CHAPTER-III

GENESIS OF FEDERAL SYSTEM IN INDIA AND SWITZERLAND

Federalism, which is a historical product, is not static or a rigid concept. It is a dynamic concept. Birth and development of federalism is a result of various forces, which are dynamic. In order to guarantee constitutional stability, one has, no doubt, to take notice of the past and think of the future in order to make the present pleasant, because as Justice Cardoza a 'multo fortiorari' has said: "today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."¹ It is expedient that yesterday cannot overpower today, and cannot obstruct today's attempt to build a social structure so as to meet the challenges that face it. This is the reason why constitutional law is never static and must always be dynamic if it has to be a living organism. On account of the inherent dynamic nature of a modern industrial welfare society and of ever growing economic and social needs of people, each federation goes through its pangs of development. Federal system is designed differently in different plural societies to suit the different conditions. What really makes a state federal is largely depended upon the necessity of that country. So if we have to understand the working of any federal system, it is necessary to know on what basis that particular country has adopted the federal system. On the basis of the forgoing analysis, an attempt has been made to study historical evolution of a federal idea in India and Switzerland separately and also to know the reasons behind to adopt the federal system.
EVOLUTION OF FEDERAL IDEA IN SWITZERLAND

Switzerland, or the Helvetic Confederation as it is formally called, is second to the United States of America. Switzerland as a federal state has a deceptively long history stretching back to the 13th century of continuous experiment in federalism. It is useful to consider the origin of the confederation, which is commonly taken as the most celebrated example of a military alliance in the guise of a 'federation'. Indeed, even critics of Riker's "military condition" for federal formation agree that military incentives were crucially important for the initial success of the Swiss Union. Since the end of thirteenth century the area that is now Switzerland was a tangle of military alliances, treaties and dependencies.

The whole evolution of federal system in Switzerland can be studied under five phases.

1. The Old Confederation 1291 to 1798
2. The Helvetic Republic 1798-1803
3. The Napoleonic Period 1803-1815
4. The Confederation of 1815-1848
5. The Federal Period 1848 up to the present day

The Old Confederation 1291 to 1798:

In 1032, the whole of Helvetia (Switzerland) became part of the Holy Roman Empire. In the beginning the Germanic kings exercised considerable power over the area, but with the passage of time their hold began to decline. This decline was almost in the thirteenth
century, when the central power declined, many communities of the empire began to experiment with self-government and some of these emerged as almost free entities. In order to win the loyalty of these communities and to strengthen the military power in the struggle against the papacy, the Holy Roman Emperor Frederick II granted them the status of free (i.e. autonomous) units of the empire. Many of these units began to organize themselves into groups for purpose of common defence, because the imperial power had become too weak to guarantee security to all the units. After the decline of Roman Empire, the three communities of Uri, Schwyz and Unterwald, became the possessions of the Hapsburg. But Uri in 1231 and Schwyz in 1240 had received charters from Frederick II declaring that they were free from Hapsburg control and were now directly under the emperor.

With the rise of Hapsburg power under Rudolf IV and his subsequent election as the Holy Roman Emperor in 1273, threatened the regional autonomy. Rudolf attempted to integrate the Swiss communities into the imperial system. This proved very irksome to the communities, but did not let their discontent break out during the reign of Rudolf. But after the death of Rudolf on July 15, 1291, the three states of Uri, Schwyz and Unterwald entered into an everlasting alliance Bundesbrief (the Pact of Confederation) for mutual defence on Aug 1 1291. The three valleys pledged, “To stand by one another with help, advice and all favour, with their lives and worldly goods, within and without the valleys, with might and main against all and every man that dare do them all, or anyone of them ill, either by force, annoyance or injury done or intended to their life and goods”2. This alliance was the foundation of the Swiss confederation and Uri,
Schwyz and Unterwalden were its founder members. The three confederating communities agreed to settle their mutual difference by arbitration rather than by force. The covenant stated: “if however, a quarrel arise among those swearing, then shall the arbiters among the confederates come forth and adjudicate the dissension among the parties as they think proper, should any party spurn such judgment, then must all other confederates turn against that party.”

The covenant proved its effectiveness on many occasions. In 1315, Duke Leopold of Austria tried to reimpose his family's authority on Schwyz and Unterwalden. But on November 15, his army was decisively defeated at Morgarten by the combined force of the three communities. Thus these communities were most faithful to their pact, for their 'better protection and seemly preservation'.

This first covenant of alliance was renewed after the battle of Morgarten, by the covenant of Brunnen in December 1315. This federation was directed at the Hapsburg. It included an important new clause-no member could make peace or enter into an alliance without the consent of the others. These first two covenants were followed by new alliances that enlarged the confederation, first with Lucerne in 1320, then with Zurich in 1351, and with Bern in 1353, Glarus and Zug also became members in the fourteenth century. Thus, the military alliance of 1291 was extended to loose military coalition of eight cantons by the mid-fourteenth century, and then it grew to thirteen cantons. What kept these different components together was a common military interest based on a desire to control the borders of the Swiss Alps and to exploit the dependent territories. The individual cantons could not control the passes that connected France, Italy,
Austria and Germany. But a military union enabled them to expropriate rents in the form of tariffs. However, there was always the danger that the adjacent European powers would take advantage of any conflict or war among the Cantons. The Swiss alliance's policy of diplomatic neutrality, which as its ostensible goal of preventing members from participating in external military conflicts performed as an important integrating function. It restrained confederation members from being divided by conflicts among its neighbours.

