CHAPTER 5

NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

ARTICLE 1(1) of *our* Constitution says—"India, that is Bharat, shall be a Union of States."

While submitting the Draft Constitution, Dr. Ambedkar, the Chairman of the Drafting Committee, stated that "although its Constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages,[1] These advantages, he explained in the Constituent Assembly,[2] were to indicate two things, *viz.,* (a) that the Indian federation is not the result of an agreement by the units, and (b) that the component units have no freedom to secede from it.

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States—the model of federation; in the Preamble of the British North America Act (which, according to Lord HALDANE, did not create a true federation at all); in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution; and even in the Constitution of the U.S.S.R. (1977), which formally acknowledges a right of secession [*Art.* 72] to each Republic, *i.e.,* unit of the Union.[3]

We have, therefore, to examine the provisions of the Constitution itself, apart from the label given to it by its draftsman, to determine whether it provides a federal system as claimed by Dr. Ambedkar, particularly in view of the criticisms (as will be presently seen) levelled against its federal claim by some foreign scholars.

Different types of Federal Constitutions in the modern World.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual with scholars on the subject to start with the model of the *United States,* the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of 'federation'. But numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia. Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain

whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India,*[4] now find support from the categorical assertion of a research worker[5] on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar[6] has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments".

Indian Constitution basically Federal, with unitary features.

To anticipate the Author's conclusion, the constitutional system of India is *basically* federal, but, of course, with striking unitary features.[7] In order to come to this conclusion, we have to formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

Essential features of a Federal polity.

Though there may be difference amongst scholars in matters of detail, the consensus of opinion is that a federal system involves the following essential features:

(i) *Dual Government.* While in a unitary State, there is only one Government, namely the national Government, in a federal State, there are two Governments,—the national or federal Government and the Government of each component State.

Though a unitary State may create local sub-divisions, such local authorities enjoy an autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

A federal State, on the other hand, is the fusion of several States into a single State in regard to matters affecting common interests, while each component State enjoys autonomy in regard to other matters. The component States are not mere delegates or agents of the federal Government but both the Federal and State Governments draw their authority from the same source, *viz.,* the Constitution of the land. On the other hand, a component State has no right to secede from the federation at its will. This distinguishes a federation from a confederation.

(ii) *Distribution of Powers.* It follows that the very object for which a federal State is formed involves a division of authority between the Federal Government and the States, though the method of distribution may not be alike in the federal Constitutions.

(iii) *Supremacy of the Constitution.* A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant of a statute by which it is created. Every power—executive, legislative, or judicial—whether it belongs to the federation or to the component States, is subordinate to and controlled by the Constitution.

(iv) *Authority of Courts.* In a federal State the legal supremacy of the Constitution is essential to the existence of the federal system. It is essential to maintain the division of powers not only between the coordinate branches of the government, but also between the Federal Government and the States themselves. This is secured by vesting in the Courts a final power to interpret the Constitution and nullify an action on the part of the Federal and State Governments or their different organs which violates the provisions of the Constitution.

The Supreme Court has observed that Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between the Union and the States and existence of an independent judiciary.[8]

Not much pains need to be taken to demonstrate that the political system introduced by *our* Constitution possesses all the aforesaid essentials of a federal polity. Thus, the Constitution is the supreme organic law of *our* land, and both the Union and the State Governments as well as their respective organs derive their authority from the Constitution, and it is not competent for the States to secede from the Union. There is a division of legislative and administrative powers between the Union and the State Governments and the Supreme Court stands at the head of *our* Judiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person[9] who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.[10] It is because of these basic federal features that our Supreme Court has described the Constitution as 'federal'.[11]

Peculiar features of Indian Federalism.

But though *our* Constitution provides these essential features of a federation, it differs from the typical federal systems of the world in certain fundamental respects:

(A) *The Mode of formation.* A federal union of the American type is formed by a voluntary agreement between a number of sovereign and independent States, for the administration of certain affairs of general concern.

