CHAPTER III

CENTRE'S INTERVENTION IN PROVINCES IN OTHER FEDERATIONS

According to Dicey, the Supreme virtue of a federal system is that "it is a political contrivance intended to reconcile national unity with the maintenance of State rights". Generally, federation is a dual system of government consisting of one National government having jurisdiction over matters of national importance and a number of Regional governments having jurisdiction over matters of local importance. Thus, the theory of federal government implies distribution of powers between the National government and the Regional governments. The demarcation of powers is done through the Constitution of the country and the Union (National or Federal) and the State (Provincial) governments have to operate within their specified areas. The Union and State governments are autonomous within their respective fields. An independent and supreme judicial authority is established to keep the balance of power between the two sets of governments intact.

To a greater extent the Federal (national) and State governments, have realised the need of having harmonious inter-governmental relations which only seems to be a way out for the

balanced growth of all regions, communities, and interests in their respective countries. But the system of federal governments is not identical everywhere, rather it differs widely in respect of power, position and influence in various countries. However, centralization now seems to have become a universal phenomenon in view of new challenges of race for world domination among the super powers, fear of nuclear war, mounting challenges of scarcity of resources, energy, supply, inflation, unemployment, etc. The concept of dual sovereignty now seems to have been completely exploded and the concept of 'cooperative federalism' has taken its place. Disintegration of confederations/ federations in different parts of the world recently has thrown new challenges and the need for fulfilment of regional and ethical aspirations while maintaining the unity and integrity of the country.

In the western countries the term "emergency" has been conceived in terms of national crisis arising out of war, or domestic insurrection which has the potential to threaten system maintenance or system equilibrium. In such situations, "constitutional dictatorship," giving sweeping powers to the national executive, has been justified. In fact, all political systems, Unitary or Federal, make appropriate provisions to meet emergent situations. For example, during first and second world

wars, the British had to resort to emergency measures to overcome national crisis. When requirements of secrecy or dispatch made Parliament unable to act, independent executive action based on Royal prerogative was taken to meet the situation. Article 16 of the French Constitution provides:

"When the institution of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities interrupted, the President of the republic shall take the measures commanded by these circumstances."

A. POSITION IN U.S.A.

"...But the provisions of the constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the works and a dictionary, but by considering their origin and the line of
The United States of America, a nation comprised of fifty States is a federal republic with a democratic system. It was created when thirteen British colonies declared their independence in 1776 and secured that independence after winning a war against the British government.

The concept of a written Constitution is one of the unique contributions that the United States has made to the art of government. The American Constitution, which has been in effect since 1789, is the oldest written national Constitution now in use. Its long life seems even more remarkable when we consider the changes that have taken place in the United States since the constitutional convention of 1787.

In United States federal government was created on account of two compelling reasons. Firstly, for waging a war to end British Imperialism and secondly, to derive economic advantages for meeting the needs of the people in a better way. Preamble

5. Ibid., p.3.
6. "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."
to American Constitution States that the people established the Constitution. However, the formation of the American Union may be seen as the accomplishment of the States themselves, acting as sovereign Units, rather than of the whole people of the United States. The original States, being very zealous of their powers, were extremely reluctant to create a strong National Government. In the light of this and other considerations, the American constitutional system was based on a division of power between the Federal government and the States. This was accomplished by enumerating the powers of the National government in the text of the Constitution and leaving unspecified, residual powers to the States. The principle was confirmed by the Tenth Amendment, ratified in 1791, which provided that "the power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." 7

Although the words federal or federation are not used in the Constitution, the creation of federal system of government was

the natural solution for the thirteen original States. The establishment of a Unitary system of government that concentrated all powers in the National government would have been impossible between the advocates of States' rights and the supporters of a strong Central government. The Framers of the American Constitution "rejected summarily the advice of those few, like Hamilton, who sought to build a Unitary authority, to abolish the States as autonomous Units, and to provide for the appointment of Governors from the National capital. They also overruled decisively the considerably greater number who wanted to keep the Union a mere confederation". Instead, they created federal system of government. Federalism was the means and price of the formation of the Union. It was inevitable, therefore, that its basic concepts should determine much of our history.

In establishing the Federal system, the Framers of American Constitution used three major devices:

8. Wheare K.C., Federal Government (1951), p.1. See also William S.Livingston, Federalism and Constitutional Change (1956), p.1, Where it is mentioned that, "federal governments and federal Constitutions do not grow simply by accident. They arise in response to certain stimuli, a federal system is consciously adopted as a means of solving the problems represented by these stimuli."


1. The States were preserved as separate source of authority and as organs of administration;

2. The States were given important powers in connection with the composition and selection of the National government.

3. The powers of government were distributed between the National government and the States.\textsuperscript{11}

a. DISTRIBUTION OF POWERS

i. Powers of the National Government:

The National government possesses all those powers that are delegated to it by the Constitution either expressly or by implication. These powers are enumerated principally as powers of Congress in Article I, Section 8. Included among these are the power to tax, borrow and coin money, maintain armies and navies, conduct foreign relations, and regulate interstate and foreign commerce. After the enumeration of powers in Article I, Section 8, the Constitution grants Congress further authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. "This general grant of

\textsuperscript{11} Ibid., pp.97-98. See also Greenstain and Nelson W. Polsby, Handbook of Political Science, Vol.5 (1975), p.,93.
implied powers in the "elastic" or 'necessary and proper" clause of the Constitution has raised numerous questions as to the actual scope of National authority.12

Despite the fact that the States are supreme in their sphere of activities, the Federal Constitution and National laws constitute the supreme law of the land when conflicts arose from attempts of both jurisdictions to govern the same subject matter. The supremacy of National authority is indicated by Article VI, Clause 2, of the Constitution, which provides:

"This Constitution, and laws of the United States which shall be made in pursuance thereof; and 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, any thing in the Constitution or laws of any State to the contrary not withstanding."

ii. Powers of the States:

The State governments possess those powers that are not given to the National government or are not prohibited to the


