the central government and their being vested in the hands of the provincial government over which the French would obtain control. In Switzerland also, there are three cultural groups—the Germans, the French and the Italians. They all, it is true, constitute themselves into a political community, but they resent being ruled by the majority in matters which they regard as concerning each group separately. Since these groups occupy specific areas in the country, the organisation of government on a federal basis has succeeded in reconciling their desire for union with their equally strong desire to preserve the individuality of the group. In Germany also, the south has been culturally different from the north, though the differences are not so fundamental as those in Canada or Switzerland; and this necessitated the leaving of a large field of independence to the local governments of states like Bavaria and the placing of limitations on the authority of the central government under the Empire.

and the 'cultural' factor illustrated from Canada,

Switzerland

Germany

The history of South Africa also throws some light, though indirectly, on the connection between federalism and the existence of cultural minorities. The relations between the English and the Dutch there are just like those between the French and the English in Canada. The English are concentrated mostly in Natal, and for long their relations with the Dutch were not friendly. And when a few years after the Boer War, responsible government came to be conferred on the Dutch republics,

and South Africa.

and when subsequently the question of establishing a common government over the whole of South Africa was taken up, opinion was keenly divided on whether the Union should be on a unitary or federal basis. The opinion among the English, especially of Natal, was in favour of a federation which would secure to them freedom from Dutch domination in matters of a purely sectional character. But the proposal of Natal fell through, as there was no leader of outstanding ability to fight for it. A unitary system was introduced and the English of Natal had to be satisfied with a provincial council which was entirely subordinate to the central government over which the Dutch had and still have a predominating control. It is now felt that a hasty step was taken by the Convention of 1909 and that it would have been a wiser policy if a federal system had been established. Natal would have been better satisfied, and that movement in favour of complete secession which has been attracting many of her political leaders would not have seen the light of day. The following words of Jan H. Hofmeyr are very significant in this connection. "Let it be said first that many who in 1909 advocated unification would to-day be prepared to admit that a mistaken policy was then followed, that the sounder view was that which was held by men like Jan Hofmeyr, who gave the preference to federation because he held that the union of the European races in South Africa had not yet reached the stage when it could provide the necessary inspiration for a political union, organically so close as the national convention proposed. Under Federation, undoubtedly, fewer causes of friction would have emerged in the post-1910 years between British and Dutch, between what the Free State and Natal respectively stand for; under Federation Rhodesia would probably by this time have entered into organic union with South Africa." [8]

The latter of paramount importance, when autocracy changes into a democracy;

In spite of the existence of 'cultural groups and minorities', a unitary system will succeed if it is based on autocracy and if governmental functions are restricted to the mere preservation of peace and order. But when autocracy changes into a democracy and when the state interests itself in social services and

[8] Coming of Age: Studies in South African Citizenship and Politics—P. 320—1.

social welfare, the unitary system breaks down and a federal system with a limit on the authority of the central government becomes inevitable. Where the government of the whole area is under an autocrat or a bureaucracy maintained by him, there is a feeling—though it is not always justified—that government would be impartial to all the groups and that the interests of one group would not be sacrificed to those of the other groups. Each group feels confident that its identity will not be destroyed. But when democracy or some approximation to it becomes the basis of government, the fear of majority rule becomes wide-spread. Every 'cultural minority' begins to feel that its position is threatened, and with a view to safeguard its interests, begins to fight for separate political existence in areas where it has numerical strength and superiority. Majority rule therefore becomes permissible only in certain matters.

and when a 'Police' State becomes a 'Public Service' State.

Similarly when the state ceases to discharge merely 'police' functions and becomes an agency for rendering public services like the spread of education, the care of health, the relief of the unemployed etc., the minority groups grow alarmed that those who are in a majority will try to get only for themselves the benefits of such services and that they would not care for the welfare of the other groups, and consequently the latter insist on political power being granted to them also.

The Federal solution possible only if these cultural minorities are concentrated in particular localities.

It is not always convenient to adopt the federal solution for the problem of cultural minorities. Such a solution is possible only when the groups are concentrated in particular areas instead of being scattered over the whole territory. It is only then that a separate government could be organised for them. It is because the French group in Canada is restricted practically to Quebec, and the several groups in Switzerland are restricted each to particular cantons, that they could be granted the kind of territorial autonomy that they wanted. Otherwise it would be necessary to fall back on other political devices like the incorporation of fundamental rights in the constitution of the state or the establishment of separate courts of justice etc., to remove the fears and the suspicions of the minorities.

The criticism that cultural individuality does not require political power to preserve and promote it and that it can be

Cultural individuality requires political power.

preserved by non-political means is not valid or correct. Culture has been destroyed in many cases by the use of political weapons. Even where in the name of toleration or neutrality governments showed their apathy in cultural matters, such a policy has proved injurious to its preservation. One aspect of human life is always bound up closely with the other aspects. A certain kind of political atmosphere is necessary to develop the cultural life of the community; and where it is absent, there is cultural decay. Federalism provides opportunities for the securing of the political aid necessary to arrest such decay, especially when the group occupies a definite area.

Size has no necessary relation with cultural differences.

The existence of cultural differences do not depend on the size of the territory in question. Even a small state like Switzerland manifests such differences in an acute form, although bigger states like England or Italy are homogeneous. It is partly the outcome of historical forces and partly of the geographical situation of the country.

Examination of the argument that size alone brings about Federalism.

It has however been argued that the mere size of a territory determines whether its political organisation should be unitary or federal, and that, where the size is fairly large, a federal system involving a limitation of the authority of the central government becomes a necessity. The larger the size, the greater is the diversity in the character of its different parts.[9] The climate, the economic resources, and the broad lines of development are bound to vary from one part to another. The needs therefore of one local area will not be identical with those of another. Along with these differences in environment, there will grow differences in the character, the outlook and the ideals of the peoples inhabiting different portions of the territory. Circumstances like these will require the setting up of a separate government over each area with freedom to legislate and administer in accordance with local needs. It would be a serious mistake to attempt to govern the whole area through one central government. Such a government will not be in possession of the local knowledge required to adjust its legislation to local conditions. It will try to make laws on uniform lines, even

[9] HOLMAN: "The Australian Constitution"—Pp. 68—70.

though the basic features are diverse. The evils of over-centralization will have a free play and the people will not be getting the right kind of help from the government of the country. From all this, it is argued, that it is best to organise a country of vast size on a federal basis.

The relation that should exist between central governments and local governments in a territory which occupies an extensive area cannot be precisely laid down. What can be asserted safely is that there should be a substantial degree of decentralization or devolution. Whether a further step should be taken and constitutional delimination of the sphere of the two sets of governments should be laid down on rigid lines cannot be decided on purely *a priori* grounds. Where there are no cultural differences among the people, a policy of devolution and regionalism may perhaps adequately serve the purpose. But it is the opinion of many leading authorities that a solution on federal lines would be better. In connection with Australia it was observed by an eminent authority that, "The immense areas of the different colonies, and their climatic and industrial conditions, make the preservation of their individuality highly important; whilst they also afford a strong argument against entrusting unlimited powers to a central government which, in the nature of things, cannot have complete knowledge of, nor complete sympathy with, all the different local requirements of the different colonies." [10] Though this observation was made a generation ago and though meanwhile there has been a talk in favour of establishing a unitary system, the older view has not lost its force, and there are many leaders of thought and opinion in Australia at present who are convinced that leaving other considerations apart, the mere size of the country requires a federal type of government. If this is true of Australia, it should be equally true of the United States of America, Canada, Brazil, Argentina and Russia which are among the bigger federal states of the modern world.

It need hardly be said, that the creation of a federal polity in an area where previously a number of independent govern-

[10] QUICK and GARRAN: Op. cit.

Federalism not always the result of voluntary co-operation.

ments existed, is the result of voluntary co-operation among them which gives them an opportunity to negotiate the terms on which the union is to be effected and the limitations to be imposed on the new central and local governments. In cases where one of the governments is strong enough to conquer the rest and bring the whole area under common control, the resulting constitutional system would be of the unitary type. A federal system may therefore be said to have its origin in freedom and equality, while the unitary system is the result of force. This conclusion is broadly correct, but it is also possible to conceive of a federal system being imposed by an outside authority in an area which is its dependency. There might be an earlier stage when the dependency is divided into a number of provinces not in any way inter-related with one another but each directly subordinate to the imperial government. The latter might subsequently find it administratively more convenient to set up a common authority over the whole dependency with its power limited to subjects common to the area, and leave to the provincial governments freedom from it in certain other matters of a purely local character, both being ultimately subordinate to itself. Such an arrangement would be federal inside the dependency, but it would be the result, not of any voluntary co-operation and negotiation among the provincial governments themselves, but of the dictates of the imperial power. In such cases, expressions like the 'Spirit of Community', 'National Consciousness', 'Loyalty to a higher ideal' etc., will have no meaning or significance.

The loosening of a unitary into a Federal System.

The forces that lead to the substitution of a federal system in an area where a unitary system existed hitherto are the same as those which operate in establishing it in an area in which independent governments existed previously. They fall into the same two categories—those which necessitate the continuance of political unity though in a modified form, and those which necessitate the imposition of limits to the authority of governments. The whole process may be described as the loosening of the former unity to a particular point at which it becomes federal in character. That which makes all the people one up till that moment is the existence of only one government to satisfy all their political needs. Its place is now taken by two sets of gov-

ernments—a central one which satisfies some of their needs and a number of independent local governments which satisfy their remaining needs. In their desire to get some of their needs satisfied through independent local governments, they do not go to the extent of destroying the whole fabric of the state, for those who are responsible for bringing about the new change are intensely alive to the advantages arising from the continuance of the old unity for certain essential purposes.

The result of (a) The instinctive love of power.

The three factors which bring about the loosening of the unitary system are the instinctive love of power, the desire of the cultural minorities to safeguard their interests and the conveniences associated with devolution in a territory of extensive size. In the local areas of every country, there are numerous individuals who will be in a position to come to power, if government is federalised and if a number of autonomous provincial governments are set up. They would have the chance of becoming rulers, as there would be more legislatures, more cabinets, more courts perhaps, and more civil service posts. In many cases, the cry for provincial autonomy or independence is the outcome of this feeling. There is equally the influence of cultural minorities who do not like dictation from one single centre. They may become increasingly conscious of their individuality and of their special needs and requirements and agitate for a federal system so that they may have the satisfaction of becoming the masters of their own destiny in a sphere of their choice. The classic example of the operation of this motive is Canada. For a number of years the French and the English of the province of Canada were subject to a unitary system under which it was found difficult to maintain a strict balance between the interests of the two sections. Many devices, it is true, were adopted for this purpose. In spite of a disparity in the numbers of their population, each section was given equal representation in the legislature; a convention was also set up according to which the ministry of the province should have the support of 'a double majority' which meant a majority of the members of the legislature separately from each section.[11] So long as the English were numerically inferior to

(b) The presence of cultural minorities.

[11] Trotter; "The Canadian Federation"—P. 26.

the French, this system worked a little tolerably, but when, through immigration and the operation of several other favourable factors the numbers of the English increased they began to complain that 'equal representation' was disadvantageous, that it meant the tyranny of the French minority over the English majority and that representation must be strictly in accordance with population. This naturally roused the fears of the French who, in days when their numbers were larger coolly submitted to a system of equal representation with the English. They were now afraid that if representation according to population was introduced the English would secure a permanent majority on the only legislature for the whole province and that that would lead to English control of the cultural interests of the French. The only way out of the dilemma was the substitution of a system under which the special interests of the French would be under the control of the French themselves. Such a solution was practicable because they occupied mostly one part of the province, viz., Quebec. It was decided to have a separate legislature and government created for the province of Quebec with complete freedom from central control in purely provincial matters—which really meant matters that specially affected the French population. A similar government was to be established over the English section of the province. In addition to these independent provincial governments free to deal with sectional matters a common central government over all Canada was set up to manage the common affairs in which the English as well as the French were equally interested. Thus the existence of a 'cultural minority' necessitated in Canada the conversion of a unitary system into a federal system. It is also interesting to note that the French were encouraged in this direction by the idea that in the new central legislature of the Dominion though there would be an English majority it would not be a homogeneous one as it would be made up partly of English in the old province of Canada and partly of those who belonged to the maritime provinces and who had their own special interests.[12]

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[12] *Ibid.*

(c) the convenience of devolution.

No lengthy account need be given of the operation of the third factor—the size of the territory—in loosening a unitary into a federal system. In countries of vast size over-centralization brings serious evils sooner or later. As has already been pointed out their harmful effects become more noticeable with the growth of democracy and with the increase in the social service functions of government. The cry becomes loud that local needs are not properly looked after and that an artificial uniformity is being forced on the whole area. This ultimately leads to federalism.

In the absence of a 'spirit of community', these may lead to disruption and not to Federalism.

That the operation of the above three factors does not result in the complete severance of the discontented areas and groups and the establishment of independent states by them is due to the existence among them all of that 'Spirit of Community' and 'National Consciousness' to which reference has already been made. This prevents the disruption of the original state; the parties affected are satisfied with a federal form of government as it puts a check on the supremacy of the central authority which was previously felt to be tyrannical and oppressive. The new provincial governments that are set up are content with the supremacy they get in purely local matters and do not aspire to a position of sovereign independence as all the inhabitants are keenly alive to the advantages that union will bring to them in military, commercial and political matters. That an underlying 'Spirit of Community' is essential to maintain the federal system when it grows out of a unitary system is also illustrated by the fact that where it was absent the discontent with the centre resulted not merely in loosening the previous unity but in its complete destruction. The discontent felt by the thirteen American colonies when the central Parliament in England claimed the right to legislate for them led not to a federal relationship between them and England but to their setting up of a sovereign Republic. The feeling that in the legislative union with England their interests were being unduly sacrificed resulted in the Irish becoming a sovereign dominion. In these cases a federal solution was out of question because of the lack of a common national consciousness among the peoples affected. The unitary system of the British Em-

pire became gradually transformed into a practically confederate commonwealth of sovereign dominions as it was not possible to create that 'Spirit of Community' between the English, the Canadians, the Australians, the Newzealanders and the Dutch in South Africa. The desire for provincial autonomy must be coupled with a willingness to obey a common government in order that the separatist tendencies under a unitary system might stop with a federal type of organisation. The failure of some of the schemes of federation with which we meet in history throw as much light on the forces behind federalism as the success of some other schemes.

From this survey the conclusion follows that a federal system of government becomes necessary and desirable if political unity is to be maintained on a basis of voluntary co-operation in a territory which is fairly extensive in size and which is inhabited by people among whom there are some minority groups with a cultural individuality of their own. The successful working of such a system depends on the existence among all the people including the minority groups, of a sense of oneness and a consciousness of common needs and interests which make them work together in the cause of the whole community.

Need for fundamental similarity in the political institutions of the units.

In all federations of the modern world there is a fundamental similarity in the political institutions of the constituent units. All of them are republican or democratic. In the Soviet federation of Russia all governments are communistic. The German Empire is often cited as an example of a federation which lacked this homogeneity as some of the states within it were monarchical and some republican. But even there the republican states were only three by the side of twenty-three monarchical states; and they had three votes in the Federal Council (*Bundesrat*) out of a total of fifty-eight. The German Empire therefore need not be regarded as an exception to this normal characteristic of federations.

The danger that might arise if the governments of some units were republican and of others dictatorial or monarchical was realised by the framers of the constitution of the United States and of the German Republic. One of the sections of the

constitution of U. S. A. provides that "The United States shall guarantee to every state in this union a republican form of government" [13], and therefore makes it illegal for any state to have a non-re-publican form of government. The constitution of the German Republic not only requires that each state should be republican but also that the state government should have the confidence of the people's representatives implying thereby that the executive must be of the parliamentary type.[14]

Such a homogeneity in respect of fundamental institutions is on the whole conducive to the smooth working of a federal system of government. In such a system there will be a central legislature competent to make laws on certain matters for all the inhabitants in the area. If some of the local governments are autocratic and others are democratic, it necessarily follows that the central legislature also will consist partly of those that are elected by the people at large and partly of those that are nominated by the autocrats. Democracy and autocracy may be regarded as articles of faith. Those who believe in the legitimacy of one will find it hard to co-operate actively with those who believe in the legitimacy of the other. This will naturally create friction among the members of the legislature and also of the executive and add enormously to the difficulties of government. It may therefore be laid down as one of the essential conditions of the smooth working of a federal form of government that all the parties to it must have faith in one common political principle whether it be democracy or autocracy or fascism or something else. An attempt to bring together people who differ in fundamentals cannot prove to be a success.

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The large size of India appears to necessitate federalism.

In the light of the above considerations it is that an attempt should be made to understand the nature of the forces behind the federal movement in contemporary India. The country is one of the vast size. Its area is 1,800,000 square miles while that of Switzerland, Germany, U. S. A., Australia, and Canada is respectively 15,940; 182,200; 2,973,774; 2,974,581; and

[13] Art. IV, Sec. IV.

[14] Art. 17.

3,684,723 square miles. It is twenty times as big as Great Britain and is equal in size to all Europe without Russia. Some of the provinces and states in it are larger than several of the countries in the Western Continent. The diversity of geographical, economic and climatic conditions found in it are far more extreme than that in U. S. A. or Australia. One is therefore naturally driven to conclude that if there is to be a common governmental system for the whole country it is bound to be federal in character. Otherwise the evils of overcentralization would become intolerable.

But other factors are more important.

It has, however, been already remarked that size by itself does not always necessitate a federal type of polity. Most of its advantages may be secured through a substantial degree of devolution; and this has been the policy pursued in respect of British India for the last sixty years. A continuation of it in a rational and improved form would certainly be adequate to satisfy the reasonable needs of the country so far as the determination of the relations between central and local governments is concerned. And if federalism is now occupying the primary place in all discussions on Indian politics, it is the result not so much of the size of the country as of the influence of other factors.

An analysis of those factors shows that Indian federalism of the present day is the instrument that is being devised for the purpose of opposing the forces of democracy. Whatever it may mean in the distant future it is to-day an essentially anti-democratic movement. In the main it is advocated by those who believe that a central government of India carried on a democratic basis would spell disaster to the country and to their vested interests. This affords the true explanation of the prominence which it has gained all on a sudden in the scheme of Indian constitutional reform.

It is a matter of common knowledge that the political situation in British India has in recent years become highly complicated and serious in consequence of the agitation for *Swaraj* carried on by the Indian National Congress and other advanced political organisations. Trained as their leaders are in the poli-

tical thought of the West and especially of England, they have come to regard parliamentary government on democratic lines as the only proper and legitimate government for the country. They have been pressing for its immediate introduction and have also succeeded in converting the large masses of the people to their view. The realisation of their aim would mean the transference of power from the hands of the Governor-General in Council who is responsible to the parliament in England into the hands of a cabinet of Indian ministers responsible to an elected legislature in British India. It is as an answer to this agitation that the proposal for an All-India Federation has been put forward.

The need felt by the British Government to meet the demand for Swaraj without introducing real democracy.

It is the sincere conviction of the British that parliamentary institutions cannot thrive in the atmosphere of India surcharged as it is with caste and communal strife. They also believe that in a country where for ages the people have been accustomed to despotic or bureaucratic rule the sudden introduction of democratic government would result in complete administrative breakdown and in the undoing of all that good work carried out during the last one century for the promotion of internal peace and the prosperity of the people. Moreover the present democratic movement in India is also an intensely nationalistic movement. If it succeeds, it will deprive England of the extremely advantageous position which she has all along been occupying in the world of Indian business, industry, commerce and banking. It may even lead to the closing of Indian markets for some of the English goods. It is certain to diminish the opportunities which many members of the English middle classes have of securing employment in the Indian civil and military services which enables them to make rich fortunes. Almost all English men therefore feel that in the interests of India as well as of England it is not desirable that power should pass into the hands of the elected representatives of the people.

But in the face of the nationalist agitation in the country it is not possible for the English government to keep quiet. Some step in the direction of responsible government requires to be taken. In the famous announcement of August, 1917 His Majesty's government laid down that their policy was, 'The gradual

development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire'. The keynote to this policy is 'Gradualism' and the government now—as it did in 1917—stands firmly by that principle. It has therefore decided on the application of the principle of 'Gradualism' to the present situation. On it is based the proposal that all departments of central administration should not be transferred at one stroke to a responsible ministry. It should be carried out by stages. In the first and the immediate stage a limited number of subjects not of a vitally important character are to be placed under the control of Indian ministers and the more important subjects like Defence and External affairs should be reserved for control by the Governor-General alone. This division of central subjects as 'Reserved' and 'Transferred' is only the application at a higher territorial level of the doctrine of 'Dyarchy' established in the provinces in 1920. This is the first answer to the demand for what is known as 'central responsibility'.

Thus far there is no connection between Federalism and Constitutional reform. It is when we examine the legislature to which it is proposed that Indian ministers in charge of the transferred subjects should become responsible that we find the part played by the federal idea. It is apprehended that even the administration of the few transferred subjects will end in breakdown if the legislature to which ministers become responsible is a legislature elected on a democratic basis by the people at large. Moreover the Indian Legislature will continue to have some influence—though not control—over the reserved subjects also through its power of discussion and of moving resolutions. The experience which the government had with the Indian Legislature under the reformed constitution of 1920 showed clearly that elected members might prove to be a source of trouble even in the Reserved Departments if they become organised as the *Swaraj* party was organised in the Legislative Assembly and pursue obstructionist tactics. That may compel the Governor-General to take frequent recourse to his extraordinary powers of legislation. If these troubles are to be avoided, it is necessary that the character and composition of the legisla-

ture should not be of the pure democratic type. It should not consist only of members elected on a wide franchise in territorial constituencies. To secure such a character to the Legislature it is that an All-India Federation is proposed.

The rulers of Indian States to act as a check on democracy.

The present constitutional system of India has already been described to be mixed in character. Though in the Governor-General-in-Council there is a common central government for all the country it exercises its powers over the Indian states and over the British Indian provinces through different channels. It has all along been one of the accepted doctrines of the working constitution of India that the rulers of states should not interfere in the politics of British India and that the people of British India should not interfere in the politics of the states. The nationalist agitation is purely British Indian; its demand is for responsible government in British India only. It is now proposed to reverse the hitherto accepted convention of mutual non-intervention and bring the provinces and the states together into one governmental system with a common legislature for the country as a whole. This will succeed in preventing the democratisation of the future Indian Legislature. It will consist partly of representatives elected by the people so far as the provinces are concerned and partly of the nominees of the rulers of Indian States. The latter will naturally be opposed to the principle of democracy as they owe their membership to monarchs who have no faith in popular government. They will serve as a powerful brake on the radical section of the legislature. They will prevent the adoption of obstructionist tactics. On all crucial issues they can be trusted to be Pro-English as the rulers of states will continue to be subject to the 'paramountcy' of the crown and all that it stands for. The bringing together of the states and the provinces is the essence of federation; and its main purpose is to check tendencies towards democracy inside the legislature as well as outside it.

The legal as well as the political sovereignty over India lies in the English parliament. In the announcement of August, 1917 it is laid down that "The British Government, and the Government of India, on whom the responsibility lies for the welfare and advancement of the Indian peoples, must be the

judges of the time and measure of each advance (towards responsible government)". The ultimate and effective power to decide what the future constitution should be is with the cabinet in England and it is by understanding the nature of the desires, the hopes and the fears that are inspiring them that it will be possible to discover the reasons for the proposal to introduce a federal form of government. This is the procedure that has to be adopted with reference to any other country. It is only by the study of the mind of the framers of constitutions that one can get at the forces lying behind all schemes of reform.

It is worth noting that in this respect there is a striking point of contrast between the processes by which constitutions were framed for Canada, Australia and South Africa—three of the important units in the British Empire—and the process by which the new Indian constitution is being framed. In their case the British had no hand whatever. The work was done not in England but in the respective countries themselves. It was as a result of deliberations among the leaders of the people affected that the principles as well as the details of reform were settled. The draft bills prepared by them were accepted by the large body of voters in those countries or by the legislatures elected by them. It was after all these stages were gone through that the bills were sent to England for final ratification at the hands of the parliament which gave them its sanction without making any modifications not approved by their original framers.[15] Such a procedure was possible in those countries because there the leaders of the people had the power and therefore the right to decide under what constitution they should live.

While the British government is naturally occupying a predominant position in framing a constitution for India it will be a profound mistake to assume that the proposed federation is merely the outcome of the British attitude towards the democratic movement in the country. For they share this attitude along with two other important sections—the rulers of Indian States and the Muslim minority. Federalism in the form in

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[15] Speech of Joseph Chamberlain in Newton, A.P.—Op. cit. P. 316.

which it is gaining ground at the present day must be regarded as the joint work of the British, the Indian Princes and the Muslims.

The concern and anxiety of the Indian Princes in the possibility of a Dominion Government in British India alone.

The agitation for a parliamentary form of central government in British India and the prospect—though remote—of the British Government responding to it created much concern and anxiety in the minds of the rulers of States. At present the Governor-General in Council constitutes the central government. He derives his authority from the English parliament and owes responsibility to it. It is he that exercises the powers of paramountcy over states. If he is replaced by an Indian cabinet of ministers responsible to an elected legislature, paramountcy would pass into its hands. From the point of view of the States such an event would be one of the most far-reaching of political revolutions. The superior strength of the British gives them a title to exercise paramountcy over Indian princes; and the latter have become reconciled to it only in view of this strength. They, however, feel that it would be humiliating to them to accept the suzerainty exercised by a cabinet of Indian ministers having not only no claim to any inherent strength of their own but also dependent for their very existence on a democratic legislature. It is therefore clear that the triumph of democracy is not a matter of welcome to the princes. They are interested in preventing its growth in British India unless the rights of paramountcy are excluded from the purview of the responsible ministry.

This is not the only ground of their opposition to the introduction of parliamentary government. It is not enough for them to keep paramountcy away from the jurisdiction of ministers. They have found it necessary that if their other interests are to be safe they must get a share in the government of the country with a proportionate number of seats in the legislature as well as in the cabinet. The claim of the states in this respect is perfectly intelligible. Matters which would be left in the hands of an Indian cabinet affect the states as much as they affect British India. They concern themselves with tariffs, railways, posts, telegraphs, salt, etc. These are subjects in regard to which a change in policy in British India is sure to produce serious

effects on the states also. It is true that at present the princes have no hand in their administration, and that the Governor-General in Council in consultation with the British Indian Legislature determines the policy to be pursued in regard to these subjects. The princes are willing to abide by the decisions of the present central government as they have complete confidence in the statesmanship and wisdom of those that constitute it. They do not, however, possess the same confidence in a responsible Indian ministry coming in and going out at the behests of the electorate. Naturally they claim that the administration of all these subjects must in future be shared by them also; and that the ministry should be responsible as much to them as to the British Indian electorate. Otherwise they would use all effective means to prevent the growth of responsible democratic government in British India.[16]

Their support of an All-India Federation.

It is now clear how the States are interested in laying down their own conditions on the subject of the next step to be taken in the path of responsible government. And the only device by which their claims can be met is the introduction of a federal form of government for the whole country. The States as well as the provinces must be brought together under one governmental system. It cannot be a unitary system as the States are not prepared to reduce themselves to the level of provinces and part completely with the quasi-sovereignty which they are now enjoying. The only type of polity which will be consistent with their position and claims is federal; and that accounts for their support of the proposed federal scheme. This is not the place to discuss whether the terms in accordance with which they are prepared to enter the new polity are consistent with real federalism and whether they are not more akin to the features associated with a confederate system. It is enough if at this point we are in a position to understand the similarity in the attitude of the Indian princes and the British government towards the problem of responsible government in British India and in their adopting federalism as a solution of the problem.

The attitude of the Muslim section towards the introduction in an undiluted form, of democratic responsible government at

[16] Report of the Indian Statutory (Simon) Commission, Vol. II, Chapter 3,

the centre is equally hostile. From their standpoint such a government would be purely Hindu in its character. The Hindus form a majority of the people of the country. They will consequently be a majority in the electorate, in the legislatures and in the cabinet. The transference of power from the hands of the Governor-General in Council into those of a body of Indian ministers would mean the re-establishment of Hindu supremacy. Such a step of course is not welcome to the Muslims who form an important minority group with a distinct religion and culture of their own. Their position in this respect is more or less like that of the French in Canada and of the English in South Africa. They apprehend that a central government dominated entirely by the Hindus would prove detrimental to their special interests and retard their development. They therefore consider it absolutely essential that such a government should be one of limited authority so that there might be no danger whatever to the preservation of their individuality. This necessarily involves federalism and the grant of a large amount of independence to the provinces. As stated by the late Maulana Muhammad Ali, "the Mussalmans desire—and this is the crux of their fourteen points and not separate electorates—that there should be federal government so that the central unitary government with a permanent Hindu majority should not override them everywhere." [17]

Muslim opposition to pure democracy.

In this view the Muslims are fortified by the fact that while they are in a minority in India as a whole, they constitute a majority in the North-West Frontier, the Panjab, Bengal and Baluchistan. They contend that Sind should be constituted into a separate province as they are in a majority in that area also. Under these circumstances a federal type of polity will enable them to enjoy independent political power in certain spheres of their own in five provinces without any interference from the Hindu majority at the centre. Their culture and religion would be safe. They ardently desire such provincial independence, as it will make the Hindu minorities in those provinces serve as hostages against the possibilities of any persecution of Muslims

Federalism would secure to them five autonomous provinces.

