

Sovereign Functions; (3) Revenue from Tributes; and (4) Revenue from Taxes.

Under the first head fall all revenues from Posts and Telegraphs. Federal Railways, banking profits and other commercial operations. Under the second head come revenues from currency and coinage, from *bona vacantia* and territories administered directly by the Federal Government. Under the third head are included Contributions and Tributes from the Indian States.

The classification of Revenue from taxes follows upon the Powers of Taxation given to the Federal Government by the Constitution. The Powers of Taxation given to the Federal Government fall into three main categories. In the first category fall those powers of taxation which is wholly appropriable by the Federal Government. In the second category, fall those powers of taxation which are exercisable for raising revenue which is divisible between the Federal Government and the Provincial Governments.

The heads of revenue which fall under the first category of Taxing Powers cover those which are specifically mentioned in the Federal List—

1. Duties of customs, including export duties.
2. Duties of excise on tobacco and other goods manufactured or produced in India except—
 - (a) alcoholic liquors for human consumption ;
 - (b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs ;
 - (c) medical and toilet preparations containing alcoholic, or any substance included in sub-paragraph (b) of this entry.
3. Corporation tax.
4. Salt.
5. State lotteries.
6. Taxes on income other than agricultural income.
7. Taxes on the capital value of the assets, exclusive of agricultural land of individuals and companies ; taxes, on the capital of companies.
8. Duties in respect of succession to property other than agricultural land.
9. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance proxies and receipts.
10. Terminal taxes on goods or passengers carried by railway or air ; taxes on railway fares and freights.
11. Fees in respect of any of the matters in this list but not including fees taken in any court.

In connection with this, attention might be drawn to the following items in the Concurrent List :

1. Marriage and divorce.
2. Wills, intestacy and succession.
3. Transfer of Property and other agricultural lands.

Being in the Concurrent list, the Federal Legislature has power to legislate upon with respect to these. Can the Federal Legislature also while legislating upon them raise revenue from them ? The Act does not seem to furnish any answer to this question. It may however be suggested that the rules contained in section 104 regarding the exercise of Residuary Powers will also apply here.

The sources of revenue which are made divisible by the Constitution are : (1) Income Tax other than Corporation Tax and (2) Jute Export duty. Those which are made divisible according to the Federal Law are : (1) Duty on Salt, (2) Excise duty on Tobacco and other goods and (3) Duties of Export.

In respect of the financial powers of the Federation there is one feature which by reason of its peculiarity is deserving of attention. The Act in giving the Federal Government the right to tax, makes a distinction between power to levy the tax and the right to collect it and even where it gives the power to levy the tax it does not give it the right to collect it. This is so in the case of surcharge on Income tax and the Corporation tax. The Income tax is only leviable in the Provinces and not in the States although it is a tax for Federal purposes. The State subjects are liable to pay only a Federal surcharge on Income Tax because such a surcharge is leviable both within the Provinces as well as the States. But under section 138(3) the Federal Government has no right to collect it within the States. The collection is left to the Ruler of the State. The Ruler, instead of collecting the surcharge from his subjects, may agree to pay the Federation a lump sum and the Federation is bound to accept the same. Similar is the case with regard to the Corporation tax. The Federation can levy it on State subjects but cannot collect it directly by its own agency. Section 139 provides that the collection of the Corporation tax shall as of right be the function of the Ruler.

V

CHARACTER OF THE FEDERATION

(1) The Nature of the Union

How does the Indian Federation compare with other Federations ? This is not only a natural inquiry but it is also a necessary inquiry. The method of comparison and contrast is the best way to understand the nature of a thing. This comparison can be instituted from points of view. There is no time for a comparison on so vast a scale. I must confine this comparison to some very moderate dimensions. Therefore I propose to raise only four questions : (1) Is this Federation a perpetual Union ? (2) What is the relationship of the Units to the Federal Government ? (3) What is the relationship of the Units as between themselves ? (4) What is the relationship of the people under the Units ?