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States. Because the Constitution deals principally with national powers, the fact that important powers are left to the States is sometimes forgotten. Among others, the States have the power to establish schools and supervise education, regulate intrastate commerce, conduct elections, establish local government units, and borrow money. In addition, a broad and generally undefined "police power" enables the States to take action to protect and promote the health, safety, morals, and general welfare of their inhabitants.

iii. Executive and Concurrent Powers:

The powers of the National and State governments are sometimes exclusive and some time concurrent. Most of the powers of the National government are exclusive. When powers are shared by both the States and the National government, they are said to be concurrent. For example, both Congress and the States have the power to tax and borrow money. Both levels of government may take property for public purposes, enact

13. See Sections 8 and 10, Article I, of the Constitution of United States.


15. For example the Federal Government alone has power to make treaties, to coin money, and to govern the district of Columbia, The States also have certain exclusive powers, such as those that relate to Wills and domestic relations.
bankruptcy laws, and establish courts. The only example of a constitutional provision expressly granting concurrent powers to both the Federal government and the States is found in the 18th Amendment. Section 2 of the Amendment provides that "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." 

Although much of the shape of the federal system is left to the working of politics, the Supreme Court has played a key role in establishing the balance of power between the States and the Federal government. The powerful opinion of chief justice Taney in Ableman Vs Booth, enhanced the power of the supreme court. In that case it was held that the Wisconsin Supreme Court, could not grant a writ of Habeas Corpus to Booth, an abolitionist editor, who was being held in federal custody for the violation of a federal law. Taney held:

"No State judge or court, after they are judicially informed that the party is


17. Compare John Schmidhanser, The Supreme Court as arbiter in Federal-State relations, 1787-1957 (1958) with Jesse Choper, Judicial review and the National Political Process (1980), who argues that the court should not perform such a role.

18. 21 How 506 (1859) cited in supra note 12, p.188.
imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.... And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court (Supreme Court) to decide, ultimately and finally, all cases and for that purpose to bring here for revision.... the judgement of a State court, where such questions have arisen and the right claimed under them denied by the highest judicial tribunal in the State.

Hence the United States is a land of Constitutions, Constitutional law and constitutional interpretation. Americans have an abiding faith in the doctrine and working of judicial review for defining or checking a multiplicity of statutes, and they place great reliance upon basic documents like written Constitutions, fundamental charters and organic acts for guidance in carrying on public affairs. Although it is evident from British experience that Constitutions need not be written to be effective, Americans, from the Mayflower compact to the most recent constitutional referendum have insisted on prescribing and
circumscribing the powers of government in textual terms.\textsuperscript{19}

b. COMMON FEATURES AMONG STATE CONSTITUTIONS:

American State constitutional systems have much in common. Their fundamental documents reflect common features in essential matters despite a wide diversity of detail and language. Most constitutional texts start with a Preamble, stating broad purposes and in many cases invoking divine guidance. "We the people of Alaska, grateful to God...." Hawaii's Constitution takes note in the Preamble of its unique heritage: "We the people of the State of Hawaii,... mindful of our Hawaiian heritage,... and with an understanding heart toward all the peoples of the earth...." As in the National Constitution, the Preamble is the introduction to provisions of rights and powers, usually a collection of glittering generalities, rather than an actual statement of rights and powers.\textsuperscript{20}

c. ROLE OF GOVERNORS:

The Governorship might be described in many respects as a small-scale edition to the American Presidency. It has standardized features with a margin of fluctuation according to the State, the time, and the man on the job. It is a venerable


\textsuperscript{20} Ibid., p.117.
American office, stemming from colonial times and characterizing the State establishments from the beginning. Restrictions on the office by the makers of the first State Constitutions on the basis of bitter experience with colonial Governors did not prevent social prestige and distinction from becoming attachments of the Chief Executive. This was true in the early national period when the Governorship was held by men like Thomas Jefferson and Edmund Randolph in Virginia, John Hancock in Massachusetts, and George Clinton in New York. It became no less true in later era when the office was to constitute a marker on the road to the White House for such leaders as Grover Cleveland, Woodrow Wilson, Theodore Roosevelt, Franklin D. Roosevelt and Clinton.21 State Governors are elected by direct popular vote in each State after nominating processes and campaigns that resemble the one for their federal counterparts.22

The Governor's role embraces a broad range of powers and functions, although it is generally hedged with more restrictions and division of authority than the role of the President. The Governor is the ceremonial and traditional Head of the State, and he speaks officially for the State in important relations with other States or the National Government. He is commander-in-

22. Supra note 4, p. 1218.

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chief of State troops when they are not in national service, and there have been constitutional provisions for him to command the "navy" of the Commonwealth. Under his responsibility for law enforcement, he may order out State troops to preserve order and, under the Federal Constitution, he may request and receive military through order of the President to check "domestic violence." In a majority of the States the Governor has broad or restricted powers of pardon, parole, and commutation of sentence. In a few States he is an important member of a board with jurisdiction in such matters. The Governor has a measure of supervisory power over State administration, but this power varies widely from State to State, partly according to whether the Executive Branch is integrated under him or shared with a number of other elected officers. The Governor has a miscellany of powers to issue proclamations, orders, rules, and regulations, to call special elections as necessary and required, and to serve as an ex-officio member of sundry boards or commissions. He is in a position to exercise important powers and employ strategic methods in formulating and initiating policy, including the making and blocking of legislative policy.23 Despite the circumscription of his power and the onerousness of his office, the Governor is in a better position than any other officer in

23. Supra note 19, p.275.
his State to speak as the chief law-maker for all - as the
tribune of the people. 24

d. THE RECALL OF THE GOVERNOR

Twelve States have provisions for the recall of the Governor
and other State officials by popular vote. The recall is a
method of holding an election for the removal of an officer in
response to a petition by a designated percentage of voters.
Oregon, first to adopt State recall (1908), requires the
signature of 25 per cent of the voters for an election, Kansas
requires only 10 per cent; the others approach Oregon rather than
Kansas. The petition contains a statement of reasons or claims
justifying the recall. The election is held within a specified
time, and the results of the balloting determine whether the
officer relinquishes or retains office. 25

e. CENTRAL INTERVENTION IN PROVINCES

Federalism in United States today is not what it was in
1789. In the New Deal era of late 1930s, the governmental system
of the United States, the classical federation, entered a new
phase. Through a series of decisions, U.S. Supreme Court, by a

