

TRACTS FOR THE TIMES: No. 3.

**FEDERATION
VERSUS
FREEDOM
(Kale Memorial Lecture)**

*Address delivered on 29th January 1939
at
the Annual Function
of
the Gokhale Institute of Politics and Economics
held in
the Gokhale Hall, Poona*

*“The distance you have gone is less important than
the direction in which you are going today.”*

—Tolstoy

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FEDERATION VERSUS FREEDOM

PREFACE

A word or two as regards the origin of this tract and the motive which has led me to publish it at this time will, I think, not be out of place.

Many in this country must be aware that there exists in Poona an institution which is called the Gokhale Institute of Politics and Economics, working under the direction of Dr. D. R. Gadgil. The Institute holds a function annually to celebrate what is called the Founder's Day and invites some one to deliver an address on some subject connected with politics or economics. This year, I was asked by Dr. Gadgil to deliver an address. I accepted the invitation and chose the Federal Scheme as the subject of my address. The address covered both (1) the structure of the Federation and (2) a critique of that structure. The address was delivered on 29th January 1939 at the Gokhale Hall in Poona. The address as prepared had become too lengthy for the time allotted to me and although I kept the audience for two hours when usually the time allotted for such address is one hour I had to omit from the address the whole of the part relating to the Federal structure and some portion from the part relating to the criticism of the structure. This tract, however, contains the whole of the original address prepared by me for the occasion.

So much for the origin of this tract. Now as to the reasons for publishing it. All addresses delivered at the Gokhale Institute are published. It is in the course of things that this also should be published. But there are other reasons besides this, which have prevailed with me to publish it. So far as the Federation

is concerned, the generality of the Indian public seems to be living in a fog. Beyond the fact that there is to be a Federation and that the Federation is a bad thing the general public has no clear conception of what is the nature of this Federation and is, therefore, unable to form an intelligent opinion about it. It is necessary that the general public should have in its hand a leaflet containing an outline of the Federal structure and a criticism of that structure in small compass sufficient to convey a workable understanding of the Scheme. I feel this Tract will supply this need.

I also think that the publication of this tract will be regarded as timely. Federation is a very live issue and it is also a very urgent one. Soon the people of British India will be called upon to decide whether they should accept the Federal Scheme or they should not. The premier political organization in this Country, namely, the Congress seems to be willing to accept this Federation as it has accepted Provincial Autonomy. The negotiations that are going on with the Muslim League and the manoeuvres that are being carried on with the Indian States give me at any rate the impression that the Congress is prepared to accept the Federation and that these negotiations and manoeuvres are designed to bring about a working arrangement with other parties so that with their help the Congress may be in the saddle at the Centre as it has been in the Provinces. Mr. Subhas Chandra Bose has even gone to the length of suggesting that the right wing of the Congress has committed itself to this Federation so far that it has already selected its cabinet. It matters not whether all this is true or not. I hope all this is untrue. Be that as it may, the matter is both grave and urgent, and I think all those who have anything to say on the subject should speak it out. Indeed I feel that silence at such a time will be criminal. That is why I have hastened to publish my address. I believe that I have views on the subject of Federation which even if they do not convince others will at least provoke them to think

1-3-39

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I

INTRODUCTORY

Dr. Gadgil and students of the Gokhale Institute,

I feel greatly honoured by your invitation to address you this evening. You have met today to celebrate a day which is set out as your Founder's Day. I had the privilege of personally knowing the late Rao Bahadur R. R. Kale the founder of your Institute. He was my colleague in the old Bombay Legislative Council. I know how much care and study he used to bestow upon every subject which he handled. I am sure he deserves the gratitude of all those who care for knowledge and study for helping to 'establish this Institute, whose main function as I understand is to dig for knowledge and make it ready for those who care to use it. For, first knowledge is power as nothing else is, and secondly, not all those who wish and care for knowledge have the leisure and the patience to dig for it. As one who believes in the necessity of knowledge and appreciates the difficulties in its acquisition I am glad to be associated in this way with him and with the Institute he has founded.