But there is an alternative mode of the *Canadian* type (if Canada is admitted into the family of federations), namely, that the provinces of a unitary State may be transformed into a federal union to make themselves autonomous. The provinces of Canada had no separate or independent existence apart from the colonial Government of Canada, and the Union was not formed by any agreement between them, but was imposed by a British statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces. Though the Indian federation resembles the Canadian federation in its centralising

tendency, it even goes further than the Canadian precedent. The federalism in India is not a matter of administrative convenience, but one of principle.[12]

India had a thoroughly centralised unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter (see pp. 1-8, *ante*).

To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept, and used the expression 'Federation of India' (s. 5) in a Constitution Act relating to India, since the Constitution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned. The foundation for a federal set-up for the nation was laid in the Govt. of India Act, 1935. Though in every respect the distribution of legislative power between the Union and the States as envisaged in the 1935 Act has not been adopted in the Constitution, but the basic framework is the same.[13] The Supreme Court observed that India has adopted for itself a loose federal structure as it is an indestructible Union of destructible units.[14]

Federation as envisaged by the Government of India Act, 1935.

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada, viz.,* "by creating autonomous units and combining them into a federation by one and the same Act". All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give direction to the Provinces.[15]

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

> "Of course in thus converting a unitary State into a federation we should be taking a step *for which there is no exact historical* precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they exercise has been in the main devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced with the necessity of *creating autonomous units and combining them* into a federation by one and the same Act."

Not the result of a compact.

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any *compact* or agreement between autonomous States.[2] So far as

the Provinces are concerned, the progress had been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous, within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935 the Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they refused to join the federal system of 1935. They lacked the 'federal sentiment' (*Dicey*), that is, the desire to form a federal union with the rest of India. But, as already pointed out, the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the Independence of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B[16] of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A[16]). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.[16]

(B) *Position of the States in the Federation.* In the *United States,* since the States had a sovereign and independent existence prior to the formation of the federation, they were reluctant to give up that sovereignty any further than what was necessary for forming a national government for the purpose of conducting their common purposes. As a result, the Constitution of the federation contains a number of safeguards for the protection of 'State rights', for which there was no need in *India,* as the States were not 'sovereign' entities before. These points of difference deserve particular attention:

(i) While the *residuary* powers are reserved to the States by the American Constitution, these are assigned to the Union by *our* Constitution [*Art.* 248].

This alone, of course, is not sufficient to put an end to the federal character of our political system, because it only relates to the *mode* of distribution of powers. *Our* Constitution has simply followed the *Canadian* system in vesting the residuary power in the Union.

No State excepting Kashmir, can draw its own Constitution.

(ii) While the Constitution of the *United States of America* merely drew up the constitution of the national government, leaving it "in the main (to the State) to continue to preserve their original Constitution", the Constitution of *India* lays down the constitution for the States as well, and, no State, save Jammu and Kashmir, has a right to determine its own (State) constitution.

(iii) In the matter of amendment of the Constitution, again, the part assigned to the State is minor, as compared with that of the Union. The doctrine underlying a federation of the *American* type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

But in *India,* except in a few specified matters affecting the federal structure (see Chap. 10, *post*), the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union Parliament, passed by a special majority.

(iv) Though there is a division of powers between the Union and the States, there is provision in *our* Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [*Art.* 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [*Arts.* 155-156]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the *Canadian* Constitution.

(v) The *American* federation has been described by its Supreme Court as "an indestructible Union composed of indestructible States".[17]

It comprises two propositions—

(a) The Union cannot be destroyed by any State seceding from the Union at its will.[18]

(b) Conversely, it is not possible for the federal Government to redraw the map of the United States by forming new States or by altering the boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. The same principle is adopted in the *Australian* Constitution to make the Commonwealth "indissoluble", with the further safeguard superadded that a popular referendum is required in the affected State to alter its boundaries.

(a) It has been already seen that the first proposition has been accepted by the makers of *our* Constitution, and it is not possible for the States of the Union of India, to exercise any right of secession. It should be noted in this context that by the 16th Amendment of the Constitution in 1963, it has been made clear that even advocacy of secession will not have the protection of the freedom of expression.[19]

No right to secede.

