I. Establishment of the Federation of India and Accession of the Indian States.

Several years' prolonged efforts to set up a constitutional structure of India at last took shape in the Government of India Act, 1935. As previously stated, a scheme was made, now for the first time, for the union of the British Indian Provinces and the Indian States in a federation. The type of federation contemplated in the Government of India Act, 1935 was unique in all respects, though it possessed the usual appearances of a federal union.

Section 5 of the Act of 1935, prescribed the methods and conditions for the inauguration of the federation. The inauguration of the federation in a sense depended upon the wishes of the States. Federation was to be inaugurated only when a required number of States, i.e., States that were entitled to send not less than 52 members to the Council of States and the aggregate population of which amounted at least to one half of the total population of the States would accede to the federation.

The accession of a State to the federation was to be governed by an Instrument of Accession executed by the State concerned. It would specify the extent to which a Ruler was prepared to transfer power from the State to the Federation. Section 6 of the Act of 1935, prescribed the details to be declared in the Instrument of Accession. By
virtue of the Instrument of Accession, the Federal Government, the Federal Legislature, the Federal Court and any other federal authority would be able to exercise in relation to the State, such functions as might be vested in them by or under the Act; but the authority to perform such functions was to be governed by the terms of the Instrument of Accession only. Section 6(2) of the Act of 1935 laid down that the Instrument of Accession should specify the matters with respect to which the Federal Legislature would be able to make laws for the State concerned and the limitations should also be mentioned, if there would be any. S.6(4) however, provided that His Majesty was free to accept or reject any Instrument of Accession, if he thought it proper to do so. If it appeared to His Majesty that the terms were inconsistent with the scheme of federation embodied in the Act he was free to reject it.

Although the Act of 1935 did not specify definitely the subjects which should be accepted as federal by the States it was expected that at least most of the important subjects mentioned in the Federal List were to be recognized as such by the Ruler of a State in his Instrument of Accession. In the British Parliament it was held on the 27th of February, 1935, "First, the States will be invited to accept the first 45 items as federal subjects. They will of course, be free to accept other subjects if they so wish. Secondly, there will and must, be some variations from State to State, either in the number of subjects or in the Qualifications which they attach to their acceptance". The

1. S.6(1)(a) of the Act of 1935.
Joint Committee on the Indian Constitutional Reforms 1933-34 (Commonly known as the Joint Parliamentary Committee) observed that at least the first 48 items of the Federal List attached to the White Paper should be accepted by the States as federal, though it was admitted that there might be 'deviations from the standard list' in exceptional cases. But the Committee mentioned that if the reservations or exceptions were of such a character as to make the accession illusory there would be no obligation on the part of the Crown to accept such an accession.

Regarding the inauguration of the federation, the Provinces were provided with no opportunity to express their opinion. They were not asked to register their approval or disapproval of the scheme. The inauguration of the federation depended solely upon the States. Without the acquiescence of the States the federation would not come even if the Provinces were in favour of it; while with the approval of the required number of States, the federation was to be brought into existence and no question of considering the willingness or unwillingness of the Provinces would arise. The reasons for meting out this differential treatment were explained by the Joint Committee on the Indian Constitutional Reforms, 1933-34 in this way:

"the Indian States are wholly different in status and character from the Provinces of British India, and that they are not prepared to federate on the same terms as it is proposed to apply to the Provinces. On the

4. Ibid, Para - 156.
first point, the Indian States, unlike the British-India Provinces, possess sovereignty in various degrees and they are, broadly speaking, under a system of personal government. Their accession to a Federation cannot, therefore, take place otherwise than by the voluntary act of the Ruler of each State, and after accession the representatives of the acceding State in the Federal Legislature will be nominated by the Ruler and its subjects will continue to owe allegiance to him. On the second point, the Rulers have made it clear that, while they are willing to consider federation now with the Provinces of British India on certain terms, they could not, as sovereign States, agree to the exercise by a Federal Government in relation to them of a range of powers identical in all respects with those which that Government will exercise in relation to the Provinces on whom autonomy has yet to be conferred."

So an identical system of Central-local relationship was not to be found in the proposed federation. Without the States the British Government could not think of bringing the federation into being and for securing their acquiescence too many concessions were made in the Act of 1935.
II. Distribution of Legislative Powers between the Centre and the Units under the Government of India Act, 1936.

The federal scheme envisaged by the Government of India Act, 1935, as stated above, apparently possessed all the characteristics of a federation. But if we probe deeply each one of the characteristics will show some uniqueness, some special features, which cannot be found in any other federation of the world. Impressions of different federal systems were stamped upon the Indian model, yet it did not conform to any one of them. It is true that federal systems vary, owing to the peculiarities of the situation. But the Indian federation was an innovation to satisfy various - even conflicting-interests - which resulted in the creation of a very peculiar type of federation.

The first essential characteristic of a federal government is the existence of two sets of government, each independent of the other within its allotted sphere. The essence of federalism, as pointed out before, is this that there should be a clear demarcation of fields of action of the two different governments.

Under the Government of India Act there was a division of subjects of legislation between the Central and the Provincial Governments. But there is a fundamental difference in the division of powers in the case of a unitary government and in the case of a federal government. Under the Government of India Act the division was made for purely administrative convenience. There was no
exclusive Provincial field and the Central Legislature retained concurrent powers of legislation in respect of the entire Provincial field. In doubtful cases when it was not clear whether the subject belonged to the Central or the Provincial field, the Governor-General in Council would decide the matter. So it was the Central executive head, and not any impartial agency like the Judiciary, which was the ultimate determinant of the question. But with the advent of the federation this could no longer be the case. So a clear division of legislative competence was necessary when the Government of India Act, 1935 was passed. The Joint Parliamentary Committee said: "We are fully sensible of the immense practical advantages of the present system, and of the uncertainties and litigation which have followed elsewhere from a statutory delimitation of competing jurisdictions, but we are satisfied that a relationship between Centre and Provinces, in which each depends in the last resort for the scope of its legislative jurisdiction on the decision of the Central Executive as represented by the Governor-General would form no tolerable basis for an enduring Constitution and would be inconsistent with the whole conception of autonomous Provinces."

It is generally accepted that there are several things which cannot be properly administered if left to different local governments and so are to be entrusted to the central or federal government which is able to look at them from a wider perspective. But the actual extent of powers granted to the federal government in a particular case, depends upon the peculiarities of the state concerned. If we analyse the conditions which existed at the time of the creation of federation in some of the States of the world this will be evident; and this will also explain the peculiar distribution of powers under the Government
of India Act, 1935.

When the thirteen American Colonies wanted to form a federation they were anxious to maintain their respective sovereignties. Economic and military necessities brought them closer and reluctantly they parted with their powers. This attitude is obvious in the distribution of powers in the U.S.A. According to Art.1 S.(3) of the Constitution of the U.S.A. powers granted to the Centre are enumerated under only 18 heads. The States forming the federation wanted to give the federal government only those powers which were absolutely necessary. But in the case of Canada local sentiment was not as strong as it was in the case of the U.S.A. One of the greatest tragedies of American history - the American Civil war, which ended in 1865 - also revealed the evils of excessive State-feeling. With this horrible memory fresh in mind Canada shaped her constitution. Some form of unitarianism had also a trial on the soil of Canada and so the central government was given greater powers there than the provincial governments. S.91 of the British North America Act, 1867 allots 29 items to the central government, while S.92 gives 16 heads to the provincial governments. In the cases of agriculture and immigration both the Dominion parliament and provincial legislatures can make laws though the Dominion legislation will prevail over provincial legislation in case of conflict.

In the case of the Commonwealth of Australia, the Colonies which were united under the federal bond had separate political existence under the Commonwealth. Naturally, therefore, they did not want to give too much power to the federal government. But as they profited from the examples of the U.S.A. and Canada, they were aware of this fact that without an adequate range of activity the federal
government could not work properly. Moreover, from the experience of the working of these two federations they understood that the centre-state relationship means a co-ordinate activity directed towards making the country prosperous. The Australians were not divided racially or culturally as the Canadians. But as the Colonies possessed separate political identities they were anxious to retain powers, as far as possible, in their own hands. So they devised a peculiar system of division of powers. Very few of the powers which they vested in the centre were exclusive powers. The states retained concurrent jurisdiction over most of the items surrendered to the centre. S.51 of the Commonwealth of Australia Constitution Act, 1900 mentions 39 items, most of which are to be enjoyed conjointly with the states. S.52 mentions a few powers which are given exclusively to the centre and by the operations of sections 90, 111, 114, 115 a few other powers become exclusive. S.90 makes the power of the Australian Parliament to impose duties on customs and excise and to grant bounties on the production or export of goods exclusive. S.111 makes provision for voluntary submission of any part of its territory by any state which, if accepted by the Commonwealth, should be under the exclusive jurisdiction of the Commonwealth. In addition to these provisions, powers regarding defence (by the combined operation of S.51 (VI) and S.114) and currency and coinage and legal tender (by the combined operation of S.51 (XII) and S.115) become exclusive. 

In the case of concurrent powers, however, under S.109 if there is any inconsistency between the central law and state law the central law is to prevail. All powers not enumerated belong to the particular states.
This peculiar distribution of powers shows how reluctant, yet how practical, the fathers of the Australian constitution were. They were not very eager to part with their respective rights; but from the experience of other federations they took the lesson that an extremely weak central government would not serve their purpose well. So they granted considerable powers to the centre, but made almost all of them concurrent, thus retaining a share for the states also in these fields.

The circumstances in which the federal scheme of 1935 was conceived for India left their mark upon the distribution of powers laid down therein. The Government of India Act, 1935 contained the most exhaustive distribution of powers as compared with the other federations of the world. It was based mainly upon the Canadian and Australian schemes and yet it did not totally follow either of them. That the structure was built upon the plinth of a strong unitary government was evident.

As regards the method of distribution of powers, the Indian federal scheme followed the system of Canada. The easiest possible course was taken by the fathers of the American Constitution, where only the powers of one government were enumerated, leaving all other powers to the other set of governments. This course was followed also in the case of Australia. In the case of Canada however, an attempt was made to give a precise limit to the powers of both the centre and the units. In this respect the Indian federation was similar to that of the Canadian federation, though it differed in some other respects. The American method is simpler than the Canadian
But the reason for adopting this detailed method was defended by Sir Samuel Hoare, the then Secretary of State for India, in these terms:

"If it had been possible to have one list we should have been glad, but, unfortunately, as in many of these Indian problems, when we came to apply to the actual facts what we desired, we found it to be impossible. We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant power in the Centre, and the Moslems who wish to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field, the Hindus demanding that the residuary field should remain with the Centre and the Moslems equally strongly demanding that the residuary field should remain with the Provinces.