The theme I have chosen for the subject matter of my address is the Federal Scheme embodied in the Government of India Act, 1935. The title of the subject might give you the impression that I am going to explain the Federal Constitution. That would be an impossible task in itself. The Federal Scheme is a vast thing. Its provisions are contained, first in 321 sections of the Government of India Act, 1935, secondly in the 9 Schedules which are part of the Act, thirdly in 31 Orders-in-Council issued under the Act and fourthly the hundreds of Instruments of Accession to be passed by the Indian States. Very few can claim mastery over so vast a subject and if any did he would take years to expound it in all its details.

I have set to myself a very limited task. It is to examine the scheme in the light of certain accepted tests and to place before you the results of this examination so that you may be in a position to form your own judgment regarding the merits of the scheme. It is true that I cannot altogether avoid setting out the outlines of the scheme. In fact, I am going to give an outline of the scheme. I realize that it is an essential preliminary without which my criticism might remain high up in the air. But the outline I am going to draw for my purpose will be the briefest and just enough to enable you to follow what I shall be saying regarding the merits of the scheme.

II

BIRTH AND GROWTH OF INDIAN FEDERATION

There are five countries which are known in modern times to have adopted the federal form of Government. They are : (1) U.S.A., (2) Switzerland, (3) Imperial Germany, (4) Canada and (5) Australia. To these five it is now proposed to add the sixth which is the All-India Federation.

What are the constituent units of this Federation ? For an answer to this question refer to section 5. It says:

“5. (1) It shall be lawful for His Majesty, if an address in that behalf has **Proclamation of India** been presented to him by each House of Parliament and if **of Federation** the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there shall be united in a Federation under the Crown, by the name of the Federation of India,—

- (a) The Provinces hereinafter called Governors’ Provinces ; and
- (b) the Indian States which have acceded or may thereafter accede to the Federation ; and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners’ Provinces.

(2) The condition referred to is that, States—

- (a) the Rulers whereof will, in accordance with the provision contained in Part II of the First Schedule to this Act be entitled to choose not less than fifty-two members of the Council of State ; and
- (b) the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of States, as so ascertained, have acceded to the Federation.”

Leaving aside the conditions prescribed by this Section for the inauguration of the Federation it is clear that the Units of the Federation are (1) The Governors’ Provinces, (2) Chief Commissioners’ Provinces and (3) The Indian States.

What is the size of this Indian Federation ?

Many people when they speak of the Indian Federation do not seem to realize what an enormous entity it is going to be—

	Population	Area	Units
U.S.A.	122,775,040	2,973,773	48 States plus 1 Federal Dist.
Germany	67,000,000	208,780	25
Switzerland	466,400	15,976	22
Canada	10,376,786	3,729,665	9
Australia	6,629,839	2,974,581	6
India	352,837,778	1,808,679	162

The Indian Federation in point of area is 3/5th of U.S.A. and of Australia and half of Canada. It is 9 times of Germany and 120 times of Switzerland. In point of population it is 3 times of U.S.A., 5 times of Germany, 35 times of Canada, 58 times of Australia and 88 times of Switzerland. Measured by the Units which compose it, it is 3 times larger than U.S.A., 6½ times larger than Germany, 8 times larger than Switzerland, 18 times larger than Canada and 27 times larger than Australia. Thus the Indian Federation is not merely a big federation. It is really a monster among federations.

What is the source from which the Federation derives its Governmental Powers and Authority ?

Section 7 says that the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General. That means that the Authority of the Federation is derived from the Crown. In this respect the Indian Federation differs from the Federation in the U.S.A. In the U.S.A., the powers of the Federation are derived from the people. The people of the United States are the fountain from which the authority is derived. While it differs from the Federation in the U.S.A. the Indian Federation resembles the Federations in Australia and Canada. In Australia and Canada the source of the Authority for the Federal Government is also the Crown and Section 7 of the Government of India Act is analogous to section 61 of the Australian Act and section 9 of the Canadian Act. That the Indian Federation should differ in this respect from the American Federation and agree with the Canadian and Australian Federation is perfectly understandable. The United States is a republic while Canada and India are dominions of the Crown. In the former the source of all authority are the people. In the latter the source of all authority is the Crown.

From where does the Crown derive its authority ?