24. Coleman B. Ransone, "Political Leadership in the Governor's
25. Supra note 19, p.284.
liberal construction of the police, commerce, taxation and spending powers under the Constitution, practically left it to the Congress to determine by legislation what was a 'national purpose,' 'national interest' or 'national objective' for evaluation of the proposals for federal aid programmes. The resulting proliferation of the federal power continued through the 1950s. This centralising process gained momentum after 1960. The extension of the police power was specially notable. By 1980, the federal role had become bigger, broader and deeper, covering a wide range of governmental functions in new fields which had hitherto been the exclusive or predominant preserve of the States or their local sub-divisions.26 While the dominant ethic of the federal grant system was still largely the co-operative one, in practice, it had become co-optive and dysfunctional.27

According to Setalvad, the Federal Government in United States has now overshadowed and eclipsed the State Governments.28 While writing on American federalism and the Supreme Court, Devil Fellmen has rightly said, "the most important thing that has

happened is that the court shafted out the hersey of dual federalism." The court, by invoking the doctrine of implied powers, has assigned a vast seep of authority to the Centre. Not only in the legislative field, but also in the spheres of administration and finance there has been a clear trend towards growing centralization. Centralization has been the most significant aspect of the operation machinery not only of American federalism but also of the Australian, Canadian and Swiss federalism.

Among the federal systems in the world, the Constitution of United States imposes a duty on the National Government to guarantee to each State a Republican form of Government and protection against domestic insurrection. Article IV, Section 4 of the U.S. Constitution lays down:

"The United States shall guarantee to every State in the Union a Republican form of government and shall protect each of them against invasion; and on application of the legislature, of the executive (when the legislature cannot be convened) against domestic violence."

30. Ibid.
It is worth mentioning here that the Constitution does not define what is a Republican form of government. The U.S. Congress determines whether a State has a Republican form of government when it decides whether to allow or not the congressional representatives of the States to take their seats in Congress.

The Congress has ensured protection to the States against domestic insurrection by delegating its authority to the President to send troops to quell insurrections on the request of the competent State authorities. This gives the President the power to determine which of the contending factions is the legitimate authority in a State. Thus, the decision of President Tyler was "binding on the courts when in effect he threatened to send federal troops to protect the Rhode Island Government against the domestic insurrection of a rival government contending for the right to speak for the State."31

During civil war, President Lincoln took a somewhat similar action derecognising the State governments of the confederacy, though he acted more by stretching the authority of his office than under Article IV, Section 4 of the Constitution. While the fighting still raged, Lincoln had taken initiative in installing loyal government in the seceded States, "He placed military

Governors over Tennessee, Louisiana, and Arkansas in 1862 and 1863, and in December 1863 he proclaimed the general procedures by which the southern people could remake their government.\textsuperscript{32}

President Eisenhower on Sept. 24, 1957 sent troops into Little Rock to break the resistance of the Arkansas Governor, Orval Faubus, who had openly challenged the integration policy of the Federal government. Similarly President Kennedy sent Federal troops to Oxford, Mississippi in 1962 to enforce Federal court's orders to admit one Negro student, James Meredith to the University of Mississippi despite strong protests of the Governor, Ross Barnett. Federal intervention, thus, is not an uncommon feature in America in total disregard of the express desires of the State authorities and such Central action authorised by the Judiciary covers more than one situation.\textsuperscript{33}

The American Congress in 1953 established an ad hoc Commission on inter-governmental relations to examine the problems and make recommendations. The Commission set up Study and Advisory Committees in each of the functional and fiscal areas principally involved in Federal-State relations. Fifteen separate studies were published, in addition to the general report. The Report stresses throughout the dangers of over-

\textsuperscript{32} Quoted by Dua, B.D. Presidential Rule in India, p. 7. See John M. Blum, The National Experience (1963), p. 353.

\textsuperscript{33} Ray, Amal, 'Inter-Governmental relations in India', (1966), p. 100.
centralization at the National level and the need for strong State and local governments. 34

Another significant study emerged when in 1957 President Eisenhower invited the Governors to join with him in forming a task force to work on functional and financial problems of inter-governmental relations. Two years later, the task force was given statutory status as the Advisory Commission on Inter-governmental Relations (ACIR). The Commission consisted of twenty-six members drawn from National, State, and Local governments. It considered problems affecting the various levels of Government, with special emphasis on grant problems and the fiscal aspects of Federal-State-Local relations. 35

The President may indicate his choice between two rival regimes by using troops to protect or restore order, as in Dorr's Rebellion in Rhode island. 36 Congress may announce its acceptance or rejection of a particular State, regime by seating or refusing to seat its senators and representatives, as it often did in the reconstruction era.

The latter part of Article IV, Section 4, requires that the United States "shall protect each of them (i.e. each State)

35. Ibid.
36. Luther Vs Border, 1849, quoted from supra note 34.
against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." This restatement of the Federal obligation to protect against foreign enemies is the logical companion to the prohibition of State armies and navies and to the primary of the Federal power.

When does domestic violence reach a point that requires Federal intervention, the President decides this. Normally he sends Federal troops only after a request from the Governor or Legislative of the State concerned or when Federal law or Federal property is violated.

f. COMPARISON BETWEEN ARTICLES 355 AND 356 OF INDIAN CONSTITUTION AND ARTICLE IV, SECTION 4, OF AMERICAN CONSTITUTION

It is worth mentioning that there is a big difference between the provisions of Articles 355 and 356 of the Indian Constitution and Article 4, Section 4 of the American Constitution. In the American Constitution, it has been provided that the Federal government would act in case of domestic violence in a State only on the request of the legislature, or when it is not in session or cannot be convened, on the request of the Executive, and on "the application of the Executive government of the State." In America, "domestic violence may or may not be synonymous with "internal disturbance." In most cases, both the
expressions mean the same thing, though the word "domestic" excludes the international or foreign, whereas the word "internal" may not necessarily mean such an exclusion. In the case of 'domestic violence,' the Federal government, in either case, will act only if the State needs its help but that precondition is not in the Indian Constitution. Only in a few cases the American government has interfered on its own. Of course, "it might seem that the National government may prohibit or suspend such State governments as do not in its judgement conform to its requirements. But practically we do not get any instance to the effect that the American government has suspended or interfered in a State government on the ground that State government had failed to perform its constitutional obligation." Even in the absence of such a request or of some express protest by the State government, the President can send the Federal troops into the State if he considers it necessary for enforcement of federal property for the peace in America or for an effective discharge of some Federal functions.