There is no doubt that the accession of the Indian States to the Federation is to be perpetual so long as the Federation created by the Act is in

existence. While the Federation exists there is no right to secede. But that is not the real question. The real question is, will the federation continue even when the Act is changed? In other words the question is, is this a perpetual Union with no right to secede or, is this a mere alliance with a right to break away? In my opinion the Indian Federation is not a perpetual union and that the Indian States have a right to secede. In this respect the constitution of the United States and this Indian Federation stand in clear contrast. The constitution of the United States says nothing as to the right of secession. This omission was interpreted in two different ways. Some said that it was not granted because it was copy recognized. Others said it was not excluded because it was not negated. It was this controversy over the question namely whether the right of secession was excluded because it was not recognized which led to the Civil War of 1861. The Civil War settled two important principles: (1) No State has a right to declare an Act of the Federal Government invalid; (2) No State has a right to secede from the Union. In the Indian Federation it would be unnecessary to go to war for establishing the right to secession because the Constitution recognizes the right of the Indian States to secede from the Indian Federation if certain eventualities occur. What is a perpetual Union and what is only a compact is made nowhere so clear as by Blackstone in his analysis of the nature of the Union between England and Scotland. To use his language the Indian Federation is not an incorporate Union because in a Union the two contracting States are totally annihilated without any power of revival. The Indian Federation is an alliance between two contracting parties, the Crown and the Indian States, in which neither is annihilated but each reserves a right to original Status if a breach of condition occurs. The Constitution of the United States originated in a compact but resulted in a union. The Indian Federation originates in a compact and continues as a compact. That the Indian Federation has none of the marks of a Union but on the other hand it has all the marks of a compact is beyond dispute. The distinguishing marks of a Union were well described by Daniel Webster, when in one of his speeches on the American Constitution he said—

“...The constitution speaks of that political system which is established as ‘the Government of the United States’. Is it not doing a strange violence to languages to call a league or a compact between sovereign powers a *Government*? The Government of a State is that organisation in which political power resides”.

“...The broad and clear difference between a government and a league or a compact is that a government is a body politic; it has a will of its own; and it possesses powers and faculties to execute its own purposes. Every compact looks to some power to enforce its stipulations. Even in a compact between sovereign communities, there always exists this ultimate reference to a power to ensure its execution; although in such

a case, this power is but the force of one party against the force of another; that is to say, the power of war. But a Government executes its decisions by its own supreme authority. Its use of force in compelling obedience to its own enactments is not war. It contemplates no opposing party having a right of resistance. It rests on its power to enforce its own will; and when it ceases to possess this power it is no longer a Government”.

In the light of this the following facts should be noted. The Act does not ordain and establish a Federal Government for British India and the Indian States. The Act ordains and establishes a Federal Government for British India only. The Federal Government will become a Government for the States only when each State adopts it by its Instrument of Accession. Again note that the subjection of the States to the Federal Government is not to be for all times. It is to continue only under certain circumstances. It is to continue so long as certain provisions of the Act are continued without a change. Thirdly, where change in the provisions is permissible such change shall not bind the State unless it agrees to be bound by it.

All these are unmistakable signs which show that the Indian Federation is a compact and not a perpetual Union. The essence of a compact is that it reserves the right to break away and to return to the original position.

In this respect therefore the Indian Federation differs from the Federations in U.S.A., Canada and Australia. It differs from the U.S.A., because the right to secede is recognized by the Indian Constitution if the constitution is altered, while it is not recognized by the Constitution of the U.S.A., even if the constitution is altered against the wishes of a particular State. In regard to Australia and Canada such a question cannot really arise and if it did, a civil war would be quite unnecessary to decide the issue. In these federations the sovereignty, whether it is exercised by the Federal Governments or the Units belongs to the Crown and the maintenance of the Federation or its breakup remains with the King and Parliament. Neither the Federation nor the Units could decide the issue otherwise than with the consent of Parliament. If a break-up came, it would be a mere withdrawal of the sovereignty of the Crown and its re-distribution which the Crown is always free to do. The break up could be legal and even if it was perpetrated by non-legal means it could give sovereignty to the rebellious units because it belongs to the Crown. The same would have been the case, if the Indian Federation had been the Federation of British Indian Provinces only. No question of secession could have arisen. The Provinces would have been required to remain in the position in which the Crown might think it best to place them. The Indian Federation has become different because of the entry of the Indian States. The entry of the Indian States is not for all times and under all circumstances. Their entry is upon terms and conditions. That being so the Indian Federation