"..... the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field."

So, S.100 of the Government of India Act, 1935, made a provision for the distribution of powers in three lists - Federal, Provincial and Concurrent. The Federal Legislature was given exclusive powers in respect of the subjects enumerated in List 1 of the Seventh Schedule.
of the Act of 1935, while List II enumerated those matters which were given exclusively to the Provinces. There was a third list of subjects which specified matters in respect of which both the Federal and Provincial Legislatures had concurrent powers of legislation. But though separate lists were made, greater importance was attached to the Federal Legislative List. In case of overlapping of the Federal List and the other two lists, the federal law would prevail. This was clear from the wordings of S.100 of the Act of 1935. Subsection (1) of section 100 used the expression 'notwithstanding any-thing in the two next succeeding sub-sections' the Federal Legislature had exclusive powers of legislation in respect of List I, while Sub-section (3) of S.100 stated that the Provincial Legislatures had exclusive power of legislation in respect of matters enumerated in List II, 'subject to the two preceding sub-sections.' As regards the Concurrent List, the position was the same. Sub-section (2) of S.100 said, "Notwithstanding anything in the next succeeding subsection the Federal Legislature, and subject to the preceding sub-sections a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in list III in the said Schedule." So, if there was any overlapping of a matter falling within List III and of a matter falling within List II, the matter was to be treated as within the Concurrent List, while in case of a conflict between List I and List II, the Federal List would prevail. The observations of the Joint Parliamentary Committee also affirmed these conclusions. It said: "We recommend, however, as some mitigation of the uncertainty arising from the inevitable risks of overlapping between the entries
in the Lists, that the Act should provide that the jurisdiction of the Federal Legislature shall, notwithstanding anything in Lists II and III, extend to the matters enumerated in List I; and that the jurisdiction of the Federal Legislature under List III shall, notwithstanding anything in List II extend to the matters enumerated in List III. The effect of this will be that, in case of conflict between entries in List I and entries in List II the former will prevail, and, in case of conflict between entries in List III and entries in List II, the former will prevail so far as the Federal Legislature is concerned."

In the case of Canada, the British North America Act, 1867 contains analogous provision. The exclusive powers of the Dominion Parliament and the provincial legislatures are mentioned in sections 91 and 92 respectively of the said Act. S.91 gives the Dominion Parliament exclusive powers regarding 29 subjects, 'notwithstanding anything in this Act.' Here the opinion of the Judicial Committee of the Privy Council in England is that in case of overlapping of matters falling under S.92 and of matters falling under S.91, the Dominion Parliament possesses predominant position. This was clearly enunciated by the Privy Council in A.G. for Alberta V.A.G. for Canada. It was held, "It is well settled that in case of conflict between the enumerated heads of S.91 and the heads of S.92 the former must prevail."4

The Federal Court of India also expressed similar views regarding the position of the Federal Legislature.

under the Government of India Act, 1935. In Subramanyan V. Muttuswami, it was stated by the Federal Court:

"Section 100(3) Constitution Act provides that a Provincial Legislature has the exclusive power of legislating with respect to the matters enumerated in List IX, the Provincial Legislative List. But this power is expressly stated to be subject to the provisions of S.100(1) which give an exclusive power to the Federal Legislature with respect to the matters enumerated in List I, the Federal Legislative List. Hence though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided ex majoris autela, that if the two sets of legislative powers should be found to overlap, then the federal legislation is to prevail."

In the concurrent field the Provincial Legislatures were to share powers of legislation jointly with the Central Legislature. But here also, it was the Central law which would ordinarily prevail over the Provincial law. Any Provincial law, whether passed before or after a Central law in the concurrent field, if inconsistent with the Central legislation, was to become invalid up to the point of inconsistency. This provision is analogous to S.109 of the Australian Constitution which lays down, "When a law of the State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of inconsistency, be invalid." It was extremely necessary to include this provision in the Australian Constitution as most of the powers of the Commonwealth, as we have seen earlier, are shared concurrently with the States.

5. Subramanyan V. Muttuswami, A.I.R. 1941, F.C.47(50)
Sub-section (2) of S.107 of the Government of India Act, 1935 modified to some extent the general rule. It provided a method of retaining Provincial laws in some cases even if repugnant to the Federal or Central law. A Provincial legislation would prevail over Federal legislation in a Province provided that the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty’s pleasure, as the case might be, received the assent thereto. This provision, however, did not absolutely tie the hands of the Federal Legislature. The Federal Legislature was given the power to supersede Provincial legislation on the same topic subject to this qualification that no Bill or amendment for making any provision repugnant to any Provincial law, which having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either chamber of the Federal Legislature without the sanction of the Governor-General in his discretion.

The most novel method of allocation, however, was to be found in the case of residuary powers. It was decided that the Governor-General would empower, by public notification, either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists, including a law imposing a tax not mentioned in any such list. The executive authority of the Federation or of the Province in that case would be extended accordingly. This method of allocation of residual subjects was adopted.

6. Proviso to subsection (2) of Section 107 of the Act of 1935.
because of the difference of opinion among the Hindus and the Moslems. The Muhammadans wanted to vest residuary powers in the Provinces because then they would be able to exercise the residuary powers in the Muslim majority Provinces, while the opinion of the Congress was that the residuary powers should be vested in the Centre. In order to obviate the difficulties, first of all (as has been already seen) a very exhaustive enumeration of powers was made, so that the question of exercising residuary powers would arise only occasionally. Secondly, the peculiar method of allocation of residuary powers was devised. The Joint Parliamentary Committee observed: "We gather from our discussions with the Indian delegates that a profound cleavage of opinion exists in India with regard to the allocation of the residuary legislative powers; one school of thought, mainly Hindu, holding as a matter of principle that these powers should be allocated to the Centre, and the other, mainly Muhammadan, holding not less strongly that they should be allocated to the Provinces. Where an apparently irreconcilable difference of opinion thus exists between the two great Indian communities on a matter which both of them appear to regard as one of principle, the proposals of His Majesty's Government may be defended as a reasonable compromise." 7

So under S.104 of the Government of India Act, 1935 the Governor-General was entrusted with the final authority to decide whether any new power was to be vested in a particular legislature. But though as regards the allocation his decision would be final, the question

whether the subject in fact was a residue, i.e., not covered by any of the legislative lists, was open to question in the courts of law. (Under S.204 of the Government of India Act, 1935 the Federal Court was given original jurisdiction to decide disputes between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involved any question (whether of law or fact) on which the existence or extent of a legal right depended.) The Governor-General could, however, consult the Federal Court under S.213, before issuing any notification. Being consulted by the Governor-General in the matter of the powers of the Federal Legislature to levy estate duty in respect of property other than agricultural land, the Federal Court observed:

"As the issue of a notification under S.104 thereby adding to the Lists in Schedule 7, is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists and this is what the Governor-General has thought fit to do in this case. In this class of cases, the reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force."

S. In the matter of Powers of the Federal Legislature to levy Estate Duty. A.I.R. 1944, F.C. 73(74)
In comparison with the U.S.A. or Australia or even Canada, the question of residuary powers in India was much less important as the enumeration of powers in the Government of India Act, 1935 was more exhaustive than in any of the above-mentioned constitutions. In List I of the Seventh Schedule to the Government of India Act, 1935, the Central Legislature was empowered to legislate upon 59 items and under List II the Provincial Legislatures upon 54 items while the items held concurrently by the Centre and the Provinces numbered 36. So there was very little scope for exercising residuary powers under the Government of India Act, 1935. This was asserted by the Joint Parliamentary Committee also, which said:

"We are ourselves convinced that the laborious and careful enumeration of both sets of subjects has secured that in fact no material and unforeseen accretion of power, either to Centre or Provinces, would result from the elimination of one List or the other; and we are satisfied that the process has reduced the residue to proportions so negligible that apprehensions which have been felt on one side or the other are without foundation."

Moreover, the three lists were to be given a liberal interpretation. In Subramanyan V. Muttuswami, it has been observed by Sulaiman J. of the Federal Court of India that 'resort to the residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non-descript.'

The system of vesting residuary legislative powers neither in the hands of the Central Legislature nor in the hands of the Provincial Legislatures might have had its origin in the British North America Act, 1867. It is true that the powers of the provincial legislatures are enumerated in Canada and residuary powers of legislation go to the Dominion Parliament as the above-mentioned Act makes it lawful for it to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the Provinces. But this does not totally exclude the Canadian provinces from exercising any unenumerated or undefined authority. S. 92(16) of the British North America Act, 1867, gives the provinces the exclusive right to legislate generally on 'all matters of a merely local or private nature in the Province.' So the Dominion Parliament is to exercise residuary powers when the interests of Canada as a whole are involved, while the Provinces are to enjoy residuary powers on a new subject, which is in essence a local or provincial subject.

Under the Government of India Act, 1935 also, it was very natural that in case of any new subject of All-India concern legislative power would be vested by the Governor-General in the Federal Legislature, while a purely local matter was to go to the Provinces.

Several interesting provisions of the Government of India Act, 1935 relating to the distribution of legislative powers between the Centre and the units evinced strong tendency towards centralisation. We may now turn to those provisions.

Section 103 provided that if it appeared to the Legislatures of two or more Provinces, that the Federal Legislature should make laws in respect of matters enumerated in the Provincial List, the Federal Legislature could make laws on these subjects in respect of those Provinces. This section is analogous to S.51(XXXVII) of the Commonwealth of Australia Constitution Act which says that the Federal Legislature may make laws on matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law. The legislative power of a Province is applicable only to that Province. So if any institution feels the necessity of having jurisdiction over two or more Provinces, the Provinces are powerless to establish such a body. The insertion of S.103 in the Government of India Act, 1935 did obviate this difficulty.