[17] Letter to the Prime Minister: Proceedings of the First Indian R. T. C. Appendix I to the Minorities Committee Report.

in the remaining provinces in which Hindus are in a majority. A balance of power would thus be secured. Sir Muhammad Shafi, an eminent Muslim leader and a member of the Indian Round Table Conference gave expression to this view in the following words: "To my mind the Federal India of the future with the Central Government in the hands of the majority community, and the Provincial Governments in six out of the eight Governor's provinces in the hands of the same community, the four provinces in which the majority community will be in a minority and the minority community will be in a majority will in itself constitute a guarantee of good treatment by both the communities. To me this one picture as regards the future is the most fascinating and the most attractive, for to my mind this is the real solution, the permanent solution, of the Hindu-Muhammadan problem in India." [18]

The Muslims also feel that federalism is the only form of government that is consistent with the dignified position they at one time occupied in the history of the country. It is well known that for a number of centuries they exercised their sway over extensive areas. The imperial mandate of the Sultan of Delhi ran for a time throughout the length and breadth of the land and every other government bowed to his supremacy. During all that time the Hindus were their subjects. But now the establishment of a democratic government will exactly reverse this position. It will mean the silent return of the Hindus to power and dominance. Instead of both the Muslims and the Hindus remaining subjects of the British Government, it will result in Muslims becoming subjects of a Hindu government. This is how democracy is being interpreted by large sections of the Muslims. If democracy is inevitable, it must, according to them, be accompanied by a re-distribution of power among all the historically important communities, and the Muslims should have a substantial share in it. Federalism is a necessary corollary of this contention, for under a unitary system the power of the Muslims even in the provinces in which they are in a majority

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[18] Proceedings of the First Indian R. T. C. Minorities Sub-Committee. Pp. 51—52.

will not be real. The federal solution will not only be in harmony with their historic importance but it will provide one of the essential safeguards against any vengeance that the Hindus might be disposed to wreak against them for their past oppression and cruelty. The late Maulana Muhammad Ali gave expression to this view in the following words: "A very important result of that with which we have to deal to-day is the feeling created by the record of Muslim rule for so long over so large a part of India. There is hardly a community that has not a real or an imaginary grievance against the old Muslim rulers and what we know of human nature elsewhere brings it home to us that even to-day there is a feeling of '*revanche*' harboured against the Mussalmans in the minds of some Hindus and some members of other communities which is not the case against any other community whether Sikh or Maharata or Rajaput. It is with this feeling that we must deal, and against which we must provide safeguards for the future when framing a constitution for an ideal Indian Government in which all would feel safe, equal and free."[19] One such safeguard is federalism which would give them the power and the protection they require.

Federalism as the logical culmination of communalism.

Federalism is also the logical conclusion of the theory of communalism which has slowly become in the course of the last thirty years the basis of Indian administrative and political system and which is now occupying as prominent a place in contemporary political thought of India as Fascism, Communism and Nazism are doing elsewhere. It starts with the assumption that the only real group is the religious community, that the individual has no value apart from that which he derives from his membership in it and that every other group including the state is important only to the extent to which it contributes to the exaltation of the religious community. Terms like 'Nation' and 'Country' and 'Patriotism' have no significance in its view. A nation is merely a mechanical mixture of a number of communities existing side by side. Love of country ought to be secondary to love of the religious community. From this it follows that every group that is organised for the realisation of a

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[19] Letter to the Prime Minister, Op. cit.

common aim should be organised on a communal basis. A union of labourers working in the same factory must be a federation of unions separately of Muslim labourers, Hindu labourers, Christian labourers etc. A University is to be a federation of a number of Muslim Colleges, Hindu Colleges, Christian Colleges, etc. Similarly the state must be a federation of different religious communities, and the power for which the state stands must be distributed in fair proportion among these communities.

There are several religious communities in the country. The State therefore should be so organised as to secure to each community its due share of power. Provinces should be redistributed so that, if possible, each community may have some in which it can be supreme. The organisation of electorates, legislatures and cabinets must be on the same basis. Admission to the army, the Civil Services and the other public institutions must be regulated on the same lines. It is then alone that 'Communal justice' can be secured.

With such a theory dominant in the country, it is no wonder that it has lent its support to the federal movement. While there are adherents of the theory among several other sections of the people, the Muslims may be said to be its protagonists. It has been systematically developed by them and its natural outcome is the distribution of the power of government in such a manner that each of the principal communities will have some provinces in which it can call itself sovereign in a certain sphere of its own. Federalism is consequently an inevitable result of the working of the theory of communalism.

The federal movement in India illustrates the working side by side of the two processes which have generally been responsible for the establishment of federations. The coming in of the Indian states illustrates the process under which areas previously independent of one another become united. The federalisation of the governmental system in British India illustrates on the other hand the process under which a previously existing unitary system is being loosened and the subordinate provinces are made autonomous. It is in this latter process that the Muslim sentiment is playing an important part.

CHAPTER IV

DISTRIBUTION OF FUNCTIONS AND POWERS

Complicated character of the problem.

FUNDAMENTAL to every federal system is a proper distribution of functions and powers between the central and local governments. A number of questions require explanation in this connection. The primary one is that of the principles which should form the basis of any scheme of distribution and their relation to the actual historical circumstances under which different federations were organised from time to time in several parts of the world. In almost every case there has been a struggle between abstract theory on one side and expediency on the other. Then there is the question of the technical method to be adopted for making clear in the written constitution the respective powers of the two governments. The constitution may enumerate the powers of only one or of both. In either case there emerges the problem of the proper location—whether in the central government or the local governments—of the unenumerated or the residuary powers. Other incidental questions that acquire prominence in this context are those that are related to the distinction between expressed and implied powers, exclusive and concurrent powers, and legislative and administrative powers. Above all, one should not lose sight of the difference between the powers as laid down in the constitution and those which come to be exercised in practice under the influence of changing usage and convention and of judicial decisions and precedents. The subject is therefore a highly complicated one and most of the controversies in federal states have naturally gathered themselves around it.

Three essential considerations in solving it.

In determining the nature and extent of the powers that should be conferred respectively on central and local governments a few essential considerations have to be kept in mind.

(1) It is the need felt for united and concentrated action in certain matters that is responsible for the establishment and maintenance of a federal system.

Therein lies the justification for the coming together of governments which were previously independent of one another and for the continuance of union—even though in a modified and looser form —in cases where a unitary system is transformed into a federal one. The realisation that there are purposes and ends which can be better and more effectively fulfilled through action from a single centre rather than from numerous separate and independent centres is at the back of all federal movements. The functions and powers entrusted to the central government should therefore have an intimate relation with these purposes and be determined with reference to them.

(2) The central government has jurisdiction over the whole of the federal territory while the authority of the local governments is restricted to particular portions of it. The functions therefore that the two governments have to discharge must have some correspondence with these differences in areas. Matters of general interest and concern which produce effects good or bad on the inhabitants of the area as a whole and which therefore require regulation on a uniform basis appropriately fall within the sphere of the central government. They cannot be entrusted to local governments for the reason that it is not a matter of indifference to the people of one locality as to how they are managed in other localities. Mismanagement in one area produces consequences in other areas also. It is therefore best that responsibility for their management should rest with the central government. It naturally follows from this that matters of purely local interest, matters which have to be regulated primarily in accordance with the peculiar conditions of the locality and the effects of which are confined to the local area alone are best left in the hands of local governments.

Though what makes a system technically federal is the existence of two governments each independent in a sphere of its own, it is necessary that the powers enjoyed by each government should be substantial and their sphere of independence fairly wide before the system is spoken of as really federal. It is then only that each will command the dignity and prestige associated in the popular mind with 'Government'. Otherwise one of the governments will in practice be reduced to a position of dependence on the other. The words of Sidgwick that "We should hardly call a state federal merely because the independence of local governments in certain minor matters was guaranteed by the constitution", are of great significance in this connection.[1] They equally apply to cases, where in the name of local autonomy and with a desire to artificially foster it, only a few minor functions are entrusted to the central government, thereby making it weak and powerless. A proper balance has to be maintained between the authority of the centre and of the parts if the relations between them are to be truly federal. For instance, it is the extreme narrowness of the sphere of autonomy left to the units in Germany under the Weimar constitution that makes many writers hesitate in describing the German Republic as a federal one. During the discussions of the Federal Structure Committee of the Indian Round Table Conference strong expression was given by many of the British Indian delegates to the view that the reality of an Indian Federation would depend on the number of powers granted to the central government and that it would not be worth-while to have a federal constitution if such a principle could not be adhered to.[2]

[1] The Elements of Politics—P. 533.
H. L. McBain: "The Living Constitution"—P. 70.

[2] Jayakar: Proceedings of the Federal Structure Committee of the Indian R. T. C. (1930)—P. 90.

'Necessary' Powers of the central government.

The primary purposes for which federal unions are usually created and maintained are the defence and security of the federated area against foreign danger, the development of its military strength, the regulation of trade with foreign countries and the removal of barriers impeding internal trade so that there might be a wide home-market. It is agreed by all that in respect of these matters the whole area should act as a single unit. It implies that their regulation should be left entirely in the hands of the central government. It is the wisest course as it not only leads to efficiency in the sense that the expected result is achieved more effectively and economically but is also conducive to the development of goodwill and harmony between one unit and another within the area and to the preservation of the union. The contrary method of entrusting such subjects to local governments not only brings about inefficiency but also becomes a source of friction and conflict between one local government and another, ultimately paving the way for the disruption of the union. Powers over subjects like these may be designated as "necessary" powers of the central government. They are necessary in the sense that they are vital to the very existence and preservation of the union, and that in their absence the breaking away of the units from the centre and from each other becomes a matter of certainty. While external relations, trade with foreign countries and between one member of the federation and another fall normally within the category of "necessary powers", it has to be noted that any other power which satisfies a similar test deserves to be included in it. For instance, the militant spirit in which labour has become organised in recent times and the equally militant spirit behind employers' organisations and trusts and combinations make control over them a 'necessary power' of the central government. It is quite possible that with the increasing change and complexity in social and economic conditions, there may arise a need in every federal state for the expansion of necessary powers.

Its 'optional' powers due to the need for uniformity.

The other powers exercised by central governments may be styled their 'optional' powers. The essential consideration in determining them is the need for uniformity.

All subjects which yield maximum advantage and convenience to the public when regulated on uniform lines over the whole area should naturally be placed under central control. The jurisdiction of the central government extends over all the federal territory and this gives it a superiority in securing uniformity to any extent required. The tendency has therefore been to entrust it with power over weights and measures, currency and coinage, posts and telegraphs, trunk roads and other national means of communication, patents and copyrights, naturalisation, bankruptcy and many other similar matters. No elaborate argument is required to show that a uniform system of currency, for instance, is more productive of advantage and convenience to the interests of business and trade and is more conducive to the growth of economic prosperity than a diversified system which is inevitable if local governments are given the freedom to regulate it each in its own way. This principle of uniformity is accepted when stated in general terms; but differences of opinion arise when one has to decide whether a particular subject comes under this principle. There are, for example, some countries where it is thought desirable to include 'marriage and divorce' among central subjects on the ground that uniformity of marriage laws is an essential basis of a civilized community. There are, however, several other countries where a different view is commonly held, as law in them continues still to be personal or tribal and as they contain many minority groups each with its peculiar system of civil law. In such territories people will not agree to have uniformity in matters relating to marriage. Similar differences of opinion are bound to crop up in respect of agriculture, land development, education etc.

Difficulties in the application of the principle of uniformity.

Much of this difficulty in the practical application of the principle of uniformity will disappear if it is recognised that with reference to any particular subject—education, public health, public morals, etc.—it may be necessary to give control to the central government at certain points and to local governments at certain other points. A subject may have different aspects to deal with, some requiring uniformity of treatment and others diversity. And again some of the purposes of the state cannot

be realised fully through the action of the central government alone or through that of the local governments by themselves. A division of labour between the two is essential and it is mainly through their co-operative effort that the end in view is achieved. Elementary education is considered in all countries to be a subject of national importance, but in all federal states control over it is in the hands of local governments. This is rather an anomaly as all local governments may not be keen on making it compulsory and free, with the result that alongside of progressive areas there may be many backward areas also.[3] It it is really a matter in which all the people have interest, it follows that legislation to make it compulsory and free and to determine its content and scope should be undertaken by the central government. At the same time it is not possible for a central agency not in touch with local conditions to lay down rules regarding the working season, the particular hours of work, detailed courses and syllabuses, methods of instruction, nature of school-buildings and their equipment and several other subjects of importance. It is best that these are kept under the control of local governments. So also the central government may be regarded as the appropriate agency in the preservation of public health in certain respects while in other respects the local governments are more competent. The control of epidemics, the fixing of standards of purity in articles of food and drink and the regulation of traffic in them may consequently be left in the hands of the central government, while other matters relating to public health where local conditions and knowledge are the deciding factors might be subject to the control of local governments. Similar division is possible in respect of many other subjects like factory labour, agriculture, land development, transport, etc. It has been found from experience, that in the suppression of gambling and of commercialised vice in the United States, the central government was able to take certain administrative measures of great efficacy, even-though the promotion of public morals is a subject naturally falling within the

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[3] KENNEDY: "Some aspects of the theories and workings of Constitutional Law"—P. 103.

jurisdiction of the units.[4] While there may be a difference of opinion as to whether the action of the Congress was constitutional or not, there is no doubt that its measures were of considerable use. It is therefore a sound policy to frankly recognise all this, and to provide in the constitution for central control over some aspects of a subject and local control over the other aspects of it. A recent writer gives expression to this view in the following words: "It is increasingly unrealistic to conceive of a federal division of functions in terms of the assignment of subjects as wholes. Each has phases appropriate to central and local attention. Federal constitutions which disregard this fact are brought into conformance with it in the end, although tardily and imperfectly, by subterfuge, indirection, and fertile adaptation." [5]

'Normative' and 'Concurrent' powers as the solution of those difficulties.

The distinction that is often drawn between the standards on the basis of which a subject is to be regulated and their application in practice is to some extent based on the above view. In such a case it will be the duty of the central government to lay down the fundamental principles regarding a subject and it will fall to the share of local governments to determine the ways and means for working them out. The goal to be reached is fixed by the former and the means required to reach it are settled by the latter. Although it is not easy to group the different phases of a subject under the two broad categories of principles and details, and although in regard to many subjects it is difficult to say where principles end and details begin, this distinction is on the whole as satisfactory a guide as one could get in a matter like this. At least one of the Federal States has boldly recognised the usefulness of this distinction. The constitution of the German Federal Republic provides for the exercise by the central government of what is known as 'Normative Authority' which consists in the power to establish fundamental principles in regard to matters like

(1) the duties and rights of religious associations,

(2) education,

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[4] THOMPSON: "Federal Centralization"—P. 111—112.

[5] Encyclopœdia of Social Sciences. Article on 'Federation'—op. cit.

(3) the law of officers of all public corporations,
(4) the land law, and
(5) the disposal of the dead.

The more important phases of these subjects are regulated by the central authority while the units are given power to settle all questions of detail.[6] The German Republic may fall short of being a typical federal state in many respects; but its example deserves to be followed in this particular by the other federations. A similar feature is found in the constitution of Austria also. The group of 'concurrent' powers found in federations fulfils a similar purpose.

Powers appropriate to local governments.

If powers which are necessary to prevent the disruption of the federal union as well as those which are required to maintain uniformity in regard to matters of general interest and national importance are thus conferred on central government, it naturally follows that all other powers which are essential to realise the remaining ends of the State should be exercised by local governments. This is the one criterion by which one could decide what the proper sphere of local governments is. On an examination of the subject, it will be found that the powers thus falling to the share of these governments are such as concern themselves with the regulation of matters which are of only local importance in the sense that it is the inhabitants of a particular area alone that are benefited when they are properly managed and it is they that suffer when their management proves inefficient. They are matters in regard to which anything done or left undone by one local government does not in any way affect the interests of those living in the other portions of the federal territory. The usefulness of this criterion depends on the possibility of drawing a definite line of separation between subjects of local and those of national importance.

Cultural minorities and control of 'cultural' matters by local governments.

In the practical application of this principle there have always been several influences at work. It has already been pointed out that in many cases a federal system is necessitated by the existence of cultural minorities determined to preserve their separate individuality and unwilling to subject themselves

[6] Article 10 of the Constitution.

to the dictation of the majority in all that they consider essential to the preservation and development of their cultural life. Under such circumstances independent local governments which are primarily established to satisfy the cultural needs of these minorities should be entrusted with power over education, religion, language and civil law. This constitutes the minimum of authority that they should have. But there is also a second influence to be taken into account, and that is the instinctive love of power which every group possesses. The cultural minority feels that it cannot impress its individuality on the public, unless the government which it calls its own is endowed with several other powers, so that it may be supreme over as wide a field as possible. It is this, much more than mere local convenience and advantage, that determines what powers local governments do really come to have. Just as in the case of the individual it is often argued that the personality in him cannot develop unless adequate and full opportunities are given to him, a claim is put forward on behalf of the minority-groups that the scope for the expression of their individuality should be as large as possible, meaning thereby that the local governments through which they happen to work should be given control over numerous functions. The handing over of agriculture, industries, public works, municipal institutions, etc., to these governments is the result of this claim.

Culture is intimately connected with conceptions of right and wrong in relation to the moral conduct of individuals. In a country of extensive size like India, the United States or Canada, standards of morality are bound to vary from one local area to another and from one cultural group to another. It will be an impossible task to try to have one uniform standard. Ordinarily no modern state attempts to regulate the morals of its citizens, partly because morality is considered to be a private matter and partly because it is difficult to make men moral through the imposition of punishment. All the same there are laws against gambling, commercialised vice, alcoholic drinks, unhealthy amusements and obscene literature etc. It has, however, been found from experience that, unless there is a strong public opinion to co-operate with the executive in the enforce-

ment of such laws, all governmental action becomes futile. Such co-operation will be forthcoming only when the public feel that the conduct which law attempts to prohibit is really of an immoral character. Since it is quite likely that on most matters regarding morals there cannot be a general standard applicable to a vast area and since each cultural group has a standard of its own, it follows that morals can be more effectively regulated when action is taken by governments representing local groups than through the action of a central government. A favourable local opinion can be more easily created about them than a national opinion. One locality may be a strong advocate of prohibition; another may be indifferent or even opposed to it. Under these circumstances prudence consists in empowering local governments to regulate the subject of prohibition.[7] The field of morals is also one where cautious experiment is necessary before a general plan of action is decided upon. In a country where there are numerous local governments, it is better to utilise them to make such experiments, so that if they succeed in one area, they may be extended to other areas also. In view of considerations like these, it may be concluded that on the whole legislation affecting morals falls more appropriately within the sphere of local governments. This need not preclude them from taking the administrative help of the central government in enforcing their laws.

Influence of 'political sentiment' more important than theoretical principles.

While statesmen in all countries accept as generally sound the above theoretical principles on the basis of which functions and powers should be divided between central and local governments, the actual division obtaining in the several existing federations varies from one to another. In some the balance is too much in favour of local governments, while in others it is too much in favour of central governments. The scheme of distribution for example in Canada and the German Republic has for its object a highly centralised system; that in the United States, Australia and the German Empire shows a 'bias' towards the autonomy of the parts. Differences like these have to be traced ultimately to the influence exercised by political sentiment as distinguished from mere logic in the making of consti-

[7] THOMPSON: "Federal Centralization"—P. 207.

tutions. In every country and in all ages the human factor is a force which gives a final shape to the institutions of government. There have been two schools of advocacy in all federations—one attracted by the urgent need for a strong central government and the other by an ardent desire for local independence. Alexander Hamilton in the United States and Macdonald in Canada are the representatives of the first school while Madison and Cartier belong to the second. Similar names might be recalled from the history of the other federal states. Different emotions are aroused in the minds of different people by terms like " centralisation " and " autonomy ", and even while engaged in discussions over particular functions, they are swayed by the magic of these general terms. The struggle between the two schools of thought is a never-ending one and the marks of their relative strength are found in almost every part of the constitutions of all federal states.

Influence of the historical background of the several federal states.

A more potent factor in creating differences in the actual division of powers is the historical background of the several federal states. The conditions out of which federations arose and the needs which they were expected to fulfil were not the same everywhere. The federation of the United States for instance was formed out of thirteen states which were in full enjoyment of *unlimited sovereignty* in which they took all the greater pride as it was wrested by the force of their arms after a long and arduous struggle with an unwilling imperial power. Such states naturally felt suspicious of another central authority that it was proposed to set over them all and disliked the idea of conferring very many powers on it. Hence in the original constitution of the United States, the units retained a good deal of their sovereignty and the central government was in possession of a comparatively limited sphere of activity. The circumstances under which the Canadian Provinces federated eighty years later were more propitious for establishing a strong central government. These provinces were not fully sovereign at any time. They were accustomed to the exercise over them of a large amount of control by England. They knew that the powers of the proposed federal government would not make their position worse. Moreover, it was during the period of the

(a) U. S. A.

(b) Canada.

American Civil War that the Canadian Federal Movement was organised; and the Canadian Statesman believed that that war was the inevitable result of a constitution which left large powers in the hands of the member-states and correspondingly weakened the authority of the central government. They were therefore determined on placing their own constitution on a firmer basis and removing from it the defects which they associated with the government of the United States. The following words of Macdonald [8] are known to every student of constitutions: "Here we have deliberately adopted a system different from that in the United States. We have strengthened the central government. We have given the central legislative all the great subjects of legislation. We have conferred on it not only specially and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest, not distinctly and exclusively conferred on the local governments and local legislatures, shall be conferred on the central government and legislature. We have thus avoided that great source of weakness which has been the cause of the present disruption of the United States". In conformity with this view the Canadian constitution not only confers powers on the central government on many matters like criminal law, marriage and divorce, banking etc., which in the United States are left in the hands of the part-states but it also provides for the appointment of the lieutenant-governors of the provinces by the federal government to which is also given the power of vetoing provincial legislation and nominating the members of the Senate which is supposed as a second chamber to represent the special interests of the provinces as such.

(c) German Empire.

In 1871 the German Empire was established on a federal basis. Historical conditions in Germany were different from what they were in Canada and it was possible for the member-states to retain a large amount of autonomy. It is to be noted that all of them were fully sovereign before 1871. They were also in most cases ruled by autocratic princes. It is a matter of common observation that it is extremely difficult to make prin-

[8] KENNEDY: "Statutes, Treaties and Documents of the Canadian Constitution"—P. 558.

ces part with power. Their attachment to their dynastic and personal interests is inordinately strong. 'Particularism' is more ingrained in them than among the people at large. Moreover Prussia the dominant power in the federation was not much interested in centralisation, for with or without it she felt that she could preserve the integrity of the empire. Under these circumstances the part-states in the German Empire retained in certain respects more powers than the states in the United States. The transformation of the federal empire into a federal republic in 1919 led to a complete reversal of the position of the member States. The princes were overthrown; the national sentiment grew stronger; fewer barriers separated one section from another; and during the period of the European War from 1914 to 1918, government was carried on as if Germany was a unitary state.[9] People therefore became accustomed to centralization and the powerful Socialist Party which brought about the revolution of 1919 had full faith in a unitary system of government. The federation therefore that was established under such circumstances bore very little resemblance either to the former empire or to the other federal states like the United States or Australia. Practically all real authority was conferred on the central government.

(d) German Republic.

The position of the six colonies which united into the Federation of the Australian Commonwealth in 1900 was more like that of the thirteen States of the United States than that of the Canadian Provinces. Though not fully sovereign, they were in enjoyment of more powers of self-government than the Canadian Provinces in 1867. They were also not under the same extreme necessity to surrender their individual existence and enter into a federation. It was more a matter of convenience to them. They were not therefore inclined to grant larger powers to the central government than what they considered to be absolutely essential. But it has to be noted that in spite of this attitude the powers of the central government in Australia have a wider range than those in the United States. This is due to the altered historical background which the Australian

(e) Australia.

[9] KRAUS: "Crisis in German Democracy"—Chapter VII.

statesmen had to take into consideration. "The changes of a hundred years necessitated divergences from any eighteenth century model. The industrial revolution and the attendant development of facilities for transportation and communication, of great cities, of commerce, and of generally closer relationships between neighbouring and distant States, lengthened the number of subjects requiring consideration and the number of powers assigned to the central government.[10] Moreover by 1900 the general conception of the State and the scope of its activities underwent a change everywhere. It was expected by all to render more social services than the thinkers and the politicians of the early nineteenth century argued as being permissible. Individualism and the doctrine of Laissez-faire were giving place to Socialism. It is circumstances like these that are responsible for more powers being conferred on the central government in Australia than in the United States. No one in the eighteenth century could have thought of subjects like insurance, invalid and old age pensions, and conciliation and arbitration as subjects fit for regulation by any government.

A study of the federal systems in Switzerland, Austria, Russia and other countries will similarly reveal the influence exercised by the peculiar circumstances of each country in the determination of the actual division of powers between central and local governments in them. In the framing of constitutions wisdom consists more in discovering what is possible and practicable than in a blind and obstinate adherence to theoretical principles however sound and logical they might appear to be.

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10 HUNT: "American Precedents in Australian Federation"—P. 14.

CHAPTER V

DISTRIBUTION OF FUNCTIONS AND POWERS (*continued*)

The Finance Power

THE primary basis of the authority of any government is its power to obtain the financial resources it needs to enable it to discharge the functions assigned to it under the constitution. In the absence of such a power no government can exist. Long ago the *Federalist* aptly pointed out that, "Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution."[1] The history of every country confirms the truth of this statement. Whatever other provisions might exist in a constitution for defining the scope of the activities of a government, the actual limits to it is set by the financial power with which it is entrusted. Its strength is in proportion to the strength of its finances. As there are two governments in a federal system it is necessary that each of them should possess the required financial strength.

The importance of the finance power in a Federation.

The soundness of the financial system in a federation is to be judged by reference to two essential conditions, viz., independence and adequacy. Independence consists in the power of either government—central or local—to obtain the resources it needs without being forced to subject itself in any way to the control of the other government in the process of getting its revenues and spending them. It is the power to determine for itself the amount of revenue it requires, the mode of raising it and the manner of utilising it. In the absence of this freedom the constitutional system loses its federal character and becomes either unitary or confederate in its actual working. For, any control of one government over the finances of the other reduces

The criteria of independence and adequacy.

[1] P. 143.

the latter to a state of dependence on the former. One of the most difficult problems therefore in the framing of a federal constitution is that of devising ways and means for securing to each government the maximum amount of financial independence.

Adequacy consists in the ability of each government to get *in full* the money that it needs to perform all its functions. The mere allotment of a wide sphere of activity to a government serves no purpose, if owing to lack of money it is compelled in practice to impose voluntary restraints on its competence, neglect many of its duties and narrow the field of its usefulness. Under such circumstances, that government which has more adequate finances is bound to possess greater weight and to command more prestige in the federation. It is possible that in certain federations aedquacy is sacrificed to independence, while in others independence is sacrificed to adequacy. But either of these courses is inconsistent with the true federal principle. A system that secures both these ends is the ideal one. From the point of view of political science, this should be regarded as the central problem in federal finance.

Taxation *versus* contributions in relation to independence.

Independence is better secured when each government enjoys the power to directly tax the citizens within its jurisdiction than when it gets its revenues through the contributions made by the other government. The issue here is broadly between the method of taxation and the method of contributions. The struggle between the two methods has been going on in all federations and it has not been found practicable to do away entirely with a system of contributions and to resort to a system of pure taxation however preferable such a course appears to be from the point of view of independence. The superiority of the method of taxation arises from the fact that under it either government will be able to approach the individual citizen directly without the interposition of the other government and secure all the revenue it wants from his pockets which after all are the ultimate source of the income of any government. The citizen has not the power or the strength to resist the demands made on him. Where one government gets its revenues from the contribution made by the other, the position is different as the latter

can offer resistance in case it considers it desirable, or impose its own conditions before the contributions are paid.

Obligatory and optional contributions—the former not against the principle of independence.

But the issue between taxation and contributions is not so simple. Contributions themselves are of different kinds and a distinction is to be drawn between those which involve the receiving government in the loss of its independence and those which do not have this effect. Contributions fall generally into two classes—obligatory and optional. The provision for obligatory contributions is included in the constitution itself and it fixes their amount as well as the terms on which they should be paid. It is not open to the government paying them to bring about any modifications on its own initiative in this respect. It has no other alternative than continue to pay them according to the terms laid down in the constitution. Federalism is a system of legal order and the presumption is that each government will be disposed to fulfil the obligations imposed on it by the constitution of the state. Its failure to do so will be a breach of the fundamental law of the land, and if persisted in, will lead to revolution and perhaps to the disruption of the state. Contributions therefore of a compulsory character do not injuriously affect the independence of the governments receiving them.

Obligatory contributions differ from the quotas which the states paid to the confederate government of the United States in the period before federation; and much of the prejudice against contributions in general is to be traced to the unsatisfactory working of the system of quotas before 1787. In the days of the confederation the individual states were sovereign and they had full discretion to pay or not the amounts demanded from them by the Congress. The central government consequently grew weak and felt itself unable to discharge its responsibilities. Moreover it had not the power even to a limited extent to tax the citizens directly and it had to depend wholly on the contributions of the component states. This made its position hopelessly crippled and this accounts for the strong indictment which is found in the pages of the *Federalist* against "the principle of regulating the contributions of the states to the common treasury by Quotas."[2]

[2] P. 99.

Grants-in-aid in relation to independence.