The Helvetic Republic 1798-1803:

The reformation had both a short term and a long-term effect on the development of Swiss political institutions. With the coming of the reformation, the loose unity of the confederation turned into discord. The confederation was divided into two opposite camps- the Protestants, who looked to France, and the Roman Catholics who looked to Spain of the thirteen cantons, Zurich, Berne, Basle, and Schaffhausen were protestant, while Uri, Schwyz, Unterwald Lucerne, Zug, Fribourg and Solothurn followed the catholic faith. Thus the inter-relation among the cantons was not peaceful. Reformation strained the relation among them. The catholic and protestant cantons fought four internal wars of religion, in 1529, 1531, 1656 and 1712. "At one point there was actually two confederations existing side by side, one protestant and one catholic. Fortunately, however, a permanent split never developed. Although no mutual assistance pacts were renewed, none were renounced. In addition, the four religious wars were neither long nor bloody, nor was there any attempt on the part of the victors to subjugate their foes or crush them completely."4 Though religious disharmony continued for about two
centuries, but a number of historical events helped to save the confederation from complete disintegration.

During the period of internecine strife (i.e., thirty years war 1618-1648) the country remained neutral despite considerable pressure to gain its participation on either side. The treaty of Westphalia 1648, brought the war to an end, and made Switzerland completely independent of the jurisdiction of the German Empire. The cantons of the old Swiss confederation varied greatly in the organization of their internal political institutions. The rural cantons were pure democracies, which assured the participation in the government of every adult male citizen. The urban cantons (Berne, Fribourg, Lucerne and Solothurn) were patrician aristocracies, “Proud, Exclusive and competent”. The remaining three cantons (Zurich, Basle, and Schaffhausen) were commercial oligarchies, governed by their craft guilds and trading corporations. Only the thing is these cantons were bound by mutual agreement and absolutely free to control their own affairs. “There existed among thirteen cantons a definite hierarchy based on political, military or economic importance”.5

Although the cantons were entitled to equal representation in Diet, there was no central executive. Every state, individually or collectively, ruled subject territories. There was little sense of nationality and no common language. So in 1798 when the armies of the French Revolution invaded Switzerland, the old confederation collapsed very quickly. Thus French bestowed a constitution on Switzerland, which suddenly transformed it from a loose confederation into a centralized and nominally democratic state. The cantons lost
their sovereign, independent status and were reduced into administrative subdivisions of the central government. The constitution of 1798 brought to the people of Switzerland the benefits of the Revolution: Liberty, Equality and Fraternity. The Swiss citizens, to whom these benefits were denied, welcomed this constitution, which worked for 5 years under the mounting tensions between the centralist and the federalists and between the Swiss, and their French overlords until upon conflicts broke out.

**Highlights of 1798 Constitution:**

1. A centralized state was created, “one and indivisible”.

2. Cantons were transformed from independent units to administrative subdivisions of the central government.

3. A bicameral national legislature was created consisting of a senate and a grand council, each canton sending four representatives to the former and eight to the latter.

4. Provisions were made for replacing of cantonal laws by a single National law.

5. Executive power was vested in a Directory of five members to be elected by the two legislative bodies. And the executive power had the right to make treaties and to dispose of the armed forces.

6. Each canton was permitted to retain a local legislature for restricted purpose

7. Single citizenship and common democratic suffrage was created.

8. Freedom of residence, trade, speech and the press were guaranteed.
The Napoleonic Period 1803-1815:

To put an end to the internal Swiss conflicts, Napoleon then first consul of the French Republic, called the representative of the various Swiss Cantons to Paris to draft a New Constitution that would put an end to the internal Swiss conflicts. This resulted in Act of Mediation, which substituted federalism for the unworkable, centralized system and secured peace for 10 years.

The Act of Mediation placed a diet at the center, to which the six largest cantons sent two deputies each and the others one each. This body was given the powers to establish a common currency, declare war and peace, raise an army and place it under a unified command, name ambassadors, and regulate the differences between cantons. The three quarters majority was necessary for declaration of war and the conclusion of treaties of allies, all other matters were to be decided by a simple majority vote. Provisions were made for the Diet to meet alternately in the six major cantons. The powers, which are not vested with central government, were placed in the hands of the cantonal governments. The cantons were permitted to retain the 1798 system of representative democracy. The Act of Mediation combined with the constitution of 1798, made Switzerland a multi-lingual nation. The Act of Mediation of 1803 turned to be an excellent blend of ingredients to meet local conditions and the needs.

Though this act was an excellent compromise between the needs for a strong state and desire for local autonomy but it gave rise to some discontent. The provision permitting the French to use the Swiss troops caused the most dissatisfaction. Since the act of
mediation was Napolean's creation, it fell with him. Although, this period is overlooked as an alien imposition, but it had a lasting effect on Switzerland's political system. Because the two peculiar features i.e. referendum and 'directorial' form of the executive took its origin in this period.

The Confederation of 1815-1848:

After Napoleon's downfall, the Act of Mediation imposed in 1803 was formally abolished, and between 1813 and 1815 there was no effective federal centre. Finally, in August 1815, the Vienna congress broke a compromise whereby twenty-two cantons signed a new federal treaty. The confederation was a union of twenty-one small sovereign states-Cantons-getting together to, in the words of Article1 of the 1815 federal treaty, "defend their freedom and independence from any foreign attack as well as preserving internal order and peace".6

At the centre of the confederation was placed a modified version of the old diet. All cantons, large and small, had one vote in the Diet, regardless of their population or their contribution to the confederal treasury. The Diet would normally meet annually, in July, in the capital of the so-called 'managing canton' (Vorort) whose own chief magistrate would be in the chair. When the Diet was not sitting, the general administration of the confederation was entrusted on a rotating basis, to the managing cantons Zurich, Berne and Lucerne. The Diet would normally vote on the basis of a simple majority, with the exception of very important decisions-such as military matters-for which three quarters 'qualified majority' was required. The cantons also resumed most of the functions of sovereign states. The Diet was
given the control of contingents of soldiers from each member canton along with an annual monetary contribution for a central war fund. They also had the power to use the troop contributions to provide for defence and maintain internal order.