S.106 of the Government of India Act, 1935 dealt with the problem of giving effect to international treaties. This problem arises because in order to implement a treaty a federal legislature may find itself unable to give effect to that treaty without invading the sphere of the units. In America this problem does not create any difficulty, as Art.VI S.2 of the American Constitution lays down that "All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." Thus any treaty entered into by the President is the law of the land. In Canada the position is somewhat different. By virtue of S.132 of the British North America Act, 1867 the Dominion Parliament can enact laws outside its normal
scope of jurisdiction only when it is necessary to implement a treaty between the British Empire and foreign countries, as distinguished from such treaties where Canada itself is a party. S.132 of the British North America Act does not apply in such cases where the obligations under a treaty or convention are not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person. It was held by the Privy Council: "There was no existing constitutional ground for stretching the competence of the Dominion Parliament so that it became enlarged to keep pace with enlarged functions of the Dominion executive ....... The Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth."

Under the Government of India Act, 1935, however, the position lay midway between the constitutions of the U.S.A. and Canada. The Federal Government in India could make a law, outside its normal scope of jurisdiction, in order to implement a treaty, only with the respective consent of the affected Province or State. Otherwise it was not possible to implement such a treaty. In the case of the Provinces the difficulty was not great as many possible subjects of future agreement were included in the Concurrent List.

These provisions lead to the conclusion that the Act of 1935 sought to establish a strong centre within the federal framework. But the culminating point, however, was reached in S.102. It gave a power to the Federal Legislature the analogue of which was not to be found in

other federations of the world. Under this section, if the Governor-General in his discretion declared that a state of emergency existed, because the security of India was threatened by war or internal disturbance, the Federal Legislature would be able to make laws on matters included in the Provincial List for a Province or any part thereof. The section however maintained that the Provincial Legislatures were capable of exercising concurrent powers of legislation. But any Provincial legislation, whether passed before or after the Federal legislation, if repugnant to any provision of a Federal law would be void. Here no question of taking the consent of the Provinces before invading their field was to arise. Such wide powers of intrusion on the Provincial field are not granted in the federation of the U.S.A. or of Australia or of Canada. Although under the other two sections mentioned above the Federal Government in India could encroach upon the Provincial field it could do so only with the consent of the Provinces. But under S. 102 no such consent was necessary. Again, whether this emergency existed or not was not open to question by any court as the Governor-General was to act here in his discretion. So no court was able to question the propriety of a declaration of the state of emergency. The Privy Council observed: "assuming that he acts bonafide and in accordance with his statutory powers, it cannot rest with courts to challenge his view that the emergency exists."

It may be mentioned here that though the Constitutions of Canada, Australia and the U.S.A. do not possess any provision which can enable their federal government

to act beyond the normal limits in an emergency, experience shows that during grave national perils courts have deduced greater powers for the centre by giving the existing powers a liberal interpretation. It was held by Hughes C. J. of the Supreme Court of the U.S.A., "While emergency does not create power, emergency may furnish occasion for the exercise of power ... The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."

In the case of Canada and Australia also we find that during times of emergency the powers of the federation were increased by judicial interpretation. In the constitutions of these countries such powers of the centre as relate to 'defence' or 'maintaining peace, order and good government' had been given very wide interpretation in times of emergency. In Australia in the case of Farey v. Burvett, the majority of the judges held that what might not be regarded as exercisable under defence powers in ordinary times might become exercisable during periods of emergency. In the said case Isaacs J. observed: "It is said that the measure of the power is the same in peace and in war, and as such a Regulation as the one now under consideration would be invalid in times of peace, so it must be unlawful in the present circumstances. I have no hesitation in rejecting such an argument. It fails to grasp the all-essential fact that is comprehended in the power of defence ..."

"A war imperilling our very existence, involving not the internal development or progress; but the array of the whole community in mortal combat, with the common enemy, is a fact of such transcendent and dominating character as to take precedence of every other fact of life. It is the ultima ratio of the nation. The defence power then has gone beyond the stage of preparation; and passing into action becomes the pivot of the Constitution, because it is the bulwark of the State. Its limits then are bound only by the requirements of self preservation."

In Canada also the federal legislature can use extra-ordinary powers during a grave national crisis. Lord Haldane observed:

"In the event of war when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interest of individuals may have to be subordinated to that of the community in a fashion which requires s.91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency, which concern nothing short of the peace, order and good government of Canada as a whole.

"The overriding powers enumerated in s.91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise.

exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament."

But one thing which merits attention is this that in these constitutions the final power to determine whether the exercise of any power can be extended up to a certain point belong to the courts. Thus, the possibility of uncertainty is not totally eliminated.

In the Australian case referred to above there were acute differences of opinion among the judges. A regulation, made under the War Precautions Act in this case, was held valid by a majority of three to two only.

So, without leaving the matter to the decision of the courts, the provision for meeting an emergency was incorporated in the Government of India Act, 1935, itself. The Joint Parliamentary Committee observed that the powers 'should not be left to be deduced from a schedule of legislative powers, but should be subject to an express provision in the body of the Act.' The Committee recommended that the emergency powers should not be limited to 'defence' in the sense of repelling external aggression, but it covered internal disturbance also. It said: "We recognize that the inclusion of internal disturbance (which should be defined in terms which will ensure that for this purpose it must be comparable in gravity to the repelling of external aggression) among the circumstances which in an emergency will enable the

16. Fort Frances Pulp and Power Company Ltd. V. Manitoba Free Press Company Ltd. 1923 A.C. 695 (704)
Governor-General to confer upon himself, or upon the Federal Legislature, as the case may be, the power to invade the exclusively provincial sphere and to override provincial legislation within that sphere, may be criticised as a derogation from the general plan of Provincial Autonomy which we advocate; but in the absence of such a power we could not regard the Governor-General as adequately armed to discharge the ultimate responsibility which rests upon him for the peace and tranquillity of the whole of India."

Thus whether in normal times or during an emergency, the powers of the Federal Legislature in India were greater in comparison to those of other federal countries. While in normal times the Federal Government could step in the Provincial field with the consent of the Provinces, during an emergency no question of consent could arise.

A further provision for interference by the Federal authorities in Provincial legislation was there. All Provincial bills, after being duly passed by the Provincial Legislature, was to be presented to the Governor for his assent. The Governor could take any of these three courses: he could give his assent to it or could veto it or he could reserve the bill for the consideration of the Governor-General. The Governor-General was also free to give his assent to the bill or to withhold his assent from it, or he could further reserve the bill for the signification of His Majesty's pleasure thereon. Any Provincial bill might thus be made subject to scrutiny

18. S.76 of the Act of 1935.
by the Governor-General in normal times even.

In the U.S.A., such questions of disallowance or federal consideration of state legislation cannot arise. There the federal executive has got no power to interfere in the matters of strictly state concern. But in the Dominion of Canada, under S.30 of the British North America Act, 1867 the lieutenant-governor of a province may reserve a bill for the signification of the Governor-General's assent. But even if a bill is not reserved for his consideration the Governor-General is entitled to veto the bill if he thinks it necessary to do so. Such power, though not usually exercised, has been vested in him in order to prevent 'unjust, confiscatory or ex post facto legislation, against which there are express safeguards in the Constitution of the United States.'

The Royal Commission on Dominion-Provincial Relations in Canada showed that the power of disallowance was in complete abeyance from 1924 until 1937 when it was used against a number of Alberta statutes. In 1938 and 1939 Alberta legislations were again disallowed. "Most of the eight Alberta statutes," the Commission observed, were invasions of the federal field of legislation conflicting with the interests and policies of the Dominion." The Privy Council in A. G. of Canada v. A. G. of Alberta held that the taxation of banks bill of Alberta was ultravires of the provincial legislature as "the proposed taxation was not in any true sense taxation "in order to the raising of a revenue for Provincial purposes" so as


to be within the exclusive legislative competence of the Provincial Legislature under s.92(2) of the British North America Act, but was merely part of a legislative plan to prevent the operation within the Province of those banking institutions which had been called into existence and given the necessary powers there to conduct their business by the only proper authority, the Parliament of the Dominion under s.91 of the British North America Act ......"

Obviously, the provision for the reservation of Provincial bills for the consideration of the Governor-General in the Government of India Act, 1935 was based upon the analogous provision in the British North America Act, 1867. The only difference was this that the Governor-General in India could not disallow a bill if it was not reserved for his consideration by the Governor. But this difference was not vital, as the Provincial Governors were given the power to reserve such bills in their own discretion and, while using discretionary powers, they were under the direct control of the Governor-General.

So long discussion has been held on the distribution of legislative powers between the Centre and the Provinces, which was conspicuous by the concentration of large amount of powers in the Central Government. But it relation to the other type of units, i.e., the federated States, the position was entirely different. Here the distribution of powers followed the lines set out by the federation of the U.S.A. In order to justify this difference in treatment it was pointed out that the relation of the States was with the Crown as the Paramount power and they were not subject to the control of the Indian

Government. So the nature of relationship between the States and the Centre could not be identical to that of the Centre and the Provinces.

Section 6(2) of the Government of India Act, 1935, as we have seen previously, laid down that a Ruler should specify in his Instrument of Accession the matters with respect to which the Federal Legislature was to make laws for his State. The respective Instruments of Accession were to be the basis of distribution of powers as between the States and the Centre. The laws passed by the Federal Legislature were to apply to a particular State, if those matters were definitely surrendered in its Instrument of Accession. Section 101 of the Government of India Act, 1935 laid down: "Nothing in this Act shall be construed as empowering the Federal Legislature to make laws for a Federated State, otherwise than in accordance with the Instrument of Accession. So the possibility of variation in the Instruments of Accession to be executed by the different States was accepted in the Act and, evidently, not all the subjects mentioned in the Federal Legislative List required to be surrendered by the Rulers. However, Section 6(4) showed that as regards general matters the States should surrender their powers; otherwise they would not be permitted to accede to the Federation. As we have seen before, ordinarily the first 48 items of the Federal List were expected to be surrendered.

But even with regard to those subjects, accepted as federal by the States, the Federal Legislature would not possess exclusive powers. The Joint Parliamentary Committee did observe: "while every Act of the Federal Legislature regulating any subject which has been accepted by a State as a federal subject will apply proprio vigore."
in that State as they will apply in a Province, a duty identical with that imposed upon Provincial Governments being imposed upon the Ruler to secure that due effect is given in his territories to its provisions, yet this jurisdiction of the Federal Legislature in the States will not be exclusive. It will be competent for the States to exercise their existing powers of legislation in relation to such a subject, with the proviso that, in case of conflict between a State law and Federal law on a subject accepted by the State as Federal, the latter will prevail.