Obligatory contributions also differ from subventions or grants-in-aid that are made by central to local governments in almost all the federal states of the present day. These are purely discretionary grants. The member-states have no legal right to demand them; on the other hand, it is the central governments that are keen on paying them. They do so primarily because they feel interested in the better administration of certain subjects which are not within their own jurisdiction but within that of the local governments. They are not therefore in a position to bring about directly the improvements they are anxious to introduce into such subjects. It becomes necessary for them to work through the concerned local governments. With a view to obtain this co-operation of the component states and induce them to effect the required improvements, central governments in almost all federations have adopted the device of grants-in-aid. The payment, however, of these grants is subject to certain conditions which have to be accepted by the local governments receiving them, and it is this that is generally regarded as interfering with their independence. Grants are given only to those part-states which are prepared to spend a proportionate amount from out of their other revenues on the subjects in question, and agree to their administration being supervised by the officers of the central government with a view to see that right standards are being maintained. Conditions like these amount really to the exercise of compulsion by the central government over the local governments. The latter are forced—through the inducement offered by the grants—to spend their revenues on departments on which they would not have otherwise spent them, to raise additional revenues if necessary through taxation, and submit themselves to the administrative supervision of the central authority which they would not have otherwise tolerated. An increasing use of grants-in-aid will result in the subservience of the part-states to the centre over a wider area and prove to be inconsistent with federalism as it is ordinarily understood. If some of the local governments represent the interests of minority-groups, the system of grants-in-aid may be regarded as an indirect method by which the majority as represented in the central government gets opportunities

of interfering in the administration of subjects which are left by the constitution under the sole control of such groups.

The justification for these grants-in-aid lies in the idea that some of the subjects like education, public health and highways which are left in the hands of the units in most federal states are really matters of national importance, and the central governments should not be indifferent to the way in which they are administered. Such a contention only shows that the existing distribution of functions is faulty. The right course under these circumstances is for the central government to take over those functions entirely into its own hands by bringing about an amendment to the constitution. It would put a stop to that indirect—and sometimes insidious—interference with the autonomy of the units which is inevitable under a system of grants-in-aid. Perhaps the difficulty that is involved in amending the constitution might have been partly responsible for the use of this system. But it should be recognised that whatever might be the explanation of its origin or the existing need for it and whatever might be its merits in other directions—and it has undoubtedly many merits—the system of discretionary grants is liable to affect injuriously the independence of the governments that receive them.[3] Unlike the obligatory contributions, they are out of harmony with the ideal of a federal system. In no federation however, do the component states depend entirely on such grants. They form only a small portion of their total revenues—the major part being derived through obligatory contributions and taxation. It is because of this that a certain amount of tolerance is shown towards them.

Obligatory contributions—Their nature and origin.

Obligatory contributions might be made by the central to the local governments or by the local to the central government. There is also the possibility of both kinds of contributions existing side by side in the same federation. In Canada and Australia it is the central governments that pay them. In the German Empire it was the local governments that paid them, while there was also the practice of the central government distributing among them a part of the revenues it derived from customs. In

[3] DAWSON: "Constitutional Issues in Canada"—Pp. 459—71.

Switzerland the constitution provides for contributions from the cantons to the federal government but no such payments have been so far made. In the constitution of the United States there is no provision for any kind of obligatory contributions.

These differences are the results primarily of the special financial circumstances characterising each federation; and in some cases they are also the outcome of political considerations. Everywhere it is the inadequacy of the revenues otherwise provided for that necessitate the payment of contributions to make up a possible deficit. In Canada and Australia, for example, customs and excise were the chief sources of revenue for the component states in the period before federation. Federalism required their exclusive transfer to the central government and the units had therefore to fall back on sources of taxation which were less lucrative. They were threatened with deficits while it was anticipated that the central governments would have large surpluses with them. Under such circumstances it was regarded as perfectly legitimate for the units to receive contributions from the centre, and provision was accordingly made for it in their constitutions. In the German Empire the position was different. Only a few sources of taxation were reserved for the central government and it was felt that it would not be in a position to meet all its expenditure from its tax-revenues. The units were consequently obliged to come to the rescue of the centre and make contributions towards its deficit. Later on, it was not so much the financial exigencies of the part-states as the political situation in the central legislature that necessitated the imperial government to divide among the local governments a part of the revenues it derived from customs and the tobacco tax.[4] Under the Weimar constitution the financial position of the central government became so strong that it was no longer in need of any help from the units. The present-day tendency may be said to be mainly in the direction of contributions from the centre to the parts and not the other way.

Their defects

While contributions of an obligatory character are not inconsistent with the federal system, it is to be observed that they

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[4] FINER: "Theory and Practice of Modern Government," Vol. I, P. 321.

suffer from several other defects and are generally responsible for a great deal of friction between one government and another and that they interfere with the smooth working of the federal form of government. Governments paying contributions have a feeling that they are being compelled to help an outside agency. These payments assume the form of a first charge on their revenues and they have to be met even before their other needs are satisfied. Those governments are often put to the necessity of raising their rates of taxation for making these payments and such a necessity becomes greater when their other expenses are on the increase. In times of depression or of an acute financial crisis, the position becomes harder still. Moreover, it is not possible to determine satisfactorily the basis on which contributions should be made. Population has been selected as the basis in many cases and wealth and needs in other cases; but no criterion satisfies all the parties concerned. In Canada the central government pays subsidies to the provinces roughly in proportion to their population, and the plan that was in vogue in Australia till 1929 was of the same character. There has, however, been a complaint from the thinly inhabited provinces that though their populations are smaller, their needs are really greater as they are more backward and they deserve as such a larger amount of relief. A third difficulty arises in consequence of the subsidies fixed at one time becoming unsuited to a later time owing to changes in the general social and economic conditions. Revision therefore becomes necessary. But the practice of revision, or even the idea that revision will be made if only a sufficiently strong agitation is carried on, will make the component states look to central contributions rather than to their own powers of independent taxation for getting any additional revenues they consider to be necessary for their purposes. This is the inevitable result of the separation of the powers of expenditure which lie with governments receiving the contributions, from the obligation to raise the revenues which rest on the governments paying the contributions. One of the speakers during the debates on the Federation proposals in the Canadian Legislature drew prominent attention to this defect when he stated that the provincial constituencies, legislatures and execu-

tives would all show a most calf-like appetite for the milking of that one most magnificent government cow (the federal government). That was the real significance of the subsidies according to him.[5]

as exemplified in the financial history of Australia.

The financial history of the Australian Commonwealth illustrates much more clearly the difficulties involved in a system of contributions.[6] In the earlier years after the establishment of the federation, the central government was under an obligation to make over to the part-states three-fourths of the net revenue from customs and excise as well as the whole of its surplus revenues. The idea then was that the functions to be discharged by the federal government were so few and the expenses to be incurred on them were so little that a large surplus balance would be left in the hands of that government for distribution among the states. But this system introduced a number of complications in the course of its working, which ultimately affected the independence of the units as well as the adequacy of their revenues. There was an element of uncertainty in regard to the amounts they could expect annually to be paid. Any revision of the tariff produced unexpected results on their finances. Moreover, there was no knowing what the actual surplus of the Commonwealth would be. The system also introduced an element of conflict between the commonwealth which was interested in spending all its revenues or saving them to meet some future expenditure, and the states which were anxious to discourage such expenditure or saving. They even raised the question of the constitutionality of the central government appropriating its revenues towards future expenditure and showing only a small surplus as being available for distribution among them. Later on the system was revised, and provision was made for *per Capita* payments to each state, irrespective of the surplus that the commonwealth might have. This did not satisfy the less populous and the more backward states like Western Australia and Tasmania which claimed special consi-

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[5] DUNKIN in Kennedy's "Constitutional Documents of Canada"—P. 609.

[6] Report of the Royal Commission on the Constitution of Australia—Ch. XIX.

deration and the payment of additional subsidies. But the revised system was not incorporated in the constitution and the *Per Capita* payments were not obligatory like the earlier contributions. There was consequently a danger that at any time the central government might reduce or even stop the payments. The danger became all the more real, as there was a steady growth in the expenditure of the central government itself, contrary to the estimates made at the time when the federation was started. The world war still further added to this expenditure. The Commonwealth therefore thought of stopping all contributions to the states, though such an extreme step was not actually taken. All the same, it wanted to fix once for all the amount of its obligations towards them, so that they might not go on increasing with every increase in their population, as was the case under the *Per Capita* system. The negotiations started for this purpose resulted in some far-reaching amendments to the constitution, under which the Commonwealth took over the public debts of the states and agreed to credit towards their interest the amount of *Per Capita* payments it made to each state in 1927, besides making some other fixed contributions towards their sinking funds. In their turn, the states have agreed to pay to the commonwealth the balance of interest and sinking fund amounts required. But the assumption of responsibility for their debts by the commonwealth did not satisfy all the states. Western Australia which always claimed special treatment has continued to do so. Her dissatisfaction at not securing it to the extent she claimed, irritated her to such a degree that her inhabitants recently voted for complete secession from the federation. All this shows that it is not an easy task to devise a system of contributions which would satisfy all the parties concerned.

It is not to be inferred from this that contributions have no place in federal finance and that they deserve to be abolished completely. The significance of their history consists in the light they throw on the complicated nature of the problem of finance in all federations and the difficulty of finding a simple solution for it. It is only because the deficits of governments could not be met in any other way that this system had to be resorted

to. There is no possibility of part-states especially, getting all the revenue they require through taxation alone. With all their defects, contributions have become a matter of necessity. Statesmanship is needed to discover the methods by which the defects might be minimised and the financial balance adjusted in the light of fresh experience.

The financial history of Australia is also important in so far as it shows clearly how, "The financial relations between the component states and a Federal Government are the chief determinant of the character of the federation." [7] The fathers of the Australian Commonwealth modelled her constitution after that of the United States, and not of Canada, as they thought that that would secure to the component states a more dignified position than that of the Canadian Provinces. But the amendment to the financial clauses of the constitution referred to above has been of such a far-reaching character that it has virtually placed the states under the control of the Commonwealth. The agreements under which the central government took over the public debts of the states empower it to enact *any* laws it deems necessary for the purpose of carrying out their terms. This law-making power is so wide, that through it, the Federal Parliament is in a position to dictate to each state what financial policy it should adopt. This is not merely a theoretical possibility. The events of 1931—32 showed clearly that the power was real. The financial Agreements Enforcement Acts passed in 1931 and directed primarily against Mr. Lang's government in New South Wales revealed "how a state may be compelled to carry out any agreement made under section 105-A, and that, in the process of compulsion, the 'Sovereign rights' of the states may be ruthlessly swept aside." It is very difficult to resist the pressure of a government from which help is expected and obtained to overcome a financial crisis.

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In respect of 'Adequacy' what is important is that each government should be *fully* provided, whether it be through con-

[7] *R. C. Mills* in "Studies in the Australian Constitution" (Edited by G. V. Portius)—P. 97.

tributions or through taxation, with all the money resources it needs for performing the functions falling to its share. Leaving 'contributions' aside for a moment, the question that has to be answered here is, what kind of taxation will enable each government to get the resources it wants. There are two systems of taxation which may be considered in this connection. Under the first system, each government is left in full possession of the whole field of taxation, and it will therefore be possible for each to get as much revenue as it requires. The constitution does not place any limits on its power of taxation. The only limits are those that are imposed by the economic condition of its subjects, their willingness to bear financial burdens and the skill of its financial advisers in selecting taxes which are most productive. Under the second system, there is a division of the field of taxation between central and local governments, some taxes being allocated to the former and some others to the latter. Each has to confine itself to the sources ear-marked for it and is free to exploit them to any extent it likes; but it is precluded from encroaching on the taxes reserved for the other government. The first system (with a few necessary modifications) is found in the United States and Australia, and the second in Canada and Switzerland. The German Empire also adhered to the second system, while its successor, the German Republic, reversed it completely.

Systems of taxation in relation to adequacy—concurrent powers of taxation and allocation of taxes.

The first system appears to secure 'adequacy' to the maximum extent possible, as each government is free under it to resort to any tax it likes. One of the greatest triumphs of the convention of Philadelphia which framed the constitution of the United States was the introduction of this system and many pages of the *Federalist* are devoted to an eloquent exposition of its merits.[8] The case for an unrestricted field of taxation lies in the fact that it is not possible to make a correct estimate of the expenses which governments are called upon to incur. An estimate that is made when the federation is started is bound to prove itself incorrect later on. This is all the more the case with the expenditure of a central government which has to look

The merits and defects of the first system.

[8] "The Federalist"; No. 30.

to defence and security and has to keep its armaments in a state of efficiency. No bounds can be set to the costs that might be entailed by war. Moreover the cost of the social services undertaken at the present day by both the central and local governments is steadily on the increase. Under these circumstances, it is not wise to place restrictions on the kind of taxes that governments should make use of. Each government must be given complete freedom to select from time to time whatever taxes it considers as most appropriate for its purposes. It is also found that every attempt to allocate particular taxes to particular governments has to face numerous difficulties. No classification which is productive as well as administratively efficient is possible. The distinction often drawn between direct and indirect taxes, or internal and external taxes, and the view that the former are to be left to the part-states and the latter to the central government, has been found to have no rational basis. Moreover, each government finds it necessary to resort to borrowing to meet its expenses. It is only when its powers of taxation are unlimited, that its credit will stand high and it will be in a position to obtain the loans it wants at a low rate of interest.

In spite of the force of the above arguments, there are several considerations of a political, administrative and economic character that stand in the way of the first system being adopted. Even in the United States and Australia where the constitution provides for it in the main, it is modified in several respects. Local governments are not allowed to levy customs as it would interfere with the exclusive right of the central government to regulate foreign trade. To permit one government to levy taxes on a function for which the other government is exclusively responsible amounts to an active interference with the latter's authority and leads to numerous political difficulties. This principle will equally apply to any other tax which, when made use of by one government, is likely to interfere with the functions of the other.

Administrative and economic difficulties.

Experience also shows that certain taxes are effective only when controlled by the central government, while others are effective when controlled by local governments. Income-tax, corporation-tax, the inheritance-tax, and the turnover-tax are

some of those that belong to the first category, while taxes like land-tax, license-tax, and profession-tax belong to the second. To permit therefore each government to levy any tax it likes, interferes with this sound administrative maxim and creates conflict and competition between the two governments. It also results in all the evils of double taxation. Each government is generally anxious to encroach on almost every subject of taxation with the result that the burden on the individual tax-payer becomes unduly heavy. Each government proceeds with its own programme of taxation without caring to know what the other is doing, and this want of co-ordination between them affects the yield of the taxes they resort to.

As a matter of fact this system worked fairly well both in Australia and the United States only so long as their central governments kept themselves under a voluntary restraint and stood aloof from the field from which the part-states were generally accustomed to draw their revenues. Though the constitution did not provide for separation of their sources of revenue, the two governments adhered to a scheme of separation in actual practice. The central governments in both these federations relied mostly on customs and left the field of direct taxes wholly to the units. But in recent years financial exigencies compelled them to reverse this policy, with results that have proved disastrous to the part-states and to the individual citizen. Referring to the United States, Professor Seligman says: "Both the Union and the States began to dip into a common reservoir. With the attainment of this stage we reach the period of duplication of revenues. At first scarcely perceptible, this duplication became more pronounced as it became necessary to resort to inheritance-taxes, to corporation-taxes, to income-taxes, and to various forms of indirect taxation. The competition which was thus engendered resulted not only in a waste of effort but in an accumulation of more or less unrelated and unconsidered burdens upon the individual, as well as in a growing embarrassment to the taxing authorities."[9] A similar ten-

[9] E. R. A. SELIGMAN: "The Fiscal Outlook and the Co-ordination of Public Revenues" in the *Political Science Quarterly*, March 1933.

dency is observed in Australia[10] as well as Germany. For more than a decade after the establishment of the federation, the central government in Australia relied on customs and excise for all its revenues. But as its needs went on increasing, it invaded the field of taxation up till then used by the states, and levied a land-tax, an income-tax, an entertainment-tax, estate duties etc., interfering very much with their revenues. In the German Empire the imperial government did not levy any direct taxes for a long time, although there was no constitutional prohibition against it. But the World War revolutionised its financial policy and many taxes up till then controlled only by the part-states were resorted to. When the Empire was overthrown and a Republic was established in 1919, finances became practically centralised in the hands of the federal government to the detriment of the interests of the part-states.

This extension of the federal field of taxation has brought out clearly that the test of 'adequacy' is not satisfied by the system under which the whole field of taxation is left to each government. Such a system is really of advantage to the central government alone. The units find themselves placed in a hopeless situation, as the number of taxes which prove effective when administered by local governments with jurisdiction over small areas, is becoming less and less with the changes in the economic structure of the modern world; and even the few taxes which are essentially of a local character are being encroached upon by the central governments. Under such circumstances it is found that a system under which the units will have exclusive control over some of the sources of taxation will serve their purpose much better. It will give them the guarantee that at least in a particular field of their own, they can roam freely and get as much revenue as it is administratively practicable for them to get, supplementing it through contributions from the central government.

The system of separate sources of taxation is found in

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10 Report of the Royal Commission—P. 127.

System of separate sources of taxation and its difficulties.

Canada and Switzerland. It was also the case in the German Empire. In Canada while the central government is free to raise money by any mode or system of taxation, the provinces have control over direct taxation. In Switzerland customs are the only important source of revenue to the federal government. In the German Empire, customs duties and consumption-taxes were left to the imperial government. The only objection to a strict allocation of taxes is that it may not give to each government all the revenues it needs. This is due to the fact that there is a conflict between the revenue requirements of a government and the kind of taxes that administrative and economic considerations make it possible for it to control. It is found that some taxes have a narrow administrative basis while others have a nation-wide basis. It is only the former that are fit to be assigned to local governments; the latter should naturally fall within the control of the central government. If this principle is taken as the guiding factor in the distribution of taxes between the two sets of governments, it is likely that one government may get from them more revenues than it needs, while the other may be getting much less. This is what has actually happened in most federations. Moreover, the number of taxes which have a wide basis is on the increase in the modern world and this would necessitate the making over of a large number of taxes to the central governments everywhere. The consequence of this will be that local governments get only a small share of taxes and their revenues will correspondingly dwindle making it difficult for them to discharge their functions, while the central governments will be in a comparatively better position. It therefore follows that adequate revenues to both governments will not be forthcoming through a rigid allocation of taxes.

The tendency at the present day is to make the division more flexible and draw a distinction between the legislative and administrative control of a tax and the enjoyment of the yield from the tax. Wherever it is possible, some taxes are exclusively assigned to the legislative and administrative control of the centre and some to the local governments and each appropriates for itself the whole of the income derived from the taxes it controls.

Distinction between the legislative and administrative control of a tax and the enjoyment of its proceeds.

As this method may give too little or too much to a government, it is supplemented by another under which the yield from some taxes controlled by one government is divided in some proportion between both. In such a case the responsibility of determining the rate of the tax and other details connected with it will lie on the controlling government. There is also another method under which, though a tax may have been assigned to one government, the other government is permitted to levy surcharges on it and enjoy the proceeds from the surcharge. These methods are combined in different proportions in different countries, so that the division of the field of taxation in a federal state of the present day is different from the simple enumeration of central and local taxes. This is a compromise between the assigning of the whole field of taxation to each government as advocated by the *Federalist* and a strict separation of the taxes allocated to each government; and like most compromises found in a federal system, it has its origin in practical necessity. It goes a great way in giving to each government as adequate a revenue as it is possible to secure through taxation alone. But it generally happens that the maximum amount of adequacy is not obtained merely through taxation. Revenues derived from it have in many cases to be supplemented by contributions from one government to another so that each government in a federal system gets the revenues it needs from a variety of sources. It is unnatural to expect anything different, as the problem of federal finance which is inherently complicated cannot have a single or a simple solution.

It must also be noted that no solution will hold good for all time. Economic conditions go on changing at a rapid pace. Taxes which appear to be productive at one time cease to be such at another; those which under certain circumstances appear to be fit for control by local governments might as circumstances change become more appropriate for control by central governments. This necessitates a change in the basis of compromise from time to time. To facilitate such changes, a machinery less cumbersome than a formal amendment of the constitution should be devised.

The adequacy of the 'Finance Power' in a federal system depends not merely on the competence of each government to tax the citizens and to get contributions but also to borrow money whenever necessary. This is recognised in every federal constitution and there is generally a provision empowering the central and local governments to borrow each on its own credit without the need for sanction from the other. In all federations therefore, there is a large amount of public debt outstanding separately against each of the governments. But here also as in the field of taxation, recent experience shows that a certain amount of co-ordination between the central and the local governments in regard to their loan policies is desirable. This is due to the fact that the money market and the banking system on which depend the facilities for borrowing form a single unit in almost all countries, and central governments which control the currency system have a good deal of influence on them. Foreign capitalists have also a tendency to treat the different governments in a federation as if they were interrelated and to form their estimates about their condition by reference to the government having the lowest credit among them. Under such circumstances it is of the greatest advantage for all the governments to work as far as possible in co-operation in respect of their loan transactions. Concerted action among them will prevent undue competition for loans, enable them to choose the proper time for floating their debts, raise their credit and bring down the rate of interest at which they could borrow. The mechanism that has to be adopted for bringing about such co-operation may vary from one country to another. The experiment has so far been tried only in Australia where a loan Council representative of the commonwealth and each of the component states is established for this purpose. The complaint is often heard that the council is so constituted as to give a preponderance of power to the central government and reduce the states to a position of dependence on it. Apart however from this complaint, the experiment itself is interesting as it affords another illustration of that tendency towards greater interdependence between the centre and the parts which is becoming the characteristic of federalism at the present day as much in the

The borrowing power and the principle of inter-dependence.

field of finance as in other fields. It is found that complete separation between central and local governments which in earlier days was regarded as the ideal to be aimed at under a federal system is unworkable in practice.

Chapter VI

DISTRIBUTION OF FUNCTIONS AND POWERS—(*Contd.*)

In order to avoid conflict between central and local governments, it is necessary to indicate their respective functions and powers with as much precision and exactness as possible. In framing a federal constitution, two methods might be adopted for this purpose. Under the first method, the powers of only one government—central or local—are enumerated, and it is understood that all the remaining powers should be exercised by the other government. No list of these remaining powers is given separately in the constitution. They consist of all those powers which are not specifically or by implication made over to the government whose powers are enumerated, and they are collectively known as the 'Residuary Authority'. It may therefore be said that under these circumstances one government exercises enumerated powers and the other the residuary authority. Almost all federal states have adoped this method. Under the second method there would be an enumeration separately of the powers of each government and the constitution would contain two lists—one giving the powers of the central and the other the powers of local governments. A reference to these lists would make clear which government has jurisdiction over a particular subject, and this method may be regarded as giving scope to fewer ambiguities. But even under this plan, there must be some provision as regards—'Residuary Authority'. For, it is not possible to draw exhaustive lists of all subjects over which either government should exercise control. There will always be a number of omissions due to oversight, or to some subjects not having been regarded as sufficiently important to find a place in the constitution, or their not having come into existence at the time of the framing of the constitution. There is no reference, for instance, to Railways, the Telegraph, the Telephone in the constitution of the United States. Even in the constitutions of Canada and of other more recent federations, there is no mention of Aerial Navigation, Radio, etc. Control

Two methods of defining the powers of the two governments.

The location of 'Residuary Authority'.

over subjects like these, which are not specifically referred to, may be designated as 'Residuary Authority' and the constitution should indicate which of the two governments should exercise it. It is, of course, possible that even when there is no such indication, control over these subjects will, by implication, go to that government which has relatively more intimate connection with them; and this practice has been followed in most federal states. But there may arise cases where it is difficult to establish any connection, or where there is a difference of opinion between local and central governments. The constitution will, therefore, be gaining in precision and clearness, if it contains a clause stating exactly which government should have jurisdiction in such cases. There have not so far been many examples of federations in which the second method of distributing powers is adopted. Canada may, with certain reservations, be cited as the only important federation of this sort.[1] In the federal constitution that is proposed for India the Canadian model is adopted and separate schedules of the powers of central and local governments are given.[2] Of the two methods, the first is on the whole much simpler. Though the second method provides for two lists, they are not after all very useful as they cannot be made exhaustive. At best, they can only be illustrative. Moreover, there is room for a certain amount of overlapping when two lists are given, as similar subjects might find a place in both. Litigation over doubtful points and over questions of jurisdiction are as prolific under one method as under the other. If a choice is therefore to be made, it is better in view of its simplicity to choose the first method.

The view that the Government having the 'Residuary Authority' is the more powerful one.

The method, however of the distribution of powers is regarded as important not because of the requirement of precision in indicating the scope of the jurisdiction of the two governments but because of the connection it has with the question of residuary authority. It has already been pointed out that in every federal state there are two schools of thought, one advocating the strengthening of the centre and the other of the units.

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[1] B. N. A. Act: Secs. 91 and 92.

[2] Report of the Joint Committee on Indian Constitutional Reforms (1934), Pp. 150—9.

There is a general impression that this strength depends on the location of residuary authority and that the balance of power will be in favour of the government in which that authority is located. It is often argued that the government whose powers are made specific will have a comparatively limited authority, while the other government enjoying power over an undefined field will have a larger amount of authority. This was the view of the framers of the constitution of the United States. At that time there were powerful sections among the people who looked with suspicion at any strong national government, as they felt that that would prove injurious to the power and importance of the component states. A method which was then regarded as effective in allaying their suspicions was to grant only specific powers to the central government and to locate residuary authority in local governments. As doubts were entertained on the score that there was no explicit reference to this in the constitution of 1787, the famous tenth amendment was passed a little later in consequence of which it was clearly laid down that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." The ideas that influenced the Canadian statesman were similar. They were bent upon establishing a strong federal government in contrast to what they regarded as the weak central government in U. S. A. They attributed the weakness of the latter to the location of residuary authority in the units.[3] They thought that it was responsible for the theory of state-rights set up by some of the states in U. S. A. and for the civil war itself. It was to avoid such a contingency that they purposely defined the powers of the provinces in Canada and located the residuary authority in the central government. In Switzerland, the German Empire and Australia where the desire for local autonomy was strong, the example of the U. S. A. was followed and residuary authority came to be located in the component states. The controversy that has been going on in India in recent years illustrates the force of this view even at the present day. Here also those who like Dr. Sapru favour a strong central government wish to have the residuary authority located

[3] Macdonald's Speech in Kennedy's Statutes, etc.—P. 558.

at the centre, while others—the leaders of the Muslim section, for example—who are more particular about the autonomy of the provinces are equally anxious to have it located in the provincial governments.[4]

No necessary connection between the strength of a Government and the location of the 'Residual Authority' in it.

As a matter of fact there is no necessary connection between the strength of a government and the location of residuary authority in it. Its importance has been unduly exaggerated everywhere. The real truth about it is expressed in the following words of the Royal Commission on the Australian Constitution: "The choice between giving the specific or residuary powers to the Commonwealth Parliament does not itself determine the relative importance or extent of the two spheres. That question depends upon the nature and scope of the specific powers."[5] Many seem to think that the totality of governmental power to be exercised in a state is infinite, and that however much might be taken away from it and handed over to the government whose powers are enumerated, the residue is still very large and that it will strengthen the government in which it is located. But governmental power has only a limited content, and if the specific powers that are transferred to a government by enumeration are sufficiently numerous, the residuary authority will not be substantial, and its location cannot by itself add to the importance or dignity of the government concerned. For instance, the location of residuary authority in the part-states has not stood in the way of the central government in U. S. A. extending its sphere of activities as necessitated by circumstances and becoming really the more important political organisation in the country. In Canada the 'Fathers of the Constitution' tried hard to locate residuary authority in the centre and regarded it as one of the most notable of their achievements; but this has not prevented the provinces from obtaining a dignity as high as that of the states in U. S. A. In the German Republic the powers of the central government were made specific and residuary authority was given to the component units. In spite of this the latter were not much

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4 Indian Round Table Conference. III Session Report, P. 18—19.

5 Report—P. 73.

better in status than the units of local government in a unitary state. The conclusion therefore follows that those whose aim is to strengthen a particular government in a federal system will better succeed in their aims if they get more specific powers conferred on it than by locating the residuary authority in it. The latter does not deserve the exaggerated importance that is often attached to it.[6]

The doctrine of implied powers.

This conclusion acquires greater force from the tendency observed everywhere for governments enjoying specific powers to make a liberal use of their incidental or implied powers. All those powers which are essential to give effectiveness and completeness to the specific powers conferred on a government by the constitution are generally known by the name of 'incidental' or 'implied' powers. The former define broadly the ends to be pursued, while the latter constitute the means required to realise them. It is always understood that the conferring of a specific power on a government carries with it the implication that it is entitled to assume and exercise all those incidental powers without which the ends defined cannot be fulfilled. As was pointed out by the *Federalist*, "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power for doing it is included."[7] This is the reason why for instance the constitution of U. S. A. does not stop merely with the enumeration of the specific powers that the Congress is permitted to exercise but also authorises it, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States or in any department or officer thereof."[8] A similar provision is found in the constitution of the Australian Commonwealth.[9]

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[6] Author's article on 'Residuary Powers in a Federal State'—TRIVENI (Madras) Nov.—Dec. 1932.

[7] P. 231.

[8] Art. I—Sec. VIII.

[9] Sec. 51 (39).

Its influence in the expansion of the activities of the central government.

The rapid expansion of the activities of central governments in almost all federal states, in spite of the fact that their authority is limited to the exercise of the few enumerated powers laid down for them, is mainly due to the extensive use made of the doctrine of incidental or implied powers. This is best illustrated by the constitutional history of U. S. A. and Australia. Early in the history of U. S. A. the specific power of the Congress to borrow money was used as the basis of a power to establish banks and later on, to obtain control over the whole money-market. The specific power 'to regulate commerce with foreign nations and among the several states' has become the basis of a whole series of incidental powers enabling the congress to control immigration, shipping and navigation; the kind of goods to be exported and imported; the vessels in which they should be carried; the means of communication like the Telegraph, the Telephone and the Wireless; transport agencies like the Railways, the rates to be levied by them, the conditions under which they should employ labourers, and the nature of goods and passengers they might carry from state to state; trusts, combines and monopolies impeding the free flow of business and trade, and any other instrumentality having any connection with either foreign trade or inter-state commerce. Similarly the specific power to provide for defence has been utilised especially during the World War to fix prices of articles, to stop profiteering, to restrict freedom of speech and association, and to take under governmental control the railways, the telegraph and the telephone.[10] The power to establish post-offices has been requisitioned to authorise expenditure on high-ways, to regulate the kind of articles that might be sent through post and to prohibit the grant of postal facilities for the conveyance and sale of lottery tickets and circulars although the right to control morals is reserved to the part-states.[11] Under the power to provide for general welfare, the Congress has been appropriating large amounts of money for education, highways, public health, agriculture, forestry, fisher-

(a) in the United States

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[10] MUNRO: "The Government of the United States"—Chs. 22, 23.