For fifteen years there was peace and prosperity and the newly emerged aristocratic rulers were content to relax somewhat their old tyrannical rule in return for the restoration of the old privileges.

**The Constitution of 1848:**

The confederation established by the 1815 federal treaty was an explicit attempt to go back to the old ways of Swiss tradition and to forget the revolutionary period. However, many of the forces put increased pressure on the institutional structures of the last confederation as it entered the 1830's and 1840's. This is duly because of internal and external events that occurred in 1830 and thus lead to another significant change in the Swiss system of government.

The first event was the rise of the liberal movement, with its demand for greater equality, more citizen participation, clearer limits on government and especially, more competences for the central level and a stronger institutional infrastructure to carry them out. From about 1830 onwards, this movement, led to wide ranging constitutional reforms in a number of 'progressive' cantons, which adopted new constitutions, which they submitted to popular approval in a referendum. If in some cantons these reforms were achieved more or less peacefully, in others it was not so. In some extreme cases the confrontation between liberal and conservative forces led to bloodshed.
in canton Basle, it even led to the secession of the countryside to form a new half-canton in 1833 of Basle town and Basle country.

These background trends were further exacerbated in the late 1840's by several disputes that touched on delicate issues such as the presence of religious orders in the Catholic Cantons. At the same time, the catholic cantons felt threatened by the liberal cantons and in December 1845 signed a pact of mutual support known as sonderbund. But under the terms of federal treaty such pacts were illegal and the existence of the sonderbund was at first kept secret. The pact became public in June 1846, and in the Diet meeting in July 1847, decided to dissolve sonderbund, to expel the Jesuits and to revise the treaty in a more centralist direction. These decisions triggered a month long civil war, which ended in the defeat of conservative, catholic cantons of central Switzerland and the radical forces, were in the triumph.

The victors of the sonderbund war set up a constitutional commission entrusted with a revision of the treaty and it ended up drafting a liberal constitution for a federal state changing the nature of the Swiss political system.

**Drafting the Constitution of 1848:**

The constitution of 1848 was drafted by a committee elected in the Diet. The members of Diet were chiefs of their Cantonal Governments. Most of the members of the Committee were from legal profession including few merchants, two doctors and few high-ranking officers, Ochsenbein as President and Kern of Thurgau and Druey of Vaud as Vice President’s of the Committee.
After the thirty-one sessions, which held secretly without outside pressure submitted a newly framed constitution with 108 articles in length to the diet. The draft along with the report of the chairman was submitted directly to the cantonal government so that their representatives could be instructed.

May 15th to June 27th, 1848, the Diet examined the draft in detail, along with the comments of the cantonal governments after minor changes and opposition of the small catholic cantons, the draft was approved by the diet and was submitted to all the cantons for its approval with a request to submit its report within September 1st 1848.

On September 12th 1848, the new constitution was approved by fifteen and a half cantons, representing a population of 1,898,887 and was rejected by six and half cantons with a population of 292,371(of these six cantons, five cantons were of old sonderbund). On September 12th 1848, the Swiss Parliament of the day, which was known as the Diet, announced that the Federal Constitution of the Swiss Confederation had been approved by a majority of 70% of the electorate. The constitution was thus established as the basic law, which was regarded as a 'model of clarity and common sense'. With this new federal Constitution, Switzerland changed from being a confederation of states to a federal state.

The Federal Constitution of 1848: an Analysis:

The constitution of 1848 was in the main a return to the system that prevailed between 1798 and 1815. The new constitution was a genuine compromise settlement between the vision of the radicals and
the need to keep the old Sonderbund Cantons on board. It set up a federal state where the member states, the cantons, retained a certain amount of sovereignty and autonomy in many areas of policy-making under the 'residual powers' clause of Art 3, while at the same time handing over their national responsibilities to the confederation. The shift from a confederation of states to a federal state was far from unambiguous. The constitution of 1848 formed the basis of a new constitutional choice. The definition given by Vincent Ostrom to this phenomenon seems highly relevant: "Federalism can be conceptualized as constitutional choice reiterated to apply to many different units of government in a system of government where each unit is bound by enforceable rules of constitutional law."7

In order to achieve a strong, stable federal state, the framers of the 1848 constitution adopted several compromises to make the Swiss federal government basically different from other European Governmental systems. The framers adopted a bicameral legislature based on the American model, though some major factions who wanted unicameral system opposed it. But the framers did not adopt the American type of executive. They thought that placing all powers in the hands of the people's representatives was against the liberal philosophy and also the experience of tyrannical rule played a significant role in the decision to reject the office. Thus the drafters decided to borrow from cantonal experience and create a collegiate executive of seven men.

The new federal constitution granted various civil rights and liberties to its inhabitants. The federal court was set up and was given the right to declare acts of a duly elected legislature invalid. Though

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high court was created, it was not given the power of judicial review. The cantonal courts were given jurisdiction over federal matters. The federal Constitution of 1848 contained the beginning of direct democracy; it was the cantons that had the greatest influence on the democratic progress towards the sovereignty of the people. Thus the balance between centralism and federalism was achieved and the resulting organization of the authorities which are still basically valid today.

The first and most important elements of the sovereignty of the people were now formulated. The liberal victors of the 1847-1848 civil wars had succeeded in establishing their postulates of the sovereignty of the people, the separation of powers and granting of civil rights and liberties, thereby creating important conditions for the growth of the economy.