In U.S.A. the powers of the States are inherent. They have jurisdiction over larger number of subjects as compared to the Federal government. The residuary powers have also been given to

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38. Ibid.
them. But in India the States do not have any such inherent power or residuary powers.

g. POSITION IN SOME LATIN AMERICAN STATES

Most of the Latin American federations also provide for federal intervention in the Provincial affairs during crisis. Thus, in the federal Constitution of Brazil there is a unique provision to cope with any constitutional emergency in a State when there is a failure of the constitutional machinery in a State, or any disregard of the Constitution or non-compliance with federal laws. The President may appoint a "federal intervener." The purpose of this device is to ensure that any State contravening principles of the federal system would be back to its proper position. In these cases, the "federal intervener" appointed by the President supersedes the State till conditions improve. 39

The Constitution of Mexico, 1917 also speaks about specific provisions in this regard. Article 76 of the Constitution gives express power to the Senate to declare when all the constitutional powers of any State have disappeared. Article 89 authorises the President to send Federal forces for the domestic safety and defence of the Union. For example in Dec 1935, the Senate removed the Governors in the States of Sonora, Sinaloa, 39. Marx, F.H. Foreign Governments (1952), p.662.
Luanajuanto, and Durango. After the break between cardenes and calles, the former succeeded in getting rid of pro-calles Governors by ordering the Senate to declare disappearance of powers because of seditious activities.  

B. POSITION IN CANADA

"The economic and social conditions of the country are generally similar to those of the United States, the political institutions have been framed upon English models and political habits, traditions and usages have retained an English character."

Bryce

a. HISTORICAL BACKGROUND

Canada was founded by the French in 1608 and ruled as a French colony till 1763. In 1763 it was surrendered by France to Great Britain through the treaty of Paris resulting in the end of the seven years war in Europe. In 1791 Canada was bifurcated


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into two parts - Upper Canada and Lower Canada. Each part had a representative assembly and an executive headed by the Governor. The British population mostly inhabited the Upper Canada and the French population got settled in the lower Canada. The Act of 1791 however, failed to satisfy both the British as well as French population. In 1837 rebellion broke out in both the parts of Canada. The British Government thought it advisable to change the constitutional set up of the country. Hence they sent Lord Durham to report on the situation. On the basis of his report, the British Parliament passed an Act in 1840, uniting the two Provinces of Lower and Upper Canada and conferring on it responsible government. 42

The Union Act of 1840 changed the Canadian political structure altogether. A bi-cameral legislature, comprising an Assembly and Council was established. The executive was to be responsible to the Assembly. The Governor was reduced to a mere constitutional figure head. The Act could not satisfy the British and the French population of Canada. Hence a federal structure was thought advisable. The Provinces welcomed this idea of federation. 43

A conference comprising delegates from various Provinces was

42. Ibid.
43. Ibid., p.76.
convened at Quebec on October 10, 1864. The conference framed a federal draft emphasising the importance of a Federation for Canada and passed 72 resolutions. The draft so prepared was approved by legislatures of the Provinces. It was later embodied in a Bill which was enacted by the British Parliament as the British North America Act 1867.44 This Act with its subsequent amendments is popularly regarded as the Constitution of Canada, although in a wide sense, the Constitution includes a number of other statutes as well as usages and conventions.45

b. PRESENT SYSTEM OF GOVERNMENT

Canada has a Parliamentary democracy. It is consisted of ten Provinces and two territories; each Province has its own Legislature and Premier. Canada's government is based on the British North America Act of 1867 which confederated the colonies of Nova Scotia, New Brunswick, Ontario, and Quebec. British Columbia joined in 1871, Prince Edward Island in 1873, and Newfoundland in 1949. From the former territory of the Hudson Bay Company, the Province of Manitoba was created in 1870, and in 1905 the Provinces of Alberta and Saskatchewan were established.46

44. Ibid.
46. Supra note 4, Vol.I, p.158.
Under the 1867 Act, executive authority was vested in the British Crown but was exercised by an appointed Governor-General; legislative power was entrusted to a bi-cameral Parliament consisting of Senate and House of Commons. Canada's growing capacity to manage its own affairs won formal recognition in the British statute of Westminster of 1931, which gave Canada autonomous status within the Commonwealth.\footnote{Banks, Arthur, "Political Handbook of the World" (1977), p.60.} 

The Head of State is the monarch of the United Kingdom, represented in Canada by a Governor-General and in each of the Provinces by a Lieutenant Governor. As in Great Britain, the role of the monarch is formal, involving no real political power; the primary functions of the monarch's representatives are ceremonial in nature. The appointment of the Governor-General and Lieutenant Governors is technically made from London; but, in practice, the appointments are made by the Prime Minister.\footnote{Supra note 46, p.159.}

The system of government prescribed by the British North America Act (renamed in 1982 as the Constitution Act, 1867) still serves as the basis of Canada's constitution, in conjunction with subsequent legislative enactments and unwritten conventions, continues in effect with the inevitable modifications made in accordance with changing circumstances. The principal power of
Union government resides in the elected House of Commons, where the leader of the majority party is asked by the Governor-General to form a Cabinet and thus become Prime Minister. Provincial governments operate along comparable lines. Each of the Provinces has its own Constitution, a Lieutenant Governor appointed by the Governor General, and a legislative assembly whose principal leader is the Provincial Premier.  

