CHAPTER I

HISTORICAL INTRODUCTION

1.1 The Constitution of India has brought into existence a federal State. The legislative power is divided between the federation called in the Constitution as the Union and the units called the States. The Constitution of India has adopted the scheme of division of powers contained in the Government of India Act 1935, which for the first time introduced a federal pattern of government for India. Though constitutionalised federalism dates only from the 1935 Act, because of the large devolution of powers, the rudiments of federal government were in existence even earlier. It is proposed to trace briefly the evolution of Indian federation with special emphasis on the division of powers and the problem of conflict of legislative powers.

EAST INDIA COMPANY AND CENTRALISED GOVERNMENT

1.2 It is sufficient for the present purpose to state that the East India Company, which had established trading centres at Madras, Bombay and Calcutta, obtained in 1765 the right of diwani over Bengal, Bihar and Orissa. The mal-administration that followed made it necessary for the British Parliament to legislatively intervene in the affairs of the Company. The Regulating Act, 1773, "altered the constitution of the Company at home, changed the structure of the Government

1. The centrally administered territories pose no problem for the present discussion.
2. 13 Geo. III, C.64.
in India, subjected in some degree the whole of the territories to one supreme control in India, and provided in a very inefficient manner for the supervision of the Company by the ministry. As the Company obtained more and more territories in India the diversities in the laws of the country became very prominent. This was due to the fact that the legislative power of the Government was partly derived directly from the Crown, which introduced certain aspects of the English Common Law, and partly from the supplanted sovereignties in Indian territory, which had followed the Hindu and Mohammedan Law. In order to clear the confusion and conflicts and to bring in some measure of uniformity, greater centralisation of the legislative power was necessary. Hence the Charter Act of 1833 superseded the then existing legislative powers of the Governments of Madras and Bombay, and enlarged, subject to certain restrictions, the powers of the Governor-General in Council. Provision was also made for the establishment of a Law Commission which was to take up codification of the laws in India.

INDIAN COUNCILS ACTS AND DECENTRALISATION

1.3 When the Crown assumed direct responsibility for the Government of India after the proclamation of 1857 and the passing of the Government of India Act 1858, there was a highly centralised governmental system in operation. However,

the size of the territory and the diversities present therein made centralised control in everything, without devolution of authority, impossible. The process of decentralisation was legislatively inaugurated by the Indian Councils Act of 1861. "The Act restored to the Governments of Madras and Bombay the powers of legislation which the Act of 1833 had withdrawn, but with one important distinction. Formerly the laws enacted by the local legislatures had been complete in themselves and came into operation of their own force. Thenceforth the previous sanction of the Governor-General was made requisite for legislation by the local councils in certain cases, and all Acts of the local councils required the subsequent assent of the Governor-General in addition to that of the Governor. To this extent the Governor-General was given direct and personal control over the exercise of all legislative authority in India".

1.4 From 1861 onwards till the reforms of 1919 there was centralised government with no attempt to rigidly demarcate the spheres of the government of India and of the provincial governments. The dominant conception, that the entire governmental system was one indivisible whole and amenable to the sovereignty of the British Parliament, made the position of the Provincial governments one of complete subordination. The

6. Para 50, ibid.
Central Legislature used to legislate on a wide field. The great Indian Codes were passed during this period. The practice of the local governments of first consulting the Government of India in matters of legislation and the requirement of Governor-General's assent for the validity of every provincial legislation ensured that there was no conflict between the central and the provincial legislation.

1.5 The reforms of 1919 envisaged progressive self-government for India. Indians were to be associated in a limited way with the governance of the country. This called for a greater demarcation between the functions of the Government of India and of the provincial governments as only a part of the provincial function was proposed to be transferred to Indian hands. "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 realisation of responsible government in India as an 'integral part of the British Empire', however did not need from the British point of view the formation of a federal pattern for the government of India. Stating clearly that the task of the reformers was not the formation of a federal government, the Montagu Chelmsford Report said:

7. For a brief account of the legislative activity see Keith, op. cit. p.210 et seq.
8. Montagu's announcement in the House of Commons on August 20, 1917 regarding British policy on Indian Constitutional reforms.
"Granted the announcement of August 20, we cannot at the present time envisage its complete fulfilment in any form other than that of a congeries of self-governing Indian provinces associated for certain purposes under a responsible government of India; with possibly what are now the Native States of India finally embodied in the same whole, in some relation which we will not now attempt to define. For such an organisation the English language has no word but 'federal'. But we are bound to point out that whatever may be the case with the Native States of the future into the relation of provincial and central governments, the truly federal element does not, and cannot, enter. There is no element of pact. The government of the country is at present one; and from this point of view the local governments are literally the "agents" of the Government of India. Great powers have been delegated to them because no single administration could support the Atlantean load. But the process before us now is not one of federalizing. Setting aside the obstacles presented by the supremacy of Parliament, the last choice of making a federation of British India was in 1774, when Bombay and Madras and rights to surrender. The provinces have now no innate powers of their own, and therefore have nothing to surrender in a foedus. Our task is not like that of the Fathers of the Union in the United States and Canada. We have to demolish the existing structure, at least in part, before we can build the new. Our business is one of devolution, of drawing lines of demarcation, of cutting long-standing ties. The Government of India must give, and the provinces must receive; for only so can the growing organism of self-government draw air into its lungs and live. It requires no great effort of the imagination to draw a future map of India which shall present the external
semblance of a great new confederation within the Empire. But 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”.

Therefore, while recommending the devolution of greater financial and legislative powers in favour of the provinces, the Montagu Chelmsford report recognised that the Government of India should have the power to intervene in Provincial matters for the protection and enforcement of the interests within its responsibility, to secure uniformity of legislation considered desirable for the whole or any part of India and to pass legislation which might be adopted by the Provinces with or without modification. But the demarcation of functions should not lead to challenges in the courts of legislative enactments on the ground of excess of powers as it would subject "every Government in the country to an almost intolerable harassment". In view of the large responsibility of the central Government for defence and law and order it was inexpedient to put statutory limitations on its powers. Adoption of constitutional conventions, which had already gained some force in India, according to which the Government of India would not without strong reasons legislate in the internal affairs of the Provinces was suggested to achieve harmony in the relations between the central and the provincial governments.

10. Ibid, para 212.
To give effect to the recommendations of the Montagu Chelmsford Report, the Government of India Act 1919, provided for the making of rules for the classification of subjects, in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature. The Act also provided that rules be made for the devolution of authority in respect of provincial subjects to local governments and for the allocation of revenues or other moneys to those governments and for the settlement of doubts arising as to whether any matter did or did not relate to a provincial subject. The Devolution Rules issued in 1920, in pursuance of the above provisions classified the functions of government into central subjects and provincial subjects. The list of central subjects contained 47 items and the list of provincial subjects contained 51 items. Defence of India, external relations, all India communications,

12. Sub-section 1(b) and 2(v) of Section 45A, ibid.
shipping, posts and telegraphs and criminal law were included as central subjects. Local Government, medical administration, public health, education with certain exceptions, agriculture, police and prison were included in the provincial list. All matters expressly excepted from inclusion among provincial subjects and all other matters not included among provincial subjects were to be treated as included among central subjects. Item 51 in the provincial list provided that any matter, though falling within a central subject, declared by the Governor-General in Council to be of a merely local or private nature within a province should be considered as a provincial subject. It was also provided that any matter included in the list of provincial subjects should, to the extent of such inclusion, be excluded from any central subject of which, but for such inclusion, it would form part.

1.8 The Devolution Rules also provided for the settling of doubts with regard to provincial subjects. If any doubt arose as to whether a particular matter did or did not relate to a provincial subject the Governor-General in Council was to decide the matter finally. Since residuary powers were included in the list of central subjects as per item 47 referred to above, the question to be determined in deciding whether a topic of legislation belonged to the central sphere

15. The full lists are given in Annexure A.
17. Rule 3(2), ibid.
18. Rule 4, ibid.
or provincial sphere was really solved when a decision was reached on the question whether it belonged to the provincial sphere or not. It may be noted that in giving enumerated powers to the provinces and the residuary powers to the centre, the pattern of the distribution of legislative power in the Canadian Constitution was followed.