**The Constitutional Revision of 1874:**

The emergence of a strong centralized government in Prussia, the defeat of France in 1870, the irritating proclamation of papal infallibility by the Vatican council, which created trouble in the bishopric of Basel and in Geneva, all these events disturbed the Swiss people. Thus, a movement was started for a general revision of the constitution of 1848 to make it further centralization. The defeat of states right in the American civil war, acted as additional stimulus. The people demanded reorganization of army, which was made up of 25 cantonal contingents with various manifold equipments. They also demanded for unified judiciary, secular state and direct democracy in the federal sphere. But, first general revision was rejected by a small
majority formed by coalition of the Conservatives and the Ultramontanes with the Roman's-Swiss (May 12, 1872). After the rejection of the first general revision scheme, another proposal was put up in 1874. The revised constitution had 4 objectives before it i.e., national centralization, extended democracy, reinforced anticlericalism and state intervention in the social and economic fields. Thus, the majority of the cantons and the electors participating in referendum accepted this general revision on April 19, 1874, with 340,889 popular votes of approval whereas 198,013 votes of disapproval.

The revised constitution, thus, increased the powers of federal government, the rights of the individuals were strengthened, military instructions, and equipment were made federal subjects, trade commerce and technical progress were all in favour of centralization, the cantons were relieved from military expenditures, and judiciary was made more independent. This constitution is still in force and is mainly a revised edition of that of 1848. By the constitutions of 1848 and 1874 Switzerland has ceased to be a mere union of independent states joined by a treaty and became a single state with a well-organized central government, where certain rights were given to the independent cantons. Swiss history teaches us, all the way through that Swiss liberty has been won by a close union of many small states and it will be preserved in the same means.

GENESIS OF FEDERAL SYSTEM IN INDIA

The constitution of India envisages a federal government, which indeed is marked by many unique features. But the roots of the
present constitution lie deep in the distant past and the proper appreciation of the nature of the Indian federalism requires not only the analysis of the present constitution but also a consideration of its long and complex constitutional background. The federal idea in India does not follow the orthodox pattern of federalism represented by the U.S Constitution or the Australian Constitution. For a vast country like India having different languages, dialects and cultures, federation was the only royal road. The evolution of federal idea in India can be traced in the government of India Act of 1935. But long before the act was passed a federation of some sort had existed and loose kinds of confederations were not unknown to India in her long and chequered history. In ancient times, it was very common for a mighty king to undertake what was termed 'Digvijay' or an all round conquest, and to become a 'Chakravartin' or 'Samrat' and to have a great number of subordinate princes who would pay him tribute and acknowledge him as their overlord. Such princes are well known in history as 'Mandalik' i.e., rulers belonging to the 'circle' of a supreme overlord.10

"The state in ancient India was not unitary in the strict sense of the term. It was saturated through and through with the principles of what for convenience may be called federalism and feudalism. It must, of course, be emphasized that modern notions of federalism-written constitutions, clear demarcation of spheres of power, and the idea of federal and state authorities -were unknown to India."11

From the earliest times India always presented a picture of a large number of states, joining in a loose confederacy for a common purpose, fighting against one another, always prepared to owe allegiance to mighty overlord, be he a Rajput, Mughal, Maratha, or
British. India needs not a loose confederation, but a real federal structure, the creation of a powerful state to which all the provincial and state units would be subordinate to the extent defined in the constitution. The system prevalent in India before the passing of the Government of India Act 1935 was a thoroughly unitary system of government. The centralization may be traced back to 1773, when the East India Company Act of 1772, commonly known as the Regulating Act of 1773, was passed. This Act introduced a centralized system of government by bringing independent provinces under the control of Bengal presidencies. The head of the government of Bengal was termed as Governor General. Subsequent legislation in 1784 further increased the powers of the governor-general in council. The East India Company Act of 1793 carried the process of centralization one step further by giving full power and authority to superintend, control and direct the governments of Madras, Bombay and all other governments that come under the control of East India Company to the Governor General in council. The centralization, which began in 1773, reached its culmination in the Government of India Act 1833. The Governor General of Bengal was renamed as governor-general of India. The government of India became the controlling authority in every respect and centralization was complete under the government of India Act, 1833. The next important landmark in the constitutional development was the Government of India Act, 1858 which declared that the British crown assumed full and direct responsibility in respect of government of India. The governor-general in council became responsible to the secretary of state for India and through him to the crown. The defects of this extremely centralized system-
disharmony, extravagance and irresponsibility—soon became obvious and an opposite trend was noticed as a learned writer puts it, "If one word could sum up the post-1858 administration of the British in India it was 'decentralization'........" 12 It was John Bright who first suggested, as far back as 1858, that the government of India should be constituted on a federal basis. He said: "what you want is to decentralize your government...you will not take a single step towards the "improvement of India unless you give to each presidency a government with more independent powers than are now possessed by it." 13

The demand for federation was raised by the Hindoo Patriot, which wrote on 28th January 1860:

"The appointment of the assets and liabilities of the Indian government among the different provinces which make up the British Indian Empire—each according to its needs and capacities—is the first condition of their improvement...each Indian governorship, whatever the free employment of the one, nor seeks to repudiate the other. What then can stand in the way of the federation of these discordant elements of an otherwise strong empire." 14

But the proposal was not acceptable to anybody acquainted with the Indian problems in Great Britain at that time; centralization was an essential necessity to the alien government. But too much centralization of power was not possible and also not desirable. There were various local problems, which needed somewhat decentralization and thus the process of devolution of power started from the year 1861.
Indian Council Act 1861:

It was deemed necessary by the government to initiate a policy reform of the Indian administration and to consider ways and means of establishing closer contacts with the public opinion in the country and taking non-officials—both European and Indian—into the counsel of the government with a view to obtain the feelings and sentiments of the public. This process of decentralization began in the year 1861 when the Indian Council Act was passed. The Indian Council Act is an important landmark in the constitutional history of India. It is important for two main reasons:

1. It enabled the governor general to associate representatives of the Indian people with the work of legislation by nominating them to his expanded council. The executive council of the Governor-General was increased to be not less than 6 and not more than 12, at least half of them were to be non-officials.