**c. THE DISTRIBUTION OF POWER**

One of the outstanding features of the government of Canada is its federal structure, the distribution of power between the Dominion on the one hand and the Provinces on the other. Matters of broad national interest are allocated to the Dominion and matters of local or particular interest are allocated to the Provinces.  

The British North America Act, 1867 (renamed in 1982 as the Constitution Act, 1867) placed only two subjects, i.e. Agriculture and Immigration, in the concurrent legislative field of the Dominion and the Provinces. The residuary powers were left in broad terms to the Dominion. The Dominion is given a general power to enact "laws for the peace, order, and good

49. Supra Note 47, p.60.
government of Canada," on all subjects not given to the Provinces. The centralising tendency in the Canadian Constitution was tempered by judicial pronouncements of the Privy council. However, the experience of the working of the system soon led to the realisation that most problems required joint action by the Federal and Provincial governments. In recent years, a fairly large field of defacto concurrency has emerged. After the mid 1952, a "consociational" type of federation was gaining favour gradually overcoming formal demarcation of powers in the Constitution Act. In this type of federation, according to Dr McWhinny, the dominant principle of co-operation is given practical shape through joint endeavours and a continuing dialogue between the Federal Government and the federating Units. This type of co-operative federalism has been ushered in Canada by various devices; Principal among these were conferences of the Federal Prime Minister and the Provincial Premiers. It has come to be one of the most crucial institutions of Canadian federalism. Allocation or sharing of revenues and tax fields; equalisation grants, unified control of borrowings have been other extra-constitutional methods to resolve financial problems of the federations.


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The Provincial Constitutions, like that of the Dominion, are of a varied composition. Unlike the Dominion, however, the Provinces are given the power to amend their written Constitutions. Legislatures of the Provinces are given power to amend "notwithstanding anything in this Act, the Constitution of the Province, except as regards the office of Lieutenant-Governor."  

Thus, in Canada also, the system has assumed, on the basis of practical arrangements, a defacto form of co-operative federalism transcending the boundaries formally designated in its Constitution.

d. POSITION OF LIEUTENANT-GOVERNOR

The head of the Provincial government is the Lieutenant Governor, who is the representative of the Crown in the Province. He is appointed by the Governor-General in Council for a five year term, and as a Dominion officer is paid by the Federal government. He can be removed "for cause assigned" by the Governor-General in Council.  

Article 59 of the State Constitution of Canada reads, "A Lieutenant Governor shall hold office during the pleasure of the Governor-General, but any

54. Section 92, Constitution of Canada (Government of Canada, 1987).

55. Supra note 50, p.104.
Lieutenant Governor appointed after the commencement of the First session of the Parliament... shall not be removable within five years from his appointment, except for cause assigned which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not, then within one week after the commencement of the next session of the Parliament. 56

Each Lieutenant Governor was expected to perform a double function: firstly as the agent or representative of the government which appointed him and secondly, as the head of the government in the colony. But while the Governor-General has now become completely cut off from the British Government the Lieutenant-Governor still remains an official of the Dominion and as such, subject to its instructions. The Governor-General, moreover, has become with the years increasingly dependent on his Cabinet, but the Lieutenant Governor has time and again asserted an independent authority in the governance of the Province. 57

The Lieutenant Governors of the Provinces have the power to make appointment of the executive officers. The executive

56. Supra note 54.
57. Supra note 53.
council of Ontario and of Quebec shall be composed of such persons as the Lieutenant Governor from time to time thinks fit... Lieutenant Governor appoints the members of the Provincial Cabinet including the Premier. That man is appointed as the Premier who has the support of majority of members in the State Legislature. But in case the picture with respect to the following of members to a particular party or individual in the legislature is not clear, the Governor decides the issue in his discretion. Such situation developed in Quebec in 1959 after the death of Premier Maurice Duplessis. Initially there appeared that there was no consensus over any name for the Premiership. In such situation, the Lieutenant Governor plays his role in discretion inchoosing the Provincial Premier. He seeks to know as to who is the leader who can form stable government.

e. CENTRAL INTERVENTION

In the absence of express provisions in the Constitution of Canada, the Central legislature confers adequate powers on the executive to cope with the problems of emergent situations. Here it is necessary to mention that whereas Indian government is constitutionally allowed to intervene in the internal affairs of

58. Article 63 'Constitution of Canada' (Govt. of Canada 1987).
a State when there is a failure of constitutional machinery, but
this peculiar feature of the Indian Constitution is conspicuously
absent in the Canadian Constitution.

The Crown of the United Kingdom exercised royal prerogative
even in the cases of Dominion governments on the basis of the
advice of the British Cabinet. There are no express provision in
the British North America Act, 1867 for dealing with emergencies.
But section 91 of the Act invests authority in the Dominion
Parliament to legislate for peace, order and good government and
gives it power with respect to militia, military and naval
services and defence.60

When the U.K. was engulfed in World War I, the Dominion
Government of Canada found itself at war because of the
Constitutional links with United Kingdom.61 The Canadian
Government was under an obligation to take active part in the

60. See 91, British North America Act 1867: "It shall be lawful
for the Queen, by and with the advice and consent of the
Senate and House of Commons, to make laws for the peace,
order and good government of Canada, in relation to all
matters not coming within the classes of subjects by this
Act assigned exclusively to the legislatures of the
Provinces, and for greater certainty, but not so as to
restrict the generality of the foregoing terms of this
section, it is hereby declared that (notwithstanding in this
Act) the exclusive legislative authority of the Parliament
of Canada extends to all matters coming within the classes
of subjects next herein after enumerated that is to say -
Militia, Military, Naval service and defence."

61. Young, C.M. Sir Iver Jennings, Constitutional Laws of the
Commonwealth 121 (2nd ed., 1952).
War. The legislation passed in 1914 by the British Parliament had been agreed upon by the Dominion Government at the Imperial conference of 1911.

It has been considered that the power to legislate in exceptional circumstances is based on implied power. Even though there are no express provisions to deal with crises, the British North America Act has certainly not denied emergency power to the Dominion Government to take effective measures in defence of the country.