1.9 The classification of subjects of legislation into central and provincial made by the Devolution Rules however did not introduce the federal principle. Its main purpose was to introduce in the provincial sphere the so-called 'dyarchy' to satisfy partially the Indian demand for self-government, by identifying provincial subjects some of which could be treated as 'transferred subjects' to be administered by Governors acting with responsible ministers. The Central Legislature could legislate on any subject even though it was classified as a provincial subject and the provincial legislature could legislate on any subject for its own territory even though it was classified as a central subject. Even the Acts of provincial legislatures could become law only on the assent of the Governor-General. The validity of any Act of the Indian Legislature or of any local legislature could not be questioned in any legal proceeding on the ground that the Act affected a provincial subject or a central subject as the case might be.

20. Part II of Schedule I to the Devolution Rules, 1920, gave a list of 'transferred subjects'.
22. Section 84(2) ibid.
It will thus be seen that it was the Government of India Act, 1935, which for the first time introduced the federal principle in the governance of India.

TOWARDS THE ACT OF 1935

1.10 The appointment in 1924 of the Reforms Enquiry Committee presided over by Sir Alexander Maddiman, followed in 1927 by a Royal Commission with Sir John Simon as Chairman, having failed to satisfy Indian aspirations, a Round Table Conference with the representatives of British India and the Indian States was convened by the British Government. During the period from 1930 to 1932 the Conference held three sessions. On January 19, 1931, at the conclusion of the first session of the Round Table Conference, Ramsay MacDonald, the then British Prime Minister, stated the policy of the British government as the setting up of an all India federation comprising of British India and the Indian States. This was followed in December 1931 by a further statement to the second session of the Conference. The statement was presented to the Houses of the British Parliament in a White Paper. The proposals of the White Paper which envisaged a federal set-up

23. C.42 (25 and 26 Geo v.).
24. The Indian National Congress boycotted the first session, but after the Gandhi-Irwin Agreement of March 5, 1931, was concluded, Ghandiji attended the second session in 1931 as the Chief spokesman of the Congress.
were further scrutinised by a Joint Select Committee of the Parliament to which Indian delegates were also invited. The Government of India Act, 1935 was based on the Report of the Joint Select Committee.

THE WHITE PAPER PROPOSALS

1.11 The White Paper noted that the conception of federation would necessitate a departure from the then existing system of concurrent jurisdiction. The Federation and the Provinces were to have exclusive legislative jurisdictions. The legislative fields for this purpose were to be defined in terms of subjects mentioned in a schedule to the Constitution Act. It was also proposed that with regard to some subjects, while some measure of uniformity of law might be necessary, variation of detail to meet local conditions was no less necessary. Hence the necessity for including in the schedule a list of subjects over which the Federation and the Provinces would have concurrent legislative jurisdiction was also recognised.

1.12 In accordance with the above proposals, the White Paper gave in Appendix VI, three Legislative Lists. Lists I and II set out matters with respect to which the Federation and each of the Provinces were to have exclusive power to make laws for the peace and good government respectively of the federation.

27. Appendix VI is reproduced as Annexure B.
or any part thereof and a province or any part thereof.
List III set out matters with respect to which the Federation and the Provincial Legislatures were to have concurrent jurisdiction. Though the Lists were intended to be exhaustive, it was not possible to enumerate every subject of a local and private character with regard to which the legislative power could appropriately vest with the provinces only. Hence a general power was included in the Provincial List which would enable a Province to legislate "on any matter of a merely local and private nature in the Province not specifically included in that List and not falling within List I or List III". But a subject, in its inception of a merely local or private character, which subsequently became of all India interest, was to be subject to Federal legislation with the sanction of the Governor-General in his discretion.

1.13 With regard to a residual subject, if any, not falling within the scope of any of the three lists, the Federal or Provincial Legislatures could legislate with the previous sanction of the Governor-General given in his discretion.

1.14 It was proposed to empower the Federal Legislature to legislate on a provincial subject at the request of two or

28. Thus item 76 in List II read "Generally, any matter of a merely local or private nature in the Province not specifically included in this List and not falling within List I or List III, subject to the right of the Governor-General in his discretion to sanction general legislation on that subject."

more provinces. A time limit was to be prescribed for challenging the validity of legislation and any question about the validity of legislation arising in a subordinate court was to be referred to the High Court for decision. The consent of the Governor-General given in his discretion was required for the introduction in the Federal or Provincial Legislature of certain types of legislation. The Federal and Provincial Legislatures were not to have the power to pass certain types of discriminatory legislation.