2. It decentralized the legislative powers of the Governor-General's Council and vested them in the governments of Bombay and Madras. Provisions were also made for the establishment of Legislative Councils in other provinces. But the central government had Overriding powers of legislation over the provincial governments. There were three types of local governments according to the Gradation of powers and positions—
   a) Presidency government
   b) Government under Lt. Governors
   c) governments under Chief Commissioners. Presidencies were governed by a governor and three Councilors. The governors made all appointments. By this Act of 1861, the presidency governments were given the power to
make laws. Land revenue, excise and other minor sources of income were in their hands.

The 1861 Act suffered from many defects. Also, it did not satisfy Indian aspirations. It made the governor General all-powerful. The non-official members could hardly play an effective role. No questions could be asked and the budget could not be discussed. The political and economic situation in the country steadily deteriorated.

**The Indian Council Act 1892:**

To overcome the defects of 1861 Act, the Indian Council Act was passed in 1892 and it was mainly influenced by the resolutions of Indian National congress. Under the 1892 Act, the number of additional members in the Governor General's council was increased to not less than 10 and not more than 16. Similarly, the number of additional members in the provincial legislative councils was also increased. The councils were now allowed to hold a discussion on the annual financial statement or the budget with certain conditions and restrictions. Members of the council were permitted to ask questions on matters of public interest under prescribed rules imposing several conditions.

The Act of 1892 was certainly an improvement on 1861 Act in so far as it brought in a representative element in the legislative council and relaxed to some extent the restrictions on the working of the council by expanding its functions.

**The Indian Council Act 1909:**

The objective of the Act of 1892 to liberalize the local government's remained unrealized. The administrative relation
between the centre and the provinces continued more or less the same. Lord Morley, the then secretary of states for India, was alarmed at the process of centralization, so he appointed a Royal Commission on decentralization to consider the relations between the government of India and the provincial governments and to report the measures to be taken. In this regard, the commission submitted its report in 1909. The commission admitted that the administration had become over-centralized and proposed that “the future policy should be directed to the enlargement of the spheres of detailed administration entrusted” to them.15 Accordingly, a bill was passed in parliament and the Indian Councils Act of 1909 was passed. Lord Morley wrote “the main object of our proposal was to give the legislative councils a more truly representative character, among other means by increasing their numbers, by substituting election for nomination in constructing them, and by a liberal extension of their freedom of discussion”.16

Under this act provisions were made to further enlarge the councils and make them more representative and effective by expanding their functions. The maximum number of additional members of the Indian legislative council was raised from 16 to 60. This act recognized the principle of indirect election. The regulation provided for separate electorates and separate representation for the Muslim community. Thus, for the first time, the principle of communal representation was introduced.

But the act did not materially change the position of the Local Council vis-à-vis the centre and no amount of responsible government was established.
The Government of India Act, 1919:

Lord Montague, the Secretary of State for India, on the 20th August, 1917, enunciated the goal of British rule in India towards "Progressive realization of responsible government in India as an integral part of the British Empire." In this regard, he visited India and after consultation with the Governor-General Lord Chelmsford, submitted a joint report. A Joint Select committee of both the houses of Parliament made an elaborate examination and ultimately the British Parliament passed the Government of India Act 1919.

The report on the Indian constitutional reform indicated the line of reforms:

"The provinces are the domains in which the earliest steps towards the progressive realization of responsible government should be taken. Some measures of responsibility should be given at one, and our aim is to give complete responsibility as soon as conditions permit this involves at one giving the provinces the largest measures of independence, legislative, administrative and financial of the government of India which is compatible with the discharge by the latter of its own responsibilities."  

The passing of the Act of 1919 was an epoch making event in the annals of the constitutional developments of India. According to Sir Fredrick Whyte, the preamble to the Government of India Act was a 'fingerpost to federalism'. It was remarkable for three reasons.

1. It completed the process of devolution of powers on the provinces and gave them a definite legal footing under a
constitutional framework. The provision was made for a clear division of functions between the central and provincial governments. Sec. 45 A of the Government of India Act laid provision regarding the classification of subjects and devolution of authority to the provincial governments. The Central government was invested with the duties, which are normally undertaken by a federal government. Such as defense, external affairs, railways and other strategic communications, currency and coinage, post and telegraphs and certain other All India functions not enumerated in the provincial list. The list of provincial subjects included items the most important of which were the maintenance of law and order, the administration of justice and jails, medical administration, public health, education, agriculture, irrigation, co-operation and local self-government. Although the scheme of allocation of functions between the centre and the provinces follows more closely a federal pattern, the provinces were legally subordinate to the centre.

2. It introduced a shadow of parliamentary government under the cover of diarchy. Under this system the provincial administration was bifurcated into two halves. Certain provincial subjects termed 'reserved subjects' were kept under the charge of the governor and his executive council. Other subjects known as 'transferred subjects' were placed under the control of Governor, acting on the advice of his ministers. The reserved half of the provincial functions included the administration of justice, police, land revenue, irrigation, etc.
among the important transferred subjects were to be mentioned local-self-government, education, public health and medical services.

3. It introduced the system of bicameral legislature in India. The Indian legislature consisting of a council of state (upper house and legislative Assembly (lower house). Even though some power of nominating members was retained. House was to have an elected majority. Members were to be elected directly by constituencies delimited by the rules framed under the act.

But the Act of 1919 had many shortcomings. It did not fulfill the demand for responsible government. The provincial legislatures could not discuss bills in a number of subject areas without the clearance of the governor general. Above all, the system of diarchy in the provinces was a dismal failure.