Evidently, the effect of §107(3) of the Act of 1935 was that the States possessed concurrent jurisdiction over the matters surrendered to the Federal Legislature. §107(3) laid down: "If any provision of a law of a Federated State is repugnant to a Federal Law which extends to that State, the Federal Law whether passed before or after the law of the State shall prevail and the law of the State shall, to the extent of repugnancy, be void." As the Federal Legislature in this case possessed jurisdiction only in regard to those matters of the Federal List submitted to it by the States threefold division of powers could not apply. As there could be no concurrent list in the case of the States the question of consistency of State legislation to Federal laws could relate only to those subjects ceded to the Federation. Thus the State laws relating to matters surrendered to the Federal Government were to be void only to the extent of their repugnancy to the Federal legislation. Here the position was comparable with that of Australia. Most of the powers granted by §51 of the Australian Constitution are held concurrently by the Commonwealth and the States.

and the State laws in these subjects remain valid if these are not inconsistent with the Federal laws.

A few subjects, among those to be surrendered by the States, were not capable of being exercised concurrently. Such items as His Majesty's Naval, Military and Air Forces borne on an Indian establishment, or External Affairs, Public debt of the Federation were bound to be exclusively Federal Subjects. In the case of Australia, the exclusive powers of the Commonwealth Parliament are specified in the sections 52, 90 and 111 of the Australian constitution. But barring these provisions, as we have seen beforehand, several other powers as well, as for instance the naval and military defence of the Commonwealth or currency and coinage granted in S.51, become exclusive powers of the federal government, by the combined operations of S.51 and several other sections.

In the next place, coming to the question of residuary powers we find that the problem of allocation of residuary powers did not arise in this case. As only the powers of the Federal Legislature were to be enumerated in the Instrument of Accession of a State all unenumerated powers would remain in the hands of the States. If it seemed doubtful whether a particular power could be exercised by the Centre or not the Instrument of Accession was to be referred to. So, S.104 of the Act of 1935 applied to the Provinces only. In relation to the States all powers, not surrendered to the Federation, would belong to the States as in the case of the U.S.A. or Australia.

As regards implementation of treaties and agreements with foreign countries, the Federal Legislature was not
empowered to exercise any extra-ordinary powers over the States. If any legislation was to be made in order to implement treaties with foreign countries outside the powers ceded to the Federal Legislature, the Federal Legislature could do so only with the prior consent of the States. The States, however, might add to the list of powers submitted by them to the Federal Legislature by executing a supplementary Instrument of Accession.

There was no provision for making any legislation on being requested by two or more States in the State field. Nor was there any power to encroach upon the States' rights on the declaration of emergency. Under S.102, as has been stated earlier, the Federal Legislature could make laws on the matters included in the Provincial Legislative List during periods of emergency only for a province or any part thereof. Moreover, there was no scope for any misinterpretation as according to S.101, whatever authority the Federal Legislature was empowered to exercise in the States, was to be exercised only by virtue of the Instruments of Accession.

The system of distribution of legislative powers between the Centre and the States, as envisaged by the Government of India Act, 1935 was basically different from that between the Centre and the Provinces, thus leading to a great disparity in the status of these two types of unit. In the case of the Provinces the system was marked by excessive centralisation. But this centralizing tendency was not noticeable in the case of the States where the Federal Legislature was given limited powers only.
The Act of 1935 also devised several new methods of legislative co-operation between the Centre and the Provinces which mitigated the difficulty experienced in other federal countries as a result of division of subjects into water-tight compartments. But this advantage was secured at the cost of extreme centralisation which placed the Provinces almost in a subordinate position.

The disparity in the distribution of powers could raise one serious problem. The Federal Legislature, as stated above, was to possess greater legislative authority over the Provinces than over the States. Representatives of the States in the Federal Legislature could thus exercise greater control over the Provinces than the representatives from the Provinces could exercise over the States. Colonel Wedgewood, in the course of his speech in Parliament made the following remarks: "It is a demonstration of what this Federation means. The States are represented in the Assembly. Nothing done by that Assembly can affect the States, either the Princes, or the subjects of those States, save in so far as is conceded by the ruler in the Instrument of Accession. In no Federation in the world would such a clause be found, and it is only put in here because this is not a Federation. This is the handing over of India to the Rulers of the States."

What would have been the actual state of affairs it is not possible to state with absolute precision. As a solution of this difficulty convention might have grown that the representatives of the States would refrain from

participating in a purely Provincial matter. However, it is unassailable that the scheme of distribution of powers between the Centre and the units under the Act of 1935 was marked by a vast disparity in the status of the units. This feature together with excessive centralization in the case of the Provinces made the contemplated Federation a very peculiar one.

III. Administrative Relations between the Centre and the Units under the Government of India Act, 1935.

By distributing legislative powers between the two sets of government in a federation only the area of policy-framing is demarcated. But policy-framing is only half the business of a government. However well-considered and beneficial any legislation may be, it will not serve its purpose properly unless its execution is made in an able manner. So side by side with legislative powers every government requires adequate amount of administrative powers in order to function ably. In a unitary state this problem is simplified; because whatever may be the degree of decentralization in a unitary state the centre retains the ultimate control in its own hands and so there is less difficulty. But in a federal state unless the different sets of government possess adequate powers of administering the laws mere allocation of legislative powers is not enough.
A federal government may tackle this problem by entrusting the duty of execution of its policies to the units. This procedure reduces the complexity of the problem doubtless, but it may not prove very efficient. Because, as Hamilton observed in 'The Federalist,' the members may 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.' Thus with half-hearted execution of national laws by unwilling units national interest will suffer.

Another method of coping with separate administrative problems is to have completely separate administrative organisations for different governments. The national government should administer its laws through its own personnel while the governments of the units should use their own administrative machinery for the execution of their laws. The federal government in the United States has its own administrative officers appointed and controlled by it. The federal government does not ordinarily take any help of the state machinery. But for the successful operation of federal government, even in the U.S.A., both formal and informal co-operative arrangements in the field of administration are worked out. The Government of India Act, 1935 provided for separate administrative organisations for the units and the federation; but techniques of administrative co-operation and co-ordination were also devised in the Act. Provision for the delegation of federal functions to a unit with its consent was also contained in the Act.

1. The Federalist No.XV. Paper by Hamilton; P.72. (Edited by Max Beloff).
2. L.D.White - Introduction to the Study of Public Administration, Pages 153-54.
Under the Government of India Act every Provincial Government was bound to obey subject to the provisions of the Act the orders of the Governor-General in Council. But this was possible as the basic relationship between the Centre and the Provinces was not changed. But with the establishment of a federal government in India a recasting of the relationship between the Centre and the units in the field of administration also would be necessary. Because the Provinces then were not to be treated as subordinate administrative bodies amenable to all sorts of Central control. As the Joint Parliamentary Committee stated, "now that the respective spheres of the Centre and of the Provinces will in future be strictly delimited and the jurisdiction of each (except in the Concurrent field) will exclude the jurisdiction of the other, a nexus of a new kind must be established between the Federation and its constituent units." Therefore, in Part VI of the Government of India Act, 1935 an attempt was made to provide for this new type of relationship.

Generally, the executive powers of a government are co-extensive with its legislative powers. S. 8(1) of the Act of 1935 provided that subject to the provisions of the Act the executive authority of the Federation was to extend to all matters with respect to which the Federal Legislature would be empowered to make laws and with regard to the raising and governance of naval, military and airforces and regarding such authority as was exercisable by virtue of a treaty, grant, usage, sufferance, etc., and in relation to tribal areas. S.49(2) of the Act of 1935 also provided that subject to the provisions of the Act the executive authority of each Province was to extend to the matters with respect to which the

Legislature of the Province had power to make laws. So the executive authority of a Province clearly extended to the matters mentioned in the Provincial Legislative List and the executive authority of the Federation extended to matters mentioned in the Federal Legislative List. Likewise in the case of a State the laws of the Federal Legislature would have full operative effect and the Federal executive authority would be extended thereby only within the limits accepted by a Ruler in his Instrument of Accession. There was scope for doubt, however, as regards the Concurrent List where both the Federal Legislature and the Provincial Legislatures possessed powers of legislation. It was mentioned in Proviso (1) to S. 8(1) that the executive authority of the Federation did not, save as expressly provided in the Act, extend in any Province to matters with respect to which the Provincial Legislature had power to make laws. But no limitation to the exercise of the executive authority by a Province as regards matters regarding which the Provincial Legislature could make laws, was mentioned in the Act of 1935. Thus the executive power regarding matters mentioned in the Concurrent List where both the Federal Legislature and the Provincial Legislatures could make laws was to be exercised by the Provinces. As regards legislation the Federal Legislature was clearly given predominance in the Concurrent field; but as regards the execution of policies the Provincial machinery was to be used. The matters included in the Concurrent List were matters mainly of Provincial concern. But they might be of great importance and unco-ordinated action on the part of the Provinces might create undesirable effects on one another. So, in order to provide a scope for
general policy-framing by the Central legislative authority, these matters were included in the Concurrent List. But as they were such matters in which the Provinces possessed greater interest, it was natural, that their administration should be left to the Provinces. The Joint Parliamentary Committee remarked: "The objects of legislation in this field will be predominantly matters of Provincial concern, and the agency by which such legislation will be administered will be almost exclusively a Provincial agency. The Federal Legislature will be generally used as an instrument of legislation in this field merely from considerations of practical convenience and, if this procedure were to carry with it automatically an extension of the scope of Federal Administration, the Provinces might feel that they were exposed to dangerous encroachment." 5

However, the Federal Government was not made totally powerless to enforce legislation in the concurrent field and was endowed with the power of giving directions to which we shall come later.

The Government of India Act, 1935, provided several methods of securing administrative co-ordination. Through the delegation of functions to the Provincial Government and the power of giving directions to them, the Federal Government could secure a large amount of co-ordination. Under the Act of 1935 there were no 'reserved subjects' in the Province and the Council of Ministers was to 'aid and advise' the Governor in the exercise of his powers except in relation to such matters where he was to act in his discretion. But the Governors could exercise individual judgement in certain cases and were entrusted with some special responsibilities.