In order to resolve conflicts between federal legislation and provincial legislation it was provided:

"In the event of a conflict between a Federal law and a Provincial law in the concurrent field, the Federal law will prevail unless the Provincial law was reserved for, and has received, the assent of the Governor-General. The Federal Legislature will have no power to repeal or amend a Provincial law to which the Governor-General has thus assented, save with the prior sanction of the Governor-General".33

30. Para 118, ibid.

31. These were: legislation which repeals or amends or is repugnant to any Act of Parliament extending to British India, or any Governor-General's or Governor's Act or Ordinance or which affects any Department reserved for the control of the Governor-General, or the coinage and currency of the Federation, or the powers and duties of the Federal Reserve Bank in relation to the management of currency and exchange, or religion or religious rites and usages, or the procedure regulating criminal proceedings against European British subjects, paras 119 and 120 ibid.

32. Para 122 to para 124 ibid.

1.16 The Indian States were expected to accede to the Federation by a formal Instrument of Accession. The powers and jurisdiction in respect of such matters as a ruler of a State was willing to recognise in federal matters were to be transferred to the Federation. Such federal jurisdiction in the States was not exclusive as in the Provinces. The States also could exercise existing powers of legislation in relation to subjects treated as federal by the Instrument of Accession. Paragraph 117 of the White Paper made the following provision for settling conflicts between Federal legislation and legislation by an acceding State.

"If any provision of a law of a State is in conflict with an Act of the Federal Legislature regulating any subject which the Ruler of that State has by his Instrument of Accession accepted as a Federal subject, the Act of the Federal Legislature, whether passed before or after the making of the law of the State will prevail".

THE JOINT COMMITTEE REPORT

1.17 The Joint Committee of the British Parliament which considered the White Paper proposals reported in 1934. The proposal to have an exclusively Federal List and an exclusively Provincial List was approved. With regard to the Concurrent List, while it was necessary for the Provinces to have legislative power, the need for the legislative jurisdiction

34. Para 2 of the White Paper Proposals.
of the Central Legislature "to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial effort, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province", was also recognised. However, "as some mitigation of the uncertainty arising from the inevitable risks of overlapping between the entries in the Lists", it was necessary to provide that the jurisdiction of the Federal Legislature should, notwithstanding anything in the Provincial and Concurrent Lists, extend to matters enumerated in the Federal List, and that the federal jurisdiction under the Concurrent List should, notwithstanding anything in the Provincial List, extend to matters enumerated in the Concurrent List. Such a provision would ensure that in cases of conflicts between entries in the List the federal jurisdiction always prevailed.

1.18 The adhoc allocation by the Governor-General of the residuary of legislative power as and when the need for legislation arose was thought to be the best compromise between the Hindu opinion for vesting it in the Centre and the Muslim

36. Instances of the First were provided by the subject-matter of the great Indian Codes (for example, the Indian Penal Code and the Code of Criminal Procedure), of the second, by such matters as labour legislation, and, of the third, by legislation for the prevention and control of epidemic disease, para 51 of the Report.

opinion for vesting it in the Provinces. If it had been possible to allocate the residuary power to the Centre or to the Provinces it would have been possible to manage with two Lists, the Concurrent List and one enumerated Provincial or Federal List.

1.19 The Joint Committee also made some changes in the Lists included in the White Paper Proposals. These proposals were accepted. The provisions governing the distribution of legislative power and the resolution of conflicts in the Government of India Act 1935 were based on the Joint Committee Report.

THE GOVERNMENT OF INDIA ACT, 1935

1.20 The Government of India Act envisaged the establishment of an All India Federation comprised of the British Indian Provinces and the Indian States. The federation was to come into effect on the issue of a Proclamation by His Majesty on presentation to him of an Address by each of the Houses of Parliament in that behalf. In addition, the condition for the issue of the Proclamation establishing the federation was that the rulers of states representing not less than half the population of the States and entitled to choose not less than 52 members of the Council of State (Upper House of the Federal Legislature) had acceded to the federation. The federation thus had two types of units. The previous British

38. Paras 54 to 56 of the Report.
39. For the revised Lists see para 242 of the Report.
Indian Provinces and the Indian States which might later on join the federation. With regard to the former the distribution of the legislative power between the federation and the units was based on the list system recommended by the Joint Committee. With regard to the States, the federal jurisdiction would extend only to such subjects as were included in the Instrument of Accession accepted by the British Government.