The Evolution of Federal Scheme, 1935 Act:

No doubt, the Act of 1919 was an epoch making event but this act could not satisfy the people of India. The Indian National Congress characterized the act as inadequate, unsatisfactory and disappointing one. The act had some inherent constitutional defects. The executive had limited responsibility, and legislature was partly elected and partly nominated. The entire devise was illogical and designed to be a transitional one. A committee was appointed under Sir A. Muddiman to examine the working of the Act. The Committee said the Dyarchy is “Clearly a complex confused system having no logical basis, rooted in compromise and defensible only as a transitional expedient.”19
It was provided in the act of 1919 that 'at the expiry of ten years after the passing of the act a statutory commission was to be appointed for the purpose of inquiring into the working of the system of the government. In this regard a commission was duly appointed in November 1927 under the chairmanship of Sir John Simon. No Indian was taken in the commission. The commission paid two visits to India, and submitted its report to the British parliament in May 1930. The commission referred to the problem of federalism when it stated its belief that the evolution of the Indian system would be in the direction of federalism. The report further recommended the setting up of a council for greater India, consisting of representatives of British India and the Indian states, with the viceroy as president. The Simon commission thought of this as the first step towards the establishment of the federal system:

"The whole scheme for the council is designed to make a beginning in a process which may one day lead to Indian federation. What we are proposing is merely a throwing across the gap of the first strands which may in time mark the line of a solid and enduring bridge, and we feel convinced that the process must begin in organized consultation between the states and British states and British India, both because such consultation is urgently needed in the interests of both and because it will assuredly foster the sense of need for further developments and bring more nearly within the range of realization other steps which are as yet to distant and too dim to be entered upon and described."20

Meanwhile, the congress convened an all-party conference for framing of a constitution for the people of India in 1928 by the Nehru
committee, known as Nehru report. The Nehru committee discussed the tangled matters and then submitted its scheme in August, 1928 containing these recommendations.\textsuperscript{21}

1. India should be granted full dominion status forthwith.

2. Responsible government should be setup at the center as well as at provinces. The responsibility of the ministers to the legislature should be collective.

3. There should be bi-cameral system at the center but unicameral in the provinces the members of the lower chamber (house of representatives) and of provincial legislative councils should be elected directly by the people on the basis of Universal Adult Franchise, while the members of the council of state should be elected indirectly by provincial legislative councils.

4. The future constitution of India should have a federal system. The powers of administration should be divided between the center and the provinces in a way that the 'residuary' powers are with the former and 'autonomy' with the latter.

5. Fundamental rights should be provided in the constitution.

6. A Supreme Court should be established as the final court of appeal in India.

However, the real difficulty came from the side of the Muslim league. Jinnah described that any scheme would be inadequate if unless it ensured three things, namely,

a) One-third representation to the Muslims in the central legislative assembly.
b) Representation to the Muslims on population basis in the provinces of Punjab and Bengal for ten years subject to the revision of this principle after that period.

c) Vesting of residuary powers in the provinces and not in the centre.

Under these conditions, Jinnah sought to bring about a rapprochment between the three factions of the league and brought forward the draft of a very comprehensive resolution accommodating divergent viewpoints wherein his 'fourteen points' found their incorporations. But only a section of the nationalist Muslims led by Maulana Azad insisted on the acceptance of the Nehru Report. Thus the conference ended in a pandemonium. Jinnaha's fourteen points became the demand of the Muslims outside the nationalist group.

**Round Table Conference:**

Federalism was in air when the First Round Table conference was held in London from November 12, 1930 to January 19, 1931. It witnessed the participation of 89 distinguished statesmen representing leading political parties of India and Britain, including Indian states, but congress boycotted the conference. The conference was inaugurated by his majesty the king emperor in the Royal Gallery of the lords. The first few days were spent on discussing the question whether the future constitution of India should be based on federal or unitary lines. In order to facilitate the job at hand, a committee of the whole conference was set up which worked with the help of 9 sub-committees (on federal sub-structure, provincial constitution, minorities, Burma, North Western Frontier province, Franchise,
Defence services and Sindh) each having different terms. The inherent differences came on the surface when the Maharaja of Bikaner asserted that no scheme of constitutional reforms would be acceptable to the native rulers, unless it guaranteed due position to the states as co-equal partners with British India provinces in the proposed federal structure of India. Jinnah stressed on the settlement of the communal problem for the inauguration of any new constitutional scheme. But no tangible decision was taken without Indian National Congress. Thus the first round table conference was a failure.

The second session of the round table conference took place in London from September 7 to December 1, 1931 in which Mahatma Gandhi took part on behalf of the congress. In this conference Mahatma Gandhi placed all blame on the divide and rule policy of British government and asserted that the communal problem could be solved by making reservations and safeguards for the minorities in the future constitutional scheme, while the fate of the depressed classes could be bettered by means of drastic legislation. Obviously, his proposals were vehemently attacked by shafi on behalf of the Muslim League as well as by Dr. Ambedkar on behalf of the depressed class. While winding up the deliberations of the second round table conference, prime minister Mac-Donald announced that the British government will adhere to the principle of responsible government subject to certain reservations and safeguards through a transition.

The third session of the round table conference held in London from November to December 1932, ended in failure as it was boycotted by the Labour part. The congress was not represented as it had embarked upon its civil disobedience programme.
After the three round table conference the British government published a white paper in March 1933 containing an outline of a new constitution. The scheme contained provisions for a federal set-up and provincial autonomy. It proposed diarchy at the centre and responsible government in the provinces. The British Parliament constituted a Joint Committee of the two houses to further consider the government scheme formulated in the white paper. The Joint Committee with Lord Linlithgo as its chairman had conservative members in majority. Representative of British India and of the princely states were invited to give evidence before the committee as witnesses. The Joint Committee submitted its report in November 1934, which reiterated that federation would be established only when at least 50% of the princely states were prepared to join it.