could not be a perpetual union. Indeed, the Indian States would not enter into matrimony with the Indian Provinces unless the terms of divorce were settled before-hand. And so they are. That is why the Indian Federation is a compact and not a union.

(2) Relationship of the Units to the Federal Government

That each separate unit should have approximately equal political rights is a general feature of federations. Equality of status among the different units is a necessity. To make them unequal in status is to give units the power to become dominant partners. The existence of dominant partners in a federation, as observed by Dicey is fraught with two dangers. Firstly, the dominant partners may exercise an authority almost inconsistent with federal equality. Secondly, it may create combinations inside the Federation of dominant units and subordinate units and *vice versa*. To prevent such an unhealthy state of affairs, all federations proceed upon the principle of equality of status. How far does this principle obtain in the Indian Federation?

(a) In the matter of Legislation

As you know for purposes of Legislation the field is divided into three parts and there are three lists prepared which are called the Federal List, the Concurrent List and the Provincial List.

The Federal List contains 59 items as subjects of legislation. The Concurrent List contains 36 items.

The first thing to note is that both these lists are binding upon the Provinces. They cannot pick and choose as to the matters in these two lists in respect of which they will subject themselves to the authority of the Federation. The Provinces have no liberty to contract out of these two lists. The position of a Federating State is quite different. A Federating State can wholly keep itself out of the Concurrent List. Under section 6(2) there is no objection to the Ruler of any Indian State to agree to federate in respect of matters included in the Concurrent List. But there is no obligation upon them to do so. Such an agreement is not a condition precedent to their admission into the Federation.

With regard to the Federal List, there is no doubt an obligation on the Ruler of a State to subject himself to the legislative authority of the Federation in respect of the Federal List, but his subjection to the Federation will be confined to matters specified by him in his Instrument of Accession. There are as I stated altogether 59 items in the Federal List. There is no obligation upon the Prince to accept all subjects in the Federal List as a condition precedent for his entry into Federation. He may accept some only or he may accept all. Again one Ruler may accept one item and another Ruler may accept another. There is no rule laid down in the constitution that some items must be accepted by every Ruler who chooses

to enter the Federation. The Federation, therefore, while it affects British India and the Provinces uniformly and completely so far as the legislative authority of the Federation is concerned, it touches different States in different degrees. A Ruler may federate in respect of one subject yet he is as good a member of the Federation as a Ruler who accepts all the fifty-nine items in the Federal List.

The Provincial List is a list which is subject to the exclusive Legislative authority of the Provinces. There is no corresponding State List given in the Act for the Federated States. It cannot be given. But it can be said that it includes all these subjects which are not surrendered by the State to the Federation. Now with regard to the exclusive authority of the Provincial Legislature, still in the event of emergency it is open to the Federal Legislature to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial List, if the Governor-General has in his discretion declared under section 102 by proclamation that a grave emergency exists whereby the security of India is threatened whether by way of war or by internal disturbances. There is no such provision in respect of the Indian States. A grave emergency which threatens India may quite well arise within a State as it may within the territories of a Province. It is thus clear that while the Federal Legislature can intervene and make laws for a Province when there is emergency, it cannot intervene and make laws for the Federated States under similar circumstances.