(b) But just the contrary of the second proposition has been embodied in *our* Constitution. Under *our* Constitution, it is possible for the Union Parliament to reorganise the States or to alter their boundaries, by a simple majority in the ordinary process of legislation [*Art.* 4(2)]. The Constitution does not require that the *consent* of the Legislature of the States is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the President is competent to fix a time-limit within which a State must express its views, if at all [Proviso to *Art.* 3, as amended]. In the Indian federation, thus, the States are not "indestructible" units as in the *U.S.A.* The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Reorganisation Act, 1956, which reduced the number of States from 27 to 14 within a period of six years from the commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequently, of several new States—Gujarat, Nagaland, Haryana, Karnataka, Meghalaya, Himachal Pradesh, Manipur, Sikkim, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttarakhand, Jharkand.

But consent of a State is not required for altering its boundaries by Parliament.

It is natural, therefore, that questions might arise in foreign minds as to the nature of federalism introduced by the Indian Constitution.

(vi) Not only does the Constitution offer no guarantee to the States against affecting their territorial integrity without their consent,—there is no theory of 'equality of State rights' underlying the federal scheme in *our* Constitution, since it is not the result of any agreement between the States.

One of the essential principles of *American* federalism is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected in the equality of representation of the States in the upper House of the Federal Legislature (*i.e.*, in the Senate),[20] which is supposed to safeguard the status and interests of the States in the federal organisation. To this is superadded the guarantee that no State may, without its consent, be deprived of its equal representation in the Senate [*Art.* V].

Under *our* Constitution, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 1 to 31. In view of such composition of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under *our* Constitution. Nor can *our* Council of States be correctly described as a federal Chamber insofar as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

No equality of State representation.

(vii) Another novel feature introduced into the Indian federalism was the admission of Sikkim as an

Status of Sikkim.

'associate State', without being a *member* of the Union of India, as defined in Art. 1, which was made possible by the insertion of Art. 2A into the Constitution, by the Constitution (35th Amendment) Act, 1974.

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Act, 1974, has been undone by the 36th Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, *as a full-fledged State* under the First Schedule with effect from 26th April, 1975 (see under Chap. 6, *post*). The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired.

Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State. Article 371G makes certain special provisions relating to the State of Mizoram, while Arts. 371H and 371I insert special provisions for Arunachal Pradesh and Goa.

(C) *Nature of the Polity.* As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the *American* Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts.

No double citizenship.

(i) An *American* is a citizen not only of the State in which he resides but also of the United States, *i.e.,* of the federation, under different conditions; and both the federal and State Governments, each independent of the other, operate *directly* upon the citizen who is thus *subject to two Governments, and owes allegiance to both.* But the *Indian* Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, *viz.,*—the citizenship of India [*Art. 5*], and birth or residence in a particular State does not confer any separate status as a citizen of that State.

No division of public services.

(ii) As regards officials similarly, the federal and State Governments in the *United States,* have their own officials to administer their respective laws and functions. But there is no such division amongst the public officials in India. The majority of the public servants are employed by the States, but they administer both the Union and the State laws as are applicable to their respective States by which they are employed. *Our* Constitution provides for the creation of All-India Services, but they are to be common to the Union and the States [*Art.* 312]. Members of the Indian Administrative Service, appointed by the Union, may be employed either under some Union Department (say, Home or Defence) or under a State Government, and their services are transferable, and even when they are employed under a Union Department, they have to administer both the Union and State laws as are applicable to the matter in question. But even while serving under a State, for the time being, a member of an all-India Service can be dismissed or removed only by the Union Government, even though the State Government is competent to initiate disciplinary proceedings for that purpose.

(iii) In the *U.S.A.,* there is a bifurcation of the Judiciary as between the Federal and State Governments. Cases arising out of the federal Constitution and federal laws are tried by the federal Courts, while State Courts deal with cases arising out of the State Constitution and State laws. But in *India,* the same system of Courts, headed by the Supreme Court, will administer both the Union and State laws as they are applicable to the cases coming up for adjudication.

No dual system of Courts.

(iv) The machinery for election, accounts and audit is also similarly integrated.

(v) The Constitution of India empowers the Union to entrust its executive functions to a State, by its consent [*Art.* 258], and a State to entrust its executive functions to the Union, similarly [*Art.* 258A]. No question of 'surrender of sovereignty' by one Government to the other stands in the way of this smooth co-operative arrangement.