On the basis of the report, a bill was prepared which was introduced in the British Parliament on Dec 19, 1934. After it having been passed by the two houses and royal assent being given to it on August 4 1935, it became the Government of India Act 1935.

**The Government of India Act, 1935:**

A constitution is federal it is supreme and unalterable by the ordinary process of legislation; secondly, if it allocates powers between centre and the units and finally, it provides for an umpire to guard the constitution and distribution of powers. The government of India Act, 1935, exhibited all these features of federal constitution.

1. The 1935 act of the constitution divided the powers between the centre and the state. Schedule VII of the act had three lists. The federal or central list contained 59 items such as naval, military
and air forces, external affairs, currency and coinage, post and telegraph, telephones, India, import and export, federal railways, maritime shipping and order, justice and courts, Prisons, provincial public debts, public works, and land acquisition, local self-government, public health and sanitation, education, communication, etc. The provincial list contained 54 items and finally there was concurrent list having 36 items such as criminal and civil law and procedure, evidence and oaths, marriage and divorce, adoption and succession, registration of deeds and documents, trusts, contracts, newspaper, books and printing presses, factories and labour welfare etc apart from this, it was provided that residuary powers would be vested in the governor general

2. The federal legislature could make law on a subject given in the central list, the provincial legislatures on one given in the provincial list. In case a law made by a provincial legislature was found to be repugnant to the federal law, it was provided that the law of the centre would prevail and provincial law be declared void to the extent of being repugnant to it. The subjects of the concurrent list were given to both the centre and the component units of the proposed All India Federation. It was made clear that the provinces would have no power to make a law on a concurrent subject in case the federal legislature had made a law on it.

3. Section 308 provided for the recommendation of any amendment relating to the size, composition and number of chambers of provincial legislature, the number of seats of the
federal houses and the qualifications of franchise, by any Indian legislature to the secretary of state for India who would present it to the British Parliament. The British Parliament had the authority to amend the act. The Indian legislature had no power of amendment, they could only recommend. The rigidity of the act was pushed to its highest.

4. The act also made provision for the establishment of a federal court consist of a chief justice of India and such number of other judges as his majesty would deem it necessary to appoint the federal court had an original jurisdiction over any dispute between the federation and one or more units, and the units interse (Sec. 204), and appellate jurisdiction in appeal from any judgment, decision or final order of a high court, if the case involved any question of the interpretation of the Government of India Act. 1935 (sec 205 and 207), and advisory jurisdiction when any advice was sought for by the Governor-General.

Thus the Government of India Act 1935 was a compromise between divergent political views. The Indian National Congress represented the nationalist India, and the Muslim politicians pressed the demand for creating four Muslim majority provinces -Bengal in the east, the Punjab, N.W.F.P. and Sind in the west and thus it represented a disruptive force. But the act failed to satisfy any section of the people. The scheme of federation under the act of 1935 was not a logical end of an evolutionary process but a new start from a unitary type to a complicated federal scheme.
Transition: from 1940 to the Making of the Indian Constitution:

In 1939 all the congress ministries resigned in 1939 in protest to India being made a party to the Second World War without consulting the legislatures in India. From 1928 to 1940 politics revolved round the question: Federation or Unitary government. From, 1940, the question became: Partition or Federation. In 1940 the Muslim league passed its Pakistan resolution.

While the Second World War was passing through a crucial state, it was felt that willing co-operation of the Indian public opinion would be an asset. At that critical moment, the British cabinet sent Sir Stafford Cripps to end the constitutional dead lock. Cripps proposed a proposal, which conceded dominion status and the right of Indians to frame a constitution in their Constituent Assembly, after the war. However, the provinces were to have an option to accept or walk out of the new constitution. The Muslim league rejected these proposals because its demand for partition of the country on communal grounds was not conceded, while the congress found them unacceptable because they opened up possibilities of dividing India into many small bits and did not seek to transfer any really effective power to representative Indian hands during the war. Gandhiji condemned the proposal as a “post-dated cheque”23

In 1945 Lord Wavell replaced Lord Linlithgow as viceroy. With a view to secure greater co-operation of the Indian people in the war against Japan, viceroy Wavell announced his proposal. The proposal promised to advance India towards her goal of full self-government and to allow Indians themselves to frame a constitution as an interim
arrangement; the executive council was to be Indianized with the inclusion of Indian political leaders on the basis of equal proportion of caste-Hindu & Muslims. It also decided to hold a conference of the political leaders of all shades at Shimla on 25 June. But the talks failed because the congress insisted on a united India, the Muslim league was not prepared to budge from its demand of Pakistan.

Cabinet Mission Plan:

A dramatic change took place in Indo-British Relation when labour party succeeded in general election of 1945. Lord Pethic Lawrence (the secretary of state for India) announced in parliament that a special mission of cabinet ministers consisting of the secretary of state, the President of the board of Trade (Stafford Cripps) ad fist Lord of Admiralty (A.V.Alexander) would go to India “to discuss with the leaders of Indian opinion the framing of an Indian Constitution”. The cabinet was in India from March 1946 to May 1946.

The mission rejected the league demand for a separate sovereign state of Pakistan as “impracticable” in as much as it would contain a large proportion of non-Muslim population ad sizeable Muslim population would be left outside Pakistan, in India. The cabinet Mission also rejected the congress scheme of a loose federation as involving constitutional disadvantages and anomalies. It recommended a three-tier structure consisting of the union of India at the top, groups of provinces and princely states at the bottom. It recommended a three-tier structure consisting of the union of India at the top, groups of provinces in the middle and provinces and princely states at the bottom. The cabinet mission plan had three parts, where
it suggested for union of India consisting of British India and princely
states dealing with the subjects like defence, foreign affairs and
communication. It also suggested for the formation of a constituent
assembly in order to frame the constitution. It also recommended that
an interim government should be set up immediately for the transfer
of power. It would consist of the representative of man political
parties.