Such a question is unnecessary in the case of Canada and Australia, because the Crown is the ultimate source of all authority and

there is nothing beyond or behind, to which his authority is referable. Can this be said of the Indian Federation ? Is the Crown the ultimate source of authority exercised by the Federation ? Is there nothing beyond or behind the Crown to which this authority needs to be referred ? The answer to this question is that only for a part of the authority of the Federation the Crown is the ultimate source and that for remaining part the Crown is not the ultimate source.

That this is the true state of affairs is clear from the terms of the Instrument of Accession. I quote the following from the draft Instruments :—

“Whereas proposals for the establishment of a Federation of India comprising such Indian States as may accede thereto and the Provinces of British India constituted as Autonomous Provinces have been discussed between representatives of His Majesty’s Government of the Parliament of the United Kingdom, of British India and of the Rulers of the Indian States;

And Whereas those proposals contemplated that the Federation of India should be constituted by an Act of the Parliament of the United Kingdom and by the accession of Indian States ;

And Whereas provision for the constitution of a Federation of India has now been made in the Government of India Act, 1935 ;

And Whereas that Act provided that the Federation shall not be established until such date as His Majesty may, by proclamation, declare, and such declaration cannot be made until the requisite number of Indian States have acceded to the Federation ;

And Whereas the said Act cannot apply to any of my territories save by virtue of my consent and concurrence signified by my accession to the Federation;

Now, therefore, I (insert full name and title), Ruler of (insert name of State), in the exercise of my sovereignty in and over my said State for the purpose of co-operating in the furtherance of the interests and welfare of India by uniting in a Federation under the Crown by the name of the Federation of India with Provinces called Governors’ Provinces and with the Provinces called Chief Commissioners’ Provinces and with the Rulers of other Indian States do hereby execute this my Instrument of Accession, and hereby declare that subject to His Majesty’s acceptance of this Instrument, I accede to the Federation of India as established under the Government of India Act, 1935.”

This is a very important feature of the Indian Federation. What has brought about this difference between the Indian Federation and the Canadian and Australian Federation ? For what part is the Crown the ultimate source and for what part is it not? To understand these questions you must take

note of two things. First, the Indian Federation comprises two distinct areas : British India and Indian States. This will be clear if you refer to section 5. Second, the relationship of these two areas with the Crown is not the same. The area known as British India is vested in the Crown while the area comprised in an Indian State is not vested in the Crown but is vested in the Ruler. This is clear if you refer to sections 2 and 311. The territory of British India being vested in the Crown the sovereignty over it belongs to the Crown and the territory of an Indian State being vested in the Ruler of the State the sovereignty over the State belongs to the Ruler of the State.

You will now understand why I said that in the Indian Federation the Crown is the ultimate source for a part of its authority and for the remaining part the Crown is the ultimate source of authority of the Indian Federation in so far as British India is part of the Federation. The Indian Ruler is the ultimate source of authority in so far as his State is part of this Federation. When therefore section 7 says that the Executive Authority of the Federation shall be exercised by the Governor-General on behalf of the Crown it must be understood that Crown's authority which is delegated by him to the Governor-General in the working out of the Indian Federation is partly its own and partly derived from the Rulers of the Indian States.

What is the process by which the Crown acquires the authority which belongs to the Ruler of an Indian State ? The process is known under the Indian Act as Accession. This Accession is effected by what is called an Instrument of Accession executed by the Ruler of a State. The provisions relating to the Instrument of Accession are contained in section 6(1). That section reads as follows :-

“6. A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler for himself, his heirs and successors—

- (a) declares that he accedes to the Federation as established under this Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal Authority established for the purposes of the Federation shall by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to his State such functions as may be vested in him by or under this Act; and
- (b) assumes the obligation of ensuring that due effect is given within his State to the provisions of this Act so far as they are applicable therein by virtue of his Instrument of Accession.”

It is this Instrument of Accession which confers authority upon the Crown in the first instance so far as an Indian State is part of the Federation and

it is because of this that the Crown's Authority in and over this Federation is derivative in part.

This is the law as to the birth of the Federation. What is the law as to the growth of this Federation? In other words what is the law as to change? The law as to change is contained in section 6(1)(a), Schedule II and section 6(5).