(b) In the matter of the Executive

Again in the matter of the Executive, the States and the Provinces do not stand on the same footing. Section 8 defines the scope of the executive authority of the Federation which according to section 7 is exercisable by the Governor-General on behalf of His Majesty. According to sub-section (1) to sub-clause (a) the authority of the Federal Executive extends to matters with respect to which the Federal Legislature has power to make laws, but this clause has not the same application with respect to the States as it has with respect to the provinces. With regard to the provinces it has authority in all matters which are included in the Federal Legislative List. It has also exclusive authority with respect to certain matters included in the Concurrent List subject to certain limitations; but with regard to the States the case is very different. With regard to the States the Federation can have no executive authority in respect of subjects in the Concurrent List, but also the Federation is not entitled to have exclusive authority with respect to matters included in the Federal Legislative List. Sub-clause 2 of section 8 is very important. It says :

“The executive authority of the Ruler of a Federated State shall, notwithstanding anything in this section, continue to be exercisable in that State with respect to matters with respect to which the Federal Legislature

has power to make laws for that State except in so far as the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a federal law.”.

In plain language what the sub-section means is this—With regard to a province the executive authority of the Federation extends to all matters over which the Federation has legislative authority. With regard to the State the position is different. The mere fact that the federal legislature has authority to legislate in respect of a subject does not give the Federation any executive authority over the State in respect of that subject. Such executive authority can be conferred only as a result of a law passed by the Federation. Whether it is possible to pass such a law is problematic in view of the large representation which the States have in Federal Legislature. Whatever may be the eventuality, in theory the executive authority of the Federation does not extend to a Federated State. The position is that while with regard to the provinces the Federation can legislate as well as execute, in the case of the Federated States, the Federation can legislate, but cannot execute. The execution may be with the State.

(c) In the matter of administration

When you begin to examine the constitution from the point of view of administration you will find certain sections in the Act which lay down rules for the guidance of the Federal Government, of the Provincial Governments and of the State Governments. The purpose of the sections is to tell them how they should exercise the executive authority belonging to them respectively. These sections are 122, 126 and 128.

Section 122 is addressed to the Federal Government. It reads as follows :

“122. (1) The executive authority of every Province and Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that Province or State.

(2) The reference in sub-section (1) of this section to laws of the Federal Legislature shall, in relation to any Province, include a reference to any existing Indian Law applying in that Province.

(3) Without prejudice to any of the other provisions of this part of this Act, in the exercise of the executive authority of the Federation in any Province or Federated State regard shall be had to the interests of that Province or State.”.

Section 126 is addressed to the Provincial Governments. It provides that—

“126 (1) The executive (authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.”.

Section 128 is addressed to the States. It runs as follows :

“128. (1) The executive authority of every Federated State shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation so far as it is exercisable in the State by virtue of the law of the Federal Legislature which applies therein.

(2) If it appears to the Governor-General that the Ruler of any Federated State has in any way failed to fulfil his obligations under the preceding subsection, the Governor-General, acting in his discretion, may after considering any representations made to him by the Ruler, issue such directions to the Ruler as he thinks fit :

Provided that if any question arises under this section as to whether the executive authority of the Federation is exercisable in a State with respect to which it is so exercisable, the question may, at the instance either of the Federation or the Ruler, be referred to the Federal Court for determination by that Court in the exercise of its original jurisdiction under this Act.’

All these sections would have been very useful if there was any possibility of conflict in the exercise of their executive authority by these agencies. But these will be quite unnecessary because there would be as a matter of fact no conflict of executive authority which can arise only when such executive authority is followed by administrative act. When administration is divorced from Executive Authority there is no possibility of conflict and the admonitions contained in such sections are quite unnecessary.

Now it is possible that in the Federal Constitution the Federal Government may be altogether denuded of its powers of administration and may be made just as a frame without any spring of action in it. The constitution provides that the Governor-General of the Federal Legislature may provide that the administration of a certain law passed by it instead of being carried on by the Federal Executive might be entrusted to Units i.e. to the Provincial Governments and the Indian States. This is clear from the terms of section 124 :

“124. (1) Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally to the Government or Ruler or to their respective Officers, functions in relation to any matter to which the executive authority of the Federation extends.