Under S.54(1) of the Act of 1935 whenever the Governor of a Province was required to act in his discretion or to exercise his individual judgement, he was to work under the general control of the Governor-General and was to comply with the directions that might be given by the latter. S.52 mentioned the matters regarding which the Governors were vested with special responsibilities such as the prevention of any grave menace to the peace and tranquillity of the Province, safeguarding of the legitimate interests of the minorities, members of the public services, protection of the rights of any Indian State and the dignity of its Ruler, etc. The securing of the execution of orders and directions lawfully issued to him under Part VI of the Act by the Governor-General was also included among the special responsibilities of a Governor. If, in any case the special responsibility of the Governor was involved, the Governor was to exercise his individual judgement. In such a case the Governor could disregard the advice tendered by the ministers and as he was to act under the control of the Governor-General, the sole authority did not belong to the Provinces.

Again the Governor-General could ask the Governors to discharge functions in relation to tribal areas or functions in relation to defence, external affairs or ecclesiastical affairs, as his agent. In such cases the Governor was to act in his discretion which meant that he was under the direct control of the Governor-General and the ministry had no right to tender any advice even.

Besides these, in relation to other matters details of administrative relationship were chalked out. First of all, S.122(1) laid down an obligation of the Provinces and the Federated States to exercise their executive authority.
in such a manner as to secure respect for the laws of the Federal Legislature applicable to that Province or State, while s. 122(3) mentioned a responsibility on the part of the Federation to exercise Federal executive authority in any Province or a Federated State in accordance with the interests of that State or Province. It was very logical that the respective executive authorities were to be exercised in such a manner. Because the success of a federal government which involves a dual polity depends upon the realization of this obligation.

Under sections 126 and 128, the Provinces and the Federated States were to exercise their executive authority in such a manner as not to impede or prejudice the exercise of the executive authority of the Federation. This was mentioned not only as a formal obligation, but the Federal Government was empowered to give directions regarding this matter. In the case of the Provinces the Federal Government could give any direction, thought necessary for the purpose of ensuring harmony between the Provincial administration and Federal administration. Though there was no direct sanction attached to the section for non-compliance with the Central direction, provision for making the directions effective was to be found in subsection (4) of S.126. If the Governor-General found that in any Province effect was not given to the directions of the Federation, he could issue, as orders to the Governor, these directions or any other modified directions which he thought fit. The securing of the execution of orders or directions lawfully issued by the Governor-General to the Governor of a Province, as we have seen before, was one of the special responsibilities of a Provincial Governor. We have also seen that when
special responsibilities were involved the Governor was
to exercise his individual judgement and would thus come
under the general control of the Governor-General. Thus
the power of giving directions was a useful controlling
apparatus in the hands of the Federal Government. Truly,
as Prof. Keith has said, this was a striking derogation
from Provincial Autonomy and more so as the judge of the
necessity of the directions was Federation only.  

In respect of certain matters included in the
concurrent field provision was made for directions being
given by the Centre. The Concurrent Legislative List was
divided into two parts and in the second part were
included such subjects as required general policy-framing.
On matters included in this part the Federal authority
could give directions for carrying into execution the
Federal legislation. As the administrative agency
regarding such matters was Provincial, it was proper that
the Federal authority could control it.

Lastly, the Governor-General, acting in his
discretion, could at any time issue orders to the Governor
of a Province as to the manner in which the executive
authority of a Province was to be exercised for the purpose
of preventing any grave menace to the peace and tranquillity
of India or any part thereof.  

Apart from giving directions, which was an effective
weapon of control, the Federal Government could keep a
close watch upon the administration of the units through
the delegation of functions. The Governor-General could
entrust executive functions of the Federation to the

6. Keith - A Constitutional History of India,
1600-1935, P.384.
7. 8.126(2) of the Act of 1935.
8. 8.126(5) Ibid.
Provincial Governments or Federated States or any of their officers with their consent. Thus, for the administration of the Federal affairs, the Provincial or State agency could be used. As the principle of Provincial Autonomy was to be maintained the provision of securing the consent of the units was there. The Federal Government was to bear the extra burden of costs where such extra duties were entrusted to the units.

As a condition in their Instruments of Accession the Federated States could stipulate that agreements were to be made between the Governor-General and the Ruler of a Federated State for administering any law of the Federal Legislature by the administrative agency of the States. Even in the absence of any such stipulation such agreements could be made between a Ruler and the Governor-General. The Governor-General was given the power of satisfying himself, by inspection or any other means, that the administration of the Federal law so agreed upon was carried out in accordance with the policy of the Federal Government. If he was not so satisfied, the Governor-General could issue any directions to the Ruler in his discretion as he thought fit.

Other provision for ensuring a harmonious relationship between the Federation and the units dealt with the problems of broadcasting, water-supply from inter-State and inter-Provincial rivers, procurement of land by a Province for Federal purposes, etc. Though broadcasting

10. S.125(1) Ibid.
11. S.125(2) Ibid.
12. S.129 Ibid.
13. S.130 - 131 Ibid.
14. S.137 Ibid.
was an exclusively Federal subject administrative convenience was secured by giving the units considerable latitude. The Federal Government would not unreasonably refuse to entrust the Provincial Governments and Rulers with the power to construct and use transmitters and regulate and impose fees in respect of them. Such functions, however, were to be exercised under the control of the Federal Government. But it was not lawful for the Federal Government to impose any conditions regarding any matter broadcast by the Provincial Government or Ruler. The Governor-General, however, could exercise restriction or impose conditions on the matters broadcast for the prevention of any grave menace to the peace and tranquillity of India or any part thereof or for the due discharge of those functions where he was to act according to his discretionary powers or individual judgement.

The dry lands in our country require much water for cultivation. The existence of many inter-Provincial and inter-State rivers in India might cause frequent disputes regarding water-supply from such rivers. Before the passing of the Government of India Act, 1935 the Government of India retained the power to control, in the public interest, the water supplies of the country. The Joint Parliamentary Committee said: "This control of the Secretary of State obviously could not continue under the new constitution, but it seems to us impossible to dispense altogether with a central authority of some kind."

So it was provided in the Government of India Act, 1935 that the Governor-General, on the receipt of a complaint from the Government of any Province or the Ruler

of a Federated State as to interference with water supplies, was to appoint an advisory Commission, if he was satisfied that the issues involved were of sufficient importance. After considering any report submitted to him by the Commission, the Governor-General could give such decision and pass such orders as he deemed proper. However, before the decision of the Governor-General regarding this matter was given, on the request of any Province or State, he could refer the matter to His Majesty in Council, who could pass necessary orders and directions. In the case of any inconsistency of the Provincial or State legislation with the orders of the Governor-General or His Majesty it was to be void to the extent of the said inconsistency. S.133 of the Act of 1935 expressly excluded the jurisdiction of the Federal Court to decide disputes regarding water supplies.

However, a provision was made for rendering discriminating treatment towards the States. The States were permitted to exclude the application of these provisions regarding water supply, by including a provision to that effect in their respective Instruments of Accession.

Another important innovation for better co-ordination of work between the Provinces was the provision for the establishment of an Inter-Provincial Council where administrative problems common to adjacent areas were to be treated.

The duties of such an Inter-Provincial Council, mentioned in the Act were: a) inquiring into and advising upon disputes between the Provinces; b) investigating and discussing subjects in which some or all of the

Provinces or the Federation had a common interest and e) making recommendation upon such subject with a view to better co-ordination of policy.

As no special type of disputes was mentioned in the Act and the term was used in a general manner the scope of jurisdiction of the Council was not limited. The jurisdiction was purely advisory no doubt and the jurisdiction of the Federal Court was not excluded. But the existence of such a body might easily lead to the settlement of disputes through mutual understandings.

Thus many provisions were made for securing harmony in the administrative relations between the Centre and the units and the difficulties and problems, with which a federal government is ordinarily faced regarding this matter, were sought to be avoided.

IV. Financial Relations between the Centre and the Units under the Government of India Act, 1935.

The division of powers, which is one of the most important features of a federal form of government, requires a division of resources also. Resources assigned either to the Centre, or to the units must be adequate to fulfil their responsibility. As far as possible, a certain degree of fixity in the division of resources is desirable so that petty jealousies and troubles may not arise. But the central government must possess some powers of co-ordination in regard to the resources in the broader
national interest. As Prof. Adarkar has rightly said that besides the principles of independence and responsibility, the principles of adequacy and elasticity and administrative economy must be observed in the division of resources between the centre and the units. It is, however, extremely difficult to secure a proper balance between the needs of the centre and the needs of the units and in most federations adherence to scientific principles has seemed unsuitable and historical reasons have played a predominant part. In the case of the Indian Provinces there was a gradual development of separate Provincial purses; but the system was to become more complicated with the inclusion of the Indian States in the proposed federation. As pointed out in a previous chapter, before the introduction of the reforms of 1919, India had a highly centralised system of finance. Under the Government of India Act, in accordance with the policy of creating a sense of provincial autonomy, the Provinces were given considerable amount of powers in the financial field. As for example, certain heads of revenue were allocated to the Provinces. They were vested with the power to raise loans in the open market under certain conditions. As the Joint Parliamentary Committee aptly described: "So far as British India is concerned the problem is not a new one. Though the separation of the resources of the Government of India and the Provincial Governments under the existing constitution is in legal form merely an act of statutory devolution, which can be

varied by the Government of India and Parliament at any time, nevertheless from the practical financial point of view there is already in existence in British India a federal system of finance."

However, although there was division of resources under the Government of India Act, all the revenues were received in the name of the Crown and all financial legislation required the sanction of the Governor-General. In order to obviate these difficulties a clear bifurcation of the sources of revenue was made in the Government of India Act, 1935. But though the jurisdictions of different governments were made separate, in order to avoid double taxation and maintain uniformity net proceeds from several taxes, though centrally collected, were to be wholly or partially distributed among the units.

In the first place, there were taxes the net proceeds of which were to be distributed wholly among the Provinces. To this class belonged duties in respect to succession to property other than agricultural land, stamp duties, terminal taxes on goods or passengers carried by Railway or air and taxes on Railway fares and freights. These were sources of Provincial revenue, but the Federation was entitled to levy surcharges on these taxes for Federal purposes. These taxes were assigned to the Federal List, in order to ensure uniformity in their collection and incidence. Surcharges on these taxes could add to the Federal exchequer in case of necessity.

In the next category were included those taxes, which were to be levied and collected by the Federation, but the net proceeds of which were to be shared

with the Provinces. Among these taxes, the sharing of the income tax and jute export duty was obligatory under the Constitution, while the sharing of the net proceeds of the duty on salt, central excise duties, export duties (other than export duties on jute and jute products) depended upon Federal legislation to that effect.