1.21 A Federal Court was also established with original jurisdiction to settle disputes between the federation and the units regarding the interpretation of the Government of India Act 1935 or of the Orders in Council made thereunder or about the authority vested in the federation by virtue of an instrument of accession accepted by a state. The Federal Court was also given appellate jurisdiction to entertain appeals from the decisions of the High Courts regarding the interpretation of the Government of India Act or any Order in Council made thereunder. The provincial part of the Government of India Act came into operation from 1st April 1937. And elections were held according to the scheme of the Act and popular ministries entered office. However, the Central Government continued under the 1919 Act. There was opposition from the principal political parties for the establishment of the federation as provided in the Act. The Muslim League considered the All India Federal Scheme "most reactionary,

43. Sections 200-218 dealt with the Federal Court.
retrograde, injurious and fatal to the vital interests of British India vis-à-vis the Indian States. However, the League had no objection to try the provincial scheme for what it was worth in spite of the most objectionable features contained therein. The Indian National Congress objected to the federation because of the presence of Indian States which could continue to retain their feudal set up. In his presidential address to the Indian National Congress 50th Session, Pandit Jawaharlal Nehru held that "the present federation that is being thrust upon us is a federation in bondage and under the control, politically and socially of the most backward elements in the country". While the dispute between the League and the Congress continued, the Second World War broke out in 1939 and the Governor-General announced the postponement indefinitely of the establishment of the federation.

EVENTS DURING THE WAR

1.22 As a protest against the Governor-General's unilateral declaration of India's involvement in the war, the Congress Ministries which had been formed in seven Provinces resigned and the Governor-General took over control of the Governments. While the Governor-General continued his efforts to pacify the Indian leaders and to secure support for the war measures, the Congress reiterated its demand for freedom, and the Muslim

League came out with its demand for a separate Muslim majority state of Pakistan. With the initial success of Japan in the war a settlement to Indian problem became a matter of urgent necessity. Hence the British Government sent Sir Stafford Cripps, Lord Prv y Seal of the War Cabinet, with proposals for negotiations with Indian leaders. These proposals envisaged the creation of an Indian Union which would be a Dominion within the British Empire like other dominions. A Constitution making body would be brought into existence at the end of the war with provision for the participation by the Indian States. Provinces and States which did not wish to participate could keep out. The British Government would be willing to sign a treaty with the Constitution making body regarding the details of the transfer. The British Government's special responsibilities for protecting the minorities and for the prosecution of the war would be continued. The Congress rejected the proposals as it thought it would encourage the separatist tendencies at the very inception. Muslim League rejected the proposals because it did not adequately concede the demand for a separate state. Since the Cripp's proposals broke down the Congress revived its civil disobedience and non-cooperation movements and in August 1942 passed the famous "Quit India" Resolution. But the British suppressed the movement and maintained its authority during the war period.

1.23 In June 1945 certain proposals were mooted on behalf of the British Government which came to be styled as the Wavell Plan named after the Viceroy Viscount Wavell. These proposals aimed at the Viceroy's Council being composed entirely of Indians except for defence and the Governor-General. These proposals failed because of the disagreement regarding the composition of the executive council.

1.24 In 1945, when the war came to an end and the Labour Government headed by Atlee assumed power in England, fresh attempts were made to solve the Indian problem.

1.25 In February 1946, the Secretary of State announced the sending out to India of a mission of Cabinet Ministers to explore in India in consultation with the Viceroy and the political leaders the avenues of settlement of the question of India's freedom. As no agreement could be finally reached between the Indian National Congress, the Cabinet mission put forward finally its own proposals on 16th May 1946. It recommended the establishment of a Constitution on the following lines:

(1) There should be a Union of India, embracing both British India and the States which should deal with the following subjects: Foreign Affairs, Defence, and Communications; and should have the powers necessary to raise the finances required for the above subjects.

49. consisting of Lord Pethick Lawrence, Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade and Mr. A.V. Alexander, First Lord of Admiralty.
50. See, Gwyer and Appadorai, op. cit., pp.577-584.
(2) The Union should have an Executive and a Legislature constituted from British Indian and States' representatives. Any question raising a major communal issue in the Legislature should require for its decision a majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting.