(vi) While the federal system is prescribed for normal times, the Indian Constitution enables the federal government to acquire the strength of a unitary system in *emergencies.* While in normal times the Union Executive is entitled to give directions to the State Governments in respect of specified matters, when a Proclamation of Emergency is made, the power to give directions extends to *all* matters and the legislative power of the Union extends to State subjects [*Arts.* 353, 354, 357]. The wisdom of these emergency provisions (relating to *external* aggression, as distinguished from 'internal disturbance') has been demonstrated by the fact that during the Chinese aggression of 1962 or the Pakistan aggression of 1965, India could stand as one man, pooling all the resources of the States, notwithstanding the federal organisation.

(vii) Even in its normal working, the federal system is given the strength of a unitary system—

(a) By endowing the Union with as much exclusive powers of legislation as has been found necessary in other countries to meet the ever-growing national exigencies, and, over and above that, by enabling the Union Legislature to take up some subject of State competence, if required in the national interest'. Thus, even apart from emergencies, the Union Parliament may assume legislative power (though temporarily) over any subject included in the State List,[21] if the Council of States (Second Chamber of Parliament) resolves, by a two-thirds vote, that such legislation is necessary in the 'national interest' [*Art.* 249]. There is, of course, a federal element in this provision inasmuch as such expansion of the power of the Union into the State sphere is possible only with the consent of the Council of States where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union *vis-a-vis* the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Union control in normal times.

Even though there is a distribution of powers between the Union and the States as under a federal system, the distribution has a strong Central bias and

Strong central bias.

the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

(b) By empowering the Union Government to issue directions upon the State Governments to ensure due compliance with the legislative and administrative action of the Union [*Arts.* 256-257], and to supersede a State Government which refuses to comply with such directions [*Art.* 365].

(c) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, *at any time,* satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [*Art.* 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Hence, Panikkar is justified in observing—"The Constitution itself has created a kind of paramountcy for the Centre by providing for the suspension of State Governments and the imposition of President's rule under certain conditions such as the breakdown of the administration". *Secondly,* the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *sou motu,* whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a *coercive* power available to the Union against the units of the federation.

A critique of the Federal System.

But though the above scheme seeks to avoid the demerits of the federal system, there is perhaps such an emphasis on the strength of the Union government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. Wheare)[22] was led to observe that the Indian Constitution provides—

> "a system of Government which is quasi-federal . . .a *Unitary State* with *subsidiary federal features rather than a Federal State with subsidiary unitary features.*"

In his later work in Modern Constitutions[23] he puts it, generically, thus—

> "In the class of quasi-federal Constitution it is *probably proper* to include the Indian Constitution of 1950. . . ."

Prof. Alexandrowicz[24] has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,[25] when he says that "India is a case *sui generis*". This is in accord with the Author's observation that—

> "the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type. It enshrines the principle that in spite of federalism the national interest ought to be paramount."[25]

In fact, anybody who impartially studies the Indian Constitution from close quarters and acknowledges that Political Science today admits of different variations of the federal system cannot but observe that the Indian

system is 'extremely federal',[26] or that it is a 'federation with strong centralising tendency'.[27]

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the *Canadian* and the *Indian* system lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed[22]—

> "That, however, is what appears on paper only. It remains to be seen whether *in actual practice* the federal features entrench or strengthen themselves as they have in Canada, or whether the strong trend towards centralisation which is a feature of most Western Governments in a world of crises, will compel these federal aspects of the Constitution to wither away."

The working of federalism in India.

A survey of the actual working of *our* Constitution for the last 59 years would hardly justify the conclusion that, even though the unitary bonds have in some respects been further tightened, the federal features have altogether 'withered away'.

Some scholars in India[28] have urged that the unitary bias of *our* Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of the States upon Union grants for discharging their functions; (b) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform development of the country as a whole. It is true that the bigger States are not allowed to appropriate all their resources and the system of assignment and distribution of tax resources by the Union [*Arts.* 269, 270, 272] means the dependence of the States upon the Union to a large extent. But, left alone, the stronger and bigger States might have left the smaller ones lagging behind, to the detriment of our national strength.