In Fort Francies Pulp and power Co. Vs Manitoba Free Press, the Privy Council held that in the words "peace, order and good government" lurked a comprehensive emergency power which the Dominion Government could invoke in time of dire necessity or grave national peril. During the period of national crisis, this general clause came into its own, and at such times it was held to override any or all of the Provincial powers which stand in the way of national interest.

In Canada the War Measures Act 1914 gave the Dominion Government powers to meet an unprecedented emergency. It was


63. (1923) A.c. 695.

authorised to fix up prices of food-stuffs, to control production, conservation and distribution of food stuff and control export and wages. The war trade Board established in 1918 was invested with sweeping powers for the supervision of industrial and commercial enterprises. Similarly to meet the crisis of World War II the National Resources mobilization Act of 1940 authorised the Dominion executive "to require all Canadians to put their persons and property at the disposal of the State."

Undoubtedly maintenance of law and order within a member State is the responsibility of the State itself. But many a time internal disorder or domestic violence assumes such dimensions which cannot be controlled without the assistance of the Federal Government. To meet such potential dangers from within the constituent Units a constitutional duty is cast upon the Centre. In Canada, the Unitary Government was converted into a Federal system in order to pacify the regional aspirations based on distinct language, religion and culture of the English and French-speaking people.


65. Supra note 53, p.152.
also added to the powers of the Dominion Government in times of emergency. In re Board of Commerce Act, I.A.C. (1922), which produced the emergency doctrine, the Privy Council conceded the right of the Federal Parliament to legislate for special circumstances such as those of war or famine, when peace, order and good government of the Dominion might be imperilled."66

**Defence Power:**

The power of declaring war and making peace has not been delegated to the Governor-General of Canada. The power to declare war and to conclude peace on behalf of Canada has been retained by the Crown of the United Kingdom. The Crown exercised royal prerogative even in the cases of Dominion Government on the basis of the advice of the British Cabinet.

In Canada, the general clause of Section 91 of the British North America Act has become the base for the full exercise of powers in times of national crisis for the defence of the Dominion. The courts have also given broad interpretation to the general clause of the section and evolved a doctrine of emergency in order to meet abnormal situations. During the period of two world wars, unlimited powers were conferred on the Dominion

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Government even though the exercise of those powers trenched upon the sphere of the Provinces.67

Even in the absence of express provision in the Canadian Constitution the Central legislature of the Canada confer adequate powers on the executive to cope with the problems of emergencies. To meet the crisis of World War II the national resources mobilization Act of 1940 authorised the Dominion executive "to require all Canadians to put their persons and property at the disposal of the State."68 It is submitted that in Canada only some powers have been given to the Provinces. Majority of the subjects have been given to the Dominion. However, in India the federal structure is much more centralised or centrifugal than Canada, both on the scores of the creation of States or Provinces and division of powers between the Centre and the States.

C. POSITION IN AUSTRALIA

a. HISTORICAL BACKGROUND:

Australia is a nation of continental dimensions. It lies in the Southern Hemisphere between the pacific and Indian Oceans.


It derives its name from the Latin *australis* (southern), which in earlier times was often used to describe lands south of the equator. 69

Australia is both a Federal and a Parliamentary democracy. The formation of the Governmental institutions known to a Nation-State began when the continent was first occupied by Captain Arthur Phillip under commission from the British Government, who brought a party of 1,030 soldiers, sailors and convicts to eastern Australia on Jan. 26, 1788. From then until about 1815, the colony remained in substance an open-air prison, and the government an autocracy of Governors who were naval or military officers. As the number of the free settlers increased, a movement towards representative and responsible government started. This movement had two components; getting rid of the rule from London, and extending the basis of political authority in Australia. 70

On January 1, 1901, six self-governing British colonies - New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania - federated to form the Commonwealth of Australia. There are also now two territories - the Northern Territory and the Australian Capital Territory - directly


70. Supra note 41 p.187.
administered for most of their history by the Commonwealth (national) government. 71

A convention of the six Australian Governments was held in Sydney in 1883 to discuss common action in the face of French and German colonisation and acquisition in the South Seas. The convention agreed to create a 'Federal Australian Council' consisting of two representatives from each self-governing colony and one from each Crown colony. The British Parliament enacted the Federal Council of Australian Act 1885 providing the legal frame-work for the creation of the Federal Council. The Federal Council however, failed to achieve its purpose. 72

On 9th April 1891, convention of six Australian governments adopted a Draft Constitution Bill. Draft Constitution Bill was produced in London in March 1900. Joseph Chamberlain, the Colonial Secretary, placed before the British Parliament the Commonwealth of Australia Constitution Act on March 14, 1900 which was finally passed on 5th July 1900 and received the Queen's assent on 9th July. On September 17, 1900, the Queen proclaimed that on January 1, 1901, the Australia Commonwealth would come into existence, with all the six Australian colonies as original States of the federations. 73 The present Constitution of

71. Supra note 46, p.37.
72. Supra note 41, p.189.
73. Ibid., p.191.
b. PRESENT SYSTEM OF GOVERNMENT

The Constitution of Australia declares Australia to be a federation. The powers of the Federal Government have been specified, the residuary being left to the States. The federation is indissoluble. No State has a right to secede. However, States have the power to amend their own Constitutions. The Governors of the States are appointed by the Crown without any reference to the Federal Government and the latter has no power to interfere with the laws passed by the State Legislatures.

Governor-General is the executive Head of the Dominion of the Australia. However, he exercises his powers on the advice of Federal Ministers or the Executive Council. He is appointed by the Crown on the advice of the Ministers of the Commonwealth and is an Australian citizen. He is liable to be recalled on the

74. Preamble of Australian Constitution.
75. In 1934, Western Australia submitted a petition to the British Parliament for secession from the Commonwealth of Australia and "A select committee of the Lords and commons decided that Parliament was by constitutional convention not competent to deal with such a matter merely upon the petition of single a State of Australia." This decision emphasizes the fact that in Practice as well as in law, no right of secession vests with any State acting alone.
76. Section 107 Australian Constitution.
same advice. He is merely a constitutional Head. The real power vests in the Federal Executive Council headed by the Prime Minister who is the leader of the majority party in the lower House. In the States also there exists the Parliamentary system. The head of the Council of Ministers in the States is called the Premier.77

Like the American Constitution but unlike the Indian Constitution, the Australian Constitution does not include the structure of the States' Governments. It only makes some general provisions in regard to the States. It says: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."78

Australia is a sovereign independent nation, but has not severed its links with United Kingdom, because the executive powers of the Commonwealth of Australia is vested in the Queen of England which is exercised by the Governor-General as the representative of the Queen.79 Thus Queen is the head of the Commonwealth of Australia.