The question of allocation of income tax receipts between the Centre and the Provinces was one of the most difficult problems of Federal finance. The Provinces were becoming more and more conscious of this elastic source of revenue. They were heavily hit by the depression of 1930 and while their revenue was constantly shrinking their items of expenditure were constantly expanding. On the other hand, the separation of Burma from India, financial adjustments with the Indian States, increase in the size of legislature and electorate, the establishment of the Federal Court of India, the creation of new Provinces like Sind and Orissa—all these things were to add to the financial difficulties of the Centre. So the entire proceeds of the income tax could not be given to the Provinces by the Centre. It was to be noted that the proceeds attributable to Chief Commissioners' Provinces or to taxes on Federal emoluments were to be excluded from the divisible pool. The Act of 1935 did not prescribe the proportion of income tax to be given to the Provinces. Sir Otto Niemeyer was appointed as an expert to investigate the matter of fixation of the share of income tax and make necessary recommendations. Sir Otto Niemeyer observed that it had been recognized that with the inauguration of the Provincial Autonomy the Provinces should be so equipped as to enjoy a reasonable prospect of
financial equilibrium and the chronic state of deficit in some of the Provinces was to be brought to an end. "My first object has accordingly been," wrote Sir Otto Hiss Meyer, "to examine the present and prospective financial position of the Provinces and to determine the extent to which special assistance would be needed in order to achieve the above aim." He recommended the assignment to the Provinces 50% of the divisible amount of the income tax proceeds.

Under S. 133(2) of the Government of India Act, 1935 the Central Government was authorised to retain a prescribed sum out of the Provincial share of income tax for a given period. It was recommended by Sir Otto Hiss Meyer to retain from the Provincial share, for the first period of five years, each year, the whole or such amount as together with any general Budget receipts from the Railways would bring the Central Government's 50% share up to 13 crores, whichever is less. For the next five-yearly period, there would be a progressive reduction of the amount withheld by the Federation. Full enjoyment of the Provincial share was to begin only after the expiration of 10 years from the commencement of Provincial Autonomy, though a word of warning was also added to this recommendation that, if necessary, the Governor-General would have to extend the second prescribed period in order to maintain the financial stability of the Federation.

5. Ibid., Para 28.
The Federal Government was, however, empowered to levy surcharges on income tax, the proceeds of which were to be appropriated wholly by the Federation.

As regards the export duty on jute, Sir Otto Niemeyer held that the percentage of income allotted to the jute growing Provinces should be raised to 62.5%. All these recommendations of Sir Otto Niemeyer were accepted by the Government of India.

Besides the allocation of proceeds from taxes referred to above there were provisions for making grants-in-aid to the Provinces by the Centre. Under S. 142 of the Act of 1935, in accordance with the orders of His Majesty in Council, the Centre could make contributions from Federal revenues to such Provinces as His Majesty might think in need of assistance. The grants to be made under this section were not conditional grants like those made in the U.S.A. These were unconditional grants. Such grants, based on the recommendations of Sir Otto Niemeyer, were given to the Provinces of Assam, Orissa, N.W.F.P., U.P. and Sind.

There was also the provision for making grants for specific purposes under S. 150(2) of the Government of India Act, 1935. Under this section the Centre was authorised to make grants for any purpose, not withstanding that the purpose was not one with respect to which the Federal or Provincial Legislature, as the case might be, might make laws.

After the commencement of Part III of the Act of 1935 separate fields of taxation for the different layers of the Governments were demarcated. It was not possible,

then, for a Provincial Government to levy taxes mentioned in the Federal List. But by § 143(2) of the Act of 1935, taxes, duties, cesses which were being levied by a Provincial Government, municipality or any other local authority or body before the first of January, 1935 could continue to be levied by it until provision to the contrary was made by the Federal Legislature. In the case of the District Board of Farukhabad V. Prag Dutt and others, it was held by the Allahabad High Court that tax on income from property called by the name of tax on circumstances and property, validly levied by the U.P. Government under the U.P. District Boards Act in 1922 and in force on first January, 1935 was valid.

Though the above-mentioned section fixed 1st January, 1935 as the determining date, later on by the India and Burma Transitory Provisions Order 1937, for a period of two years from the commencement of Part III of the Act of 1935 the references to 1st January, 1935 were to be read as 1st January, 1937.

The proposed entry of the Indian States into the Federation necessitated some financial adjustments. The Indian States were regarded as distinct political units, for the administration of which the Government of India was not responsible. The relations between the Indian States and the Crown were based upon different treaties and engagements. But if the States were to enter into the federal system their position would be considerably changed. The special privileges enjoyed by them would be anomalous if they became units of the federation. It was also

undesirable that they would suffer any special hardships.

As regards income tax it was clear that the States would not agree to the levy of income tax in their territory by the Federal Government. Under the Act of 1935 it was accepted that income tax might not be leviable in the Federated States. But surcharges on income tax, if any, were to be paid by the Federating States in the same manner as the Provinces. In order to justify this disparity in the treatment the Joint Parliamentary Committee observed: "If the problem is considered merely as one of striking a theoretically correct balance between the States and British India, on the assumption that the States will not be subject to the Federal income tax, there are many factors to be taken into account. Some of the federal expenditure will be for British India purpose only, such as subsidies to deficit British-India Provinces; there has also been controversy on the question whether the service of part of the pre-Federation debt should not fall on British India alone; and further, part of the proceeds of taxes on income is derived from subjects of Indian States, e.g., holders of Indian Government securities and share holders in British-India Companies."

In the case of the corporation tax, the States were placed in a somewhat favourable position. The Corporation tax was not to be levied by the Federation in any Federal State until ten years had elapsed from the establishment of the Federation. The Act of 1935 gave the Ruler of an Indian State also the option of making a contribution to the revenues of the Federation as near as

equivalent to the net proceeds of the Corporation tax leviable within his territory. In the event of any dissatisfaction as regards the determination of the amount of contribution the Ruler of a State could appeal to the Federal Court of India and the Federal Court could reduce the amount if it was considered excessive.

The Indian States used to pay tributes and make contributions to the Crown for various reasons, as for example, contribution in commutation of an obligation to provide military assistance to the Crown, or cession of territories in return of specific military guarantees. If the States were to join the Federation such special provisions for defence, of which there was no corresponding provision in British India should be abolished. Federal Government in that case should make general provisions for defence of which the States would become the common beneficiaries. So the States would be entitled to a remission of these tributes and contributions. On the other hand, over a number of sources of revenue, so far as the States were concerned, the Centre had no control. Among the important privileges the right to impose customs duties and the right to impose sea customs by the maritime States are worth mentioning.

The problem of ceded territories and the problem of contribution were exhaustively examined by the Indian States Enquiry Committee. The Committee held that there was a close analogy between the cash contributions and cessions of territories. "If a tribute-paying State has a claim to remission," the Committee observed, "a State which has ceded territory is equally entitled to some form of relief."

But on the other hand the privileges and immunities enjoyed by the States were to be quite out of harmony with their new status as the units of the proposed federation. The Joint Parliamentary Committee observed: "internal customs barriers are in principle inconsistent with the freedom of interchange of a fully developed Federation, and we are strongly of the opinion that every effort should be made to substitute other forms of taxation for the internal customs." Another complicated problem was the imposition of customs duties by the maritime States. The sea-customs collected at various Indian Provinces would go to the Central exchequer. So, in order to join the federation the maritime States should surrender the revenue derived from sea-customs. But as this was a substantial source of revenue these States were reluctant to surrender this source. The Joint Parliamentary Committee made the following suggestion regarding this matter: "The general principle which we should like to see applied in the case of maritime States which have a right to levy sea-customs is that they should be allowed to retain only so much of the customs duties which they collect as is properly attributable to dutiable goods consumed in their own state." 14

S. 147 of the Act of 1935 which was based upon the recommendations of the Indian States Enquiry Committee, 1932, provided the following solution. Under it the Crown might, in signifying the acceptance of the Instrument of Accession of a State, agree to remit over a period not exceeding twenty years from the date of accession of the

State to the federation any cash contributions payable by that State. But account was to be taken of the value of the privileges and immunities enjoyed by the State and only the contributions made by the State in excess of the value of the immunities and privileges enjoyed by it were to be remitted.

Where territories had been ceded by the States, either in return of specific military guarantees or in return of the discharge of the State from obligations to provide military assistance, His Majesty could direct the payment of such sums to these States as in the opinion of His Majesty ought to be paid in respect of any such cession, subject to the condition that in the first mentioned case the said guarantees were waived. But here also the value of any privilege or immunity was to be deducted.

So, these were the provisions for financial adjustment with the Indian States under the Act of 1935. We may now consider the borrowing powers of the Provinces. The Provinces were given almost complete freedom to borrow on the security of their revenues. Normally, the Provinces were free to raise loans on the security of the Provincial revenues within the limits fixed by the Provincial Legislatures. But, at the same time, some amount of Federal control over the Provincial borrowing was to be found under the Act of 1935. The Federal Government was empowered to make loans to the Provinces or give guarantees in respect of loans raised by the Provinces. Borrowing outside India on the part of the Provinces required Federal consent. In the case of borrowing within the territory of India the consent of the Federal Government was also necessary if there was outstanding any part of a loan.
which had been made to the Province by the Federal Government or in respect of which guarantee had been given by the Federal Government. Consent, however, was not to be unreasonably refused. But the question what was an unreasonable refusal and what a reasonable one was a matter to be decided by the Governor-General in his discretion.

Sections 154 and 155 of the Act of 1935 provided for the exemption of the property of the Federal Government from taxation by the units and vice versa. In the House of Commons in the course of debates it was held: "It is consistent with the general practice of federal Constitutions to exempt the Governments of the units from federal taxation, that being merely part of a reciprocal arrangement under which the Federal Government also is exempt from taxation by the several units." Proviso to § 154, however, laid down that any property vested in His Majesty for the purposes of Federation, which immediately before the commencement of Part III of the Act of 1935 was liable to any such tax should continue to be so until any Federal law otherwise provided. It was held in Governor-General in Council v. Corporation of Calcutta that property vested in His Majesty for purposes of Federation would be exempted from taxation under § 154, Government of India Act, unless it was liable to tax on 31.3.1937."