(2) An Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof.

(3) An Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.

(4) Where by virtue of this section powers and duties have been conferred or imposed upon a Province or a Federated State or officers or authorities thereof, there shall be paid by the Federation to the Province or State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra cost of administration incurred by the Province or State in connection with the exercise of those powers and duties.”

It is quite possible for States and Provinces to combine to rob the Federation of all administrative powers and make it only a law making body.

A more staggering situation however is created by section 125. It is in the following terms:

“125. (1) Notwithstanding anything in this Act, agreements may, and, if provision has been made in that behalf by the Instrument of Accession of the State, shall be made between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies therein.

(2) An agreement made under this section shall contain provisions enabling the Governor-General in his discretion to satisfy himself, by inspection or otherwise that the administration of the law to which the agreement relates is carried out in accordance with the policy of the Federal Government and, if he is not so satisfied, the Governor-General, acting in his discretion, may issue such directions to the Ruler as he thinks fit.

(3) All courts shall take judicial notice of any agreement made under this section.”.

This section means that a State by its Instrument of Accession may stipulate that the administration of Federal laws in the State shall be carried out by the State agency and not by the agency of the Federation and if it does so stipulate then the Federation shall have no administrative power inside the State. The benefit of a law depends upon its administration. A law may turn out to be of no avail because the administration is either inefficient or corrupt. To deprive the Federal Government of its administrative powers is really to cripple the Federal Government. There is no Federation in which some units of the Federation are permitted to say that the Federal Government shall have no administrative powers in their territory. The Indian Federation is an exception. Not only is there a difference between the Provinces and the States in this matter but they also differ in their liability to supervision and direction by the Federal

Government in the matter of the exercise of their executive authority. That difference will be clear if you will compare section 126 with section 128.

Section 126 enacts that the executive authority of every province shall be exercised as not to impede or prejudice the exercise of the executive authority of the Federation and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose. Section 128 is a section which enacts a similar rule with respect to a Federated State, but there is a significant difference between the two sections. Section 126 says that the executive authority of the Federation extends to the giving of such directions to a province as may appear to the Federal Government to be necessary for that purpose, while section 128 does not give such a power. That means that the Federation does not possess the inherent executive authority to give a direction to the Ruler of a Federated State to prevent him from so exercising the executive authority of the State as to impede or prejudice the exercise of the executive authority of the Federation. That is one very significant difference. Such authority, instead of being given to the Federation, is given to the Governor-General, who, of course, under the law is distinct from the Federal Government and it is the Governor-General who is empowered to issue such directions to the Ruler as he thinks fit. A further distinction is also noticeable. When directions are issued to the Governor of a province under section 126 he is bound to carry them out. He has no right to question the necessity of the directions nor can he question the capacity of the Governor-General to issue such directions. With regard to the Ruler of a State, however, the position is entirely different. He can question such a direction, and have the matter adjudicated in the Federal Court, because the proviso to sub-section 2 of section 128 says that if any question arises under this section as to whether the executive authority under this section of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is so exercisable, the question may at the instance either of the Federation or the Ruler be referred to the Federal Court for determination by that Court.

(3) In the matter of Finance

Coming to the question of Finance, the disparity between the Provinces and the States is a glaring disparity. Take the case of the taxing authority of the Federation over the Provinces and the States. It may be noted that the revenues of the Federation are derivable from sources which fall under two main heads—those derived from taxation and those not derived from taxation. Those not derived from taxation fall under six heads—

- (1) Fees in respect of matters included in the Federal List.
- (2) Profits, if any, on the work of the Postal Services, including Postal Savings Banks.
- (3) Profits, if any, on the operation of Federal Railways.

- (4) Profits, if any, from Mint and Currency operations.
- (5) Profits, if any, from any other Federal enterprise, such as Reserve Bank, and
- (6) Direct contribution to the Crown from Federated or non-Federated States.