[11] THOMPSON: "Federal Centralization—Ch. V.

ies, and several other purposes falling within the residuary jurisdiction of the states. The justification for all this extension of authority into fields which were unknown or unthought of at the time when the constitution was framed is that without it the specific powers conferred by enumeration cannot become effective or complete.

(b) in Australia.

In Australia also the development of the activities of the central government was the outcome of the application of the doctrine of incidental powers and is closely parallel to what happened in the United States. Besides the use that has been made of the powers incidental to the general federal power over taxation, commerce and defence, the central government took advantage of its power with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state' and has added enormously to its authority and encroached on the domain reserved for the states.[12] This power of conciliation and arbitration has been utilised not only where ordinary manual labourers are concerned but also in respect of employees in the service of banking and insurance companies and of municipal corporations. It has been ultimately extended to employees in state industries also, with the result that the Commonwealth Arbitration Court is in a position to dictate to the state governments what wages and salaries they should pay to those working under them and thus decide for them their budgets and financial commitments. Moreover, disputes, which in their essence are local and which should naturally be settled by the agency of the states have been brought under the jurisdiction of the Commonwealth Court merely because the parties to them are organised in unions having a nation-wide basis. The awards of the Court which at one time were regarded invalid, if found inconsistent with State laws, have gradually acquired an overriding power over State industrial laws, so much so that at present the states have little residuary authority left to them in the industrial sphere.

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[12] Robert G. Menzies in "Studies in the Australian Constitution"—Ed. G. V. Portius, P. 59.

The incidental powers of the Commonwealth arising out of its specific powers under Section 105-A of the constitution relating to agreements with respect to state debts have also shown a tendency to expand. Power is given to parliament to make laws for the carrying out by the parties thereto of any such agreement. This is an exceedingly comprehensive power, and it was made use of in 1931—'32 to pass a number of "Financial Agreements Enforcement Acts" under which the Commonwealth acquired the right to attach the moneys standing in any bank to the credit of a state if any sum was due from it under the financial agreement and also to receive for itself any specified classes of the revenue of such a state.[13] A state, therefore, could thus lose control over its revenues and its balances in banks. In consequence of these acts, the government of New South Wales, against which they were enforced, was redueed to complete impotence. There does not seem to be any limit to the extent to which incidental powers might be used. It is bound to be so because there is no method by which the precise scope of such powers might be indicated in the constitution. In his epoch-making judgment in *McCulloch* v *Maryland,* Chief Justice Marshall pointed out: "A constitution to contain an accurate detail of all the sub-divisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and would scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[14] But what Marshall referred to as "minor ingredients" have shown a tendency to obtain major importance and the governments which have the power to deduce them have not shown any hesitation in increasing their number and variety.

This tendency on the part of a government with enumerated powers to gradually extend its authority and importance

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13 NORMAN COWPER in "G. V. Portius (Ed) Studies", etc.—Pp. 137—43.
14 CUSHMAN: "Leading Constitutional Decisions"—Pp. 10—11.

through the use of incidental powers is also illustrated to some extent by the course of events in Canada. Here it is the powers of the provinces that are enumerated and one of them is the power to exclusively make laws in relation to "Property and Civil Rights in the Province." This is an all-embracing power, as there is hardly any piece of legislation which does not affect property and civil rights. The result is that the Privy Council often upheld the rights of the provinces as against the claims of the central government in a large number of cases in respect of legislation on Temperance, Insurance, Industrial Disputes, etc. In consequence of this, the provinces are really in enjoyment of a sphere of authority much wider than what the framers of the constitution thought of leaving to them.[15]

Its influence in Canada in the expansion of the powers of the Provinces.

A federal system requires the existence of two governments side by side, each independent in a sphere of its own, and it is with a view to maintain this independence that efforts are made in the written constitution to define their respective spheres. But if in consequence of the application of the doctrine of incidental powers, one of the governments—the central—goes on steadily encroaching on the domain of the other, it may so happen that in course of time the federal system is unconsciously transformed into a unitary one contrary to the intentions of the framers of the constitution or of the people living under it. Such a result has to be avoided and it can be avoided only when the distinction is clearly recognised between the legitimate use of the incidental powers and their illegitimate use. If an incidental power is used primarily to give effect to any of the specific powers authorised under the constitution, it may then be regarded as legitimate. The power to levy a tax, for instance, is legitimately used, when the object is to get revenue or to further any of the other powers conferred by the constitution on the taxing government. But if it is used primarily with a view to regulate a subject which is entirely within the jurisdiction of the other government, it should be regarded as illegitimate, even though it be within the constitutional competence of the taxing government to levy any tax it likes. It was on this ground that the Supreme Court of the United States declared unconstitu-

Legitimate and illegitimate use of these powers.

[15] KENNEDY: "Some Aspects of Constitutional Law"—P. 85.

tional the imposition by the Congress of a tax on employers of children in their factories. The regulation of factory labour is reserved for the component-states; and to try to interfere with it indirectly through a tax-law is not really the legitimate exercise of a power incidental to taxation but an illegitimate use of it.[16] It cannot be argued that the power to regulate industrial labour is incidental in any way to the power to levy taxes. In Australia also an attempt was at one time made by the Commonwealth Parliament, through its power to levy excise duties, to compel the manufacturers of certain agricultural machinery to pay fair and reasonable wages to their employees, although the States alone had the power to regulate wages. That attempt was frustrated by the judgment of the High Court.[17] It may be argued that in cases like these, the action taken by central Government is defensible on social and humanitarian grounds, and that necessary legislation should not be made to wait till indifferent and backward state-legislatures awake to a sense of their responsibilities. But a view like this is inconsistent with the maintenance of a federal system, the essential feature of which is the recognition that, however indifferent a component-state may be, it must have the freedom to manage the affairs assigned to it in its own way.

The doctrine of 'implied prohibitions'.

The principle that an illegitimate use should not be made of incidental or implied powers may be regarded as one aspect of the doctrine of "implied prohibitions." It is desirable that under a federal system each government should feel that in all that it does, it should not unduly interfere with the rights and powers of the other government. This carries along with it the recognition that the legitimate rights of the other government impose certain prohibitions on its complete freedom of action even in the exercise of its incidental powers. The language in which the constitution is couched and its strictly logical interpretation may warrant the exercise of unlimited power in respect of taxation or commerce or defence; but if this leads to

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[16] THOMPSON: Op. cit.—P. 137.

[17] HOLMAN: "The Australian Constitution—P. 22.
Report of the Royal Commission—P. 130.

too much interference with the authority left to the other government, it is better that the power is not exercised to the utmost limits. Such a course will be more in conformity with the spirit of the constitution. It is this that forms the basis of the doctrine of "The Immunity of the Instrumentalities of Government" which has become a cardinal feature of the interpretation of the constitution in the United States and which was accepted for about twenty years in the history of the Australian Commonwealth—a doctrine under which for instance federal officers are not liable to pay state income-tax.

Exclusive and concurrent powers.

It is not obligatory upon a government whose powers are enumerated in the constitution that it should enter on the whole field of its activities all at once. For, some of the powers are exclusive and therefore lie within its sole competence, while the others are concurrent and might therefore be exercised by it or by the other governments or by both. The sphere covered by exclusive powers should be taken over immediately while that covered by the concurrent powers might be taken over at leisure as times and circumstances require it. In the first case the necessity for immediate occupation arises out of the fact that if the government on which the exclusive powers are conferred does not take action, it is not possible for the other government to step in; the result in such a case will be that the powers are left unused and disaster will be inevitable. For instance, in all federal states foreign affairs, defence and customs are within the exclusive control of central governments; and if these governments do not take over their management the moment that federation is established, the governments of part-states are not competent to manage them. Either the central governments should administer them or they will be left without anyone to look after them. Under such circumstances they will naturally be taken over by the governments concerned immediately after the federal constitution comes into effect. In the case of the field covered by concurrent powers, there is no immediate urgency for the central government to begin its control. For, if it does not take action, the part-governments will enter the field and manage it in some manner or other. There

will be no cause for anarchy or complete absence of governmental control in that part of the field.

What generally happens in almost all federal states is that the central governments take time to occupy the field of concurrent jurisdiction. In the early years after a federal system is established, the central authority is mostly engaged in settling the matters in the exclusive sphere, and it is only gradually that it extends its activities into the concurrent sphere. This feature partially explains why the spheres of central governments appear to go on expanding from time to time. When two governments begin to exercise the same set of powers on the ground that they are concurrent, difficulties are bound to crop up, as action taken by one government may come into clash with that taken by the other. Every constitution provides for the reconciliation of such difficulties. It is the recognised rule everywhere that either the part-states should vacate the concurrent field as soon as the central government occupies it, or that when their laws come into conflict with the laws of the central government, the latter alone should be recognised as having validity.

Administrative powers should accompany legislative powers.

In a federal system it is absolutely necessary that each government should, in respect of the subjects assigned to it, have the power not only to enact appropriate laws, but also to enforce them directly through its own machinery of officials if it considers such a course desirable. Mere legislative power without the required administrative power to accompany it is not of much use.[18] If one government is under a legal obligation to leave the execution of its laws to the other government, there will be no guarantee of their prompt and effective enforcement. It will also reduce the law-enacting government to a position of dependence on the law-enforcing one, unless a number of precautions are taken to prevent it. This was the experience of the United States in the period of Confederation when the Congress had only the powers of legislation and not of administration. The governments of the component states were expected to give effect to the decrees of the Congress but they were

[18] FINER: "Theory and Practice of Modern Government"—Vol. I, P. 276.

generally indifferent in the matter and even hostile on certain occasions. The *Federalist* refers to the situation in the following words: "If, therefore, the measures of the confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims, the momentary conveniences or inconveniences that would attend its adoption. All this will be done; and in a spirit of interested and suspicious scrutiny, without the knowledge of national circumstances and reasons of State, which is essential to a right judgment, and with that strong predilection in favour of local objects, which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part."[19] It was to avoid serious consequences like these that the present constitution of the United States provides for the Congress making all laws necessary and proper for carrying into execution all the powers conferred on it and for the vesting of executive authority completely in the President. Each government has at present a self-sufficient machinery of its own to administer its laws. It should be noted that the weakness experienced by the Congress in this respect was not due to the United States having been a confederacy before 1787. Even in federal states like the German Empire where the constitution failed to vest the central government with administrative powers, it has been found that many laws even of a very important character were not effectively enforced by the officials of the component states.[20] When the German Empire was transformed into a republic in 1919, one of the improvements brought about was in the matter of centralising a larger amount of administrative authority.

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[19] Pp. 72—73.

[20] FINER: Op. cit. P. 279—80.

Differences between the Anglo-American and the Continental practices.

Even now there is an essential difference between the United States on one side and the federal states on the Continent of Europe on the other in respect of the distribution of administrative powers. In the former the central government has its own machinery to execute its laws. In the latter the laws passed by the central government continue to be enforced to a great extent by the part-states. Canada and Australia follow—though not completely—the example of the United States. The Continental practice is in the main the outcome of the jealousy felt by the component states towards federal authority. In Switzerland and Germany they have been in enjoyment of sovereign powers for such a long period of time that they have cultivated an intense suspicion of any central authority. They naturally desire to restrict this authority to as narrow a field as possible, and they have found for this purpose a convenient principle in "Legislative centralization and Administrative decentralization". Even in recent times the advocates of centralization in a country like Switzerland find that one practicable device by which they could overcome the opposition of the protagonists of cantonal rights would be to concentrate the legislative powers alone in the federal government leaving administration to the cantons. Such an arrangement makes the cantons feel that they are not deprived of their traditional power and prestige.[21]

Merits of administrative decentralization.

The main advantages that may be claimed for the continental practice are that it avoids the duplication of administrative machinery and is consequently more economical. It also makes possible the administration of most laws by public officers who are familiar with local needs and peculiarities, and who may be trusted to show sympathy with local prejudices. It is worthy of notice in this connection that there is the counter-part of this practice where the laws enacted by local governments are enforced by the administrative officials of the central government. This arrangement is sometimes found to be more conducive to efficiency and economy. It is in financial matters that this system is generally followed. In the German Republic, for instance, almost all the taxes levied by part-states are collected by

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21 R. C. Brooks: "Government and Politics in Switzerland"—P. 60.

the central government.[22] In Australia, the collection of income-tax imposed by state governments is entrusted to the commonwealth.

Its defects as revealed in actual working in Germany.

This practice of one government passing the necessary laws and leaving their enforcement to the other government is not without its defects. It is therefore desirable that the law-enacting government takes the necessary precautions to see that its laws are properly execued by the other government. The nature of the measures that might be adopted for this purpose is best illustrated by the German Empire and the German Republic.[23] In the Empire it was only foreign affairs, military and naval affairs and the postal and telegraph departments that were directly administered by the central government. In regard to all other matters within its jurisdiction, the executive power was in the hands of the part-states. Even the collection of customs and other indirect taxes were left to them. The central government had two kinds of power in its hands for seeing that its laws were properly administered. One was the power of general superintendence and the other was that of "Federal Execution". Superintendence assumed many forms. Sometimes it only meant the incorporation of detailed rules and instructions in imperial statutes for the guidance of local administrations. These were supplemented as occasions arose by statutory rules enacted by the *Bundesrat*. There was also the practice of the imperial government appointing commissioners, controllers and inspectors whose duty was to observe the work of local officials, and report to the imperial government any shortcomings that might have come to their notice. Where the part-states displayed gross neglect of their duties, the *Bundesrat* enquired into the matter, and if any state was incorrigible and refused to listen to persuasion or argument, it authorised the emperor to resort to 'Federal Execution' which meant the use of military force against the recalcitrant state. But it was only very rarely that such drastic measures were adopted, as the *Bundesrat* was a body consisting of the delegates of state-

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22 BLACHLY AND OATMAN: Op. cit. P.—184.

23 FINER: Op. cit. P. 364—66.

governments. The result was a good deal of slackness and indifference in the matter of the enforcement of imperial laws.

The constitution of the republic tries to rectify many of these evils and reflects the general centralizing tendency which became so prominent by 1919. It provides for a larger number of items being included in the list of functions to be directly administered by the central government through its own agents. Over many other items like insurance, poor-relief, labour, health, agriculture etc., the central government shares administrative power with the part-states. With regard to all other matters whose administration falls into the hands of the units, the power of central supervision is made more comprehensive and effective. It extends not only to matters in regard to which legislation has actually been undertaken by the centre, but to the whole field of concurrent jurisdiction. The policy of incorporating more detailed rules in the federal statutes is adopted. Many central administrative departments are created to deal directly with state-departments. The central cabinet is empowered to send commissioners to the state central authorities and with their consent to the subordinate authorities also; and these officers exercise wider powers of scrutiny and report. Differences of opinion between central and local governments are left for settlement by a judicial tribunal and not by a body like the *Bundesrat*. The power of federal execution is made more stringent. The extraordinary power under which the whole state administration might be taken over by the federal government also gives it a larger amount of control in these matters. In addition to this the constitution and federal statutes lay down a number of fundamental principles regarding public officers and these have to be adhered to by state governments in all the appointments they make.

The conclusion drawn from the above discussion.

The conclusion that naturally follows is that there is a certain amount of inconsistency between federalism on one side and the execution of laws enacted by the central government by the administrations of part-states on the other. Without a large amount of central control and supervision, there is no guarantee that those laws would be properly administered.[24] But it is these

[24] ZURCHER: "Democratic Experiments in Central Europe"—P. 44.

wide powers of central control that injuriously affect the autonomy and the dignity of part-states. Outwardly they may have the satisfaction that they are entrusted with a good deal of administrative authority, but really their power is hedged round by so many restrictions. It is on the whole much better, therefore, for each government to have its own administrative machinery to enforce its laws. This should be the general rule, though there might be occasional departures from it under exceptional circumstances. Even in a unitary system like that in British India where the central government has complete control over provincial governments, it has been found necessary from experience to create in recent times many central administrative departments for enforcing central legislation, especially in financial matters. Much greater is such a necessity in a federal system where the autonomy of each government is to be effectively preserved and all friction avoided. All suggestions for administrative decentralization have to be carefully considered from this standpoint, especially in view of the fact that there are a few advocates of it as a proper means of preserving federalism in the modern age of excessive centralization in legislative matters necessitated by changing economic conditions. This does not, however, mean that local governments should not be made use of by central governments for any of their administrative needs. In the application of many central laws to particular areas, it often becomes necessary to take into consideration the special needs and requirements of localities; and local governments may be made to serve as advisory bodies in all such matters. This will be of special importance where the territory under federal control is an extensive one like that in Australia, Canada and the United States.

CHAPTER VII

FEDERALISM AND THE STRUCTURE OF GOVERNMENT

The representation of units on the central government.

FEDERALISM has thus far been viewed primarily as a certain kind of relationship between central and local governments without any reference to their internal structure. It is now necessary to enquire if their structure should conform itself to any particular pattern and contain any special elements if the requirements of federalism are to be fulfilled. History has given an answer to this question. In almost every federal state are found incorporated into the central governments certain elements which derive their authority from either the local governments or those who are in power in the several provinces constituting the federal territory. Some representatives or delegates from the component units form part of central legislatures; and in some cases central executives also are formed on a similar basis. This special representation of units as units on the organs of central government is usually considered to be a necessary feature of government in a federation and as its distinguishing mark.[1] Although there is not much of theoretical soundness behind this view, it is necessary to understand the nature of the grounds on which it is made to rest and the circumstances of which it is the outcome.

This is due to: (a) their fear of central encroachment on their autonomy, and

Among the component units of a federation, there is generally found a mixed sentiment which colours their attitude towards all constitutional questions and makes its influence felt in the organisation of almost every governmental institution. There is in them a distrust of unlimited authority being exercised by the central government and an ever present fear that it would encroach on their independence unless adequate safeguards are provided against such a possibility. The framing of a federal constitution is nothing else except the drawing up of such safeguards. The definition of the respective powers of central and local governments, their embodiment in a rigid con-

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1 SIDGWICK; "The Elements of Politics"—Pp. 534-5.

stitution which neither can change by itself, and their interpretation by an independent and impartial judicial tribunal are the usual devices adopted for this purpose. But these are not considered to be sufficiently effective by themselves. Even when the powers of central government are precisely defined and separated from those of local governments, it is felt that unless there are certain representatives of the latter on the various governing bodies of the centre, the former will display a tendency to extend the sphere of its activities and interfere with the freedom and independence of the units. The courts are not a perfect check as they are external to the central legislature—the body specially interested in the usurpation of authority—and as their action is only remedial. They come in only after legislation is enacted and after its evil effects are experienced. What is on the other hand necessary is to prevent the authorities at the centre from passing and executing laws which may adversely affect the local governments. Prevention, it is argued, is much better than cure; and this requires the presence at the centre, of a number of spokesmen who can defend the interests of the units. Such a check will be an internal one and it will be in harmony with the theory of checks and balances which has been having a hold on the political thought and practice of the Western World since the latter part of the eighteenth century. The *Federalist* has stated with reference to the separation of the legislative, executive and judicial powers that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands",[2] and showed that, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[3] These remarks are quite applicable to the separation of powers between central and local governments. The separation may be made through a written and rigid constitution, but its enforce-

[2] P. 256.

[3] P. 252.

ment and maintenance requires that the local governments or the inhabitants of the local areas have some influence through their representatives over the policy and the measures of the central government. In the structure of the government of the United States—the first of the modern federations—the influence of the views expressed by the *Federalist* is most clearly seen; and its example has been subsequently followed by the other federations.

The representation of units on the institutions of central government is considered all the more necessary as they have no constitutional right to secede when they feel that their privileges and interests are injuriously affected. Their membership in the federation is compulsory and perpetual. They are not sovereign like the component units in a confederacy. Each unit should be prepared to abide by the decisions of the central government whatever its views on them may be. It is true that where they are of a justiciable character, their constitutionality can be tested in courts. But many measures, though perfectly constitutional and legal, may through their political effects undermine the relative strength and importance of the units. What is required in cases like these is provision for the discussion of questions from different standpoints so that the decisions arrived at may be fair and just to each unit concerned. This can only be secured, it is argued, if the representatives of units are found on the legislatures and executives of central governments and have an opportunity of taking part in discussions and in the making of decisions.

(b) the desire to impress their individuality on every sphere of public life.

Besides a general distrust of central authority, there is in each component unit a deep-rooted idea of its own importance and an ardent desire to maintain its individuality and impress it on every sphere of public life. It has already been pointed out that in many cases this is the outcome of the existence of cultural minorities inhabiting each separate area and having ideals different from those of other groups. It is to give scope to the fulfilment of such a desire that local governments completely independent of the centre in a field of their own are established. But the cultural groups and the territorial units are not satisfied with this. They are equally interested in the activities of cen-

tral government as they are bound to affect them for good or evil. They therefore wish to have a part in the regulation of those activities and impress their uniqueness and the results of their special experience on them. This attitude also has resulted in the representation of units as units on the central governments of federations. Federalism is an attempt at the preservation of unity in diversity. Outwardly it expresses itself in the form of duality of government. The desire on the part of each unit to have a share in the management of central affairs in addition to its enjoying independence in the regulation of purely local matters is only an aspect of this duality. Every institution in a federal state tends to have on it the marks of unity as well as of diversity.

Danger of constituting the central government wholly on this basis.

Even if the above argument is correct, it must be recognized that this "representation of units as units" should not result in making the central government a mere creature of local governments, deriving its existence and all its authority from them. This will happen if the central legislature and executive consist *only* of the nominees of local governments without an admixture of elements drawn from other sources. Such a course is sure to undermine the independence of central government; it will also lead to all central questions being discussed and settled from the narrow standpoint of local interests even when such a standpoint happens to be quite irrelevant. A danger like this is all the more serious if the nominees of local governments are in the position of delegates voting according to instructions and liable to be recalled at any time. A central government constituted on these lines is more in conformity with the confederate idea.

This does not necessitate a bicameral legislature.

It has already been pointed out that "representation of units as units" does not require a bicameral legislature. Whatever the members of a second chamber are expected to achieve on behalf of the part-states can as well be achieved by the representatives sitting in the lower chamber. Even in the United States the second house was instituted not primarily for serving a federal purpose but as a check against the despotism of a single house and its sudden and violent passions. It was the want of complete confidence in democracy that led to the establish-

ment of the senate in that country.[4] When the framers of the American constitution decided on having a second chamber for satisfying other political needs, they found in the principle of "representation of units" a convenient basis for determining its composition. It also enabled them to effect a compromise on the question of equality of representation claimed by the smaller states and opposed by the bigger ones, the Senate being based on equality and the lower house on the populations of different states. The practice in this respect was followed by all other federations and this gave birth to the idea that without a second chamber federalism cannot work. Even in Canada where the Senate is nominated by the central government and cannot in any way be said to represent the units, arguments were put forward to make it appear that federalism would be incomplete without a second house.[5] All this is, however, a superstition and if what is required is merely the "representation of units as units", it can be effectively provided for even through a unicameral legislature.

Different meanings of the expression—'Representation of units as units'.

There is a certain amount of ambiguity in the expression "Representation of units as units", and its exact significance is not always understood. It may be used in the sense that the representative system should be so organised that in electing representatives each unit acts as a separately distinct electorate without the inhabitants of other units forming part of it. Its choice of representatives will then be unfettered by the views of the other units and those whom it sends to the central legislatures will then be wholly and purely its own representatives. In the terminology of current Indian politics this will correspond to the idea of separate communal electorates—the inhabitants in each component-state forming a separate community. The acceptance of this principle will necessitate that no constituency shall be formed out of parts of different units in a federation. This is the practice followed in all federal states. It also explains why in some federations candidates for election from any unit have to be its residents. This is a corollary from

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[4] The *Federalist*—Pp. 316-18.

[5] Macdonald's Speech, 1865, in Kennedy's 'Statutes, Treaties and Documents of the Canadian Constitution'—P. 560.

the view that the uniqueness which a unit is said to possess can be expressed only by its inhabitants and not by any outsider. It is also responsible for the provision that is found in all federal constitutions that every unit should have a minimum number of representatives whatever be its size or population so that even the smallest and the least populous of units may have a few members at least to put forward its views.

Equality of representation of units.

There is also another sense in which the expression "Representation of units as units" is used. One of the acute problems in every federation is the basis on which the number of representatives that each unit should have on the central institutions is to be determined. There is the contention of some that all units must have an equal number of representatives irrespective of their differences in population, size or wealth. It is argued that these differences should not be taken into account as all units are on the same level in point of their political and juridical status. Ordinarily in almost all federations the powers and functions of units are identical and this, it is pointed out, should automatically lead to their equal representation. This view is more or less analogous to the doctrine of universal suffrage which is now accepted without any question in all democratic states and which has taken the place of the older theory that franchise should depend on a man's birth or property or income. Just as it is now agreed that it is the humanity in each man that is really represented in the political system from which results the principle of "One individual, One vote", it is contended that it is the individuality or the unique experience of each territorial unit that requires representation in a federal state, and that as all units are similar in this respect, they must be represented by the same number of persons. This alone will ensure the representation of units as units as distinguished from the representation of their wealth or their populations.

There is nothing strange in this view although it is not quite logical. It is the outcome to some extent of the element of mutual suspicion which forms a part of that mixed sentiment characterising the units in a federation. Each unit has a feeling that other units—however important they might be—should not be allowed to get a disproportionate share of influence in the

settlement of common questions while it is left in a position of comparative disadvantage. Such a feeling becomes all the stronger when there is much disparity in their size—some being small and others large, the former being afraid that the latter might outvote them. Where decisions are arrived at by majority vote, it is natural for each unit to claim the same number of votes. The plea for weightage that is being put forward by the Princes in the proposed Indian Federation is of the same character as the demand for equality, and has to be examined from the same standpoint.

It is inconsistent with democracy.

The answer to this claim for equal representation was given by the *Federalist* in the most unimpeachable terms in the following words: "Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority would prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and commonsense. It may happen that a majority of states is a small minority of the people of America; and two-thirds of the people of America could not long be persuaded upon the credit of artificial distinctions and syllogistic subtleties, to submit their interests to the management and disposal of one-third. The larger states would after a while revolt from the idea of receiving the law from the smaller. The smaller states, considering how peculiarly their safety and welfare depend on union, ought readily to renounce a pretension which, if not relinquished, would prove fatal to its duration".[6] Moreover, the fear that is entertained by the smaller units that the representatives of all the bigger units will act together and will generally oppose those belonging to the smaller ones is ground-

[6] Pp. 104-5.

less. Party lines are not formed on a basis like this. There is as much possibility of representatives of bigger states opposing each other and of many of them associating with those of smaller states in carrying out their legislative programme. A man's vote does not depend on the size of his state.

Unsoundness of the whole idea of 'the representation of units as units'.

The fallacy in the claim for equality is to be ultimately traced to the unsoundness of the whole idea of "Representation of units as units". It is the counterpart of the mistaken view that federation is a compact. It has already been pointed out that in its essence it is a system under which the community constituted by all the inhabitants living in a given territory prefer to have their political work carried out through two sets of governments instead of through only one and that, it is made possible because of the existence of a real spirit of oneness among them. They feel that there are certain functions in discharging which they should act together as a body, even though there are certain others in respect of which those living in one local area should act separately from those living in the other areas. Federation is not merely the expression of the separatist tendencies among them. It is as much an embodiment of their unity. In the regulation therefore of all those matters in respect of which they are prepared to act as a single entity, it is unnecessary and undesirable to recognize the existence of the smaller territorial unit. All matters within the jurisdiction of central government are of this character. The individual citizen is interested in them not as a member of this or that local area in which he happens to be a resident but as an inhabitant of the whole federal territory and as a member of the community as a whole. In determining the unit which should secure representation on the organs of the central government, the local area has therefore no place. The citizen is the ultimate unit for this purpose, and equality of representation should be conceded to individual citizens and not to the component territorial units. The connection of the citizen with the central government is to be made direct and he should not be compulsorily tied down to associate himself with the citizens living in a particular area. It is quite possible that in the decision of central issues a citizen feels that his real interests and those of the whole community lie in his

voting along with the inhabitants of other local areas and not with those of the particular component part to which he belongs. He must have the freedom to choose his group. This is not the place to discuss the several theories of representation but it may be stated that, whether one accepts the theory of individual representation or of group representation, there is no need to take the part-state as a basis. If the individual is regarded as the ultimate unit, no intermediary groups are necessary: if on the other hand group-representation on a vocational or corporative basis is regarded desirable, there is no reason why the territorial group should be given a preference over others. Leaving aside these controversial issues, it is best to take the individual citizens as the real units that have to be represented on the organs of the central government.

Under these circumstances population becomes the only rational basis for calculating the number of representatives that each component-state should have. Any departure from this in favour of weightage is sure to lead to complications, as no agreement is possible in regard to the standard to be adopted for this purpose. There is nothing opposed in this to the preservation of the individuality of the territorial units. They have each of them a field specially reserved in which they can give expression to their unique individual experience; and in this respect they are in almost all federations placed on an equal basis. This is the only reasonable kind of equality that they are entitled to.