(ii) Even in a country like the United States, such factors have, in practice, strengthened the national Government to a degree which could not have been dreamt of by the fathers of the Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer[29] has observed—

> "Here is an attack on federalism, so subtle that it is scarcely realised . . . Control of economic life and of these social services (*viz.*, unemployment, old-age, maternity and child welfare) were the two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."

In fact, the traditional theory of mutual independence of the two governments,—federal and States, has given way to "co-operative federalism' in most of the federal countries today.[30]

An American scholar explains the concept of 'co-operative federalism' in these words[30]—

> ". . . the practice of administrative co-operation between general and regional governments, the partial *dependence* of the regional governments *upon payments* from the general governments, and the fact that the general governments, by the use of *conditional* grants, frequently promote developments in matters which are *constitutionally assigned* to the regions."

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against the concept of federalism and that is why Granville Austin[31] prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central . . . government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies."

In fact, the federal system in the Indian Constitution is a compromise between two apparently conflicting consideration:

(i) There is a normal division of powers under which the States enjoy autonomy within their own spheres, with the power to raise revenue;

(ii) The need for national integrity and a strong Union government, which the saner section of the people still consider necessary after 59 years of working of the Constitution.

Indian federalism as judicially interpreted.

The interplay of the foregoing two forces has been acknowledged even by the Supreme Court in interpreting various provisions of the Constitution, *e.g.*, in explaining the significance of Art. 301[32] thus—

> "The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in the view *the essential structure* of a federal or quasi-federal Constitution, namely, that *the units of the Union have also certain powers as has the Union itself* . .
>
> In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations. . . first, in the larger interest of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, *the regional interests must not be ignored altogether,* and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India . . . Therefore, in interpreting the relevant articles in Part XIII we must have regard to the *general scheme* of the Constitution of India with special reference to Part III, Part XII . . . and their inter-relation to Part XIII *in the context of a federal or quasi-federal Constitution* in which the States have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted[33] against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission (which itself was not recognised by the Constitution like the Finance Commission, the Public Service Commission or the like). But this is not because the Constitution is not federal in structure[34] or that its provisions envisage unitary control; the defect is *political,* namely, that it is the same Party which dominates both the Union and State Governments and that,

naturally, complaints of discrimination or interference with State autonomy are more common in those States which happen to be, for the time being, under the rule of a Party different from that of the Union Government. The remedy, however, lies through the ballot box. It is through political forces, again, that the Union Government may be prevented from so exercising its constitutional powers as to assume an 'unhealthy paternalism'[35]; but that is beyond the ken of the present work. The remedy for a too frequent use of the power to impose President's rule in a State, under Art. 356, is also political.[36]

Survival of Federation in India.

The strong Central bias has, however, been a boon to keep India together when we find the separatist forces of communalism, linguism and scramble for power, playing havoc notwithstanding all the devices of Central control, even after five decades of the working of the Constitution. It also shows that the States are not really functioning as agents of the Union Government[7] or under the directions of the latter, for then, events like those in Assam (over the language problem), or territorial dispute between Karnataka and Maharashtra could not have taken place at all.

That the federal system has not withered away owing to the increasing impact of Central bias would be evidenced by a number of circumstances which cannot be overlooked [see, further, Chap. 33, *post*]:

(a) The most conclusive evidence of the survival of the federal system in India is the co-existence of the Governments of the parties in the States different from that of the Centre. Of course, the reference of the Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in Kerala as an undue interference with the constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court[35] was prompted by a purely legalistic outlook free from any political consideration so that the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Court discharges its duties as a guardian of the Constitution.