As regards the revenues derived from taxation under the Government of India Act, they fall under two heads; Ordinary taxation and Extraordinary taxation. Ordinary taxation includes levy from following sources :

- (1) Customs duties;
- (2) Export duties;
- (3) Excise duties;
- (4) Salt;
- (5) Corporation tax;
- (6) Tax on income, other than agricultural; and
- (7) Property Taxes i.e., taxes on Capital value of the individual assets or a property.

The extraordinary revenue falls under following heads :

- (1) Surcharges on Income-tax.
- (2) Surcharges on succession duties.
- (3) Surcharges on terminal taxes on goods or passengers carried by rail or air and all taxes on railway freights.
- (4) Surcharges on Stamp duties, etc.

Now, while the provinces are liable to bear taxation under any of these heads whether the taxation is of an ordinary character or is of an extraordinary character, the same is not true of the States. For instance, the States are not liable in ordinary time to ordinary taxes falling under heads 6 and 7, while the Provinces are liable,

With regard to extraordinary taxation, the States are not liable to contribute even in times of financial stringency the taxes levied under items 2, 3 and 4 and even where they are liable to contribute under head 1 of the extraordinary sources of revenue, it must be certified that all other economies have been made.

There is another difference from the financial point of view between the States and the Provinces. The field of taxation for provincial Governments has been defined in the Act. A provincial Government cannot raise revenue from any source other than those mentioned in the Act. Such is not the case with the State. There is nothing in the Government of India Act, which defines the powers of a Federated State with regard to its system of taxation. It may select any source of taxation to raise revenue for the purpose of internal administration and may even levy customs duties upon articles entering its territory from a neighbouring province although that neighbouring province is a unit of the Federal Government of which the

Federated State is also a unit. This is a most extraordinary feature of this Indian Federation and also one of its worst features. One of the results of a Federation, if not its primary object, has been the freedom of trade and commerce inside the territory of the Federation. There is no federation known to history which has permitted one unit of the Federation to levy customs duties or raise other barriers with a view to prevent inter-State commerce. The Indian Federation is an exception to that rule and this is a feature of the Indian Federation which makes it stand out in glaring contrast with other federations with which people are familiar today.

One of the characteristics of a Federal Constitution is that although the territory comprised in the Federation is distributed or held by different units, still they constitute one single territory. At any rate for customs purposes the territory is treated as a single unit. Every Federal Constitution contains powers and prohibitions to prevent trade and customs barriers being erected by one unit against another.

The American constitution by Section 9 of Article II prohibits a State from preventing the import or export of goods or from levying import or export duties upon goods passing in or out of the State boundary. Section 8(3) of Article II gives the Federal Government the power of regulating trade or commerce between the States of the Union.

In Australia by virtue of Section 92 of its Constitution both the States and the Federal Government are bound so to exercise their power of regulation as not to transgress the fundamental guarantee of the Constitution embodied in Section 92 that "trade and commerce among the States whether by means of internal carriage or ocean navigation shall be absolutely free".

In Canada section 121 enacts that "all articles of the growth, produce or manufacture of any one Province shall, from and after the Union, be admitted free into each of the other Provinces."

In the Indian Constitution the provision relating to freedom of trade and commerce within the Federation is contained in Section 297. It reads as follows :

"297. (1) No Provincial Legislature or Government shall—

- (a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description ; or
- (b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between

goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this shall, to the extent of the contravention, be invalid.”

Now it will be clear from the terms of this section that the freedom of trade and commerce is confined only to the provinces. That means the Indian States are free to prohibit the entry of goods from the Provinces absolutely or subject them to duty. This is quite contrary to the fundamental idea underlying a federal union. To allow one unit of the Federation to carry on commercial warfare against another unit is nothing but negation of federation.