Section 6(1)(a) makes it clear that the accession by a Prince, effected through his Instrument of Accession, is "to the Federation as established by this Act." Schedule II deals with future amendment of the Constitution. It declares what are the provisions in the Government of India Act an amendment of which will be deemed to affect the Instrument of Accession and what are the provisions an amendment of which will not affect the Instrument of Accession by the States.

Section 6(5) does two things. In the first place it provides that the Instrument of Accession shall be deemed to confer upon Parliament the right to amend these provisions which are declared by Schedule II as open to amendment without affecting the Instrument of Accession. In the second place it provides that although Parliament may amend a provision of the Act which is declared by Schedule II as open to amendment without affecting the Instrument of Accession such an amendment shall not bind the States unless it is accepted as binding by the State by a supplementary Instrument of Accession.

To sum up, the units of this Federation do not form one single whole with a common spring of action. The units are separate. They are just held together. For some purposes the position of the units cannot be altered at all. For some purposes alteration is permissible but such alteration cannot bind all the units alike. Some will be bound by it but some will not be unless they consent to be bound. In other words in this Federation there is no provision for growth. It is fixed. It cannot move. A change by evolution is not possible and where it is possible it is not binding unless it is accepted.

III

THE STRUCTURE OF THE FEDERATION

(a) The Federal Legislature

The Federal Legislature is a bicameral legislature. There is a Lower House which is spoken of as the Legislative Assembly and there is an Upper House which is called the Council of State. The composition of the two Chambers is a noteworthy feature. They are very small Chambers compared with other legislatures having regard to the population and the area as the total membership of the Federal Assembly is 375 and of the Council of State 260. These seats are divided in a certain proportion between British India and the Indian States. Of the 375 seats in the Federal Assembly 250

are allotted to British India and 125 to the Indian States. In the Council of State, out of the 260 seats, 156 are allotted to British India and 104 to the Indian States. It may be noticed that distribution between British India and the Indian States is not based upon an equalitarian principle. It is possible to take the population as the basis of representation. It is also possible to take the revenue as the basis of representation. But neither of these has been taken as the basis of distribution of seats. Whether you take population as the basis or whether you take revenue as the basis, you will find that British India has been under-represented, while the Indian States have been over-represented in the two Chambers. The method of filling the seats is also noteworthy. The representatives of the British India in both the Chambers will be elected. The representatives of the Indian States, on the other hand, are to be appointed i.e., nominated, by the Rulers of the States. It is open to a Ruler to provide that the representatives of his State, though appointed by him, may be chosen by his subjects but this is a matter which is left to his discretion. He may appoint a person who is chosen by his people or he may, if he pleases, do both, choose and appoint. In the final result a State's representative is to be appointed by the Ruler as distinguished from being elected by the people. In the case of British India, the representatives are to be elected, but here again there is a peculiarity which may be noticed. In the case of all bi-cameral Legislatures the Lower House being a popular house is always elected directly by the people, while the Upper House being a revising Chamber is elected by indirect election. In the case of the Indian Federation this process is reversed. The Upper Chamber will be elected by direct election by the people and it is the Lower Chamber which is going to be elected indirectly by the Provincial Legislatures. The life of the Federal Assembly is fixed for a term of five years, although it may be dissolved sooner. The Council of State on the other hand is a permanent body not liable to dissolution. It is a body which lives by renewal of a third part of its membership every three years.

Now the authority of the two Chambers to pass laws and to sanction expenditure may be noted. With regard to the authority to pass laws some constitutions make a distinction between money bills and other bills and provide that with regard to money bills the Upper Chamber shall not have the power to initiate such a bill, and also that the Upper Chamber shall not have the authority to reject it. It is given the power only to suspend the passing of the bill for a stated period. The Indian constitution makes no such distinction at all. The money bills and other bills are treated on the same footing and require the assent of both the Chambers before they can become law. The only distinction is that while according to section 30(1) a bill which is not a money bill may originate in either Chamber, a money bill, according to section 37, shall not originate in the Upper Chamber. But according to section 3(2) a money bill needs the assent of the Upper Chamber as much as any other bill.

With regard to the authority to sanction expenditure : here again there is a departure made in the accepted principles of distributing authority between the two Chambers when a Legislature is bi-cameral.