It may be mentioned here that before the passing of the Act of 1935 all properties were vested in His Majesty for the purposes of the Government of India. But after the enactment of the said Act, the separate existence of the Provinces was to be recognized in the matter of

distribution of properties. By the combined effects of Ss. 172 and 173 of the Government of India Act, 1935 lands, buildings and other property were to be divided into two parts- property vested in the Crown for Federal purposes and property vested in the Crown for Provincial purposes.

From the above discussion of financial relations between the Centre and the units under the Government of India Act, 1935, it becomes evident that the Federal Government was placed in a stronger position as compared to the Provinces. Most of the elastic sources of revenue went to the Federation. Those taxes which belonged to the Provinces, such as succession duties, stamp duties, etc., were not very elastic sources of revenue. Land revenue, one of the most important sources of Provincial revenue, was comparatively inelastic and benefited agricultural Provinces only.

Another important feature to note was the favourable treatment meted out to the Indian States in this sphere also. The inhabitants of the States might be exempt from Federal income tax. The Corporation tax would not come within the purview of Federal finance for a period of ten years in the case of the States. When it would become leviable the Rulers of the States could administer this tax within their territory through their own officials, as they might, at their option, make a lump sum payment as near as equivalent to the amount which would result from the tax. This procedure of making equivalent contributions was to be followed also in the case of surcharges on Federal income tax, if any.

But inspite of these defects and disparities we cannot ignore the fact that the system of allocation of financial resources was highly flexible. There was an extensive field for co-operation in financial matters between the Centre and the units. Moreover, the principle
that the federal government should try to mitigate the
difficulties of the economically weaker units was provided
through different types of grants-in-aid. So, on the
whole the progressive character of the financial system
must be recognized.

V. Amendment of the Constitution.

Rigidity of the Constitution is one of the
characteristic features of a federal form of government.
The Government of India Act, 1955 provided for India an
elaborately written Constitution which technically
belonged to the category of rigid constitution. Because,
a rigid constitution requires that a constitutional law-
making procedure should be something different from
ordinary law-making procedure. Under the Government of
India Act, 1935, the Federal Legislature and the Legisla-
tures of the units were vested with the power of law making
within their respective limits. But they were not vested
with any constituent powers. The Joint Parliamentary
Committee did not think it practicable to grant
constituent powers to any authority in India at that
moment. The ultimate authority of amendment was the
British Parliament. The Indian Legislatures, however,
were allowed to request suitable changes in certain cases.
The Joint Parliamentary Committee, though reluctant to

1. Report of the J.P.C., 1934, Vol.1,
Part 1, Para - 380.
give general constituent powers to the Indian Legislatures, added: "We are satisfied that there are various matters which must be capable, from the beginning, of modification and adjustment by some means less cumbrous and dilatory than amending legislation in Parliament." S. 308(1) of the Government of India Act, 1935 provided the procedure for making such a request. The Federal Legislature or any Provincial Legislature might, in certain cases specified in the above-mentioned section, pass a resolution recommending the amendment on the motions proposed in each chamber by a minister acting on behalf of the Council of Ministers. An address then was to be presented to the Governor-General or to the Governor as the case might be, requesting him to submit the resolution to His Majesty who would communicate it to the British Parliament. The Governor-General or the Governor as the case might be, was to send, along with any such resolution, a statement of his opinion on the proposed amendment, its effect on any minority, the views of that minority, the attitude of the majority of representatives of that minority in the legislature; and this statement too was to be laid before Parliament.

Such motions for amendment, to be taken by any legislature in India, were limited by S. 308(2) of the Government of India Act, 1935 to the following four items only:

I) The size and composition of the Federal Legislature and the method of choosing its members or the qualifications of the members of that legislature;

II) any amendment relating to the number of chambers in a Provincial Legislature, or to the size and composition

of the chambers or to the method of choosing the members
or to the qualifications of members of a Provincial
Legislature;

III) Substitution of literacy for any higher
educational qualification for women's franchise and the
entry of the names of duly qualified women in the voters'
list without application; and

IV) any amendment regarding the qualification of
voters.

But in the case of item No. (I) the Act of 1935
made these exceptions that no amendment should vary the
relative proportion between the number of seats allotted
to British India and the Indian States; nor was it to
vary the relative proportion between the Council of States
and the Assembly. Moreover, the provision of Part II of
the First Schedule of the Act was not to be amended
without the consent of the Ruler of any State which was
to be affected by the amendment.

Amendments, except in the case of women's
franchise, were to be proposed only after the expiry of
of ten years after the inauguration of the Federation or
the introduction of Provincial Autonomy as the case might
be. Sir Samuel Hoare explained the provision thus: "It
is provided that, after a specified period, an Indian
legislature should have a formal procedure under which its
resolutions on the points set out in the Clause would
have to be taken into account by the Imperial Parliament.
Parliament is not tied in any way. All that would happen
would be that resolutions sent to the Secretary of State
under the procedure set out in the Clause would be taken
into account. I attach importance to the safeguard that
this procedure cannot come into operation for 10 years. I think it is very important that we should have as much stability as possible in the early years of constitutional changes. 3

It may be added, however, that His Majesty-in-Council could make amendments regarding these specified matters at any time notwithstanding that the ten-year period had not elapsed and without the receipt of any address. 4 But if no such address had been presented to His Majesty, His Majesty might direct the Secretary of State to take such steps for ascertaining the views of the Governments and Legislatures in India that would be affected by the proposed amendment and for ascertaining the views of any minority likely to be affected.

Excepting these four items the Indian Legislatures could take no part in the amendment procedure and all authority belonged to the British Parliament. As Prof. Keith remarked, "the Act confers on the Federation no general constituent power nor does it give any authority to the Provinces, such as it is enjoyed by the Provinces of Canada and the States of Commonwealth to mould their own Constitution in detail, within the federal framework. The only power of change is vested in the Imperial Parliament with the exception that in a number of minor points change by the Crown in Council is permitted." 5

Turning now to the Indian States we find that the position of the Indian States limited this power of the

British Parliament. Full authority to amend the Constitution of British India remained doubtless with the British Parliament, but when such amendments were likely to affect the relationship between British India and the Indian States the authority of Parliament was not complete. The Ruler of an Indian State could join the federal structure by executing an Instrument of Accession. The Instrument of Accession was to constitute a solemn covenant, the terms of which restricted the scope of amendment, unless the Ruler wanted to change it according to his free will. Because, in the case of an amendment impinging on the Instrument of Accession, the Rulers of the States could rightly raise objections. But an extremely rigid constitution was not desirable. Proviso (II) to S.303, Sub.S.(4) laid down that the provisions of Part II of the First Schedule to the Act of 1935 were not to be amended without the consent of the States which were to be affected by that amendment. But those provisions which were not to affect the States were sorted out in the Second Schedule to the Act of 1935. Clause (5) of Section 6 of the Act of 1935 mentioned that every Instrument of Accession, executed by the Ruler of a State was to contain provisions indicating acceptance on the part of the Ruler concerned of matters mentioned in the Second Schedule of the Act of 1935 as matters to be amended without affecting the accession of a State. No such amendment, however, was to extend the functions exercisable by any Federal Authority in relation to the State unless accepted by the Ruler in a supplementary Instrument of Accession. The Second Schedule to the Government of India Act, 1935 did, therefore, fix the extent to which the British Parliament was competent to make any amendment.
Thus, although it did not offend any principle of federalism the proposed procedure for amending the Constitution in India was peculiar in comparison with that of other federal countries.

VI. The Federal Court of India.

The existence of a Supreme Court, as discussed earlier, is an imperative necessity in a federal state. The division of powers on which a federal state is based may lead to disputes between different sets of governments about the limits of their powers. Prof. Wheare goes so far as to say, "since language is ambiguous it is certain that in any federation there will be disputes about the terms of the division of powers." So there must be some authority to solve these ambiguities, if any, and to settle these disputes. This was very lucidly explained by the Joint Parliamentary Committee which said, in order to stress the necessity of a Federal Court for India, "A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and the guardian of the Constitution and a tribunal for the determination of disputes between the constituent units of the Federation."

Under S.200 of the Government of India Act, 1935 a Federal Court was established for India. The Federal Court possessed both original and appellate jurisdiction.

Where the condition as to the proper parties and as to the nature of disputes was satisfied, the Federal Court could exercise exclusive original jurisdiction. The Federal Court could exercise exclusive original jurisdiction in any dispute between any two or more of the following parties, i.e., the Federation, any of the Provinces or any of the Federated States if that dispute involved a question of law or fact on which the existence or extent of a legal right depended. So, whether any legislation was within the legislative competence of the legislature concerned was now to be determined by the judiciary, which was not the case under the Government of India Act. As for example, in Governor-General in Council v. Province of Madras, the Governor-General in Council brought an action against the Province of Madras for a declaration that the Madras Sales Tax Act, 1939 was an encroachment upon the rights of the Central Legislature to impose a duty by virtue of the entry no. 45, List 1 contained in the Seventh Schedule to the Act of 1935. The Federal Court dismissed the suit on the ground that the Provincial Legislature was competent to enact such a law as it fell within entry 48 of List II of the Seventh Schedule to the said Act. The Federal Court, it may be noted, could exercise jurisdiction in cases of disputes involving a dispute under the Government of India Act also. In U.P. v. Governor-General in Council, it was held by the Federal Court that the fact that the Provinces could not have sued the Central Government under the Government of India Act would not stand in the way.

In the case of the Federated States, the original jurisdiction of the Federal Court was to extend to cases involving the interpretation of the Act of 1935 or of an Order in Council made thereunder or to cases concerning the extent of legislative and executive authority vested in the Federation by virtue of the Instrument of Accession of the State. By S. 120 and Sub-section (2) S. 204 of the Act of 1935, the Indian States could invoke the jurisdiction of the Federal Court while contesting the directions given by the Federal executive under Part VI of the Act of 1935. However, in the case of disputes to which a State was a party, the jurisdiction of the Federal Court would not extend, if that dispute arose under any agreement specifically excluding the jurisdiction of the Federal Court.

There were two limitations to the exercise of the original jurisdiction by the Federal Court. S.133 and S.196 of the Act of 1935, expressly took away the jurisdiction of the Federal Court in cases of disputes relating to water supply from natural sources and in certain cases where a Railway Tribunal could exercise jurisdiction, although these disputes might involve a question on which the existence or extent of a legal right depended. (An appeal, however, lay to the Federal Court from any decision of the Railway Tribunal on a question of law.)