It is however well known that in practical politics it is sentiment and not logic or exact mathematical calculation that triumphs; and to some extent it has been the case in regard to this principle of equality of representation. The upper houses which are generally supposed to represent units as units contain an equal number of members from the different component states in the United States, Australia and Switzerland. In Canada equality is conceded to 'sections' or groups of provinces and not to individual provinces, though the two important provinces of Quebec and Ontario are treated as 'sections' for this purpose. Equality was not recognised in the German Empire. In the German Republic and in Austria population is the basis of representation.

The so-called equality of representation in the Second Chamber is not real equality.

But this equality of representation in the second chamber does not amount to real equality. The lower house is everywhere constituted according to population and except in the United States it has more authority and influence than the upper house. It may even be asserted that it was the certainty that such a thing would happen that brought about the concession of equality so far as the senates were concerned. Experience has shown that the upper houses cannot maintain a position of authority equal to that of the lower houses whatever the intentions of the framers of constitutions may be. In Switzerland, for instance, it is now generally admitted that the National Council exercises considerably greater influence than the Council of States.[7] In Canada the Senate has become an effete body. In Australia the constitution itself gives less power to the senate in all matters of finance. In the making and unmaking of cabinets—which is the main determining factor in the relative position of the two chambers in a country with responsible government—the senate has little influence. It is therefore found that in all these states the form of equality is kept up while the real substance of power is in the Lower House.

Methods of election to the Second Chamber.

Where it is decided to have a second chamber to represent units as units, the question as to who should elect its members becomes important. It is possible to conceive of three electorates for this purpose—the executive government of a unit, its legislature and the body of citizens in it. In Germany it was the executive governments that appointed the members; in the United States it was the legislatures that elected them till 1913 when, by an amendment of the constitution, the power was transferred to the people of each state. In Switzerland there is no uniform method, discretion being allowed to individual cantons. At present most cantons choose their representatives by direct popular election but there are a few in which they are elected by the cantonal legislatures. There is no instance of the cantonal executives appointing them. In Australia they are elected by the people of each state, and to emphasize their character as representatives of units as units, it is provided that the

[7] R. C. Brooks: "Government and Politics of Switzerland"—P. 88.

people of the state should vote as one electorate. It was contended that if a state were divided into electorates, and if locality became the guiding principle of selection, the special purpose for which the senate was constituted would be obscured, as that purpose was that each state should be represented as a whole, as one entity, and not in divisions or sections.[8] Subsequent events have however shown that this method is one of the important factors that has contributed to the weakness of the senate and to its having become a partisan body.[9] In Canada there is the strange method of the central government nominating the members of the senate which is supposed to represent the provinces and their interests.

Election by the people to be preferred.

Taking all points into consideration, it may be stated that election by the people of each state is the method which has to be ordinarily preferred. They can express the individuality of the state as effectively as the legislature or the executive. The effects of central legislation are felt primarily by them and not by the members of the local executive or the local legislature, and it is appropriate that the law-makers should be responsible to them and to no-body else. There is also less scope for the working of cliques and for corruption when the electorate is a large one. It is also found that senators appointed by state executives have a greater tendency to look at central questions from too narrow a standpoint. There is no reason to fear that candidates chosen by the general body of people will be wanting in ability or statesmanship as the all-pervasive party organizations will see that the right kind of persons are elected. It may be argued that in practice it does not make much difference whether it is the people that elect the senators or the legislatures, as candidates are nominated really by parties and are helped to win the elections by them. But popular election is more educative and more in conformity with democratic theory. In cases, however, where resort to popular election will make constituencies unwieldy in size and prevent the candidates and representatives from coming into real touch with the citizens, recourse may be had to election by legislatures or by some

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8 QUICK AND GARRAN: Op. cit.—Pp. 419-20.

9 Report of the Royal Commission—P. 46.

other intermediary body.[10] It also goes without saying that where some of the units are under autocratic governments and others under democratic governments, it is not possible to have a uniform method of electing the representatives from all of them. Those representing the monarchical units are bound to be nominated by the monarchs. It will be unnatural to expect monarchs who would not give to their subjects any share in internal administration to permit them to elect representatives to a central legislature which has control over all external and national affairs. Everywhere the tendency is for those that are in power in the domestic politics of a part-state to obtain and exercise power in central affairs also. This has to be specially borne in mind in all discussions now going on in India as to who should appoint the representatives of states and of provinces in the Indian Federal Legislature.

The power to regulate the franchise, to delimit constituencies, etc., should be vested in the central government.

A question of some incidental importance in this connection is whether it is the central or the local governments that should have the right to determine the qualifications of voters and candidates, to delimit the electoral districts, to prescribe the times, places and manner of holding elections and to make all other arrangements necessary for constituting the legislative bodies at the centre. These are all matters which concern the community as a whole and not particular areas; the action taken by one local government produces effects on the welfare of the inhabitants living in other areas. It is to the interest of all that the right sort of persons are elected in every local area to the central legislature. Its legislation affects every one and the central government as the representative of the community as a whole is the body that should be entrusted with all this work. This was the view of the Canadian statesman Macdonald, who said that it was impossible that the elective franchise to the federal legislature should be at the mercy of a foreign body like the provincial government.[11] Even in respect of the arrangement of constituencies, he was of opinion that it would evidently be

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10 SYDNEY WEBB: "Is Soviet Russia a Democracy"? in *Current History*, Feb., 1933—P. 534.

11 KENNEDY: Statutes, etc.—P. 565.

improper to leave to the local legislatures the power to alter the constituencies sending members to the general legislatures, and that the general parliament could not have real control of its legislation and be assured of its position unless it had the full power of arranging and rearranging the electoral limits of the constituencies. Even in the United States where the individual states were empowered to determine the franchise for the House of Representatives, it was found necessary to restrict their powers in various ways with a view to prevent them from unjustly discriminating between citizen and citizen in the matter of franchise. Citizenship came to be recognized as a matter of national and not of local concern; and the Fifteenth Amendment to the Constitution lays down that "The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state an account of race, colour, or previous condition of servitude" and that "The Congress shall have power to enforce this article by appropriate legislation". In Switzerland and Germany the franchise is determined by the constitution itself. In Australia it is the commonwealth parliament that has the power to regulate the conditions of franchise.

The compromises found necessary in practice.

A difficulty which arises in practice in making franchise a matter of purely national concern is due in several cases to the absence of homogeneity in the systems of suffrage prevailing in the different component units at the time when a federation is started. If by that time some units, for instance, demand a property qualification from their voters while others do not insist on any such qualification, if in some units women are enfranchised while in others they are not, the transfer to the new central legislatures of all control over franchise will ordinarily result in its adopting a uniform system of electoral qualifications applicable to all units. If it adopts a liberal policy, citizens in certain component units will obtain rights of voting in national affairs even though they may have no such rights in internal matters; if on the other hand it adopts a narrow policy, citizens in certain units will lose their rights of voting in national affairs even though they have such rights in local affairs. Either course brings an element of incongruity along with it. If this is to be avoided and if there is to be a complete coincidence between

franchise in local and in central matters, the power to regulate it has to be left to the local governments. This solution is welcomed by some as it satisfies that peculiar sentiment which makes each unit in a federation aspire after as much power as possible and place restrictions on the authority of the central government. It is this that led to the incorporation of a provision in the original constitution of the United States that "the electors (for the House of Representatives) in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature". Even in Australia a similar clause was introduced into the constitution with the proviso that the Commonwealth Parliament might later on lay down any electoral qualifications it liked. It is therefore clear that while theory as well as the general tendency in recent times have been in favour of the regulation of franchise for the central legislature by the central government itself, such a course is found easy and practicable only when there is a large degree of homogeneity in the fundamental institutions of the different component units. Where there is a wide disparity between them in this respect, there is a real difficulty in the regulation of franchise from the centre. Among the numerous compromises that federation necessitates and the numerous concessions that have to be granted to the separatist sentiment of the units is this in regard to the control over franchise. It may create friction in the central legislature as some representatives on it would be elected on a wide and some on a narrow franchise. The alternative then will be between not attempting to have a federation at all and being prepared to have it with all the friction that it may bring. In the federations of modern times, the disparity in respect of electoral qualifications between unit and unit was not very wide except in the case of the United States where the problem became acute as regards the Negroes. There was therefore no insuperable difficulty in organising federations and in working them smoothly. Where difficulties were anticipated, the fundamental constitution itself laid down—as in the German Republic—the general basis of government not only at the centre but also in the units.[12] What is necessary is the

[12] Art. 17.

recognition that the central government should have the power to regulate the franchise. It may be that it does not exercise that power at all, leaving virtually to the units the control over franchise; or it may be that it exercises it with a due consideration of the different conditions prevailing in different units and lays down not a uniform set of qualifications for the whole federal territory but varying qualifications for the various units. Whatever modifications may be introduced in the actual exercise of it, the power itself should belong to the central and not to the local governments if the constitutional system is to be really federal.

The conclusion that emerges from this brief sketch is that it has become a practice in all federations to introduce into the central legislature a few elements and features deriving their authority from units as units thus emphasizing the duality that is characteristic of federalism. The more important of these are a second chamber, a minimum number of representatives from each unit in the lower house, and weightage if not complete equality of representation. The introduction of these elements is based on the idea that units have to be represented as units. This idea has been shown to be an unsound one. These elements do not serve any rational purpose. They are there to satisfy a peculiar sentiment and that is all the utility they possess. If the independence of the units in a sphere of their own is the essence of federalism, none of the elements referred to above is needed to maintain that independence. Nothing real will be lost from this standpoint if they are removed. Much will be gained as the governmental structure will become simpler.

(2)

Reasons for the smaller influence of the idea of the representation of units on the central executive.

The influence of the idea that units should be represented as units is not found to the same extent in the structure of the central executive as in that of the legislature; nor has it always taken the same form. This is due mainly to two circumstances. In modern democratic states—and most federations are democratic—the tendency has been to regard the legislature as the most important department of government and to assume that

control over it would give control over every sphere of state life. The view has also been generally held that the danger to the independence and freedom of the units would come more from the legislature than from the executive. This view was not wanting in the past in an element of truth as the executive had until recently a restricted scope of work, dominated as most states were by the philosophy of individualism and *laissez-faire*. The dictatorship of the executive with which the contemporary world has become familiar and which has been the outcome of the growth of socialism and nationalism, of administrative law and justice and of bureaucracy was not anticipated by the framers of the existing federal constitutions. The separatist sentiment of the units was therefore saisfied by expression being given to it in the organisation of the legislature. A second circumstance which led to the same result is the practical difficulty in the representation of the units on the executive. The executive consists of either a single individual like the President in the United States, or of a small council as in Switzerland, or of a prime-minister and his cabinet as in Canada, Australia and the German Republic. It is never a body made up of a large number of persons. The vigour and promptness of action expected of it makes it a small and compact body, while the number of units requiring representation is large e.g., forty-eight in U. S. A., and twenty-two in Switzerland. Any attempt therefore to give it a representative character will make it unwieldy. It is therefore found impossible to reconcile the requirements of executive efficiency with the idea of representation of units as units.

The idea is however not completely absent.

This however does not mean that the influence of the idea is totally absent. It can never be absent because the peculiar sentiment to which reference has already been made intrudes itself into every sphere of public life in a federation. The feeling that the inhabitants in each component-state have something much more in common among them than what they have in common with those living in the remaining portions of the country and that this makes them a separate group is always dominant. It is stronger and more deep-rooted than the provincial feeling found in unitary states. Pride in the province of

one's birth and residence is natural. But in unitary states it does not manifest itself in the organization of political institutions. No one troubles himself in Great Britain whether the Prime Minister is an Englishman or a Welshman or a Scot, or whether in the cabinet there is a preponderance of politicians belonging to England, Scotland or Wales. No public significance is attached to it. But in federal states such dominance is likely to be resented. No component-unit likes the idea that a disproportionate number of persons belonging to any particular unit should have seats on the cabinet of the country, however eminent and capable they may individually happen to be. It is this factor that has to be taken into consideration in the organization of the executive in federal states; and it is done—though it be to a limited extent—in most of them, partly through law and partly through convention and usage.

The practice in Switzerland and U. S. A.

In Switzerland, for instance, the constitution lays down that not more than one member of the federal council can be elected from the same canton.[13] Usage requires that Zurich and Berne should always be represented on it and that the French and the Italian cantons should have one representative each.[14] In the United States the principle is applied not to the office of President but to the various arrangements made in connection with the manner of electing him. In the exercise of some of his executive powers—the power of making appointments and of concluding treaties—he has to obtain the consent of the Senate which is organised specially to represent the states as states. To the extent to which it takes part in the discharge of executive functions it may be taken as illustrating the principle under consideration. The President has also his cabinet of Secretaries of State who are heads of departments and who help him in carrying on the administration. In appointing them he is expected to pay due regard to the representation of different geographical sections.[15] In selecting persons to the posts in Federal Civil Service not yet thrown open for competitive examination, he is required by usage to consult the senators of the states within

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[13] Art. 96.

[14] R. C. Brooks: Op. cit.—P. 105.

[15] Finer: "Theory and Practice of Modern Government", Vol. II—P. 1026.

which the posts lie and appoint local candidates. In all this the influence of provincialism is clearly found.

The 'Federalisation' of the Canadian cabinet.

The effect of Federalism on the structure of the cabinet is most clearly seen in the case of Canada. During the debates in 1865 in the Canadian Parliament on Confederation, Mr. Dunkin stated thus: "I think I may defy them to show that the Cabinet can be formed on any other principle than that of representation of the several provinces in the Cabinet. It is admitted that the provinces are not really represented to any Federal intent in the Legislative Council (The Senate). The Cabinet here must discharge all that kind of function, which in the United States, is performed in the Federal sense, by the Senate".[16] He pointed out that not only provinces but the different sections in each of them—the Catholics, the Protestants, the Irish etc.,—would clamour for representation and that would make the cabinet so large that it could never work. The subsequent history of Canada has demonstrated the truth of his statement. There are now eighteen members on the cabinet not because there is enough work for all of them but because so many provinces and so many racial and religious groups require representation. This has made the transaction of business slow and difficult at all cabinet meetings and it unnecessarily involves the country in huge expenditure.[17] Many however regard this as the price that has to be paid to secure the advantages of federal union and to keep the different sections of the people together. It is their opinion that in countries of vast size like Canada, there is a real need for some kind of representation of the different provinces on the executive for two reasons. Conditions in one province differ so very much from those of another, that unless there is a representative of each province on the cabinet, it is not likely to have that local knowledge which is so necessary for sound administration.[18] It may be said that the provincial representatives on the legislature will supply all the knowledge that is required. But it has to be noted that in Canada, as in so many other countries with a Parliamentary government, the pri-

16 KENNEDY: Op. cit.—P. 606.

17 BRADY: "Canada"—Pp. 54-5.

18 DAWSON: Op. cit.—Pp. 112-16.

vate member of the legislature has very few opportunities of taking the initiative and exercising substantial influence on the conduct of government. Leadership and control are now centred more in the executive than in the legislature; and if representation is required, it should be as much on the executive as on the legislature. The danger of the executive becoming too unwieldy may be avoided by not making these representatives regular members of the cabinet and by constituting them into consultative committees attached to each minister. What is necessary is some kind of association between the central executive and the representatives of provinces.

Its influence in Germany.

In the German Empire the Bundesrat had a large amount of executive authority. It was a body specially representative of states as states. In the German Republic the Reichsrat which consisted of representatives nominated by the governments of part-states was endowed with considerable power in administrative matters and may be taken as another illustration of the influence of federalism on the executive. Though the cabinet itself was not organised on a representative basis, the ministers had to consult the committees of Reichsrat on all matters of importance. Its assent was required in the case of all ordinances concerning federal laws the execution of which was left to state authorities. In the regulation of railway construction, management and operation, its assent had to be secured by the cabinet. It had also a large amount of nominating or appointing power in regard to a number of courts, councils, officers, and committees.[19] The constitution also required that the federal officers entrusted with direct national administration of the central laws in the states should as a rule be citizens of such states.

Its great defect.

The above examples indicate the nature and the form of the influence exercised by federalism on the structure of the executive. Except in Canada the attempt to organise the central cabinet on a purely provincial basis is not found anywhere else. Whatever other advantages it may have, it suffers from the serious defect that it will bring into the cabinet men of second and third-rate ability and make the system of administration ineffi-

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[19] BLACHLY AND OATMAN: Op. cit.—Pp. 51-55.

cient. Advisory committees representative of different units and regions will adequately serve the purpose of placing before the cabinet the local point of view and supply it with the required local knowledge. Anything more than this may be of use only in satisfying the sentiment of provincialism but possesses no utility apart from it. Much of what was said in connection with the representation of units on the legislature is equally applicable to their representation on the executive.

(3)

Federalism and the dual system of Courts.

The spirit of sectionalism which is so characteristic of the people in all federally-organised states is not without its influence on the organization of the judiciary. Where it is acute, it results in the establishment of two sets of parallel courts—one under the control of the central government dealing with disputes arising under the laws enacted by the central legislature and the other under the control of local governments dealing with cases arising under the laws enacted by local legislatures. Each becomes a self-contained system and no appeals lie from the state or the provincial courts to the federal courts. This duality appears at first sight as the only system consistent with federalism. It has been pointed out that federalism involves the setting up of two independent governments. A natural inference from this is that each government must have as a part of it a separate judiciary of its own to administer its laws so that it may not be dependent on the courts of the other government for this purpose. Just as each government finds it necessary to have a legislature of its own and its own executive machinery, it may be argued that it should have its own courts also.

Its adoption in the United States.

This duality is characteristic of the judicial organization in the United States—the first and the most orthodox of modern federations. Previous to the establishment of the Union, each of the thirteen states was fully sovereign and had its own courts. So jealous were they of their own sovereignty that no one could in those days have thought of abolishing these courts and entrusting the new federal government with complete and sole control over the administration of justice. State courts had therefore necessarily to be retained. At the same time the central government as well as all those who stood for unity and uniformity

were unwilling to make use of the state courts for administering the federal law. There was the apprehension that these courts, the judges of which owed their office to the people of the part-states or their governments, would not care to interpret and apply federal laws with the required amount of zeal, interest and integrity. They would, it was feared, show a prejudice in favour of the people of the locality and would be lax in helping federal officers and agents in the carrying out of their duties especially in the matter of the collection of taxes and the enforcement of other fiscal measures. There was a real ground for such fears as the judges in most states held their office during pleasure or from year to year, and could not be consequently relied upon to possess a high degree of independence and impartiality. This necessitated the organization of separate federal courts consisting of judges appointed by the central government and subject to its ultimate authority. There were also other factors which led to the same result. The administration of federal laws by state courts would have meant their being interpreted differently by different tribunals causing much confusion and uncertainty. The institution of a federal appellate court would have gone a great deal in remedying this defect, but it was felt that it might result in the multiplication of appeals. There was also in those days a large amount of prejudice entertained by the citizens of one state towards those of another, and this led to the apprehension that disputes to which citizens of different states were parties would not be decided promptly and impartially by state courts. The commercial and creditor classes who had dealings in different states and who suffered very much in recovering their debts and in enforcing their business contracts pressed for the setting up of federal courts. Under such circumstances the dual system became inevitable.[20]

Its defects.

It has been at work for about a century and a half. It is now felt that whatever might have been the justification for it in 1787, it has now outlived its usefulness, and that there is no need to continue it any longer. Not only has the national spirit grown

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20 FRANKFURTER AND LANDIS: "The Business of the Supreme Court"—Pp. 6—11.

stronger and confidence in federal tribunals greater, there is also less of jealousy and suspicion between citizens of one state and those of another. Moreover the dual system is found to bring some serious evils in its train. It unnecessarily duplicates the judicial machinery. It increases enormously the expenditure on administration of justice. It gives rise to a large crop of questions of jurisdiction, causing trouble and delay to litigants and lawyers. The experience of other federations has shown that a duality of this kind is not a necessary element in the structure of federal government. There is therefore a growing opinion in the United States at present that it would be better to have a unified system of courts.[21] It is true that some reformers wish to abolish the state courts and have justice administered solely through superior and inferior federal courts, while others regard this as too radical a measure and wish to abolish the inferior federal courts and invest the state courts with federal jurisdiction, keeping the supreme court as the final court of appeal. Inspite of such differences of view in regard to details, it may be asserted that there is a recognition of the defects of the dual system and a considerable amount of agreement among the leaders of thought that unification should somehow be brought about.

The practice in other federations.

The duality that is characteristic of federalism has expressed itself in another form in the judicial organization of other federations. Instead of two sets of courts being set up, there is a certain kind of dual control over the single set of courts entrusted with the administration of both the provincial and the federal laws. In a way the control is shared by the central and local governments. The proportion in which it is shared or the method of sharing it is not the same everywhere. These depend upon the particular circumstances of each federation; but the principle itself is recognised throughout.

Central control over State Courts exercising federal jurisdiction.

There is in the first place the distinction maintained between the highest appellate courts which are under the direct and complete control of the central government and the intermediary and original courts which may be designated as provincial or

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21 WILLOUGHBY: "Principles of Judicial Administration"—Pp. 247 ff.

state courts. Every court administers both the federal and state laws, and appeals lie on both sets of laws to the highest courts. It must be observed in the second place that it is in respect of the control exercised over the state courts by the central government that the practice in one federation differs from that in another. In Canada the provinces organise and institute the different provincial courts like the superior courts, the district and the county courts and fix the number of judges to be employed in them; but it is the central government that appoints and removes the judges on all these courts and pays them their salaries, allowances and pensions, though these might be supplemented by provincial governments. The central control is at its maximum in Canada. In Australia the Commonwealth government has no control over state courts though they are entrusted with federal jurisdiction. In the German Republic the constitution [22] laid down certain general principles regarding judicial independence and tenure which were binding as much on state governments as on the federal government. The central legislature also had the right to fix the educational qualifications for all judicial offices and the conditions under which judges should be appointed and removed. It also determined the procedure to be observed by state courts. Appeals lay to the central supreme courts from all state-courts. All this gave to the central government and the community as a whole a large amount of control over courts everywhere. In their turn the component-states participated in this control, as they could delimit the judicial districts, choose the judges and provide salaries for them, supervise the order of business in each and exercise a general disciplinary authority over them all.[23] There was thus a unified judicial system coupled with a considerable degree of decentralization in accordance with the requirements of federalism. Conditions in Switzerland are similar to those prevailing in Australia.

One conclusion that can be drawn from the contrast between the dual system of the United States and the unitary system of

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[22] Articles 102, 104-5.

[23] BLACHLY AND OATMAN: Op. cit.—Pp. 421-23.

the other federations is that the latter is preferred only when there is homogeneity between one component-state and another in respect of the recruitment of judges, the fixity of their tenure and the procedure they follow. The central government will not be disposed to have its laws enforced through state-courts unless the part-states maintain relatively high standards in the selection of their judges and enable them to do their work with a sense of independence and impartiality. Where the state-constitutions do not make provision for these essentials, the central government should have a certain amount of control over state-courts to bring them to the required standard.[24] It is only then that the unitary system is advantageous. Considerations like these are of fundamental importance in deciding for instance whether in the proposed Indian Federation the federal government should institute inferior tribunals of its own, especially in the territory of the Indian Princes. Such a course may have to be adopted if the princes do not organise their courts more or less on the same basis as the courts in British India and follow the same high standards in the selection and the tenure of their judges and adopt a more regular and systematic procedure for the trial of cases.

Unitary system of courts requires homogeneity in the judicial systems of the units.

It is worthy of notice that the idea of representation of units as units has not exercised much influence on the structure of the central Judiciary. Switzerland is the only federal state where the constitution requires that in choosing members of the federal court care should be taken to see that all the three national languages are represented therein.[25] Considerations which make it undesirable to constitute the central executive on a representative basis are of equal weight in the case of the judiciary. To select judges in accordance with the component-states to which they belong goes against the primary principle of judicial efficiency and independence. The possible danger that judges might be swayed by local influences in discharging their duties becomes all the more serious if such a course is resorted to. The value of judicial integrity is so inestimable that in appointing them nothing except their knowledge of law and the dignity of their character should influence the appointing authorities.

Representation of units as units on federal courts not found in most federations.

[24] The *Federalist*—P. 414.

[25] Art. 107.

(4)

Central control over the units not consistent with federalism.

There are some who contend that there is much danger of the units encroaching on the authority of the centre unless institutional devices are adopted as a safeguard against it. The break-up of many historic confederacies and leagues due to the political ambitions of member-states is taken as a proof in support of such a contention. Even though federation represents a higher and a more perfect kind of unity, it is felt that the possibility of the part-states attempting to increase their own importance at the expense of the centre is not remote. Those who entertain such fears argue in favour of strengthening the centre by giving it a certain amount of control over the units. This may be taken as the counterpart of that view which insists on the representation of units on the organs of central government for the purpose of protecting their special interests. The control that is proposed may be internal or external. It is internal when the agents of the centre are appointed members of the highest governing bodies of the part-states—their legislatures and executives, share in their deliberations and exercise a moderating influence on their decisions. It is external where the central government exercises from outside a power of ultimate veto over the measures of local governments. Both these kinds of control are, however, very irritating; they are not found to be quite consistent with federalism of the right sort, as they interfere too much with the independence of the units. There are several other normal devices which are sufficiently effective in strengthening the centre. This is the reason why it is only in a few federations that there is provision for central control.

The exceptions prove the rule. The peculiar case of Canada.

One such federation is Canada. Here the Lieutenant-Governor of each province is appointed by the Governor-General who also possesses the power to veto provincial legislation. Both kinds of control are found here in combination. Many of the statesmen that were responsible for establishing a federal form of government in Canada were strongly in favour of a unitary type and it was only the force of circumstances that compelled them to yield to the federal view. This explains why they succeeded in providing for central control over the provinces. To them it was the easiest available approximation to a unitary type

of government. In accomplishing this task they put into practice the views of Alexander Hamilton, one of the fathers of the constitution of U. S. A. who was a strong advocate of centralisation but who did not receive much support from his colleagues influenced as they were by ideas of state-sovereignty. But as a matter of fact the control of the dominion government over the provinces in Canada is not real. The Lieutenant-Governor is only the constitutional head of the province who has to carry on the administration according to the advice of the responsible cabinet of ministers. It is not therefore possible to influence the policy of provincial governments through him. The dominion veto over provincial legislation has also been found inconsistent with true provincial autonomy and the present tendency is to restrict its exercise only to extraordinary occasions.[26] For all practical purposes it is kept in abeyance. This difference between the theory and the practice of the Canadian constitution indicates clearly that with the progress of the Canadian government towards a real federal form, central control is fast disappearing.

The German Republic.

Republican Germany under the Weimar Constitution is another example of a federation where the central government had much control over the units. Here also in some cases the central government sent supervising commissioners to the part-states to supervise their administration. Besides this it had vast control in legislative and financial matters. Under the well-known article 48 of the constitution, the President of the Republic was empowered to send armed forces to compel a part-state to fulfil the duties laid upon it by the National Constitution or the National Laws. He had also the power to take any measure he considered necessary whenever the public safety and order were considerably disturbed and endangered, even suspend the constitution of a part-state and carry on its administration through a National Representative. Action on these lines was taken on several occasions over small states like Saxony, Thuringia, and Gotha as well as over big states like Prussia. This special feature in the German constitution was the outcome of the strong unitarian and centralizing tendencies that were pre-

[26] DAWSON: Op. cit.—Pp. 446-59.

dominant throughout the post-war period.[27] The Weimar constitution marked merely a transition from federalism to unitarism which became an accomplished fact under Hitler.

Soviet Russia.

The case of Canada and of the German Republic may on the whole be regarded as exceptions to the general rule that the local governments in a federal state should be left free without the central government imposing any internal or external check over them. The example of Soviet Russia belongs to another category. Here the state is organised on a federal basis and a large amount of autonomy is given to the various constituent republics each representing a separate cultural group. Every one of these part-republics has a government of its own to which is allotted a certain number of functions. But in all the constituent governments a prominent place is given to the official representatives of the central federal government. "It is expressly provided by statute that the Sovanarkom (cabinet of ministers) of each Union Republic shall include, in addition to the Peoples' Commissaries appointed by its own central Executive Committee, also the delegates or plenipotentiaries of the Peoples' Commissariats of the U. S. S. R. for foreign affairs, war and marine, foreign and internal trade, ways of communication and posts and telegraphs. The specific function of these federal officials is doubtless to see that nothing is done by the union republic that would be inconsistent with federal policy".[28] All this is in addition to the all-pervading control of the completely united and centrally directed Communist Party.

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27 KRAUS: "The Crisis of German Democracy"—Pp. 107 ff.

28 SYDNEY WEBB: "Soviet Russia as a Federal State",—*Political Quarterly*, April—June 1933—Pp. 196-7.

CHAPTER VIII

ALTERATIONS IN THE FEDERAL CONSTITUTION

(1)

The need for altering a federal constitution.

The body of fundamental principles according to which the Government of a State is organised is its constitution. In a federation the constitution may be said to consist of two parts—one dealing with matters that have a special bearing on the maintenance of the federal character of the state and the other dealing with non-federal matters. In the first part are included all those clauses relating to the distribution of powers between the central and local governments, the institutions devised for keeping in tact the scheme of distribution and the special guarantees if any that are secured to the units to preserve their individuality and particular interests. Almost all the known federations are the result of agreements among the peoples or governments of the several units that make up the federal territory and these agreements are their constitutions to start with. While it is true that the constitution should not be altered every now and then under the influence of momentary impulses, it is also necessary to recognise that facilities should exist for its alteration whenever there is a real need for it, so that it may not become antiquated and unsuited to the changing times and conditions. Every constitution reflects the ideas held by the political groups which happen to be dominant at the time when it is framed. These ideas in their turn are based on the experience, the interests and the needs of such groups. But experience and needs are bound to change. New political groups with new interests emerge and become dominant. Social and economic conditions which determine the character of political organisation do not remain constant. An agricultural economy may as in the United States be transformed into a manufacturing one. A predominantly rural life may give place to an urban one requiring a redistribution of powers between the centre and the parts. The balance between nationalism and particularism may lean towards one side at one time and towards another at another time.