77. Supra note 41, p.193.
78. Section 106 of Australian Constitution.
79. Section 61, Australian Constitution.
Australian Constitution mentions as Executive Council.\textsuperscript{80} This Council include the Ministers. These Ministers are appointed by the Governor-General to administer government departments, and they must either be members of Parliament when appointed or become such within three months of appointment. The Prime Minister, who heads this Council, is chosen by the party in majority at its meeting of parliamentary members of the party. The Prime Minister then chooses his colleagues who are appointed by the Governor-General.

c. POSITION OF GOVERNOR-GENERAL

Governor-General is the representative of Queen. Until 1931, the Australian Government was only consulted about the choice of a Governor-General, but the final choice was made by the Monarch on British advice. Then the Scullin Australian government insisted on the appointment of an Australian, Sir Issac Issacs. After further appointment of titled Britishers, an Australian was again appointed on Australian advice in 1946, and since 1965 it has become settled practice for Australian Governments, irrespective of party, to procure the appointment of Australians, without any intervention by British Ministers. The Governor-General holds office during the Queen's pleasure and may

\textsuperscript{80} See Chapter II of the Australian Constitution.
be recalled by her on the advice of the Ministers of the Commonwealth of Australia.\textsuperscript{81}

The position of the Governor-General is of a nominal Head. The Government of Australia is of Parliamentary type and hence the Governor-General is expected to act on the advice of the Ministers. His position cannot be considered as a strong one because of the fact that he is appointed on the advice of the Ministers and is liable to be recalled on their advice.

In comparison to Indian President, the position of Australian Governor-General is very weak. The President of India, also a Head of Parliamentary form of Government, is not so appointed like the Governor-General but is elected. Indian President also exercises some emergency powers. In comparison to Canadian Governor-General, the position of Australian Governor-General is also weak. Because Canadian Governor-General appoints and removes from office the Lieutenant Governors of States and President of the Senate and can disallow an Act of a Provincial Legislature.

d. POSITION OF GOVERNOR

Australian Constitution also provides for the office of Governor in each State. The Head of the State administration is

\textsuperscript{81} Supra note 41, p.197.
known as Governor. These Governors are appointed by the British Queen. 82

In Australia the Governors make appointments to the high offices in the States including the members of the State Cabinet. He appoints, the person who is elected leader of the majority party in the State Legislature as Premier. Portfolios are distributed among the Ministers on the recommendation of the Premier. 83

Governor is one of the constituents of the State Legislature. He has the power to summon as well as prorogues the session. He can dissolve the Legislature. As a matter of law he can exercise these powers on his own initiative, but as a matter of convention he exercises these powers normally on the advice of the Premier. But in exceptional circumstances such as when the government has failed to hold the session of the State legislature within a year; or when the Premier after losing the support of the majority in the Legislature is advising for the dissolution of the Legislature, the Governor can use his discretion and act independently. He can even act contrary to the advice of the Premier. 84

82. "How Australia is governed," Edited, Research Board, Delhi, p.25.
83. Supra note 59.
e. CENTRAL INTERVENTION

The Australian Constitution specifies the allocation of powers between the Commonwealth and the States. The Commonwealth powers are mainly the obvious "national" ones - currency, defence, foreign affairs, immigration, international trade, postal service, and so on. Few of these powers are exclusive, most being "concurrent" with continuing State powers - though Commonwealth law prevails in any case of inconsistent concurrent legislation. The States retain all powers not exclusively transferred to the Commonwealth. 85

In the Australian Constitution, as in the American and Canadian Constitutions, there is no specific provision to deal with an emergent situation. But the Australian Constitution is also not without defence power "for its self-preservation. The royal prerogative as to wage war, as far as the Commonwealth is concerned, can be exercised by the Governor-General. The Commonwealth Government is competent to exercise power for the purpose of defence and war. It is the sole judge of the necessity or occasion to exercise defence power and this power cannot be delegated to any other constituent State.

Specific provisions have been incorporated in Section 51 of the Constitution which give power for the purpose of defence of

85. Section 51, Australian Constitution.
the Commonwealth. Section 51 says "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

vi. The naval and military defence of the Commonwealth and of the several States, and the control of forces to execute and maintain the laws of Commonwealth...."

The legislative and executive powers relating to defence and other allied matters are also granted to the Commonwealth Government under sections 65, 68, 69, 114 and 119 of the Australian Constitution.

The Governor-General as Commander-in-Chief retains the power to declare war even though it is a power for formal declaration of war. The task of national defence is entrusted to the

86. Section 68: "The command in chief of the naval and military forces of the commonwealth is vested in the Governor-General at the Queen's representative."

87. Section 69: "On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the commonwealth: Navel and Military defence...."

88. Section 114: "A State shall not, without the consent of Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the commonwealth, nor shall the commonwealth impose any tax on property of any kind belonging to a State."

89. Section 119: "The Commonwealth shall protect every State against invasion and, on the application of executive government of the State, against domestic violence."
Commonwealth Government. It is the Commonwealth Parliament which has power to ensure internal peace and to make laws for the peace, order and good government under Section 51 and 119 of the Constitution.

During the World Wars I and II under the defence power, the Commonwealth Government exercised enormous powers. Powers exercised by the Commonwealth Government were so wide that it had evoked the comment from the Royal Commission on the Constitution in 1929 that the Commonwealth during the period of great war for all practical purposes became unified government.\(^90\) The Commonwealth Government had found itself equipped with the substantial power to wage war. The power to control defence in war time is sufficient to bring within the ambit of the government matters which, without invoking defence power, would have been beyond its powers.\(^91\) In the case of \textit{R Vs. Sherkey}\(^92\) Webb J stated that the defence power might be wide enough "to protect Australia against attacks in peace or in war, from within as well as without, and against incitement to such attacks."