The original jurisdiction granted to the Federal Court under the Government of India Act, 1935 was narrower in comparison with that granted to the Supreme Court in the U.S.A. under Art.III, S.(II) of the constitution of the U.S.A., or to the Federal Court in Australia under S.75 of the Commonwealth of Australia Act. The Supreme Court in the U.S.A. and the Federal Court in Australia can entertain suits also in cases in which citizens are a party. The Indian Federal Court was not vested with the power of
entertaining suits in which a resident of any of the units was a party, or suits between residents of different units. Nor could it exercise jurisdiction in cases involving ambassadors, consuls or public ministers.

Turning now to the question/appellate jurisdiction we find, that the Federal Court of India possessed appellate jurisdiction in certain types of cases. Appeals from any judgment, decree or final order of a High Court in British India might go to the Federal Court, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Act of 1935 or of an Order-in-Council made thereunder. It was, however, held that if the High Court was to grant such a certificate, such a substantial question of law regarding the interpretation of the Constitution was to be raised and decided in the proceedings in the High Court. Where no such question had been raised at all in the proceedings before the High Court no certificate could be granted. Subsection (2) of S.205 of the Act of 1935 provided that where such certificate was given by the High Court any party might not only appeal to the Federal Court on the ground that any such question as aforesaid was wrongly decided, but also on any other ground which might have formed a ground of appeal to the Privy Council without special leave, if no such certificate had been given and with the leave of the Federal Court on any other ground.

The Federal Court, however, was not a supreme court of appeal. The Federal Court could only exercise constitutional appellate jurisdiction. But here also it

5. Goddam V. Pasupuleti A.I.R. 1943, Mad.481 (482).
was not the final judicial authority to interpret the Constitution. In the course of debates in the British House of Commons the Solicitor-General explained: "Nothing in the Clause affects the right of appeal to the Privy Council in cases outside the Clause. In cases that fall within the Clause, which involve matters of interpretation of the Constitution, parties will have to go to the Federal Court. There is a further right of appeal from the Federal Court to the Privy Council in a later clause." S.203 of the Act of 1935 laid down that an appeal might be brought to His Majesty in Council from a decision of the Federal Court given in its original jurisdiction, without leave, if the matter involved a question as to the interpretation of the organic law of the Constitution. In other cases no appeal lay as of right but an appeal could be preferred on leave granted by the Federal Court or by the Privy Council.

An appeal to the Federal Court from a High Court in a Federated State could be made on the ground that a question of law had been wrongly decided regarding any of the following matters: a) a question about the interpretation of the Act of 1935 or or an Order in Council made under it; b) a question concerning the extent of legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State and c) a question arising under an agreement made under Part VI of the said Act in relation to the administration in that State of a law of the Federal Legislature. The procedure prescribed in the Act of 1935 was that the case

was to be stated for the opinion of the Federal Court by the High Court in a Federated State. The case might be stated on the initiative of the Federal Court also. The Federal Court, if it required a case to be stated before it, might cause to be sent letters of request in that behalf to the Ruler of the State, who would then communicate the matter to the judiciary of his State. There was no similar procedure to be followed in the case of the Indian Provinces. In order to justify this procedure the Joint Parliamentary Committee observed: "It was urged before us that to permit a litigant in a State Court to apply to the Federal Court for leave to appeal, if the State Court had already refused leave, would be to derogate from the sovereignty of the Ruler of the State and that the refusal of a State Court to grant leave to appeal, at any rate in a case concerning the interpretation of Federal laws should be treated as final. We should much regret the inclusion of a provision of this kind. The appellate jurisdiction of the Federal Court, so far as regards an Indian State, arises from the voluntary act of the Ruler himself, viz., his accession to the Federation; the jurisdiction is in no sense imposed on him ab extra. This being so, and since it is proposed that all appeals to the Federal Court should be in the form of a Special Case to be stated by the court appealed from, we think the position of the States would be appropriately safeguarded if it were provided that the granting of leave to appeal by the Federal Court were in the form of Letters of Request directed to the Ruler of the State to be transmitted by him

7. S. 207(2) of the Act of 1935.
8. S. 211, Ibid.
Now there remains to be mentioned another power - the power of giving opinion on any question of law - conferred on the Federal Court. S. 213 of the Act of 1935 empowered the Governor-General to refer to the Federal Court of India any question of law, which was of great public importance. The advisability of giving such opinion had been questioned by Courts in many other countries. We should like to defer the discussion on this question (and the principle laid down by the Federal Court regarding this matter) and consider the subject in the section on the Supreme Court of India contained in Chapter Six.

Thus, although the scope of original jurisdiction of the Federal Court was much restricted in comparison with that of the Supreme Court in the U. S. A. or the Federal Court of Australia and although as regards appellate jurisdiction its powers were not supreme, the Federal Court constituted an important safeguard against the encroachment of the Centre on the units.

Para - 325.
VII. The Nature of the Proposed Scheme of Federation Under the Act of 1935.

The Federal scheme, contemplated in the Government of India Act, 1935 was full of peculiarities. Most of these peculiarities resulted from two main things: the Federation was to be composed of disparate political units and the Federal Centre was the legacy of the previously existing unitary central government.

The Provinces of British India which were not hitherto autonomous units were to be united with the Indian States which were largely autonomous within their own territory. This disparity in the status of the constituent units of the proposed federation was the cause of many complicated features introduced into the Constitution of India which were not to be found in any other federal government. As Prof. Keith explained, "This combination of wholly disparate elements gives a unique character to the federation and produces certain abnormal features."

The Act offered many advantages to the States that would join the federation. This favourable treatment to the Federated States, as we have seen earlier, was to be found everywhere - in the method of accession of the States to the federation, in the scheme of distribution of legislative and executive powers, in the administration of laws, in the domain of finance, in the settlement of disputes, in the sending of representatives to the Federal Legislature.

Mr. Morgan Jones, a British M.P., while commenting on this favourable treatment meted out to the States, said in the course of debates in the House of Commons: "Instead of permitting the Princes to join the Federation without prejudicing the future progress of British India, the Government have proceeded to safeguard the Princes - to make British India join the Federation without prejudicing the Princes." Another member of Parliament remarked; "The Constitution which we are giving India is one of such impossibility that the most hardened constitution mongers would shudder to impose on a Country. Even Abbe Sieyes would turn in his grave if he were asked to design a constitution of this sort."

The union of disparate units certainly led to incongruities. But the border between Indian and British India was more political than real. Their interests were inextricably mixed up and what happened in the one was sure to produce some effect upon the other. "The political unification of India," as an eminent writer put it, "is essential to Indian advance, political, social and economic." Moreover, as Prof. D. N. Banerjee observed, "The States represent in a special manner the centrifugal forces in Indian politics. If they are left out of any scheme of reconstruction of the Governmental system of India, they may, apart from any sentimental consideration, impede the smooth working of the constitutional machinery that may be set up, and may even become sources of danger.

3. Ibid., Col. 1775.
5. Rajani Palit Dutt - Indian Today - P. 465.
in times of internal disturbance or external invasion." So in any new scheme for constitutional advance, the States were to be included and generous concessions were made to them in the Act of 1935.

Another conspicuous feature of the Federal system was the tendency towards excessive centralisation in the case of the British Indian Provinces for which Prof. Wheare termed it 'Quasi-federal'. We have discussed earlier, how this tendency was evident in the case of distribution of legislative, administrative and financial powers and we need not enter again into the details of this subject. It may only be stated in brief that these things stood in the way of real Provincial Autonomy.

Again, it was clear that fully responsible government was not granted to the Provinces. It is true that federalism does not necessarily mean responsible government and the autonomy of a Province may become complete even with an autocratic ruler, if he is free from central intervention. But whenever the Governor of an Indian Province, who was not merely a nominal executive head, acted in his discretion or exercised his individual judgement he was answerable for his action to the Governor-General. The position had been very lucidly explained by Prof. Venkatarangaiya when he said: "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 Provinces to a position of dependence on the Governor-General."

7. Wheare, Op.Cit., P.38 (Foot - Note)
The Governor, if he was satisfied that the constitutional machinery of a Province had failed, could issue a Proclamation and assume to himself all or any of the powers vested in any Provincial body except the High Court. While exercising any function under this Proclamation he was to act in his discretion and so was under the control of the Governor-General. Moreover, the Governor could not issue such Proclamation without the concurrence of the Governor-General. So, in such cases, the Provinces could come under the direct control of the Governor-General.

However, in spite of these anomalies, in spite of the existence of several provisions derogatory to Provincial Autonomy, we should accept that the nucleus of federalism was there in the Act of 1935. And though it is not possible to concur fully with such viewpoints as that the Act of 1935 constituted a 'great improvement' on the Constitution existing at the time it must be admitted that provisions for co-operation and concerted action included in the said Act could introduce a large amount of flexibility which might prove much helpful.

The Act of 1935 failed to attract Indian people. The Indian Congress, in its Haripura session in 1938, resolved that 'the imposition of this Federation will do grave injury towards India, as it excluded from the sphere of responsibility vital functions of government.'

The Muslim League also denounced the Federal scheme as fundamentally bad and most reactionary, retrograde, fatal

9. S. 93(1) of the Act of 1935.
10. S. 93(5) Ibid.
11. Ibid.
and injurious to the vital interests of India, though it decided to work the Provincial part for what it was worth, having regard to the conditions then prevailing in the country.

The Princes, concerned only with their parochial interests, lost their enthusiasm which they had shown in the First Round Table Conference and were not satisfied with the generous concessions made to them in the Act.

But in spite of its grave defects, it would have been better had the scheme of All-India Federation been put into operation as it preserved the essential unity of the country. The observation of Prof. Coupland seems to be correct that the British constitutional practice attaches a great value to conventions and safeguards and reservations which were necessary for the transitional system would cease to operate in fact, after the period of transition was over. If "the whole of the Act had come into force," writes Prof. Coupland, "by general consent before the outbreak of the war in 1939, the whole complexion of the Indian problem might conceivably have been changed." The same trend of thinking is also discernible in the writings of another distinguished personality, who was also a delegate to the Round Table Conference; he observes: "The Congress, if it had accepted the Act of 1935, unsatisfactory though it was, and had pressed for an early inauguration of the Federation, things might have been different." Prof. D.N. Banerjee also remarked: "Defects and anomalies are bound to disappear in a few years, even if the scheme is brought into operation as it is." But destiny proved

to be otherwise. To the clash of different political interests the scheme of an All-India-Federation became a tragic victim and it never saw the light of the day.