According to section 31(1) the Annual Financial Statement of estimated receipts and expenditure shall be laid before both Chambers of the Federal Legislature and shall, of course, be open to discussion in both the Chambers. Not only are they open to discussion in both the Chambers, they are also subject to the vote of both the Chambers. Section 34(2) requires that the expenditure shall be submitted in the form of demands for grants to the Federal Assembly and thereafter to the Council of State and either Chamber shall have the power to assent to or refuse any demand, or to assent to any demand subject to a reduction of the amount specified therein.

It will thus be seen that the two Chambers are co-equal in authority, both in the matter of their authority to pass laws and in the matter of sanctioning expenditure. A conflict between the two Chambers cannot end by one Chamber yielding to the other if that Chamber does not wish so to yield. The procedure adopted for the resolving of differences between the two Chambers is the method of joint sessions. Section 31(1) deals with the procedure with regard to joint sessions where the conflict relates to a bill. Section 34(3) relates to the procedure where the conflict relates to the differences with regard to sanctioning of expenditure.

(b) The Federal Executive

The constitution of the Federal Executive is described in section 7(1). According to this section the executive Authority of the Federation is handed over to the Governor-General. It is he who is the Executive Authority for the Federation. The first thing to note about this Federal Executive is that it is a unitary executive and not a corporate body. In India ever since the British took up the civil and military government of the country, the executive has never been unitary in composition. The executive was a composite executive. In the Provinces it was known as the Governor-in-Council. At the Centre it was known as the Governor-General-in-Council. The civil and military government of the Provinces as well as of India was not vested either in the Governor or in the Governor-General. The body in which it was vested was the Governor with his Councillors. The Councillors were appointed by the King and did not derive their authority from the Governor-General. They derived their authority from the Crown and possessed co-equal authority with the Governor and the Governor-General and, barring questions where the peace and tranquillity of the territory was concerned, the Governor and the Governor-General were bound by the decision of the majority. The constitution, therefore, makes a departure from the established system. I am not saying that this departure is unsound in principle or it is not justified by precedent or by the circumstances

arising out of the necessities of a federal constitution. All I want you to note is that this is a very significant change.

The next thing to note about the Federal Executive is that although the Governor-General is the Executive Authority for the Federation, there are conditions laid down for the exercise of his powers as the Federal Executive. The constitution divides the matters falling within his executive authority into four classes and prescribes how he is to exercise his executive authority in respect of each of these four classes. In certain matters the Governor-General (1) is to act in his own discretion ; (2) In certain matters he is to act on the advice of his Ministers ; (3) in certain matters he is to act after consultation with his Ministers, and (4) in certain matters he is to act according to his individual judgment. A word may be said as to the *de jure* connotation that underlies these four cases of the exercise of the executive authority by the Governor-General. The best way to begin to explain this *de jure* connotation is to begin by explaining what is meant by "acting on the advice of his ministers." This means, in those matters the government is really carried on, on the authority of the Ministers and only in the name of the Governor-General. To put the same thing differently, the advice of the Ministers is binding on the Governor-General and he cannot differ from their advice. With regard to the matters where the Governor-General is allowed "to act in his discretion" what is meant is that the Government is not only carried on in the name of the Governor-General, but is also carried on the authority of the Governor-General. That means that there can be no intervention or interference by the Ministers at any stage. The Ministers have no right to tender any advice and the Governor-General is not bound to seek their advice ; or to make it concrete, the files with regard to these matters need not go to the Ministers at all. "Acting in his individual judgment" means that while the matter is within the advisory jurisdiction of the Minister, the Minister has no final authority to decide. The final authority to decide is the Governor-General. The distinction between "in his discretion" and "in his individual judgment" is this that while in regard to matters falling "in his discretion" the Ministers have no right to tender advice to the Governor-General, the Ministers have a right to tender advice when the matter is one which falls under "his individual judgment". To put it differently in regard to matters which are subject to his individual judgment the Governor-General is bound to receive advice from his ministers but is not bound to follow their advice. He may consider their advice, but may act otherwise and differently from the advice given by the Ministers. But in respect of matters which are subject to his discretion he is not bound even to receive the advice of his Ministers. The phrase "after consultation" is a mere matter of procedure. The authority in such matter vests in the Governor-General. All that is required is that he should take into account the wishes of the Ministers. Cases relating to

“acting after consultation” may be distinguished from cases relating to “individual judgment” in this way. In cases relating to “individual judgment” the authority vests in the Ministers. The Governor-General has the power to superintend and, if necessary, overrule. In the cases falling under “after consultation”, the authority belongs to the Governor-General and the Ministers have the liberty to say what they wish should be done.