War, stresses and strains demand control of the whole


\(^91\) Griffith C.S. had stated in \textit{Farey Vs. Burvett} (1916) \textit{C.L.R.} 433 at 440: "The word "defence"... includes preparation for war in time of peace.

\(^92\) (1949) 79 \textit{C.L.R.} 121 at 163.
economic and social life and the people. Liberties of the people are affected. Therefore, the Commonwealth Parliament passed legislation and conferred special powers on the executive to control the ordinary life of the people throughout the country. The war precaution Act, 1914 was enacted by the Commonwealth Parliament. Regulations were made under the Act in the interests of National security and most of the essential things to the community were regulated, e.g. the Commonwealth's control over the disposition of, and pricing and other matters related with, basic food resources.  

In September 1939 the Australian Parliament passed the National Security Act which gave the government complete power to deal with any matter which affected Australian war efforts. The Act also conferred wide powers upon the Governor-General in Council to make regulations for securing public safety and defence of the Commonwealth and its territories and for prescribing all matters necessary or convenient for the more effectual prosecution of the war. The Commonwealth's legislative power enabled the government to do many things which would go to the preparation of war, the waging of war or the

95. Supra note 90, p.205.
different problems that might arise when the transition from war to peace had to be faced.\textsuperscript{96}

The extent and scope of defence power had been interpreted in a very liberal manner by the courts. In \textit{South Australia Vs. The Commonwealth}\textsuperscript{97}, the Court upheld the right of the commonwealth to take over State taxation offices and personnel under the Income Tax (War-time arrangements) Act, 1942 as having genuine connection with the defence of the Commonwealth.

As Governor-General is the Queen's representative, he is Commander-in-Chief of the armed forces. He is vested with military powers. His position resembles, with the position of the American President under Para 1, Section 2, Article II of the Constitution of the United States. But the American President exercises real powers. The position of the Governor-General and the American President is different in actual practice.

Under the defence power under Section 51(vi) of the Australian Constitution the Federal government is allowed to exercise wide range of powers by the Courts by giving broad meaning to the contents of the provisions of the Constitution and laws enacted by the Federal Legislature. The courts have permitted the Commonwealth Government to exercise wide powers in


\textsuperscript{97} (1942) 65 C.L.R. 373.
times of war to cover any and every matter of the society.\textsuperscript{98} The liberal and broad interpretation of the Commonwealth's defence power by the courts produced the flexibility of a Unitary system in times of war.\textsuperscript{99}

In Australia the division of powers between the Commonwealth and States did not come in the way of Parliament in conferring wide range of powers on the government. Powers were conferred on the Governor-General in Council to impose more regulations on the life and property of citizens during the period of World War I. The war precautions Act 1914 was a notable example. In 1939 the National Security Act was enacted by the Commonwealth Parliament which empowered the Governor-General in Council to make regulations for securing the public safety and defence of the Commonwealth.\textsuperscript{100} Regulations touching various aspects of the society had far reaching consequences which gave the impression that the federal system of Australia had become a unitary mechanism.

In Australia maintenance of law and order within a member State is the responsibility of the State itself. But many a time internal disorder or domestic violence assumes such dimensions

\textsuperscript{98} Supra note 94 (1968)

\textsuperscript{99} Ray Amal, Inter-governmental relations in India 94 (1966).

\textsuperscript{100} Supra note 98 at p.196.
which cannot be controlled without the assistance of the Federal Government. To overcome such potential dangers from within the constituent Units a constitutional duty is cast upon the Centre.

Australian Constitution imposes on the Commonwealth a duty to protect every State against (a) foreign invasions and (b) domestic violence on the application of the State Government. Section 119 was invoked in the State of Queensland in 1913 but it was declared that the final and conclusive authority to determine whether help was needed rested with the Commonwealth, in fact, eventually the help was refused. The Commonwealth Government can take necessary action even without the formal application from the concerned State if in its opinion the protection of the property of the Commonwealth or services or execution of some powers vested in the Commonwealth is necessary.

When violence is aimed against Commonwealth institutions, e.g. barracks, post offices, matters which fall within the purview of Commonwealth power, then the Commonwealth government can intervene without a request from the State in which violence occurs or there is imminent danger to its safety. Thus in accordance with Constitutional principle the Commonwealth would

101. Section 119 Australian Constitution.
102. Supra note 93.
be the final authority to determine whether "domestic violence" exists or "invasion" requires its protection.

Australian Constitution gives incidental powers to the Commonwealth Parliament under Section 51 of the Constitution. Courts were convinced by the Commonwealth Government during the period of two world wars that wide powers were necessary for the government to overcome, national crises. Judicial interpretation has also mitigated the rigours of constitutional limitations imposed on the Commonwealth Government. After the judgement of the Amalgamated Society of Engineers Vs Adelaide Steamship Co. Ltd. the federal balance has tilted in favour of the Commonwealth. One of the greatest factors in the expansion of powers of the Commonwealth was liberal interpretation of the powers of defence.

The Constitution enables the Commonwealth to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." The federal "balance" is thus largely (though not entirely) a political rather than a strictly constitutional matter. Politically the States are much stronger than their weakened constitutional status suggest. A Commonwealth Government intervenes in the affairs of an unwilling State only at considerable political cost.

104. (1920) 28 C.L.R. 139.

105. Supra note 46, p.37.
Therefore, it is submitted that in the Federations of America, Canada and Australia, the Dominion authority has been empowered to supersede the State of Provincial governments not on its own initiative.

Neither the American nor the Canadian and the Australian Constitutions contain provisions, for expansion of federal powers during emergency, but courts have always got over the difficulty by interpreting the war and the defence powers of the Central Government so as to embrace emergency taken by them. 106

Thus Indian Governor has been assigned powers greater than those of Governors in Australia, U.S.A. and Lieutenant Governor in Canada. Hence Federalism in India appears to be more centralised in spirit as compared to that of Australia, Canada and U.S.A.