(b) That federalism is not dead in India is also evidenced by the fact that new regions are constantly demanding Statehood and that already the Union had to yield to such demand in the cases of Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,[37] Uttaranchal[38] and Jharkhand.[39]

(c) Another evidence is the strong agitation for greater financial power for the States. The case for greater autonomy for the States in *all* respects was first launched by Tamil Nadu, as a lone crusader, but in October, 1983, it was joined by the States ruled by non-Congress Parties, forming an 'Opposition Conclave', though all the Parties were not prepared to go to the same extent. The enlargement of State powers at the cost of the Union, in the *political* sphere is not, however, shared by other States, on the ground that a weaker Union will be a danger to external security and even internal cohesion, in present-day circumstances. But there is consensus amongst the States, in general, that they should have larger financial powers than those

conferred by the existing Constitution, if they are to efficiently discharge their development programmes within the State sphere under List II of the 7th Schedule. The Morarji Desai Government (1977) sought to pacify the States by conceding substantial grants by way of 'Plan assistance', by what has been called the 'Desai award'.[40]

Sarkaria Commission.

It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such *ad hoc* palliatives. It is interesting to note that the suggestion, in a previous edition of this book, that the remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in the appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, SARKARIA, J., empowered to recommend changes[41] in the Centre-State relations' in view of the various developments which have taken place since the commencement of the Constitution. The Commission submitted its Report in 1988. The Supreme Court referred to the report in *S.R. Bommai*[7] (see also under 'Inter-State Council', *post*).

The proper assessment of the federal scheme introduced by *our* Constitution is that it introduces a system which is to *normally* work as a federal system but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.[42] But the exceptions cannot be held to have overshadowed the basic and normal structure.[43] The exceptions are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [*e.g.*, *Arts.* 252, 258(1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

Conclusion.

In fine, it may be reiterated that the Constitution of India is *neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type.*[44] It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".[45]

REFERENCES

1. Draft Constitution, 21-2-1948, p. iv. [The word 'Union', in fact, had been used both in the Cripps proposals and the Cabinet Mission Plan (see under Chap. 2, *ante*), and in the Objectives Resolution of Pandit Nehru in 1947 (Chap. 3, *ante*), according to which residuary powers were to be reserved to the units].
2. C.A.D. Vol. VII, p. 43.
3. See Author's *Select Constitutions of the World*, 1984 Ed., p. 188.

4. Author's *Commentary on the Constitution of India,* 7th (Silver Jubilee) Ed., Vol. A, pp. 33 *et seq.*
5. Prof. W.T. WAGNER, *Federal States and their Judiciary* (Moulton and Co., 1969), p. 25.
6. LIVINGSTONE, *Federation and Constitutional Change,* 1956, pp. 6-7.
7. This view of the Author has been affirmed by the 9-Judge Bench Supreme Court decision in *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 (para 211).
8. *Ganga Ram Moolchandani* v. *State of Rajasthan,* AIR 2001 SC 2616.
9. Cf. *Gujarat University* v. *Sri Krishna, AIR* 1963 S.C. 703 (*715-16*); *Waverly Mills* v. *Rayman & Co., AIR* 1963 S.C. 90 (*95*).
10. Cf. *State of West Bengal* v. *Union of India, AIR* 1963 S.C. 1241.
11. Cf. *Atiabari Tea Co.* v. *State of Assam,* (1961) 1 S.C.R. 809 (*860*); *Automobile Transport* v. *State of Rajasthan,* AIR 1962 S.C. 1406 (*1416*); Ref. under *Art. 143, AIR* 1965 S.C. 745 (para 39).
12. *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918; **affirming** by and large, the views of the author at pp. 35-55 of C7, Vol. A.
13. *Prof. Yashpal* v. *State of Chhattisgarh,* AIR 2005 SC 2026.
14. *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184.
15. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier [see under 'Federation and Provincial Autonomy', *ante*].
16. *Vide* Table III, col. (A).
17. *Texas* v. *White,* (1869) 7 Wall. 700.
18. A contrary instance is to be found in the Constitution of the *U.S.S.R.* which expressly provides that "each Union Republic shall *retain* the right freely to secede from the U.S.S.R." [Art. 72 of the Constitution of 1977; see Author's *Select Constitutions of the World,* 1984 Ed., p. 188].
19. Author's *Constitutional Law of India* (6th Ed,, 1991, Prentice-Hall of India, p. 46).
20. Each of the 50 States of U.S.A. has two representatives in the Senate.
21. There are three legislative lists in the Seventh Schedule; 99 items in the Union List, 61 items in the State List and 52 items in the Concurrent List [see Table XIX, *post*].
22. K.C. WHEARE, *Federal Government,* 1951, p. 28. He relaxes this view in the 4th Ed. (1963), pp. 26, 77.
23. WHEARE, *Modern Constitutions,* 2nd Ed. (1966), p. 21.
24. C.H. ALEXANDROWICZ, *Constitutional Developments in India,* 1957, pp. 157-70.
25. *Vide* Author's *Commentary on the Constitution of India,* 7th Ed., Vol. A, p. 55.
26. APPLEBY, *Public Administration in India* (1953), p. 51.
27. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 1.
28. E.g. SANTHANAM, *Union-State Relations in India,* 1960, pp. vii; 51, 59, 63. At p. 70, the learned Author observes—