According to the plan, the elections for the Constituent
Assembly were held in July 1946; the congress won 208 seats
including all the general seats except nine and the Muslim league 73
seats, that is all but five of the seats allotted to Muslims.25 Though
both the parties excepted the plan initially, a difference of opinion rose
between the Muslim league and the congress regarding the
interpretation of the 'grouping clauses' of the proposals of the cabinet
mission. The Muslim league boycotted the Constituent Assembly and
pressed its demand for a separate state.

Constituent Assembly and the Idea of Federalism:

The Constituent Assembly for India met on December 9, 1946.
However, the Constituent Assembly was not a sovereign body, as it
was created by the British government which could also abolish it, its
working was limited within the framework of the Cabinet Mission
Plan. It was only after the Indian Independence Act 1947 was passed
that it assumed a sovereign nature and was free to work
independently. Dr S. Sinha acted as the provincial president. Later Dr.
Rajendra Prasad was elected as the president of the Constituent
Assembly.
With the Creation of Pakistan and the settlement of the Indian states problem, a fresh examination of the rationale of the federal system in the context of Indian conditions was called for. The situation required a fresh look at the problem of federalism. The framers of the Indian Constitution were fully aware of India’s unique and peculiar problems that had not "confronted other federations in history". And therefore, they pursued "the policy of pick and choose to see (what) would suit (them) best, (what) would suit the genesis of the nation best." However there were two options open before the constituent assembly: first to adopt a unitary system of British type which India had been experiencing for a considerable period of history; second, to choose a federal polity in which there is a division of powers between the center and the state. The constituent Assembly had formally endorsed the federal principle when it accepted Nehru’s Resolution, which stated that:

"The said territories... shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government of administration, and except such powers and functions as are vested in or assigned to the union, or as are inherent or implied in the union."

As a result of the size and complexity of the country, few members of Constituent Assembly emphasized the need for federalism. N.V.Gadgil pointed out the impossibility of governing a large country like India with its many cultures and traditions by unitary Government. He pointed out, that the nature of the state had to be federal-"a point on which there is perfect agreement between all the parties in the country."
A similar view was expressed by Mohammad Ismail Sahib: "Our's is a vast country of great distances and huge population. However much the center my be anxious to accord uniform treatment to the various parts of the country, still in the very nature of things there will be drawbacks and shortcomings. It will naturally lead to discontent and conflict. It is for this reason that political thinkers have been of the view that a federal type of government is more suitable than anything else for such a country as ours. We in India need not be afraid of anything like disintegration or undue clashes and conflicts between the various parts of the country... I say that the federal system is more suited to the conditions of our country than the unitary type."30

Although the federal idea was taken for granted there were a few voices of dissent, but these were voices in the wilderness. A member from Bihar, Shri Brajeshwar Prasad, was completely opposed to the federal idea. He held that in the circumstances of India, federalism would prove to be both a conservative and a divisive force. He argued, "Federalism will accentuate centrifugal tendencies and break up Indian unity. It is suicidal to divide powers into federal, concurrent and provincial. Any such division of powers will weaken the hands of the nation on all fronts."31

The Union Powers Committee unanimously supported the idea of a federation with a strong center. Overriding powers of the center were favoured by K.M.Pannikar also to safeguard the structure of administrative unity of India. Dr. Ambedkar, chairman of the Drafting Committee, while clarifying the position of the centre and the states in the Indian federal polity, make the point clear by observing that the
"Constitution establishes a dual polity with the union at the center and the states at the periphery, each endowed with sovereign powers to be exercised in the fields assigned to them respectively by the constitution." He further asserted, "The states are not administrative units or agents of the union government." Other prominent members of the Drafting Committee supported this assertion of Dr. Ambedkar. Mr. K Santhanam argued that we have got a constitution, which is federal and is protected by an independent judiciary. T.T.Krishnamachari maintained that "the concept of this constitution is undoubtedly federalism".

Dr. Ambedkar clarified how Indian Constitution is federal:

"The basic principle of federalism is that the legislative and executive authority is partitioned between the centre and the states not by any law to be made by the centre but by the constitution itself. This is what the constitution does. The states in our constitution are in no way dependent upon the centre for their legislative authority. The centre and the states are co-equal in this matter."

Thus, the Constituent Assembly, accepted the establishment of federal polity. The federal structure that emerged out of the deliberations of the assembly not only provided for a strong centre but also for a stronger executive at the centre itself. The values that determined the constitutional framework of the Indian federal system had historical, political and circumstantial contexts and were almost invariably conducive to a centralized federalism to meet India's peculiar needs. In the words of Mr. Granvill Austin, "the assembly was
perhaps the first constituent body to embrace from the start what A.H.Birch and others have called “co-operative federalism”35

CONCLUSION

When we view the genesis of federal system in India and Switzerland, the present Swiss federal institution reflect the experience of the last seven centuries, which were the result of loose military alliance (the alliance which grew out of the desire to protect themselves from external enemies). Thus emphasis on federalism was considered necessary not only to create unity but also to recognize the historical importance of the cantonal units and the cultural differences that existed among them. Even in India the founding fathers did not adhere to any theory or dogma about federalism. Gaining from the experiences of functioning of old federations, they adopted the policy of pick and choose what was in the best the traditional principle of federalism to make a working formula to solve the peculiar problems of the country. In this way it becomes clear that the nature of federation differs from country to country to which it has to serve. Each country adopts the federal formula, which is most expedient to solve its own problems. It is, therefore found that none of the two federal systems are identical.
REFERENCES


3. Ibid


6. Ibid.


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17. Ibid. p.36

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19. Ibid. p.47.


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