(c) The Federal Judiciary

The Government of India Act provides for the constitution of a Federal Court as part of the Federal Constitution. The Federal Court is to consist of a Chief Justice and such Puisne Judges as His Majesty thinks necessary, their number not to exceed six until an address is presented by the Legislature asking for an increase. The Federal Judiciary has original as well as appellate jurisdiction. Section 204, which speaks of the Original Jurisdiction of the Federal Court, prescribes that, that Court shall have exclusive Original Jurisdiction in any dispute between the Federation, the Provinces and the federated States which involves any question of law or fact on which the existence or extent of a legal right depends. This section, however, provides that if a State is party then the dispute must concern the interpretation of the Act or an Order in Council thereunder, or the extent of the legislative or executive authority vested in the Federation by the Instrument of Accession or arise under an Agreement under Part VI of the Act for the administration of a federal law in the States, or otherwise concern some matter in which the Federal Legislature has power to legislate for the States or arise under an agreement made after federation with the approval of the Representative of the Crown between the States and the Federation or a Province, and includes provision for such jurisdiction. Even this limited jurisdiction of the Federal Court over the States is further limited by the proviso that no dispute is justiciable if it arises under an agreement expressly excluding such jurisdiction.

The appellate jurisdiction of the Federal Court is regulated by section 205 and section 207. Section 205 says that an appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India if the High Court certified that the case involves a substantial question of law as to the interpretation of this Act or an Order in Council made thereunder. Section 207 relates to appeal from decision of Courts of the Federated States. It says that an appeal shall be to the Federal Court from a Court in a federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of any Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State or arises under an Agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature ; but sub-section (2) to section 207 provides

that an appeal under this section shall be by way of a special case to be stated for the opinion of the Federal Court by a High Court, and the Federal Court may require a case to be so stated.

Two further points with regard to the Federal Judiciary may be noted. The first is the power of the Federal Court to execute its own orders. The Federal Court has no machinery of its own to enforce its orders. Section 210 provides that the orders of the Federal Court shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction as the case may be in that part. The instrumentality, therefore, which the Federal Court can use for the enforcement of its own orders consists of the administrative machinery of the units of the Federation. The units of the Federation are bound to act in aid of the Federal Court. This is different to what prevails for instance, in the United States of America, where the Supreme Court has its own machinery for enforcing its own orders.

The second point to note with regard to the Federal Court is the question of the powers of the Executive to remove the judges and the power of the Legislature to discuss their conduct. In this respect also the Federal Court stands on a different footing from the Federal Courts in other Federations. The Constitution does not give the Governor-General the power to suspend a Judge of the Federal Court. It forbids any discussion of a judge's judicial conduct by the Legislature. This, no doubt, gives the judge of the Federal Court the greatest fixity of tenure and immunity from interference by the Executive or by the Legislature. To remove the Judiciary from the control of the Executive it has been found necessary that the tenure of a judge must not be subject to the pleasure of the Executive. All constitutions, therefore, provide that the tenure of a judge shall be during good behaviour and that a judge shall be removeable only if address is presented by the Legislature pronouncing that he is not of good behaviour. Some such authority must be vested in somebody which should have the power to pronounce upon the good behaviour of a judge. This provision is absent in the Federal Constitution, so that a Judge of the Federal Court once appointed is irremoveable from his place till retirement, no matter what his conduct during that period may be. Instead of this, power is given to His Majesty under section 200(2)(b) to remove a Judge of the Federal Court on the ground of misbehaviour or infirmity of body or mind if the Judicial Committee of the Privy Council reports that he may be removed on any such ground.