All such changes necessitate corresponding changes in the structure and functions of the central and local governments if they are to work in harmony with the needs of the people.

A change in those elements of a constitution which give to it its federal character is of importance to the central as well as to the local governments. Every such alteration brings about a fresh redistribution of authority between them and affects their relative significance. It follows from this that all alterations of this kind should be brought about by the conjoint action of both the whole and the component parts and not separately by either of them. Otherwise there is no guarantee that the interests of either will be adequately safeguarded. The only other alternative is to have an agency outside both of them and entrust it with the power to amend the constitution. But such an alternative is unthinkable in an independent self-governing state. It will be tolerated only in a dependency, or in a federation like Canada where the external imperial authority has only the formal power of registering constitutional amendments. The problem of alterations in a federal constitution really centres itself round the machinery to be devised to secure the joint action of the 'whole' and the 'parts'.

The joint action of the whole and the parts necessary for such alteration.

It is ordinarily assumed that the consent of the 'whole' should be obtained through either the central legislature or the electorate in the federal territory considered as a homogeneous group. Similarly by the consent of the 'parts' is meant the consent of either their legislatures or the local electorates in each of them taken separately. Whether it is the legislature or the electorate that should be used as the agency for altering the constitution is a question in the settlement of which federalism has nothing to say. Either method is consistent with the federal principle. The preference that is shown towards the one or the other alternative in the various federations is the result of the extent to which they wish to give a free play to democracy.

Methods of obtaining their consent immaterial from a federal point of view.

Theoretically it is quite possible to obtain the consent of the whole through the component units themselves without the intervention of either the central legislature or the federal electorate. The proposal to amend the constitution may emanate from the legislature of any one unit and it may be referred to

Consent of the whole through the units only?

the other units for their acceptance and be regarded as ratified if a specified majority of the units are in its favour. This does not mean that the point of view of the centre or the 'whole' is ignored. For, in every component state there are always substantial sections of the people who look at all proposed amendments from the standpoint of the centre. Each individual citizen in a federation has in him the true federal sentiment which is made up of devotion and loyalty to the whole as well as to the parts. No citizen is completely a nationalist or a particularist. There is therefore no reason to assume that every proposal to increase the powers of the central government will be opposed in the legislatures of the part-states or that proposals to diminish those powers will be supported in them. Thus the machinery for altering the constitution may consist of only the legislatures of the units without the central legislature or the federal electorate coming any where and this procedure satisfies in a sense the requirement that constitutional alterations should be the result of the joint action of the whole and of the parts. In spite of the theoretical soundness of this view, it has not so far been adopted by any federation because of certain practical inconveniences and disadvantages accompanying it. In such a system there is no guarantee that any unit will be sufficiently interested to take the initiative in the matter of proposing amendments. Moreover there is no central institution where all those concerned with any proposed amendment can meet, examine it from the point of view of each other and vote on it after a general face-to-face discussion. Because of these practical difficulties it is that the initiative in respect of constitutional alterations should lie with the central legislature. Other agencies also may take the initiative but they do not supersede the central legislature. For instance, in the United States amendments may be proposed by the Congress or by a convention specially called by the Congress on the application of the legislatures of two-thirds of the several states.[1] Similarly in Switzerland the initiative may come from the federal legislature or from fifty thousand voters demanding an alteration.[2] But complete supersession of

[1] Art. V of the Constitution.

[2] Art. 120 and 121.

the central legislature by the legislatures of the part-states is not found anywhere.

Consent of the parts through their representatives on the Central Legislature.

As regards the part-states it is arguable that their consent may be obtained through their representatives on the central legislature instead of through their own legislatures or electorates.* Every central legislature in a federation has on it a certain number of representatives from each unit. It may be presumed that these will fairly and correctly represent the views of their constituents on all proposals for amending the constitution which come up for discussion in the central legislature. It is unreasonable to suppose that the mere fact of their being members of the central organisation will dispose them to favour a policy of undue centralization or disqualify them from speaking for the states to which they belong. Here again it should be remembered that in them is found a blending of the nationalist and the particularist sentiment. None among them will ignore the point of view or the special interests of the part-states. But there is everywhere a fear that the position of the units will be endangered if constitutional amendments are brought about solely by the action of the central legislature however representative it may be. The sentiment is strongly in favour of such amendments being referred directly to state-legislatures or state-electorates. This is due in the main to that desire for equality which is instinctive with the units in a federation. Equality is not the basis on which central legislatures are constructed. States with larger populations possess a larger amount of voting strength on them. Decisions arrived at in them are based on a majority of mere numbers. Such a majority is not a majority of part-states. In a federation where there is a wide disparity in size and population between one unit and another, the smaller units will naturally be in favour of constitutional amendments being directly referred to them. Their representatives on the central legislature may, it is true, speak for them but their vote will not be as effective and valuable as that of the representatives of the larger units. A direct reference therefore to the states will be a real recognition of their equality. It is a guarantee that every amendment has behind it the support of a majority of units as distinguished from a majority of numbers.

* This is practically the case in Canada.

Besides this, there is also another consideration which necessitates a direct reference to the units. Their representatives on the central legislature are not mere delegates voting according to the instructions of their constituents. They have a discretion of their own and it may happen in some cases that they do not look at the proposed alterations from the point of view of their electorates. This also makes it desirable that a direct reference to the part-states should be made whenever the constitution requires amendment. This is the practice in almost every federation. It is the absence of such a provision that makes many writers regard the German Republic as unitary and not federal. It may appear as if the same was the case in the German Empire (1871—1919) where alterations in the constitution took place by way of ordinary legislation by the central legislature without any subsequent ratification by the component states. But it should be noted that the *Bundesrath* (the Upper House in the Legislature) was really a house of part-states. It consisted of the nominees of the several state-governments. They voted strictly according to instructions; all the nominees coming from the same state had to vote alike. They were more like ambassadors and a vote therefore of the *Bundesrath* was as good as a vote of the states. No other federal legislature is constructed on these lines. That is the reason why the consent of the states has to be obtained through their legislatures or electorates.

The controversy in regard to the amendment of the Canadian constitution.

The issues relating to the share of the 'whole' and the 'parts' in altering a federal constitution are best brought out in the controversy going on in regard to the amendment of the Canadian Constitution. The British North America Act which embodies the constitution of Canada is an Act of the English Parliament. It does not contain any provisions enabling the people of Canada or their legislatures to amend the constitution. Every amendment therefore requires an Act of the English Parliament, an external authority. An influential section of the Canadians hold the view that it is derogatory to their self-governing status that they should not have the right to alter their country's constitution and that they should seek the help of an outside power for that purpose.[3] As a matter of fact, however, the various

[3] BRADY: "Canada"—P. 40.

amendments to the constitution thus far brought about by the English Parliament were based on resolutions passed by the central legislature of Canada * so that it may be said that it is the practice in Canada to have amendments proposed by the Canadian legislature and ratified by the English Parliament. As no amendment proposed by the Canadian Legislature has so far been vetoed or is likely to be vetoed by the English Parliament, the conclusion follows that ratification by the latter is a mere formality and that the position is that though Canada is a federation the central legislature by itself is competent to make alterations in the constitution. The provincial legislatures or electorates have no hand in them.

This is considered by several prominent statesmen to be inconsistent with the real spirit of federation. There are many who advocate that the provinces should be consulted and their consent obtained before the central legislature proposes amendments for ratification by the English Parliament. This is not the view of the French minority alone who have a culture, a language and a civil law of their own which they wish to safeguard against any possible attacks from the dominant English majority. Such a view is held by the statesmen belonging to the English provinces also.[4] They point out to the original constitution of the Dominion having been a 'pact' among the then existing colonies and to the unconstitutionality of any change in the terms of the original compact without the consent of the provincial units.[5] Even those who refute the compact theory of the constitution are constrained to admit that "federal practice and political expediency call for a limited measure of provincial consultation and consent in the future amendment of the Canadian Constitution, and for definite guarantees to the rights of certain minorities".[6] It is therefore now becoming firmly established that the provincial governments should be consulted and their consent obtained before alterations are made in the consti-

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* It is a convention that these resolutions should be passed unanimously.

4 Hon. Ernest Lapointe in "Dawson's Constitutional Issues in Canada" (1900—1931)—P. 15.

5 Letter and Memorandum of Hon. Howard Fergusson in Dawson—Op. cit. —Pp. 28-34.

6 N. Mc. L. Rogers in Dawson—Op. cit.—P. 45.

tution. There is, however, a difference of opinion as to whether the consent should be a unanimous one or of a majority of the provinces. The latter is not regarded as adequate where rights affecting race, language, creed, etc. are involved. It is the view of certain leaders that "in the event of ordinary amendments being contemplated the provincial legislatures should be consulted, and a majority consent of the provinces obtained, while in the event of vital and fundamental amendments being sought involving such questions as provincial rights, the rights of minorities, or rights generally affecting race, language and creed, the unanimous consent of the provinces should be obtained." [7] There are no doubt some practical difficulties in the acceptance of this view as it might result in making the constitution too very rigid and in even a single province holding up amendments of a wholesome character. Even the requirement of a three-fourths majority is generally regarded as having obstructed the healthy growth of the constitution of the United States. It may also be difficult to draw a clear line of distinction between 'ordinary' and 'fundamental' amendments. But such difficulties are inherent in federalism and cannot be got over without undermining the very basis of the federal system.

The requirement of unanimity in respect of certain alterations is a characteristic of almost all federal states. This rests on the hypothesis that there are some matters which are so vital to the preservation of the individuality of the part-states that no unit should be compelled against its own will to agree to any change affecting them by a mere majority vote. The territorial boundaries of the units and the basis of their representation in the central legislature belong to this category. Matters affecting race, language and creed and changes in the political constitution of the component-states may also be included in this class. If the majority is free to alter the boundaries of any unit, it may so happen that the area of any particular unit is so much reduced that it practically ceases to function as a political entity. In some cases, even additions made to a unit against its own will may prove injurious to its interests. A province with a

The requirement of unanimity in respect of certain alterations.

[7] Report of Dominion-Provincial Conference, 1927.

homogeneous population—all belonging to one race or professing one religion—may in consequence of such additions become altered into a province with a heterogeneous mass of people creating undesirable political complications. This is the reason why every federal constitution provides for the consent of the individual unit being taken before alterations are made in its boundaries. It is on this score that the redistribution of provinces on a linguistic or a communal basis has attained so much importance in contemporary India. It may be that even at the moment of its start a federation may contain some units which are too small in size to equip them with all the essentials of a modern civilized state. This was the position of certain units in the German Empire and the German Republic. This is also the case with a number of States in India at the present day. There is also the possibility of some of the units in the federation being like Prussia in Germany so big in size that they are able to dominate the state completely and reduce the other units to a position of subordination. In one case the interests of the federation as a whole may require the amalgamation of the smaller units into more compact areas and in the other case they may require the splitting up of the bigger units into smaller ones. The requirement of the consent of the individual states affected may retard such amalgamation or division as the case may be. Here is evidently a conflict between the interests of the whole and those of the parts. But as has already been pointed out, this should be regarded as one of the inevitable accompaniments of federalism and a part of the cost which has necessarily to be incurred if its advantages are to be reaped. What is true of territorial redistribution is equally true of the basis of representation in the central legislature or the guarantees given in respect of language, culture, etc. These are matters in regard to which the majority has no right to dictate to the minority. As has been pointed out by McIver, " Here we cannot simply appeal to the principle of majority, whether it be a majority of the federal state as such or a majority of the constituents regarded as units. For in a true federation each constituent has *ex hypothesi* a certain autonomy, recognized in the articles of the union. This would seem to imply that no change

of its relation to the whole or to the others can legitimately be forced upon it by a majority outside itself, or, more strictly, that, *apart from the conditions it has accepted in entering the federation or at any later time,* it remains in the position of a free state." [8]

The view that the consent of the parts need not be positively expressed.

There is a view among certain writers that while alterations in a federal constitution should necessarily be the outcome of joint action of the centre and the units, the part to be played by the latter need not be a positive one. The object of joint action is to see that no amendment is forced on the whole or on the parts against their will; and according to these writers, that object can be secured even if there is no provision for positive consent by the units to the proposed amendments. Their silence may be taken, it is said, as implying their consent. These writers propose that, if within a given time after the passing of the amendment by the central legislature, the legislatures of a majority of units do not present a formal protest against it, it is to be presumed that all the units are in favour of the amendment. As a precaution against hasty action by the central legislature, they suggest that every amendment should be passed in two successive sessions by a two-thirds majority. This procedure is well-worth consideration as it is simpler. It gives a relatively larger share to the central legislature in the process of amendment without weakening the need for the co-operation of the units. The suggestion, however, of Laski that in the event of the legislatures of two-thirds of the constituent states presenting a formal protest against the change, it should still be given effect to if it is passed a third time by a two-thirds vote of the central legislature, does not appear to be consistent with the federal principle.[9] In such a case it is best to drop the proposed amendment.

The two usual stages in amendment—initiation and ratification.

An analysis of the processes of amendment in different federal states shows that generally they pass through two stages before they become a part of the constitution. The first stage is that of initiation and the second is that of ratification. In Canada, the United States, Australia and Switzerland the cen-

[8] The Modern State—P. 379.

[9] LASKI: "Grammar of Politics"—P. 307.

tral legislature has the power of initiation. The same was the case in the German Empire and the German Republic. The alternative method of initiation provided for in the United States, viz., through a convention called by the central legislature on the application of the legislatures of two-thirds of the part-states has not been made use of. In Switzerland proposals for amendment may be made on the petition of fifty thousand voters. A similar provision for popular initiative existed in the German Republic. In Canada the ratification is left to the English Parliament. In the United States it is to be by the legislatures of three-fourths of the several states or by conventions in three-fourths of them; it is only the former method that has been so far made use of. In Australia and Switzerland ratification is through popular referendum and it requires the approval of a double majority—a majority of all the electors voting in the federation and a majority of electors in a majority of the part-states. In the German Empire alterations in the constitution were considered as rejected if they had against them fourteen out of the fifty-eight votes in the *Bundesrat*. In the German Republic ratification required two-thirds of the members of the legislature to be present and at least two-thirds of those present voting in the affirmative; and where proposed amendments were submitted to popular referendum they required the assent of a majority of those qualified to vote.

The utility or otherwise of initiative, referendum and of large majorities.

It is clear from the above analysis that all states except Canada and the German Republic require the participation of the component-states in the alteration of their constitutions. Differences, however, arise in regard to

(a) the relative share of the legislatures and the electorates in the amending process, and

(b) the kind of majority that is required for proposing and ratifying the amendments.

Experience shows that popular initiative and referendum are not really useful in bringing about amendments that are necessary and beneficial. An appeal to the electorate on the question of an amendment "suffers from the fact that it is referring to an undiscriminating and uninformed mass a problem

which, from its very nature, requires treatment by expert enquiry ".[10] The kind of majority required varies from an ordinary one in some cases to an absolute one in other cases and to a two-thirds or a three-fourths majority in still other cases. The larger the majority that is required, the greater is the difficulty in carrying out the necessary alterations. It also gives an effective power of veto to small minorities. Referring to the constitution of the United States, Professor Garner states that " an amendment may be prevented by the vote of one more than one-third of the members of either the Senate or the House of Representatives, and when proposed by the two houses may be defeated by the legislatures of one more than one-fourth of the states. Indeed, it would be possible, on account of the great inequality of population of the different states, for one-fortieth of the people living in sparsely settled states to prevent an amendment demanded by the other thirty-nine-fortieths." [11] In view of the fact that in almost all federations amendments require consideration at the hands of two sets of bodies—the central legislature and the part-states—it may be presumed that they will not be rushed through in haste and it is therefore desirable not to insist on specially large majorities giving their assent to them. Ordinary majorities will adequately serve the purpose.

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Other methods of altering the constitution.

In spite, however, of the complicated nature of the amending process, there has not been any serious retardation in the growth of federal constitutions for two reasons. In states like the United States where the courts have the power to interpret the constitution, it has been under-going an appreciable though a silent change. In other states the central legislature itself is the final authority for determining what is constitutional and what is not, and this gives it a power to modify the constitution however rigid the technical process of formal amendment may be. Even in states where courts have the power of declaring the laws made by the legislature invalid, it is not correct to say that the legislature has no hand in altering the constitution. Everywhere

[10] LASKI: "Grammar of Politics"—P. 307.

[11] "Political Science and Government"—P. 539.

it is given the authority to provide for many details in the organisation of government. It is also quite possible that many laws are passed by the legislature which on a strict interpretation are in conflict with the constitution of the state but remain on the statute-book till their constitutionality is formally raised in courts of justice. It has therefore to be noted that alterations in a federal constitution take place through a number of alternative methods not explicitly provided for in the written fundamental law and they give to it a real flexibility.

Method of judicial interpretation.

Of these alternative methods the most significant one is that of judicial interpretation. It has played an important part in modifying the original balance of powers provided for in the constitutions of the United States of America, Canada and Australia. By making use of the doctrines of implied powers and implied prohibitions, courts in the United States have enormously increased the authority of the central government. By adhering to other rules of interpretation, the judicial committee of the Privy Council entirely changed the relative importance and sphere of the central and local government in Canada. It has already been pointed out that the object of the framers of the British North America Act was to confer only a few limited powers on the provinces and leave the entire residuary authority in the hands of the central government. It is true that the Act contains a list of the powers to be exercised by the central government, but this was meant to be an illustrative and not an exhaustive one. It was therefore the view of the fathers of the constitution that the federal parliament should have the power to pass any legislation requisite for the peace, order and good government of Canada even though it might incidentally affect the jurisdiction left to the provinces in the field of civil rights and property. This was also to some extent the view of the Privy Council in earlier days. In course of time, however, the Privy Council changed its opinion [12] about the nature of the Canadian constitution, assumed that the British North America Act should be interpreted like any other statute of the British Parliament, that no consideration whatever should be paid to the

Its importance in the Canadian constitution.

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12 Toronto Electric Commissioners *v* Snider and others.

motives of the founders of the constitution or the historical circumstances that led to federation, that the Act should be construed from 'within' and not from 'without' and that the federal laws or precedents of the United States should not be taken as a guide in elucidating the clauses of the constitution. It has therefore become settled now that the mere fact that dominion legislation is to the advantage of the federation as a whole does not entitle the federal legislature to enact any measure if the subject-matter of the law cannot be brought under one of the heads enumerated in the illustrative list. The residuary power originally meant to be located in the central government does not now find its resting place there except in times of extraordinary national peril. Judicial interpretation has brought about such a change in its location that a profound writer on the subject observes that "the real residuum of powers, except in cases of national peril or calamity, either rests with the provinces under their exclusive power over 'property and civil rights in the province' or is unprovided for in the constitution. Thus the courts have reversed the whole scheme of 1867."[13] In consequence of this, the power of the provincial legislatures has been considerably enlarged. There is now a fear that the process of this enlargement has gone too far, and that unless it is put a stop to, there is the possibility of national interests being endangered especially in the spheres of industrial and labour legislation, the development of water-power and the formulation of a general company law.[14]

Its importance in the Australian constitution.

The influence exercised by courts in altering the distribution of powers is no less striking in the case of Australia. The point gains special importance in this case owing to different canons of interpretation having been adopted by the High Court at different times. Here is an illustration not only of the part played by courts in altering the constitution but also of the possibility of their bringing about unexpected alterations from time to time. It is well known that in the earlier years of its history

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13 KENNEDY: "Some aspects of the Theories and Workings of Constitutional Law"—P. 87.

14 *Ibid.*—P. 102.
BRADY: "Canada"—P. 48.

the High Court of Australia adhered to the two famous doctrines of the Immunity of the Instrumentalities of Government and of the Reserve Powers of the part-states. In accordance with these canons, it decided for instance that federal officers were not liable to pay state income-tax in respect of their official salaries, that the awards of the Federal Arbitration Court could not be applied to disputes between the Railway servants of a state and their employer which was the state itself, that the Commonwealth government should not interfere through its power of taxation with the reserve power of the states to regulate wages and hours of labour, that the decisions of the Arbitration Court could not over-ride the positive laws of the part-states and so on. The court took its stand on the ground that it was a federal constitution that it was called upon to interpret, that the essence of such a constitution was the division of powers between two governments each being sovereign in a sphere of its own and hence nothing should be done by one government which would directly or indirectly obstruct the agencies of the other government in the discharge of their lawful duties, and that the central government should, in exercising its authority, be careful to observe not merely the letter and the language of the constitution but also its underlying federal spirit and do nothing which would impair the sovereignty reserved for the states. But in 1920 there came a change in the views of the High Court. It discarded the two doctrines referred to above and declared that the laws made by the Commonwealth parliament on subjects made over to it were fully and without any reserve binding on individuals and the constituent-states, and that full effect should be given to them whatever might be their reaction on the reserve powers of the states or the instrumentalities of their governments. As a consequence of the adoption of this view, the Commonwealth government was enabled to encroach on the jurisdiction of the states in several matters. The awards of the Federal Arbitration Court have acquired a sort of over-riding authority on the industrial legislation of the part-states. The latter are not in a position to fix with any certainty the salaries of their own servants. Decisions of the Federal Arbitration Court regarding wages and salaries may completely upset the

budgetary arrangements of the states. Their powers of direct taxation have been narrowed. A feeling is now present that without any formal amendment to the constitution, courts have succeeded in undermining the federal spirit and reducing the states to a position of dependence on the central government.[15]

Opposition to the use of this method short-sighted.

It is circumstances like these that are responsible for the opposition to the whole system of judicial interpretation that one occasionally meets in the United States and Australia and to some extent in Canada also. The opposition may be said to be a short-sighted one. It has already been pointed out that one of the essentials of federalism is a judicial tribunal with power to interpret the constitution and keep the central and local governments within the limits laid down for them. Even in countries like Germany where the need for it was not felt in the days of the Empire, there was a strong tendency in the period of the Republic for the courts to assume such a power without rousing much opposition from the public. The federal constitution of the Austrian Republic also provided for the exercise of such a power by the courts. To do away therefore with the authority of the courts to interpret the constitution is to do away with one of the essentials required to maintain the federal system in tact. Moreover in countries like the United States where the formal process of amending the constitution is too rigid, courts have been instrumental in introducing the requirement of elasticity and flexibility in adapting it to the changing needs of the state. It should also be noted that judicial interpretation has really no arbitrary character about it. In all federal states the highest courts contain judges who have a reputation for exceptional integrity and an imaginative insight into the requirements of the people and who keep themselves in touch with the main currents of public opinion. It may be that a few of their decisions appear to be too revolutionary or too reactionary, but these should be regarded as exceptions and not the general rule. The whole position is correctly summed up in the following words though they have been expressed specially with reference to the conditions in Australia.[16] "It is suggested that future decisions

[15] HOLMAN: Op. cit—Lectures I and II.

[16] A. C. GAIN in "Studies in the Australian Constitution"—(Ed. G. V. Portius)—P. 227.

of the High Court will continue in this way to increase the powers of the Commonwealth, and thus, in effect, to amend the constitution by progressive judicial interpretation. Probably there is some truth in this, but I submit the extent of any such change will not be very great. In the first place it must be remembered that the courts seek only to interpret the existing law. They set their faces against any conscious change; holding that changes, however necessary or desirable, are not a matter for the courts. This seems at first sight to conflict with actual experience, as indicated by the Engineer's case. It must however be remembered, that the doctrine of immunity of state instrumentalities was laid down practically at the commencement of the commonwealth; it was never accepted by the Privy Council, and Isaacs and Higgins, JJ. always opposed it strongly in the High Court. Although therefore, it remained until 1920, it was always subject to considerable doubt; and the decision in the Engineer's case, which swept it aside, was not unexpected. I submit, therefore, that the only changes that will take place, will be those unconscious changes which (judges being human) arise by reason of the personality and environment of the judges. That changing times, with their changing needs and changing outlook will produce changes in the interpretation, is to be expected; but for the reasons I have given these changes will probably be so gradual as almost to be imperceptible."

Courts are an outside agency and therefore impartial in altering the constitution.

It has been pointed out that federalism requires that alterations in the constitution should be brought about by the conjoint action of both the whole and the parts or by some agency outside both of them. Courts belong to the latter category in a sense, and though they are to be regarded as an outside agency for this particular purpose, it should be understood that their action is not like that of an imperial power imposing its will on a dependency. It may appear at first sight that the highest court in each federal state entrusted with the power of interpreting the constitution is really a part of the central government and that as such it will be disposed to uphold the authority of the centre at the expense of the parts and that it should not be regarded as an outside agency at all. But such a view is not correct. It is through the action of the central legislature

and the executive that encroachments on the power of the part-states are brought about. They are the institutions that are directly interested in such encroachment; and it is alteration of the constitution by them that has to be prevented. The courts are outside both of them in all federal states. It is not open to them to establish or abolish the highest court. The constitution itself provides for the establishment of such a court. In some states like Australia the appointment of a minimum number of judges to constitute the court is made mandatory on the highest executive. This gives a guarantee that the court will be in a position to carry out efficiently all its duties. The constitution also provides for the permanent tenure of the judges and for the fixity of their salaries. The result is that the courts are practically independent of the central legislature and executive. They are not therefore biased specially in favour of the centre; and any alteration in the constitution brought about by their action may therefore be regarded as alteration by an independent agency without any special prejudice towards either the centre or the parts and therefore perfectly consistent with the principle of federalism.

(3)

Alterations through usage and convention.

All federal constitutions have been altered not only through the processes of formal amendment and judicial interpretation but also through the growth of extra-legal devices generally known as conventions and usages. Their existence or validity is not recognised by courts. All the same they form a substantial part of the working constitution of every federal state. They have their sanction in the tacit consent given to them by all those sections of the community that are politically dominant, and that have therefore the power to actually determine how the institutions of government should be made to work in practice. In almost all cases they are the outcome of necessity and serve as correctives of those defects in the constitution which are slowly brought to light by growing experience. It is they that give to the written constitution the quality of adaptability which it may otherwise lack. They produce wide-spread effects as they are found to alter not only the distribution of powers between the central and local governments but also modify the

relative importance of the different organs of government and their composition and character and even create many new types of governmental machinery to supplement those which are provided for in the original constitution. Their significance in all this lies in their being the result of the operation of an outside agency unconnected with either the whole or the parts, and in this respect they closely resemble the process of constitutional alteration through judicial interpretation.

This method is responsible for (a) the co-ordination of the central and local governments in U. S. A., Australia, and Canada;

It is usage that is responsible for central governments in the United States, Australia, Canada, etc. entering the fields of education, agriculture, roads, forests, fisheries, animal husbandry, industrial welfare and the like which are reserved under the written constitution to the units. In the United States for example there are separate federal departments or bureaus for each one of these branches of administration. The central government spends a large amount of money in maintaining them. It also pays large grants-in-aid to the several local governments to enable them to administer these functions at a higher level of efficiency, and in doing so obtains a considerable amount of control over them in the settlement of policy and the general programmes of work.[17] The net result of this procedure is to extend the sphere of the activities of the central government beyond the limits originally laid down for it. The situation in Australia is similar to this.[18] There also the commonwealth has established for instance its own department of public health which co-operates with the corresponding department of the part-states in the general field of health and of industrial hygiene and sanitary engineering. The commonwealth government has also instituted a council for scientific and industrial research which is of the greatest use in enabling the states to develop agriculture, forestry and other means of production. In Canada again a central department of health has been established to supplement the work of the provinces.[19] The central government also helps the provinces by bearing the burden of old-age

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17 FITE: "Government by Co-operation"—Ch. II.

18 Report of the Royal Commission on the Constitution—Ch. 17, 18.

19 BRADY: "Canada"—Pp. 75—76.

pensions, a matter which is more or less provincial. The central department of labour is more or less of the same character. Both in Australia and Canada there is a regular system of grants-in-aid which is giving to the central government an increasing hold over the provincial governments in spheres which are exclusively vested in the latter by the original constitution. This encroachment of the centre over the domain of the parts has been brought about by the force of circumstances. A good deal of national co-ordination is found necessary in the administration of public health and industrial welfare, and the central government is the only agency which is competent to bring it about. In many cases the units do not possess the financial resources necessary to enable them to attain a minimum standard of efficiency in departments like highways, education etc. Usage has therefore brought into existence the system of grants-in-aid. What has to be noted in all these cases is that usages of this character are responsible for increasing the actual powers of the central government for which there is no specific provision in the written constitution.

(b) the modifications in the relative importance of the various branches of government; and

The influence of usage in modifying the character, composition and relative importance of the different organs of government can also be illustrated from the constitutions of the United States, Australia and Canada. In the case of the United States the remarkable power which the Supreme Court possesses in questioning the validity of the laws enacted by the Congress or the state legislatures is not based on any provision in the written constitution but on mere usage. In Canada the federalisation of the dominion cabinet in consequence of which the several provinces and minorities have secured representation in it is again the result of usage. The control which the central government was expected to exercise over the provinces through its power to appoint Lieutenant-Governors and to veto provincial legislation has practically fallen into abeyance because of disuse. The decline in the power of the Canadian Senate and the reduction in the relative importance of the Second Chambers in Australia and Canada which have all of them been specially constituted to safeguard the interests of the units is also due to the growth of conventions.

(c) the growth of new institutions and agencies for co-operation.