(3) All subjects other than the Union subjects and all residuary powers should vest in the Provinces.

(4) The States will retain all subjects and powers other than those ceded to the Union.

(5) Provinces should be free to form groups with Executives and Legislatures, and each group could determine the Provincial subjects to be taken in common.

(6) The Constitutions of the Union and of the groups should contain a provision whereby any Province could by a majority vote of its Legislative Assembly call for a reconsideration of the terms of the Constitution after an initial period of ten years and at ten-yearly intervals thereafter.

THE CONSTITUENT ASSEMBLY

1.26 A constitution making machinery and a Constituent Assembly composed of representatives of the Provinces and Indian States was to be brought into existence, in accordance with the Cabinet Mission Proposals. Elections to the Constituent Assembly took place and the Muslim League joined the elections. However, a difference with the Congress crept up regarding the interpretation of the grouping sections in the Cabinet Mission Proposals. The Muslim League had hoped that the grouping provisions contained the germ of a separate state of Pakistan. When the Congress' stand on the grouping
would in effect thwart this hope, the League proclaimed its intention of boycotting the Constituent Assembly. A clarification issued by the British Government favourable to the League's stand did not improve matters. This statement of December 6, 1946, also said that the constitution framed by the Assembly would not be enforced on the people who were not represented therein. This was taken as indicative of the British Government's willingness to constitute two Constituent Assemblies. So when the Constituent Assembly met on 9th December 1946 the Muslim members boycotted it and the League demanded its dissolution.

1.27 On 20th February 1947 the British Government declared that their rule in India would be ended by June 1948 and if there was no agreement in India about the transfer of power they would decide to whom the power in India should be transferred. Meanwhile, Mountbatten replaced Wavell as Governor-General and Viceroy. According to Mountbatten's plan partition of India was agreed upon. On 26th July 1947 the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The British Parliament passed the Indian Independence Act which was to come into force from 15th August 1947. This Act set up two separate Dominions,

India and Pakistan, provided for the abolition of British sovereignty over the territories of the Dominions, declared that dominion legislatures would be sovereign and provided that the Constituent Assemblies already set up would function also as the legislatures for the respective dominions.

1.28 The Constituent Assembly for India which had its first meeting on 9th December 1946 became a sovereign body only on the passing of the Indian Independence Act. The Objectives Resolution introduced into the Constituent Assembly on 13th December 1946 by Pandit Jawaharlal Nehru, stated in a nutshell its aims and purposes. It said among other things that

"This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and

...territories (of the Indian Union) whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom;"55

1.29 The Constituent Assembly appointed a number of committees. They were the Union Powers Committee, the Union Constitutional Committee, the Provincial Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights, the Committee on Chief Commissioners Provinces, the Committee on Financial Relations Between Union and States, and the Advisory Committee on Tribal Areas. Based on the reports of these Committees the scheme for the drafting of the new Constitution was accepted. The Drafting Committee was appointed on August 29, 1947. The draft prepared by the Drafting Committee was discussed in the Constituent Assembly and finally passed on 24th November 1949. It is proposed to note some developments regarding the drafting and acceptance of the provisions governing the distribution of powers.

PROVISIONS GOVERNING THE DISTRIBUTION OF POWERS

1.30 Since the Cabinet Mission proposals which formed the basis for the working of the Constituent Assembly envisaged a federal set up with defence, communication and foreign affairs allocated to the federation, initial attempts were to spell out the full implications of these powers. The Objectives Resolution spoke of the inherent, implied, and resulting powers of the Union which betrayed the anxiety to make the Union as powerful as possible within the frame-work of the Cabinet Mission Plan. Thus the Union Powers Committee set up on January 25, 1947, received a number of memoranda from its members like K.M. Munshi and Alladi Krishnaswamy Ayyar regarding the scope of the Union powers. In its report to the Assembly
on April 28, 1947, it pointed out the possibility of the revision of the Union powers in the light of the ultimate decision that might be taken in regard to partition. The Union Constitution Committee set up on April 30, 1947, initially accepted the proposal of Gopalaswamy Ayyangar and Alladi Krishnaswamy Ayyar to have three lists as in the case of the Government of India Act 1935. After the announcement on June 3, 1947, regarding the partition, a joint meeting of the Union Constitution Committee and Provincial Constitution Committee on June 5, 1947, noted that the limitations of the Cabinet Mission's proposal regarding the power of the Centre no longer survived. At its meeting on June 6, the Union Powers Committee decided that there should be a federation with a strong centre, there should be three lists of legislative powers with the residue to the centre, and that the Indian States should be on a par with the Provinces regarding the federal legislative lists.