IV

POWERS OF THE FEDERATION

Before I describe the powers of the Federal Government it might be desirable to explain what is the essence of a Federal Form of Government,

There is no simpler way of explaining it than by contrasting it with the Unitary Form of Government.

Although the Federal Form of Government is distinct from the Unitary form, it is not easy to see distinction. On the other hand, there is, outwardly at any rate, a great deal of similarity between the two. The Government of almost every country in these days is carried on by an inter-related group of Administrative Units operating in specific areas and discharging specific public functions. This is true of a country with a Federal Form of Government and also of a country with a Unitary form of Government. In a Federal Constitution there is a Central Government and there are inter-related to it several Local Governments. In the same way in an Unitary Constitution there is a Central Government and there are inter-related to it several Local Governments. On the surface, therefore, there appears to be no difference between the two.

There is, however, a real difference between them although it is not obvious. That difference lies in the nature of the inter-relationship between the Central and the Local Administrative Units. This difference may be summed up in this way. In the Unitary Form of Government, the powers of the local bodies are derived from an Act of the Central Government. That being so the powers of the Local Government can always be withdrawn by the Central Government. In the Federal form of Government the powers of the Central Government as well as of the Local Government are derived by the law of the Constitution which neither the Local Government nor the Central Government can alter by its own Act. Both derive their powers from the law of the Constitution and each is required by the Constitution to confine itself to the powers given to it. Not only does the Constitution fix the powers of each but the constitution establishes a judiciary to declare any Act whether of the Local or the Central Government as void if it transgresses the limits fixed for it by the Constitution. This is well stated by Clement in his volume on the Canadian Constitution in the following passage :

“Apart from detail, the term federal union in these modern times implies an agreement to commit people to the control of one common government in relation to such matters as are agreed upon as of common concern, leaving each local government still independent and autonomous in all other matters, as a necessary corollary the whole-arrangement constitutes a fundamental law to be recognised in and enforced through the agency of the Courts.

“The exact position of the line which is to divide matters of common concern to the whole federation from matters of local concern in each unit is not of the essence of federalism. Where it is to be drawn in any proposed scheme depends upon the view adopted by the federating communities as to what, in their actual circumstances, geographical, com-

mercial, racial or otherwise, are really matters of common concern and as such proper to be assigned to a common government. But the maintenance of the line, as fixed by the federating agreement, is of the essence of modern federalism; at least, as exhibited in the three great Anglo Saxon federations today, the United States of America, the Commonwealth of Australia, and the Dominion of Canada. Hence the importance and gravity of the duty thrown upon the Courts as the only constitutional interpreter of the organic instrument which contains the fundamental law of the land.”.

Thus to draw a line for the purpose of dividing the powers of Government between the Central and Local Governments by the law of the Constitution and to maintain that line through the judiciary are the two essential features of the Federal Form of Government. It is these two features which distinguish it from the Unitary Form of Government. In short every federation involves two things : (1) Division of Powers by metes and bounds between the Central Government and the Units which compose it by the law of the Constitution, which is beyond the power of either to change and to limit the action of each to the powers given and (2) a Tribunal beyond the control of either to decide when the issue arises as to whether any particular act of the Centre or of the Unit, Legislative, Executive, Administrative or Financial is beyond the powers given to it by the Constitution.

Having explained what is meant by Federal Government, I will now proceed to give you some idea of the Powers which are assigned by the constitution to the Federal Government.

(a) Legislative Powers of the Federation

For the purposes of distributing the Legislative Powers the possible subjects of Legislation are listed into three categories. The first category includes subjects, the exclusive right to legislate upon which is given to the Federal Legislature. This list is called the Federal List. The second category includes subjects, the exclusive right to legislate upon which is given to the Provincial Legislature. The list is called the Provincial List. The third category includes subjects over which both the Federal as well as the Provincial Legislature have a right to legislate. This list is called the Concurrent list. The scope and contents of these lists are given in Schedule VII to the Government of India Act.