Usage has also brought into existence many new governmental institutions which have transformed the actual working of the federal system. In its ideal form federalism implies complete separation between the central and local governments in regard to the sphere of their work and in the possession of the means required to enable them to discharge it. Every function is to be discharged either by the central or the local governments and the citizen knows precisely what to expect from each government. But experience has revealed the inadequacy of this theory of complete independence of the two sets of governments from each other. Many functions assigned to them can be efficiently carried on only through co-operation between them. Interdependence and not independence is to be the principle of their mutual relationship. Driven by the force of circumstances, central and local governments in all federations have ceased to lead a life of complete isolation and have created various institutions through which they come together for common deliberation and concerted action. In the United States President Roosevelt initiated the system of conferences with state-governors and it has been continued by his successors. There are other conferences of a similar character like those of the State Highway officials, the state auditors, the comptrollers and accounting officers, the attorneys-general, etc. There are other organisations, official and non-official, which have been playing an important part in carrying on the work of government by encouraging co-operation between the central and the local authorities. The National Conference of Commissioners on Uniform State Laws, the American Law Institute, the National Tax Association belong to this category. In Australia the Premiers' Conference has always been a regular feature of the working constitution. At the Conference of Commonwealth and state ministers held in 1929, it was resolved to have an annual conference of this sort, and many controversial questions are being discussed and settled in it. It was through it that agreement was arrived at on the subject of the financial relations of the states and the Commonwealth. The Loan Council was originally instituted without any statutory authority for the purpose of controlling the loan-policy of the states and the Commonwealth and it was

only in 1929 that it became a statutory body. In Canada also there are several organisations for promoting co-operative and uniform action by the Dominion and Provincial governments. Dominion-Provincial conferences are attaining a larger amount of importance. Institutions like the Social Service Council of Canada, and the Canadian Bar Association are of this type.[20] All these illustrations make it clear that usage has created everywhere a large number of organisations for which there is no provision in the Written Constitution and that it has thus brought about substantial alterations in it.

[20] KENNEDY: Op. cit.—Pp. 91—94.

Chapter IX

THE VALUE OF FEDERALISM

Increasing influence of Federalism.

In estimating the value of federalism it is to be noted at the outset that as a form of government it is at present in existence in a fairly large number of countries like the United States of America, Canada, Brazil, Argentina, Australia, Russia and Switzerland and that some of these countries are occupying a prominent position in the affairs of the world. There are also clear indications of the prospect of federalism extending its influence to several other countries. It is now finally settled that the future government of India should be organised on a federal basis and legislation to that effect is being enacted by the English Parliament. China may have to follow a similar course if her political unity is to be preserved against further disintegration. Federalism is considered to be the proper solution for the problem of racial minorities created in Europe by the presence of the Catalonians, the Croatians, the Ruthenians, the Wallans and the Alsatians. Those who are dissatisfied with the working of the League of Nations in its present form and who have faith in reconstituting it look to a time when it will assume a real federal shape and become a more effective instrument for maintaining the peace of the world. There is thus every probability of the fulfilment of the prediction of Proudhon that the twentieth century would be distinguished by the marked development of federation.

It should also be noted in this connection that all countries which hitherto adopted federalism did so as a result not of mere accident but of deliberate choice. Their statesmen met in conventions and constituent assemblies, spent months—and in some cases years also—in a thorough discussion of the merits and defects of all alternative forms of government and ultimately found that in the circumstances in which their countries were situated a federal government would be the best for them. Moreover, the people of these countries have by now gained several decades of experience in working a federal form of gov-

ernment and they are not showing any signs whatever of their dissatisfaction with it or of their desire to abandon it. There is clear evidence everywhere of their growing attachment to it. It is true that one occasionally hears of the failure of federalism in Australia [1] and of a movement there in favour of unitarism. This agitation is, however, confined to a small section and there is no likelihood of its finding acceptance at the hands of the people as a whole. After an exhaustive enquiry into the subject, the Royal Commission on the Constitution of Australia arrived at the conclusion that the Federal System of government was the system best suited to the needs of the Australian people.[2] Germany is the only example of a country which chose federalism at one time and subsequently gave it up in favour of a unitary system. But no inference as to the inadequacy of federalism can be drawn from this solitary instance. For, the federal system of Germany was dominated by Prussia from the very beginning and this gave to it a real unitary character. In addition to this, it should be noted that the recent establishment of unitarism there is more the outcome of force than of the expression of the popular will. Leaving therefore this case aside, it may safely be asserted that people who have so far taken to federalism are on the whole satisfied with it and are not anxious to replace it by any other system.

It satisfies a real need and is a highly flexible system.

There is nothing unnatural in such an attitude. A study of the forces behind federalism has already shown that everywhere it is the outcome of necessity created by hard political, social and economic facts. It is the only form of government that has so far been found appropriate to countries of vast size divided into provinces with varying special problems of their own and inhabited by people among whom there are cultural groups with an intense desire to preserve their uniqueness and individuality. One important test of an ideal government is its being in harmony with the character and requirements of the people for whom it is intended; and federalism is an ideal form of government for people among whom there is a considerable amount of

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[1] CANAWAY: "The Failure of Federalism in Australia".

[2] Report—P. 240.

diversity. Another reason why it has found welcome in several countries is that so far as details are concerned, it can be adapted to the varying conditions of each country and it permits of all sorts of adjustments regarding the distribution of powers, the location of residuary authority and the method of constitutional amendment. It can be used successfully either to strengthen the centre or to maintain the autonomy of the parts at a high standard. As was remarked by Professor Frankfurter, there is no limit to its pliability and resourcefulness.[3]

It is essentially a unifying force.

Federalism is essentially a unifying force. This is one of its merits which is generally forgotten by those who contrast it to its disadvantage with a unitary constitutional system. Without resort to military conquest or coercion of any other kind, it has succeeded in creating union among peoples that were previously separated from one another and bringing them together under a common government. In many cases it has equally succeeded in preserving a previously existing union against all dangers of disruption. This is its great achievement in all those countries where a unitary system of government was loosened at the proper time and transformed into a federal one. Its ability to serve as a cohesive force in these and in other cases is due to the fact that it alone makes possible the enjoyment of a large amount of autonomy by territorial groups and cultural minorities and gives to them a sense of security in the safeguarding of what they consider to be their legitimate needs and interests. It recognises that man's attachments and loyalties are of a diverse character, that he is at the same time a member of more than one community and that there is nothing inherently wrong in his being simultaneously devoted to a large number of such communities. It adopts a realistic attitude towards society and politics, and where it finds a man's attachment to his province or sub-nationality to be highly intense, it takes account of it instead of trying to ignore it or destroy it as unitarism does. It thus facilitates the coming and living together of peoples with different kinds of outlook on life and with different traditions and varieties of culture. It does not lose sight of the possibility that with time

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3 FRANKFURTER: "The Public and its Government"—P. 40.

and with improvements in the means of communication and with the increasing advantages of closer association, the original cultural and territorial differences may become obliterated. But so long as they are present, it feels that real statesmanship consists in taking them into consideration in planning the general frame-work of government for a country. In doing this it reduces to a minimum the friction that is inevitable in governing a people who are not completely homogeneous and gives to the constitution the character of workability which it may not otherwise possess.

It is a safeguard against majority tyranny.

Federalism also serves as a protest against the tyranny of the majority. By conceding a sphere of independence to each constituent unit in the state, it draws a line between matters in regard to which majority-decision is to be accepted as binding, and matters where minorities should be left to themselves. The area of liberty is consequently broadened and this secures to the units a wide scope for the exercise of initiative. In unitary states where there is only one ultimate source of political authority, the opportunities for making experiments and putting to practical test any new scheme of social and economic policy are limited. It is difficult to secure a majority that is sufficiently interested in anything that is novel. There is too much of caution displayed in launching new programmes of work. There is everywhere the fear that any failure attending such programmes will bring nation-wide disaster. The situation is quite different in a federal state. Each unit is free in its sphere to make experiments with new policies and measures without the need for waiting till the public opinion in the whole country becomes favourable towards them. If it succeeds, other units are sure to follow it. If it fails, it alone shares the resulting loss. A federal state may therefore be regarded as a political and sociological laboratory where irrespective of majority opinion each group is free to conduct its own experiments and add to the world's store of knowledge in the art of government.[4]

In many countries of the world at the present day parlia-

[4] THOMPSON: "Federal Centralization"—P. 363.
H. L. McBAIN: "The Living Constitution"—P. 61.

It gives relief to over-worked central parliaments in a much better way than decentralization or devolution.

mentary government has fallen low in the general estimation of the people. One reason for this is undoubtedly the failure of parliaments to cope with the ever-increasing volume of their work. There is throughout a complaint of congestion of business. The modern state is expected not merely to preserve order and peace but to undertake all sorts of functions for promoting the positive welfare of the community. Parliaments are trying to come up to these expectations, but they find it impossible to dispose of their work in proper time. Many pressing matters of importance are left unattended and many others are decided in haste. Central parliaments are thus in need of urgent relief. The most effective way of providing them with the relief they require is to delegate as many of their functions as possible to local legislatures.[5] This is just what federalism accomplishes. In a federal state a large amount of work is undertaken by the constituent units and the central government has consequently fewer burdens to bear. In two or three respects federalism is superior to decentralization or devolution which are the alternative methods suggested for giving relief to central parliaments. In the first place there is no need under federalism for the central government to spend its time in supervising the work of local governments and frame numerous rules, regulations and instructions for that purpose. In many countries where decentralization has been tried, it is not so much the amount of work but only the character of the work of the central government that undergoes alteration. There is also another merit that federalism possesses in this connection. Powers enjoyed by the constituent units cannot be easily transferred to the centre. An amendment of the constitution is required for this purpose. No artificial agitation set up by discontented local politicians and factions for bringing about a redistribution of powers will easily succeed. But legislatures under schemes of devolution and decentralization continue to be subordinate to the central government. The powers delegated to them may be resumed at any time without much difficulty by the central government. There will be many persons interested in such resumption. On the whole therefore federalism is a better device

[5] Gooch: "Regionalism in France"—P. 4.

especially in countries of large size for giving real and permanent relief to central governments.[6]

Other merits.

A passing reference may now be made to some of the other merits of federalism. It establishes a closer contact and a more intimate relationship between the rulers and the ruled than what is possible under a unitary system. This is the case even when the general basis of government is autocratic or fascist or communist. It brings into existence several local centres of authority and the citizen has therefore ample opportunities of approaching the rulers easily, expressing his grievances to them and obtaining redress from them. Federalism also diminishes the scope for the exercise of power by a bureaucracy which has a tendency to gain the upper hand whenever government is centralized. The rapid development of new countries like the United States of America, Canada and Australia is the result of their federalism. Local legislatures are free to enact measures which are specially needed to utilise the local resources. Above all, federalism has been found to be an efficient instrument for training people in the art of democracy and making it a success. Each constituent unit becomes a centre of true self-government which "stimulates the interests of people in the affairs of their neighbourhood, sustains local political life, educates the citizen in his daily round of civic duty, teaches him that perpetual vigilance and sacrifice of his own time and labour are the price that must be paid for individual liberty and collective prosperity".[7]

(2)

Defects due to distribution of powers not being rational or adequate.

From the above survey of the elements of value in federalism, one is not justified in drawing the inference that it is an ideal system of government free from all defects. In many cases the defects arise in consequence of the difficulty involved in drawing a rational scheme of distribution of powers between the central and local governments, making full allowance for the claims of uniformity and of diversity. The actual schemes that are in force in existing federations are found to be faulty in one

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6 HOLMAN: "The Australian Constitution"—Pp. 73-4.

7 BRYCE: "The American Commonwealth"—Vol. I, P. 351-2 (1917).

respect or another. The fault may lie in the grant of certain functions and powers to one government instead of to the other; or it may lie in the constitution not making any provision for the exercise of certain necessary powers by one or the other government; or it may be due to functions which are interdependent having been separated from each other and assigned to different governments instead of being lodged in one and the same government. At the time when the constitution is drafted, no one is aware of defects like these. It is only in the actual working of it that they are brought to light, and until they are removed by an amendment of the constitution they continue to produce results of a harmful character.

It is, for instance, the view of many observers of American conditions at the present day that it would have been far better if 'marriage' had been included among the subjects under the control of the central government instead of being reserved to the part-states. The failure to do so has resulted in numerous anomalies. "A child may be legitimate in one state and illegitimate in another, and a man may be deemed married or unmarried according to the state he is in,—he may even be regarded as married to one woman in one state and the husband of another woman in another state".[8] Such differences in law do not create any serious difficulties or inconveniences as between two independent states. But within the frontiers of a federal state whose constituent units are in active mutual communication and where people pass freely from one unit to another, considerable hardship is caused by the existence of such diversities in law. Many other anomalies of this sort can be quoted from the constitutions of other federations. It is true that in these matters later federations have benefited a great deal from the experience of the earlier ones.[9] But all the same it is not possible to completely remove this defect.

There are also cases where federal constitutions have not provided for the exercise of necessary powers either by the central or the local governments. One illustration may be given

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8 WILLOUGHBY: "The Fundamental Concepts of Public Law"—P. 220.

9 GARNER: "Political Science and Government"—P. 420-21.

here. In Australia the Federal Arbitration Court is able to over-ride the laws enacted by the part-states on industrial matters. The result of this is that no part-state can legislate with finality on any industrial subject. But the constitution has not included that subject among those within the jurisdiction of the Commonwealth Parliament. There is therefore this serious anomaly that at present there is no legislature in Australia competent to make a general law on industrial topics.[10]

Defects due to inter-dependent functions being separated.

More serious than this is the difficulty caused by interdependent functions being separated and placed within the control of different governments. In such cases the success of a department of administration in the hands of one government is contingent on appropriate action being taken by the other government in some kindred department of administration under its control. But there is no guarantee that such appropriate action will always be taken and this tells very much on the efficiency of the governmental system as a whole. Immigration is for instance a central subject in Australia; but agriculture and land-settlement are within the jurisdiction of part-states. The central government may do all its best to attract immigrants into the country; but its efforts may not have much chance of success if the policy pursued by the part-states in regard to agriculture and land-settlement is not favourable to the immigrants. External affairs is again a central subject in all federations and central governments in Canada, Australia and the United States of America have in recent years become parties to a number of international labour conventions dealing with the regulation of child labour, working hours, health, insurance, etc. All these, however, are subjects which are exclusively within the jurisdiction of the constituent units and central governments naturally find considerable difficulty in giving effect to their treaty-engagements. Difficulties have also arisen in consequence of 'naturalisation and resident aliens' being a subject of central regulation and 'labour, property and civil law' being under the control of the units. In such cases central governments find themselves helpless when local legislatures impose severe restrictions on the rights of aliens in the matter of acquiring and hold-

[10] HOLMAN: "The Australian Constitution"—P. 58.

ing property or engaging themselves in lucrative occupations. Even the line drawn in most federations between inter-state commerce and intra-state commerce has been found to create confusion as there is a good deal of inter-relation between the two.[11]

There are numerous instances of the inconveniences resulting from this kind of separation of inter-dependent functions and there is no effective way of escaping from such a situation. It is not possible to frame an exhaustive list of such functions on an *a priori* basis and make it a part of the written constitution. Any classification of functions into independent and inter-dependent ones is bound to break down in practice. Moreover if the rule that inter-dependent functions are best kept in the hands of the same government is strictly adhered to, it will be found that most governmental functions in the modern state are of this character and that a large majority of them should be made over to the central government leaving very little work in the hands of the constituent units. Such a situation will not be tolerated in any federation and the defect in question should therefore be regarded as being inherent in a federal scheme of government.

It may, however, be noted that this as well as the other defects due to a faulty distribution of powers are not so very serious in practice as they appear to be in theory. This is due partly to the wide use made of the doctrine of implied powers and of 'legislation by indirection' which have enabled central governments to get round the difficulties created by the written constitution. It is also partly due to the fact that it is possible in the light of growing experience to improve the technique of drafting constitutions and to introduce an element of flexibility into the scheme of distribution of powers by providing for the exercise of 'normative authority' and by drawing a distinction between the laying down of the principles of legislation and their application in detail. The habit of co-operation between central and local governments to which reference has previously been made is also helpful in this connection.

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11 H. W. Stoke: "Some Problems of Canadian Federalism"—*The American Political Science Review*, Oct., 1933.

Defects due to over-rigidity of the constitution.

A rigid constitution is one of the essential requisites of a federal form of government. Some of the defects experienced in the working of federal systems are attributable to this requisite. Where methods of amending the constitution are made specially difficult as in the United States, there are serious obstacles in the way of modifying any faulty scheme of distribution of powers. The drawback in cases like these is due not so much to the rigidity of the constitution as to its over-rigidity. Here again it may be observed that the inconvenience caused by this feature has been to a considerable extent diminished in practice through judicial interpretation and the growth of usages and conventions. It is also worthy of note that the methods of constitutional amendment in later federations like Switzerland, Germany and Australia are not so complicated as those in earlier federations like the United States.

Defects due to uncertainty regarding the validity of laws.

Reference has already been made to the need that exists in a federation for a judicial tribunal to enquire into the validity of the laws enacted by the central and local legislatures so that each may keep itself within the sphere laid down for it in the constitution. But this has been responsible for some of the evils in those federal states where courts are entrusted with the exercise of this power. There is always a good deal of doubt entertained about the competency of the legislatures to pass the laws which they place on the statute book. This gives rise to a mass of litigation and it may take a long time before the highest court of justice pronounces its opinion on the validity of the laws in question.[12] Legislatures themselves hesitate to take prompt action in respect of various matters of importance for fear that their power to do so may be questioned by courts. Judges become the final arbiters of public policy and the elected representatives of the people have to bow to the decision of courts in carrying out their political programmes. Parties which make promises during elections can safely throw the blame on courts whenever they find it inconvenient to fulfil them. Different canons of interpretation may be adopted at different times by

[12] Report of the Royal Commission on the Constitution of Australia—P. 245. S. Mills: "Thirty Years' Working of the Australian Constitution" in *Journal of Comparative Legislation*, Feb. 1933.

the supreme courts of the country leading to the upsetting of old decisions and adding to the uncertainties of law. Defects like these are inevitable under a federal system of government.

Suggestions for mitigating this uncertainty.

In connection with these defects it may, however, be noted that in actual practice they are not really so formidable and serious as they appear to be in theory. Even in Unitary States where the central government is compelled to delegate powers to local authorities, courts are called upon to dispose of questions of *ultra vires*; and there is therefore nothing very extraordinary in the courts of federal states being called upon to pronounce on the validity of the laws enacted by the part-states. This may therefore be regarded as a necessary feature of every governmental system. As regards the power of the courts to question the validity of the laws passed by the central legislature, it is found from the experience of the United States of America and several other federations that the number of such laws declared invalid by courts is not very large. Courts are cautious in the exercise of their authority in this respect. There is also the possibility of an improvement in the technique of judicial review on the lines on which it was provided for under the Austrian Constitution of 1920. The work may be left in the hands of a Special Constitutional Court freed from every other kind of civil or criminal jurisdiction so that it may decide promptly all constitutional issues coming before it. It may be given the power not merely to decide the validity of the statutes already enacted, but also of "a project of law destined to be submitted to the decision of a legislative body". This would promptly remove all occasions for doubt on the constitutionality of the laws placed on the statute book. Decisions in other cases may also be expedited by a rule that constitutional questions arising in the course of a trial should be taken directly in the very first instance to the supreme court instead of being decided upon by the lower courts and subsequently taken on appeal to the court of last resort. The period during which the constitutionality of a law may be attacked may be limited to a certain number of years from the date on which it is enacted, it being understood that, if within that period its constitutionality is not

questioned, it should be regarded as being valid.[13] It is quite possible to think of other improvements in the technique of judicial review and reform the lines on which it should be carried on and reduce the extent of the evil arising from it in all federal states.

No evidence for the view that federal states are comparatively weak.

There is no need to dwell at length on some of the other defects ascribed to federalism. It is said for instance that it is responsible for the weakness of a state in the conduct of its external affairs and that it promotes rebellion on the part of the constituent units and brings about their secession.[14] But there is no evidence in support of these views.[15] The strength displayed by a state in matters of foreign policy and the respect which it commands in the world of international affairs depend primarily and essentially on its financial and military resources. Federalism does in no way prevent the development of such resources by central governments. Even in the conduct of war federal states like the United States of America, Australia and Canada have not shown less vigour or efficiency than unitary states. In the last World War, nothing stood in the way of the central governments of federal states exercising all the powers they wanted for energetically prosecuting their campaigns and winning victory in them. The existence of differences of opinion between one section of the people and another in matters of foreign policy which may sometimes adversely affect the interests of the country is not a peculiarity of federal states. The opposition of the liberal party in England to the carrying on of the Boer War is well-known. The opposition of the Dutch element in the unitary state of South Africa to taking part in the world-war against Germany was not less strong than that of the French in the federal state of Canada.[16] These instances show that the strength of a country in times of war or in the regulation of its foreign affairs has no close relation with its

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[13] J. A. C. GRANT: "Judicial Review of Legislation under the Austrian Constitution of 1920"—*The American Political Science Review*, August, 1934.

[14] BRYCE: "The American Commonwealth", Vol. I, P. 341.

[15] GOOCH: "Regionalism in France"—P. 85.

[16] JAN H. HOFMEYER: "South Africa (Benn)"—P. 133.
BRADY: "Canada (Benn)"—P. 11.

having a unitary or federal government. It is determined by factors of an entirely different character.

The view that federalism promotes secession.

There are very few examples of rebellion or secession in federal states. The instance often quoted is that of the slave-owning southern states of the United States of America in 1861 and the terrible civil war that followed it. This event however had nothing to do with either the weakness or the strength of federalism. It was not federalism, but other irreconcilable differences between the north and the south on an issue of a fundamental character that was the cause of the civil war. In the history of every state there arise occasions when individuals and groups become so impatient and dissatisfied with the conditions around them that they do not hesitate to appeal to the sword to gain their cause. Many unitary states passed at some time or other in their history through such a stage. The unitary system of Britain did not prevent the Irish rebellion of recent times or the revolt of the thirteen American colonies in an earlier period; it did not prevent the silent revolution by which dependent colonies have become practically independent Dominions. The unitarism of South Africa has not succeeded in completely stopping the agitation of Natal for secession. The laws that determine the formation, growth and dissolution of political partnerships are of a diverse character, and from the single example of the American Civil War, it is not reasonable to conclude that federalism is a cause of disruption. The following words of Lord Bryce bring out the issue quite clearly: "It may be answered not merely that the National government has survived this struggle (The Civil War) and emerged from it stronger than before, but also that Federalism did not produce the struggle, but only gave to it the particular form of a series of legal controversies over the federal pact followed by a war of states against the union. Where such vast economic interests were involved, and such hot passions roused, there must anyhow have been a conflict, and it may well be that a conflict raging within the vitals of a centralized government would have proved no less terrible and would have left as many noxious *sequelae* behind".[17] There is at present a strong secessionist movement

17 BRYCE: "The American Commonwealth"—Vol. I, P. 348.

in Western Australia. But it is too soon to say what its ultimate outcome will be. Federal tariff and arbitration awards have hit hard her unsheltered primary industries and her general financial condition is not very sound. She feels that she can be better off outside the Union than inside it. But here also it must be noted that it is sentiment and not reason that is influencing her conduct. There is no strong evidence to show that she would be more prosperous as a separate state. It is also quite possible that there would be sufficient statesmenship among the leaders of the Commonwealth which would enable them to conciliate Western Australia and keep her within the union by contributing special grants and subsidies to her.

While federalism is not a cause of disruption, it may serve as a powerful aid to it. It has already been pointed out that federalism is necessitated by the lack of homogeneity among the people of a country. It is essentially with a view to satisfy those groups who feel that they are different from the rest of the community and have some special interests and needs of their own that a federal form of Government is established. Under such a system cultural minorities occupying a definite area within the state are enabled to have a government of their own which is autonomous in a certain sphere. But it is quite possible in some cases that even this grant of local independence may not give complete satisfaction to a particular minority, and it may resolve on cutting itself entirely away from the federal union and establish an independent state for itself. Where the minority adopts such an attitude and is determined on even using force for gaining its ends, the local autonomy which federalism grants to it may serve as a powerful aid in its pursuit of rebellion. It gets through the schools it maintains and controls an opportunity for carrying on an insidious propaganda against union and in favour of separation; it can encourage the production of literature advocating the views for which it stands; it can make use of its industrial establishments to secretly manufacture munitions of war; it can train its police force and militia for military purposes; and through its powers of taxation, it can collect the funds required for its campaign. This is the advantage that federalism

provides for a discontented minority which is bent on revolt. No such facilities are possible in a unitary state.

The need for co-ordination of work between central and local governments under a federal system.

Federalism may prove to be a burdensome and an irresponsible constitutional system unless there are agencies for bringing about a certain amount of co-ordination between central and local governments. Ordinarily it develops a peculiar habit of mind under the influence of which each government thinks that the best policy for it is to pursue its own course of action so long as it does not come into conflict with the other government. Such isolated action, however well-intentioned it may be, is in many cases injurious to the citizen who is subject to the authority of both the governments. In the field of taxation, for instance, it is quite possible for each government to go on adding little by little to the taxes it levies without its knowing or caring to know what the other government is doing. The total burden of taxation which the citizen has to bear may thus become very heavy, eventhough the burden, when looked at separately from the point of view of each government, may appear to be light. In such a situation the citizen is helpless, as each government will naturally try to throw the blame on the other. It has also been already pointed out that many governmental functions are interrelated and that there is no guarantee that anything done by one government will produce the results expected from it unless a desired course of action is taken by the other government. In such a situation each government is in a position to throw the responsibility upon the other for any neglect or failure on its own part; and the citizen again is unable to fix the responsibility.[18] If the evils arising under these circumstances are to be overcome, it is necessary that there should be some agencies—legal or extra-legal—for co-ordinating the work of both governments, so that they may not pursue policies which are in mutual conflict. In a democracy it is the political parties that are expected to fulfil this purpose. Ministers' conferences and other agencies of co-operation referred to already have come to existence to satisfy the same need. It is also clear from all this that the average citizen in a federation, having as he does the need

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[18] CANAWAY: "The Failure of Federalism in Australia"—Ch. II.

for watching the work of two governments, must be more alert and take a more intelligent interest in political questions than the citizen in a unitary state.

Federalism the only suitable form of government under certain circumstances.

Like other constitutional systems, federalism has thus its merits as well as its defects. But in countries and among peoples where it has been adopted, its merits are found to far outweigh its defects, and it is this that gives to it its special value. No constitutional system is ideally and universally the best. Its soundness and efficiency depend on its suitability for the people for whom it is intended. Judged by this test, federalism may be said to be the best kind of government for people among whom there is a considerable amount of diversity in respect of language, religion and culture, and for countries which are vast in size and which contain provinces and sections with varying geographical and economic characteristics. In such situations, no other form of government can thrive so well and produce such good results as federalism does.

Elements of universal value in Federalism.

We may note in conclusion that there are certain elements of universal value in federalism. The principles for which it stands have been able to exercise a far-reaching influence on recent political thought and practice in almost every part of the world. There is no need to emphasize at this stage how the federal system is built on the maxim that the centres of authority in a state are many and not one. Its whole theory is opposed to centralization of power. It advocates its diffusion. It is this idea that is at the root of the modern attack on the theory of absolute and unlimited sovereignty of the state. A large number of political thinkers of the present day are upholders of the view that the state is only an association, that it is not identical with the community, that there are several other great associations—the family, the trade union, the church, etc.—through which man tries to realise the ends of his life and satisfy his social impulses, that each of them by virtue of the services it renders to him has a right to command his assent and exercise sovereignty over him, that the State is only one among a number of equals and has therefore no exclusive claim to the whole of man's loyalty and devotion, and that a distinction should always be drawn between the things that are Caesar's and those

that are not his.[19] All these and other kindred ideas found in pluralism, guild socialism and syndicalism are only adaptations of the central truth in territorial federalism that local governments have as much right to exist as central governments, that they have an independent value of their own and they should not be made subordinate to central authorities under any circumstances. It is also now becoming increasingly the practice of modern governments to recognise the importance of administrative bodies of a functional as distinguished from a territorial character and entrust them with the exercise of a large amount of authority especially in economic matters. The group consisting of the employers and of the employees in the mining industry or the cotton trade is considered to be not less real than a territorial group like a city or district or county. The tie of neighbourhood is not the only bond that brings men together. The wisest thing therefore for the state is to entrust functional groups and associations with the same kind of legislative and administrative authority as territorial associations like the constituent-units of a federation. As Laski puts it, "We need to let the cotton industry legislate for itself within the ambit of the general level at which the society broadly aims. We need to allow it to grow organs which can take initiative on its behalf".[20] This is the idea behind the corporative state about which so much is heard nowadays. There are evidences everywhere that federalism is gaining ground over a larger sphere of social and political organisation and that it is destined to play an important part in reconciling authority and liberty as well as in making the State more efficient than what it is at present.

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19 McIver: "The Modern State"—Pp. 149-

20 Laski: "Grammar of Politics"—P. 269.

CHAPTER X

THE INDIAN EXPERIMENT

(1)

Indian Federation the result of the simultaneous operation of the two processes of union and the loosening of unity.

It has already been pointed out[1] that federations may be brought into existence in two ways—either by areas previously independent of one another and enjoying sovereignty becoming united under a common government to which they surrender a part of their sovereignty, or by a unitary system becoming loosened with the result that the administrative divisions which in the past were completely subordinate to a supreme central government are elevated to the position of autonomous units independent in a sphere of their own. One distinguishing feature of the federation to be established in India is that it is the outcome of the simultaneous operation of both these processes. The surrender of a portion of their sovereignty by the Indian States and their coming together with the Provinces in British India as the constituent units of a single system illustrates the first process; the second process is illustrated by the transformation of the Provinces of British India into autonomous units. To what extent the new system is really federal depends on the nature of the powers surrendered by the States and the nature of the autonomy acquired by the Provinces.

Review of the essentials of Federal Union.