1.31 The position regarding Indian States was still uncertain as the process of integration was not yet over. So in the initial draft, Article 217, which dealt with the distribution of powers, was made applicable only to the Governor's Provinces and the Chief Commissioner's Provinces (States specified respectively in Parts I and II of Schedule I). The distribution of powers between the Federal Centre and the Indian States had to be settled on the basis of negotiations depending upon the preparedness of the native States to surrender more powers than those specified in the Cabinet Mission proposals.
1.32 Article 217 of the Draft Constitution prepared by the Drafting Committee provided for the distribution of powers in three lists as in the case of the Government of India Act 1935 and Article 223 provided for the residuary powers of legislati including taxation. Alladi Krishnaswami Ayyar however thought that since it had been decided to vest the residuary powers

56. 217(1) Notwithstanding anything in the two next succeeding clauses, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in the next succeeding clause, the Legislature of any State for the time being specified in Part I of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to the two preceding clauses, the Legislature of any State for the time being specified in Part I of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included for the time being in Part I or Part III of the First Schedule notwithstanding that such matter is a matter enumerated in the State List.


57. 223(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

in the Centre, there was no longer the necessity to follow the three-fold division as in the case of the Government of India Act. It may be recalled that the Joint Select Committee which reported on the proposals for the reforms introduced in the 1935 Act had observed that if it were possible to allocate the residuary powers either to the federation or to the units it would have been possible to manage with only one list of subject. Alladi proposed a draft which began with the exclusive powers of legislation of the States followed by the Concurrent powers and then by the Union powers.


59. "I would, therefore suggest for the consideration of the Constituent Assembly the following article as a substitute for articles 217 and 223(1) in the draft.

"(1) The Legislature of the States in Part I, Schedule I, shall have exclusive power to make laws for the State or for any part thereof in relation to matters falling within the classes of subjects specified in List I (Corresponding to Provincial Legislative List).

"(2) The Legislature of any of the States in Part I, Schedule I, shall in addition to the powers under clause (1) have power to make laws for the State or any part thereof in relation to matters falling within the classes of subjects specified in List II, provided, however, that the Union Parliament shall also have power to make laws in relation to the same matters within the entire area of the Union or any part thereof, and an Act of the Legislature of the State shall have effect in and for the State as long as and as far only as it is not repugnant to any Act of the Union Parliament.

"(3) In addition to the powers conferred by the previous sub-section, the Union Parliament may make laws for the peace, order and good government of the Union or any part thereof in relation to all matters not falling within the classes of subjects enumerated in List I and in particular and without prejudice to the generality of the foregoing, the Union Parliament shall have exclusive power to make laws in relation to all matters falling within the classes of subjects enumerated in List III. (contd...28).
1.33 In support of his revised draft Alladi stated in his note as follows:—

"(i) as much as it is agreed that the residuary power is to vest in the Centre (Union Parliament), the various enumerated items in the Union List are merely illustrative of the general residuary power vested in the Centre.

(f.n. 59 contd.)

"(4)(a) The Union Parliament shall have power to make laws for the peace, order and good government of the States in Part II, Schedule I.

(b) Subject to the general powers of Parliament under sub-section (1), the Legislature of the States in Part II, Schedule I, shall have the power to make laws in relation to matters coming within the following classes of subjects:

Provided, however, that any law passed by that unit shall have effect in and for that unit so long and as far only as it is not repugnant to any law of the Union Parliament.

(This provision is necessary, if the recommendations of the adhoc Committee on Chief Commissioners' Provinces in this regard are accepted).

"(5) The power to legislate either of the Union Parliament or the Legislature of any State shall extend to all matters essential to the effective exercise of the legislative authority vested in the particular legislature.

"(6) Where a law of a State is inconsistent with a law of the Union Parliament or to any existing law with respect to any of the matters enumerated in List I or (List II), the law of the Parliament or as the case may be the existing law shall prevail and the law of the State shall to the extent to repugnancy be void".