In accordance with the fundamental principles of Federation a law made by the Federal Legislature if it relates to a matter which is included in the Provincial List, would be *ultra vires* and a nullity. Similarly, if the Provincial Legislature were to make a law relating to a matter falling in the Federal List such a Provincial Law would be *ultra vires* and therefore a nullity. This is, however declared by statute and section 107 is

now the law on the point. Cases of conflict of legislation touching the Federal List and the Provincial List are not likely to occur often. But cases of conflict between the two are sure to arise in the concurrent field of legislation. The law as to that you will find in section 107. Sub-section (1) lays down when a Federal Law shall prevail over a Provincial Law. Sub-section (2) lays down as to when a Provincial Law shall prevail over the Federal Law. Reading the sub-sections together the position in law is this. As a rule a Federal Law shall prevail over a Provincial Law if the two are in conflict. But in cases where the Provincial Law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or His Majesty, the Provincial Law shall prevail until the Federal Legislature enacts further legislation with respect to the same matter.

With regard to the question of this distribution of powers of legislation every Federation is faced with a problem. That problem arises because there can be no guarantee that enumeration of the subjects of legislation is exhaustive and includes every possible subject of legislation. However complete and exhaustive the listing may be there is always the possibility of some subject remaining unenumerated. Every Federation has to provide for such a contingency and lay down to whom the powers to legislate regarding these residuary subjects shall belong. Should they be given to the Central Government or should they be given to the Units? Hitherto there has been only one way of dealing with them. In some Federations, these residuary powers are given to the Central Government, as in Canada. In some Federations they are given to the Units, as in Australia. The Indian Federation has adopted a new way of dealing with them. In the Indian Federation they are neither assigned to the Central Government nor to the Provinces. They are in a way vested in the Governor-General by virtue of section 104. When a Legislation is proposed on a subject which is not enumerated in any of the three lists it is the Governor-General, who is to decide whether the powers shall be exercised by the Federal Legislature or by the Provincial Legislature.

(b) Executive Powers of the Federation

The first question is, what is the extent of the executive powers of the Federation? Is it co-extensive with the legislative powers? In some of the Federations this was not made clear by statute. It was left to judicial decision. Such is the case in Canada. The Indian Constitution does not leave this matter to courts to decide. It is defined expressly in the Act itself. The relevant section is section 8(1). It says that the executive authority of the Federation extends—

- (a) to matters with respect to which the Federal Legislature has powers to make laws ;
- (b) to raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment;

- (c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas.

There is no difficulty in following the provisions of this sub-section. There might perhaps be some difficulty in understanding sub-clause (a). It says that the executive powers must be co-extensive with the legislative powers of the Federation. Now the legislative power of the Federation extends not only to the Federal List but also to the Concurrent List. Does the executive power of the Federation extend to subjects included in the Concurrent List? Two points must be borne in mind before answering this question. First, the Concurrent List is also subject to the legislative authority of the Province. Second, according to section 49(2) that the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws. The answer to the question whether the executive authority of the Federation extends also to the Concurrent list is that the Executive Authority in respect of the Concurrent List belongs to the Federal Government as well as to the Provincial Government. This is clear from the terms of section 126(2). It belongs to Provincial Government except in so far as the Federal Legislature has covered the field. It belongs to the Federal Government except in so far as the Provincial Legislature has covered the field.

The Concurrent List is not the only list which is subject to Legislation by the Federal Legislature. The Federal Legislature has the right to legislate even on Provincial subjects under Section 102 in cases of emergency and under Section 106 to give effect to international agreements. Does the Executive Authority of the Federation extend to such matters also? The answer is that when a field is covered by Federal Legislation that field also becomes the field of Executive Authority of the Federation.

(c) Administrative Powers of the Federation

The Administrative Powers of the Federation follow upon the Executive Powers of the Federation just as the Executive Powers of the Federation follow upon the Legislative Powers of the Federation.

To this there is one exception. That exception relates to the administration of subjects included in the Concurrent List. The Concurrent List is a list to which the Legislative Authority of the Federation extends by virtue of Section 100. As has already been pointed out the executive authority of the Federation extends in so far as Federal Legislation has covered the field. But the administrative powers for subjects falling in the Concurrent List do not belong to the Federation. They belong to the Provinces.

(d) Financial Powers of the Federation

The revenues of the Federal Government are derived from four different sources : (1) Revenue from Commercial Enterprise, (2) Revenue from