So far as the first of these two points is concerned there is still a great deal of uncertainty. It is not known definitely to what extent the States are prepared to accept the constitution that is embodied in the Government of India Bill now under discussion in the British Parliament. It may, however, be affirmed that it is only if the Bill is passed into law in its present form and the States accede to the federation according to its terms that a true federal relationship will be established between them and the future government of India. A federation is an organic and perpetual union of territorial units from which they have no legal or constitutional right to secede. The surrender of sove-

[1] Chapter III—*Supra.*

reignty made by them to the central government is not a conditional one which it is possible for them to revoke at any subsequent time. Moreover the exercise by the central government of the sovereignty surrendered to it should be real and effective. It should possess the right to legislate on all the subjects included within its jurisdiction; its laws must be automatically binding on the inhabitants of the units without any need for their re-enactment by the government of the units; and it should have all the powers required to unreservedly enforce its laws. It is also necessary that the total extent of the powers surrendered to it should be sufficiently large so that it may be a real 'government' and command the prestige and dignity associated with that term. It is in the light of these considerations that the nature of the relations between the acceding states and the future federal government should be examined.

Demands of the States not consistent with Federalism.

In respect of all matters except the last one, the Government of India Bill recognises fully the need for all these requirements. Under its terms no State is compelled to join the Federation, but a State which voluntarily accedes to it has no legal right to secede from it on any future occasion. It requires a declaration from the ruler of such a State that he accepts the Constitution Act as binding on his State and his subjects and that he assumes the obligation of ensuring that due effect is given to it within his State.[2] The rulers of States have not yet seen the propriety and the wisdom of these features of the Bill. They still continue to think in terms of a confederacy or an alliance. It is their contention that the agreement through which they signify their willingness to enter the Federation should be known as a 'Treaty of Accession' and not an 'Instrument of Accession' as proposed in the Bill; that the Constitution should not have any general binding character on them; that their relations with the federal government should be determined solely by their individual treaties of accession;[3] that there should be no direct relationship between their subjects and the federal government;[4]

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[2] Clause 6, 1 (a).

[3] Princes' Note accompanying their letter to the Viceroy published in the White Paper: March 18, 1935.

[4] Mr. Bhulabhai Desai's Note to the Princes published in the 'Hindu', March 25, 1935.

that federal laws should not become automatically operative in their States and that before they acquire that character the ruler of each State should issue a proclamation declaring them to be a part of the law of their States.[5] They also contend that in times of prolonged crisis when the normal constitutional machinery is found to break down, they should automatically get back the powers originally surrendered by them, the federation being regarded as dissolved.[6] No argument is required to show that claims like these are totally inconsistent with a real federal system. To assume that a treaty should be the basis of their accession is to imply thereby that they are free to repudiate it at any time and withdraw from the federation. Even when there is a breakdown of the regular constitutional machinery, the proper course is not to declare that the federation is dissolved but to devise a new machinery which will work more efficiently and successfully. Every modern constitution contains provisions required for meeting a general crisis. Moreover the federal government will be no government unless its laws are binding on the subjects of the States without any intervention of the State-rulers.

Students of the history of federalism will find nothing new or strange in the demands put forward by the Indian States. They are the questions which aroused the keenest controversy in other federations and which were finally settled in the only appropriate way in which they should be settled under a federal system. The history of the United States has clearly shown the untenability of the claim put forward by the units to sovereignty and to secession. The position taken by the States—that even after they become members of the federation, they should have safeguards essential for 'the unimpaired continuation of their sovereignty and autonomy'—is one which is opposed to the theory as well as the practice of federalism. It brings out prominently that they have not yet developed that 'spirit of community' which lies at the foundation of all federations.

The States also have taken objection to those clauses in the Bill by which special powers are granted to the federal govern-

[5] Mr. Bhulabai Desai's Note.—*op. cit.*

[6] Princes' Note—*op. cit.*

States and the exercise of administrative powers.

ment to see that federal laws are properly enforced in the territories of the units. This is one of the necessary powers that every central government should possess. It is the inherent right of every federal legislature 'to impose duties upon the State or officers and authorities thereof' in connection with every one of its laws.[7] Under the Bill, the ruler of every State is given the option to have the federal laws enforced in his territory either by federal officials directly or by his own subordinates. When he chooses the latter alternative, he is required to agree to provisions 'enabling the Governor-General in his discretion to satisfy himself, by inspection or otherwise, that the administration of that (Federal) law is properly carried out'.[8] A general duty is also imposed on the rulers of States that " (1) the executive authority of every Federated State shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation " and it is also laid down that " (2) If it appears to the Governor-General that the Ruler of any Federated State has in any way failed to fulfil his obligations under the preceding sub-section or has failed to maintain a system of administration adequate for the purposes of any Act of the Federal Legislature, the administration of which has been entrusted to him or to his officers, the Governor-General acting in his discretion, may issue such directions to the Ruler as he thinks fit ".[9] The experience of European Federations like Germany has shown that, where there is legislative centralization accompanied by administrative decentralization, it is absolutely essential that the central government should have adequate authority to issue directions and to exercise supervision over the administrative work of the units.[10] This is all the more necessary in respect of Indian States in many of which the standards of administration are still of a medieval character. This will have the additional advantage of habituating the people of States to the idea that they are citizens of India as a whole and not merely of their particular states.

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7 Government of India Bill—Clause 123; 1 (3).

8 Government of India Bill—Clause 124.

9 Government of India Bill—Clause 127.

10 Chapter VI—*Supra.*

Small extent of the powers surrendered by states.

It has already been pointed out that the reality of the Indian Federation will very much depend on the extent of the powers surrendered by the States to the central government. It is, however, uncertain what exactly these powers will be. The federal list of subjects contains fifty-six items [11] and it is hoped that the rulers of States will accept items 1 to 45 as federal. If this hope is fulfilled, the federal government will enjoy all necessary powers. But there is no certainty that it will be fulfilled. The Constitution Act gives complete freedom to the ruler of each acceding State to "specify which of the matters mentioned in the Federal Legislative List he accepts as matters with respect to which the Federal Legislature may make laws for his State and his subjects".[12] It does not lay down any minimum list of subjects which a ruler should accept before he joins the federation. It is therefore quite possible that many rulers may choose only a few subjects, and such a possibility is all the greater in view of the fact that the privileges which a ruler enjoys as a member of the federation are the same, whatever be the number and significance of the subjects accepted by him as federal. Two other circumstances also point to the same conclusion. The whole federal scheme has been devised by the British primarily with a view to meet with as little risk as possible the demand for a responsible central government in India. It is their conviction that the institution of central responsibility will not be a safe experiment unless the princes and their nominees are introduced in fairly large numbers into the central legislature and ministry. It will therefore be their aim to make it easy for the rulers of States to enter the federation, and they will naturally not be over-critical in examining the terms on which they are prepared to enter. The only alternative to this will be to indefinitely postpone the introduction of central responsibility and provoke intense political agitation in the country. The other circumstance is that according to the Constitution Act federation cannot be established until the rulers of States representing not less than half the aggregate population of States, and entitled to not less than half the seats to be allotted to the

11 Government of India Bill—Seventh Schedule: List I.

12 Clause 6: 1 (b).

States in the federal upper chamber have signified their desire to accede to the federation.[13] Such a condition implies that if the Crown is really anxious to proclaim the federation at an early date, it should not impose hard conditions on States intending to accede. It looks as if most States will be in a position to dictate their own terms to the Crown and that as a consequence the new central government will have only a narrow range of authority over the inhabitants of the States and that it will not be able to make a strong impression on them or command sufficient prestige and dignity in its relations with them.

Another serious defect in the distribution of powers between the Central and State Governments is that from the federal legislative list have been excluded a large number of subjects which in the modern industrial age require regulation on uniform lines. Factories, Welfare of labour, Bankruptcy, Trade Unions, Regulation of industrial disputes, and the prevention of the extension of infections or contagious diseases are some of the subjects that belong to this category. The Constitution Act recognises no doubt the need for uniformity in some of the aspects relating to these matters and it has included them in the 'Concurrent Legislative List'.[14] But the operation of this list does not extend to the States. It is restricted only to the provinces. With a single tariff and that of a protective character over practically the whole federation, it would be in the fitness of things to have a uniform system of industrial legislation, so that the constituent units which are liberal enough to adopt a more progressive labour policy may not be at an undue disadvantage over those with a less liberal labour policy. Economic ties between the States and British India are becoming closer day by day. There is an urgent need for a centre of common industrial action for the whole country.[15] It is the prospect of the creation of such a centre that has reconciled many to the cause of the Indian Federation in spite of so many anomalies surrounding its structure. The present unwillingness of the States to accede to the

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13 Clause 5: (2).

14 Seventh Schedule—List III.

15 Report of the Joint Committee on Indian Constitutional Reform (cited as J.C.R.)—Vol. I: Para. 31.

industrial items of the concurrent list deprives the federation of a good deal of its usefulness.

The conclusion therefore follows that on the whole the States are retaining too much power in their hands which prevents the responsible federal government from obtaining even that minimum strength essential to give it the title of 'Government' in relation to the inhabitants of States.

State-autonomy limited not so much by the Federal Government as by the Paramount Power.

It should, however, be noted that while the States are thus free over a large sphere from the control of the federal government, they are not free from the control of the Crown. The latter will continue to exercise paramountcy as before. The indefinite and therefore the all-embracing character of paramountcy has already been described.[16] The paramount power has the right to control the internal affairs of States to an enormous extent as it has the final responsibility to defend them not only against external attack but also from internal rebellion. It is true that in the new constitution it is the Viceroy and not the Governor-General that is the representative of the Crown in the exercise of paramountcy. But politically this is a distinction without a difference. The two offices are combined in the same person. The Resident or some other agent of the Viceroy continues to be stationed in each State to watch its administration. The Resident's position is closely parallel to that of the provincial governor in the exercise of his special responsibilities. Thus the autonomy of the Indian States has no comparison with the autonomy possessed by the units in self-governing federations like Australia or Canada. The peculiarity of the situation is that the rulers of States are willing to become dependents of a Viceroy over whose decisions in matters of paramountcy they have no influence or control and should feel suspicious of a federal government of which they themselves form an influential part.

(2)

Improvement in the autonomy of the Provinces.

Whether under the new constitution the Provinces in British India are sufficiently autonomous to have their relationship with the central government regarded as federal is the next

[16] Chapter I: (2) *Supra.*

question to be considered. In a few respects they may be said to have moved in the direction of real autonomy. In the first place, the Constitution Act itself lays down the list of subjects [17] over which they could claim jurisdiction. This list is not subject—as is the case at present—to any modification by the central government. They have therefore a sphere of activity which they can call their own. In the second place, their control over this sphere is of an exclusive character.[18] The central legislature has no right to legislate on any of the subjects included in it. Provincial bills do not as at present require the assent of the Governor-General before they become laws. Any invasion of the provincial field by the central legislature can be questioned through courts which have the power of interpreting and upholding the constitution. The subjects in the provincial list are fairly exhaustive and in addition to these the provinces have the power to make laws on the subjects included in the concurrent list. Thus they have wide opportunities of giving adequate expression to their individuality and to the special needs of their inhabitants, and their governments possess a really effective authority over an extensive field.

Autonomy of the Provinces not real because of the powers vested in the Governor.

The reality of provincial autonomy depends, however, on the composition of the government set up in the provinces under the new constitution. According to it, each province is governed by a Governor with the help of a ministry responsible to the legislature. The extent to which a government of this kind is free from the control of the centre depends on the position of the governor. If he is only the nominal head of the province like the Governor in the States of Australia or the Lieutenant-Governor in the provinces of Canada and if the real authority is in the hands of the provincial ministry responsible not to any outside body like the Government of India but to the elected provincial legislature and through it to the electorate, the province can then be said to enjoy real autonomy with a true federal relationship towards the centre. If on the other hand the governor happens to be the real head of the province with ultimate

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17 Seventh Schedule—List II.

18 Clause 100 (3).

control over legislation and administration, the province ceases to be autonomous in any accurate sense of the term. While it is true that the autonomy of a province has nothing to do with its government being despotic or democratic, it should be recognised that the elevation of the position of the governor to that of a despot will make the province dependent on the central government of India, as in the exercise of his power the governor is required to be answerable to the Governor-General. The Constitution Act states thus: "In so far as the Governor of a Province is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall, subject to the provisions of any Instrument of Instructions issued to him by His Majesty, *be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by the Governor-General in his discretion.*" [19] The Governor is a despot in relation to the provincial legislature and electorate; but to the extent to which he is a despot in this sense, he is dependent on the Governor-General, and his despotism reduces the province to a position of dependence on the Governor-General. Real provincial autonomy therefore requires that the Governor should be merely the constitutional head of the province and leave the actual government to be carried on by the ministry responsible to the legislature and the electorate. This distinction is fundamental, but it has always been ignored by the exponents of the official view.[20]

An analysis of the new constitution shows clearly that the Governor continues to be the main spring of action and the real motor force in driving the machinery of provincial government. This is in part the outcome of the system of communal and special electorates on which the legislature is based and in part the outcome of the special powers and responsibilities conferred on

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19 Clause 54.

20 For official view see Report of the (Muddiman) Reforms Enquiry Committee (1924).—Paras. 44-47; WHYTE: 'India a Federation?'—P. 295-6.

See the author's article "The Indian Constitutional Experiment"—'TRIVENI': Nov.—Dec. 1934.

him. The electoral system makes it impossible to bring into existence either stable majorities or parties based on political issues. Communal groups and factions will dominate the legislature and no stable ministry can ever be formed.[21] Every provincial cabinet will under these circumstances be compelled to look to the Governor for support and the part he will play will be as important under the new constitution as it was under the old.[22] While the ostensible object of the new scheme of provincial government is to confer power on a responsible ministry, the whole political system is so devised as to make it impossible for a responsible government to work. Besides this the Governor has vast powers of control over the police and over the departments of law and order.[23] He has also a number of special responsibilities which give him a general power of supervision over the whole field of provincial administration.[24] These responsibilities are really in the nature of certain standards by which the Governor is to judge whether the ministers and the legislatures are doing their work well or ill. In such a situation the cabinet will prefer to be guided not by the opinion of the electorate or of the parties in the legislature but by the opinion of the Governor. Nothing will be gained by the ministry by opposing him as he is empowered to place on the statute book any law he likes[25] and appropriate the revenues of the province for any purpose he wants[26] irrespective of the sanction of the legislature, provided he considers such a course of action essential to enable him to duly discharge his responsibilities. The government of the province will literally be the government by the Governor.

It may therefore be concluded that the Indian Constitutional System cannot be styled truly federal until a real parliamentary type of government is introduced into the provinces. The des-

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21 J. C. R.—Para 20.

22 J. C. R.—Para 102.

23 J. C. R.—Para 93; Government of India Bill: Section 56.

24 Government of India Bill—Clause 52.

25 Government of India Bill—Clause 90.

26 Government of India Bill—Clause 80.

potism of the provincial Governor is inconsistent with a sound federal system.

(3)

Indian Federation one of disparate units. The special privileges of the states.

The Indian system is a federation of disparate units.[27] It is based in the main on inequality of status. The constituent units are divided into the two classes of States and Provinces, and the former enjoy in many respects a privileged position as compared with the latter. The accession of States to the federation is voluntary, while that of the provinces is compulsory. The states are therefore quite free to choose the terms on which they are prepared to join it. They possess autonomy over a larger sphere. Even on matters included in the Federal Legislative List, they have powers of concurrent jurisdiction.[28] They enjoy residuary authority on all subjects falling outside that list, while in the case of the provinces the residual powers of legislation are with the Governor-General acting in his discretion. Some of the States retain the power of imposing internal customs duties which are quite 'inconsistent with the freedom of interchange of a fully developed federation.'[29] Maritime States which take their stand on treaty-rights continue to levy sea-customs even after they become members of the federation, thus interfering with the universally recognised principle that within the federal area there should be uniformity in tariffs.[30] The inhabitants of States are free from liability to pay the federal income-tax and they enjoy special privileges in respect of other direct taxes like the corporation-tax and surcharges on income-tax.[31] The rulers of States can insist on their own officials administering the federal laws in their territory. The provinces have no hand in amendments to the Constitution, while no amendment made to it can extend to a Federated State without the concurrence of the ruler of that State.[32]

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27 J. C. R.—Para 29.

28 J. C. R.—Para 236.

29 J. C. R.—Para 264.

30 J. C. R.—Para 265.

31 J. C. R.—Para 256.

32 Government of India Bill—Section 6 (4).

This will make the federal system unworkable.

It is this vast disparity between the position of the States and of the provinces that makes it doubtful whether the Indian Federal System will be a workable one. The federal legislature has a wider range of authority over the provinces than over the States. It is in a position to make laws for British India on a number of important subjects on which it cannot make laws binding on States. It can levy special financial burdens on provinces and determine through the federal ministry the kind of administrative policy that should be followed towards them without any corresponding power over the States. A large proportion of members of the federal legislature and of the federal cabinet belong to the States. The above disparity in the power and authority of the central government as between the States and the Provinces really amounts to giving control to the nominees of States over the fortunes of the people of British India, without the latter having a similar control over the administration of the States. The representatives of provinces will find it difficult to reconcile themselves to such a situation. It is suggested that friction may be prevented if the nominees of States adopt a self-denying ordinance and refrain from voting on purely British Indian affairs.[33] But such a convention is bound to fail in practice. "It is a common place of constitutional government that the legislature by its votes not only enacts laws but appoints and dismisses responsible governments. The provisions of a particular measure may interest only British India, yet if it is of sufficient importance for its rejection to involve the existence of the government, this becomes of direct interest to India as a whole, and it is clear that no convention can prevent the representatives of Princes from taking part in the critical division. It follows that this anticipated convention would break down in the face of any measure of first class importance upon which the fate of a Government might depend."[34] Here is a most serious obstacle in the way of the smooth working of the Indian federal government.

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[33] J. C. R.—Para 217.

[34] Motion of the Marquess of Salisbury.—J.C.R. Vol. I (Part II) Proceedings: Pp. 291-2.

The resentment of the provinces at the authority exercised over them by the States is bound to be all the greater in view of that authority emanating from autocratic monarchs and not from popular representatives. This dissimilarity between the fundamental institutions of the States and of the provinces is really another serious barrier in the way of complete harmony between the two halves of the federation.[35] The States are under autocratic personal rule. The Provinces are quasi-democratic. The members of the federal legislature belonging to the States are the nominees of rulers; they are bound to be in the position of delegates voting according to instructions given to them by their chiefs. The members belonging to the Provinces are on the other hand representatives elected by assemblies deriving their authority ultimately from the people. The difficulty of the two halves working together becomes all the greater because of the prospect that the nominees coming from the States may not in reality be the nominees of their rulers but of the paramount power and thus constitute an 'official' bloc in close alliance with British interests. Many of these nominees are bound to be members of the Indian Civil Service who are lent by the Government of India to the States. It is with a view to get them into the federal legislature that the Constitution Act lays down that 'a person shall not be deemed to hold an office or profit under the Crown in India by reason only that while serving a State, he remains a member of one of the services of the Crown in India and retains all or any of his rights as such.'[36]

This danger increased by the autocratic character of the States whose nominees form an official bloc.

It is not only in respect of their powers that the States enjoy a privileged position. They are also granted a great deal of weightage of representation on all the organs of federal government. Seats are reserved to them in the federal ministry.[37] Though they have less than twenty-five per cent of the total population of the country, they are given forty per cent of the seats in the Council of State (The Upper Chamber) and a third of the seats in the House of Assembly (The Lower Chamber).[38]

Weightage of representation enjoyed by the States in both houses of legislature.

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35 J. C. R. Vol. I (Part II) Proceedings: Mr. Attlee's Draft, P. 259: Para 17.

36 Clause 26 (4) (b).

37 J. C. R.—Para 192.

38 Clause 18 (2).

This secures to them a power and influence in the government of the federation which is out of all proportion to their population or size or wealth or the obligations for which they are prepared. As it is anticipated that all the States will not accede in the early years of the federation, an additional bait is offered to the States actually acceding, that they will be entitled to elect representatives in both houses up to half the number of States' seats which remain unfilled.[39]

Most of these anomalies due to Federation being really a Federation of the British, the Princes and the Muslim minority.

These as well as several other anomalies in the new constitution can be best understood if the federation is regarded not so much as a federation of territorial units as of interests. It has already been pointed out that the federal movement is the outcome primarily of an alliance between the British, the Indian Princes and the Muslim minority.[40] It is therefore really a federation of these three interests, and the new governmental structure bears on it all the marks of this alliance. The separation of the Viceroyalty from the Governor-Generalship secures the interests of the British in the field of paramountcy; the Governor-General exercising his powers at discretion and in his individual judgment safeguards their interests in the sphere of defence, external affairs, ecclesiastical affairs, finance and commerce. In the discharge of all these special responsibilities, he is entrusted with supreme authority to make laws and to appropriate revenues without the approval of the legislature. The interests of the Princes are safeguarded through the various devices to which reference has already been made. The interests of the Muslim minority are equally safeguarded by other constitutional provisions. To increase the number of Provinces with Muslim majorities, the new province of Sind is created. Though they form only a fourth of the population, they are given a third of the seats on the Federal Legislature. They are guaranteed adequate representation on the Federal ministry and public services. They are permitted to have their representatives elected in separate communal electorates not only in provinces where they are in a minority but also in those where they are in a majority.

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[39] First Schedule—Part II, 10.

[40] Chapter III: (2) *Supra.*

Thus the problem of central government in the Indian Federation has really been approached from the standpoint of the interests of the British, the Princes and the Muslim community and the resulting structure is naturally one of inequality and privilege.

(4)

Dyarchy in the Provinces and Triarchy at the Centre constitute a new type of Federation.

Federalism is defined as a constitutional system under which the people of a given territory are subject to the control not of one government but of a number of governments each supreme in a sphere of its own. An analysis of the new constitutional system of India shows that it is federal from more than one standpoint. It is federal like Canada, Australia, Switzerland, etc., because it has one central government supreme in a certain sphere and a number of local governments—State and Provincial—each supreme in a certain other sphere. In this respect the usual features of territorial federalism are reproduced here. But in another sense also the Indian system is federal. At each of the territorial levels—Provincial and Central—there are really a number of governments. In every province there are two governments—one consisting solely of the Governor and the other consisting of the Governor, his council of ministers and the Provincial Legislature. The Governor by himself is supreme in certain matters and for certain purposes; and in respect of them there is no limit to his legislative, financial and administrative authority. In respect of other matters and purposes the other government has similar authority. As has already been observed, this system of dyarchy has all the characteristics of federalism in it. In the new scheme of provincial government, the old dyarchy is continued in another form. There are still certain reserved matters but these are administered now by the Governor alone instead of by the Governor and his executive council as before. Similarly there is a system of *Triarchy* at the centre. The Viceroy constitutes a separate government by himself and is in charge of all matters relating to paramountcy. The Governor-General by himself constitutes another government and controls the departments of defence, external affairs, ecclesiastical affairs and several other subjects for which he has special responsibilities. There is a

third government consisting of the Governor-General, the Federal ministry and the Federal Legislature. Among these three governments at the centre and the two governments in the provinces, there is as precise a division of powers laid down by the constitution as the division between the centre and the parts usually found in all territorial federations. It is this dyarchy in the provinces and the triarchy at the centre that give to the Indian Constitution a peculiarly federal character not met with elsewhere.

This is the outcome of the peculiar position of India in the British Empire.

This is entirely due to the peculiar position occupied by India in the British Empire. She is not a mere Crown colony and she has not yet become a Dominion. Her exact position is summed up in that well-known announcement made by the Secretary of State for India in the House of Commons on August 20, 1917 and embodied in the Preamble to the Government of India Act of 1919. She is now on the stage where the policy of the British Government " is that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government as an integral part of the British Empire." Governments of Crown colonies and of Dominions are simple as they are built on only one principle. A Crown colony is merely an integral part of the Empire. Its government has therefore only to stand for this principle. There is no need to have institutions to give expression to the idea of self-government. A Dominion is at the opposite end. It has ceased to be a part of the Empire. It has a completely responsible self-government and its institutions have therefore to embody this one characteristic. The transitional position of India requires, however, that her governmental organization should be of a mixed character, some of her political institutions indicating that she is an integral part of the Empire and some others indicating that she is on the road to responsible government. This task is accomplished through the creation of a multiplicity of governments at the centre and in the provinces. The Viceroy, the Governor-General and the Governor stand for India as an integral part of the Empire while the other governments mark the sphere of her responsibility.

The dependent position of India and its relation to the settlement of some acute federal problems.

In one respect, however, this dependent position of India for the time being helps her in the solution of some problems which become acutely controversial in framing a federal constitution. The part to be played by the whole and the units in amending the Constitution is one such problem. It is easily solved in the case of India by neither the whole nor the parts being given a hand in it. The sovereign British Parliament retains the entire power in this respect. Even the slight opportunity to suggest amendments in certain directions given to the legislatures in India are hedged round by so many restrictions that it is not possible for any real initiative to be exercised by them.[41] Similarly the creation of new provinces out of the existing ones, the increase or decrease in their areas, the alterations in the number of their representatives in the federal legislature and similar other matters which require elsewhere the consent of the units affected can in the Indian Federation be brought about by Orders in Council—the federal and the provincial legislatures being merely given the opportunity to express their opinions.[42] In the admission of new states into the Federation and in determining the terms of their accession, the federal legislature has no hand. For a period of twenty years the matter lies entirely at the discretion of the Crown.[43] The controversy as to the location of residuary authority has been settled by vesting it in the Governor-General in his discretion and not in the provinces as advocated by the Muslims or in the centre as advocated by others.[44] The consent of the Governor-General is also sufficient to validate a provincial law on any of the matters included in the concurrent list even though such a law is in conflict with an earlier federal law.[45] When disputes arise between the federal and provincial governments as regards the execution by the latter of any administrative directions issued by the former, it is the Governor-General that has to settle them.[46] Inter-Pro-

The extraordinary powers of the Governor-General.

41 Clause 445.

42 Clause 271, 272.

43 Clause 6, (5).

44 Clause 104.

45 Clause 107 (2).

46 Clause 125 (3).

vincial disputes regarding water-rights are left to his arbitration.[47] In his capacity of being the representative of the imperial authority, the Governor-General is entrusted with many powers to enable him to settle most of the controversies that may arise between one unit and another, and between the centre and the units. The *Bundesrath* is generally spoken of as having been the centre of authority in the German Empire. With his powers in legislation, administration, finance and judicial arbitration, the Governor-General may be said to occupy a similar position in the Indian federal system.

(5)

Provision for concerted action by the several governments is a feature of the Indian Federation.

One marked feature of the Indian Federation is the provision that is made for concerted action by the different governments in matters of common interest. The idea has gained ground in all modern federations that their central and local governments should not look at each other as rivals competing for power but as agencies set up by the people to work in co-operation so that the common welfare may be better promoted. In conformity with this principle of interdependence, the Indian Constitution provides for the establishment by an Order in Council of an Inter-Provincial Council charged with the duty of (a) 'inquiring into and advising upon disputes which may have arisen between provinces; (b) investigating and discussing subjects in which some or all of the provinces, or the Federation and one or more of the provinces, have a common interest; or (c) making recommendations upon any such subject and, in particular, recommendations, for the better co-ordination of policy and action with respect to that subject.'[48] It is also expected that in addition to this there will be a regular system of inter-provincial conferences and consultations as a normal feature of administration.[49] All the existing central organisations of research like the Council of Agricultural Research are to continue and other central boards for irrigation, forestry, public health, education, etc. are to be established. A feature of

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[47] Clause 130.

[48] Clause 133.

[49] J. C. R.—Para 223.

all these organisations is that they are representative of the central and provincial governments, and it is out of their contributions that the expenditure incurred on them is to be met. Their business is to collect and co-ordinate information for general use. The Constitution Act also makes it possible for a number of provinces to combine together and have a common Public Service Commission; it is also possible for particular provinces to make use of the Federal Public Service Commission if they so desire.[50] Provincial co-operation is further encouraged through empowering the Federal Legislature to legislate for two or more provinces on any of the matters enumerated in the Provincial Legislative List if the concerned Provincial Legislatures pass resolutions to that effect.[51]

A still larger amount of co-operation is secured in the sphere of finance. Though the general basis is to allocate separate fields of taxation to the central and local authorities, joint action by them is required in most financial matters. Many taxes are levied by the Federation while their proceeds are assigned either wholly or partly to the Provinces. In the case of certain succession duties, stamp duties, terminal taxes, taxes on railway fares and freights, the proceeds are assigned wholly to the units; in the case of the income-tax a certain percentage is assigned to the provinces. In both these cases the assignment is obligatory. There are other taxes like duties on salt, federal duties of excise and export duties of which a share may be assigned to the provinces at the discretion of the Federal Legislature. The Federal Government is given the right of levying surcharges on those taxes the proceeds of which are compulsorily assigned to the Provinces. It is under an obligation to make contributions to provinces like Sind, Orissa and the North-West Frontier, which are not expected to be otherwise able to balance their budgets.[52] It is also open to the Federal Government to make grants-in-aid to provinces for purely provincial purposes and it is equally open to the provinces to make similar grants to the

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50 J. C. R.—Para 227.

51 Clause 103.

52 Clause 139.

Federation for purely federal purposes.[53] This course will prevent the raising of issues regarding their constitutional validity on any future occasion. On the whole, therefore, the Indian system of federal finance possesses a degree of flexibility not met with in other federations. While complete freedom is given to the units to borrow on the security of their revenues, the Federation is also empowered to make loans to them or to give guarantees in respect of the other loans raised by them subject to the conditions it thinks fit to impose.[54] This extensive field for co-ordinate action is an indication of the progressive character of the Indian Federation in certain essential respects.

[53] Clause 140.

[54] Clause 160.

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