    "India has practically functioned as a Unitary State though the Union and the States have *tried* to function formally and legally as a Federation."
29. GRIFFITH, *The Impasse of Democracy* 1939, p. 196, quoted in GODSHALL, *Government in the United States,* p. 114.
30. Cf. BIRCH, *Federalism,* pp. 305-06.
31. GRANVILLE AUSTIN, *The Indian Constitution* (1966), pp. 187 *et seq.*
32. *Automobile Transport* v. *State of Rajasthan, AIR* 1962 S.C. 1406 (*1415-16*). In *Keshavananda* v. *Union of India, AIR* 1973 S.C. 1461, some of the judges (paras 302, 599, 1681) considered federalism to be one of the 'basic features' of *our* Constitution. A nine-Judge Supreme Court Bench has in *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 laid down that the Constitution is federal and some of the Judges characterised federalism as its basic feature.
33. *Vide* Report of the Centre-State Relations Committee (Rajamannar Committee) (Madras, 1971, pp. 7-9).
34. It is interesting to note that even the Rajamannar Committee characterises the system under the Constitution of India as 'federal' (para 5, p. 16, *ibid.*), but suggests amendment of some of its features which have a unitary trend (para 6, p. 16).

35. Re. Kerala Education Bill, AIR 1958 S.C. 956.
36. It is unfortunate that even the Janata Government formed in 1977 which was determined to undo all mischief alleged to have been caused by the long Congress rule, was not convinced of the need to effectively control the frequent use of the drastic power conferred by Art. 356, and that the amendments effected by the 44th Amendment, 1978, in respect of this Article, are not good enough from this standpoint.
37. *Vide* The Madhya Pradesh Reorganisation Act, 2000.
38. *Vide* The Uttar Pradesh Reorganisation Act, 2000.
39. *Vide* The Bihar Reorganisation Act, 2000.
40. *Statesman,* Calcutta, dated 26-2-1979, p. 1.
41. Rao Government, which was in office till 1995, did not implement any of the recommendations made in the report of the Sarkaria Commission.
42. As Dr. Ambedkar explained in the Constituent Assembly (VII C.A.D. 33-34), the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances".
43. How far the 9-Judge Bench of the Supreme Court in *Bommai's* case (AIR 1994 S.C. 1918) has adopted the Author's views as expressed in the foregoing discussion will be evident from its following observation:

    "The fact that under the scheme of our Constitution, greater power is conferred upon the Centre *vis-a-vis* the States does not mean that states are mere appendages of the Centre. Within the sphere allotted to them, *States are supreme* . . . More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. . . let it be said that federalism in the Indian Constitution is not a *matter of administrative convenience, but one of principle*—the outcome of our own historical process and a recognition of the ground realities (para 276).

    This view, expressed by Jeevan Reddy and Agrawal, JJ. is joined by Pandian, J. (para 2). The view is supported by Sawant and Kuldip Singh. JJ. in these words (para 99);

    ". . . the States have an independent constitutional existence. . . they are not satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not *destructive* of the *essential* federal feature of our Constitution. . . they are exceptions and have to be resorted to only to meet the exigencies of the *special situations.* The *exceptions are not a rule* (para 99).
44. GRANVILLE AUSTIN [*The Indian Constitution* (1966), p. 186] agrees with this view when he describes the Indian federation as 'a *new* kind of federalism to meet India's peculiar needs'.
45. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 55.