(This follows the Australian and American provisions: Without embarking upon an examination of each section and each clause, a court may easily come to the conclusion that an Act taken as a whole is repugnant to another law).

If it is felt necessary, special provision may be inserted in regard to laws in respect of matters in the Concurrent List on the lines of article 231(2) though I think such a provision may not be necessary in view of the overriding power of the Central Legislature".

The proper plan, therefore, is to define the powers of the States or Provincial units in the first instance, then deal with the concurrent power and lastly deal with the power of the Centre or the Union Parliament while at the same time making out a comprehensive list of the powers vested in the Centre by way of illustration to the general power. The plan adopted in section 100 of the Government of India Act was to some extent accounted for by the fact that there was no agreement then among political parties as regards the location of residuary power and it was left for the Governor-General to decide by which Legislature the residuary power was to be exercised in any particular place in cases not covered by any of the Lists. There is no such problem facing us now. A canvassing of the meaning and import of individual items in the Central List has become of much less importance now than under the provisions of the Government of India Act.

The repetition of "notwithstanding" in every clause of section 100 has been the subject of prolonged and unnecessary arguments in courts. 60

However, the majority of the members of the drafting Committee thought that the question was merely one of form and preferred not to disturb the wording suggested in the draft.

1.34 K. Santhanam, A. Ananthasayanam Ayyanger, T.T. Krishnamachari and Smt. G. Durga Bai gave notice of an amendment that Alladi's draft be adopted in preference to the one in the draft Constitution. B.N. Rao, the Constitutional Adviser, thought that Alladi's draft did not provide for the

60. Ibid, pp.675-76.
61. Note to Draft Article 217, see ibid, pp.598-99.
predominance of the Union power in case of a conflict between an item in the Union field and an item in the State field. Under the draft Constitution the words "notwithstanding anything in two succeeding clauses" clearly provided for such a contingency and absence of these words in Alladi's draft would lead to ambiguity and would make provincial list the dominant one. This amendment proposed by Santhanam and others was not moved in the Assembly.

1.35 However, on 13th June 1949, Professor Shibenlal Saxena moved in the Constituent Assembly an amendment exactly similar to the one earlier suggested by Alladi and pointed out how it would be more logical than the one already adopted by the Assembly. He was, however, unsuccessful.

1.36 While discussing the passage of entry 91 of the draft Constitution, Hukam Singh and Naziruddin Ahmad pointed out the redundancy involved in enumerating items 1 to 90 in List I when by the residuary entry 91 it was proposed to confer on the Union all the powers not mentioned in Lists II and III.

1.37 Hukam Singh wanted the word 'other' in entry 91 to be deleted. Naziruddin Ahmad wanted entries 1 to 90 to be deleted and article 217 redrafted on logical lines. "All complications could be avoided and matters simplified by

63. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.
drafting Article 217 to say that all matters enumerated in List II must belong to States, and all matters enumerated in List III are assigned to the centre and the States concurrently and that every other conceivable subject must come within the purview of the centre.  

1.38 The assembly upheld the view that it was too late to raise the question of the deletion of the entries 1 to 90 as they had already been passed by the Assembly. Professor Shibenlal Saxena thought that entry 91 would strengthen the centre. Dr. Ambedkar defended the enumeration of items 1 to 90 along with the mention of the residuary power in item 91 on the ground that such a step was necessary to give detailed information to the States which were anxious to know the extent of the power of the centre and which would not be satisfied by a "symbolic phrase" residuary powers. He said that such enumeration was made in the Canadian Constitution as well as in the Government of India Act. The amendments moved by Hukam Singh and Naziruddin Ahmad were not adopted.  

1.39 In Union of India v. H.S. Dhillon discussed later under the chapter on 'Residuary Powers', the Supreme Court pointed out that entries 1 to 96 in the Union List are mere illustrations of the residuary entry 97 and that the

66. Though the reference to the Government of India Act did not bear an exact analogy as the residuary power was not allotted either to the federation or to the provinces but was to be allocated in the discretion of the Governor-General.  
enumerations may be of some assistance in interpreting the extent of State's powers. The result of this case would seem to suggest that it would have been better if the drafting of Article 217 had been modified as suggested by Alladi Krishnaswami Ayyar and Shibanlal Saxena and of the entries in the Union List as suggested by Hukam Singh and Naziruddin Ahmad.