(4) Relationship of the People under the Federation

Before I enter into this question it is necessary to clear the ground by pointing out certain distinctions. The words ‘State’ and ‘Society’ are often presented as though there was a contrast between the two. But there is no distinction of a fundamental character between a State and a society. It is true that the plenary powers of the State operate through the sanction of law while society depends upon religious and social sanctions for the enforcement of its plenary powers. The fact, however, remains that both have plenary powers to coerce. As such, there is no contrast between state and society. Secondly, the persons composing society are persons who are also members of the State. Here again, there is no difference between State and Society.

There is, however, one difference, but it is of another kind. Every person, who is a member of society and dwells in it, is not necessarily a member of the State. Only those who dwell within the boundary of the State do not necessarily belong to the State. This distinction between those, who belong to the State and those who do not, is very crucial and should not be forgotten because it has important consequences. Those who belong to State are members and have the benefits of membership which consists of the totality rights and duties which they possess over against the State. From the side of duty the relation is best indicated by the word subject, from the side of rights it is best designated by the word citizen. This difference involves the consequence that those who dwell in the State without belonging to it have no benefit of membership which means that they are foreigners and not citizens.

Theoretically, the task of differentiating the foreigners from the citizens of a State would seem to be an easy task, in fact, almost a mechanical task. This is particularly true of an Unitary State. Here there is a simple question : What is the relation of this State as against any and all foreign States ? In a Federal State the matter is complicated by the fact that every individual stands in a dual relationship. On the one hand, he sustains certain relations to the Federal State as a whole ; and on the other he sustains certain relations to the State in which he may reside. The moment an attempt is

made to define the status of a person in a Federal State, therefore, not one question, but several must be answered : What is the relation of this person to the Federal State, as against any and all foreign States ? What is the relation of this person to the State in which he resides ? Further is it possible to be a citizen of one State and not a citizen of Federal State ?

Such questions did not arise in Canada and Australia when they became federations. The reason was that persons residing in their respective units were natural born British subjects—a status which remained with them when the Federation came. After the Federation the powers of naturalization was given to the Federation and consequently every one who is naturalized by the Federation is a citizen of the Federation and therefore of every unit in it.

Such questions however did arise in the U.S.A., Switzerland and Germany, because before the Federation their units were all foreign States and their subjects were foreign subjects. But it is noteworthy that in all these cases a common citizenship was established as a part of the federation. A rule was established whereby it was accepted that a citizenship of one unit carried with it a citizenship of the Federation.

The case of the Indian Federation is similar to that of the U.S.A., Germany and Switzerland. The subject of an Indian State is a foreigner in British India as well as in another Indian State. The subject of a British Indian Province is a foreigner in every Indian State.

What does the Indian Federation do with regard to this matter ? Does it forge a common Citizenship for all Units which become members of the Federation ? The answer is no. A British Indian will continue to be a foreigner in every Indian State even though it is a Federal State after the Federation, as he was before the Federation. Similarly a subject of a Federated Indian State will be a foreigner in every British Indian Province after the Federation as he was before Federation. There is no common nationality. The whole principle of the Federation is that the ruler of a Federated State shall remain the ruler of the State and his subjects shall remain his subjects and the Crown as the ruler of the Federated Provinces shall remain the ruler of the Provinces and his subjects shall remain his subjects.

This difference in citizenship manifests itself in two specific ways.

Firstly, it manifests itself in the matter of right to serve. Federation being established under the Crown, only persons who are subjects of the Crown are entitled to serve under it. This is recognized by Section 262. This of course is an injustice to the subjects of the States. To prevent this injustice which of course is a logical consequence of difference of citizenship, power is given to the Secretary of State to declare the subjects of the Indian States eligible for service under the Federation. This is an anomalous state of affairs and although the injustice to Indian State subjects is mitigated, the injustice

against British Indians in the matter of right to employment in Indian States continues. For, Indian States are not required to declare that British Indians shall be deemed to be eligible for service under them. That notwithstanding Federation such an anomaly should exist shows that this Federation is a freak.

Secondly, this difference in citizenship shows itself in the terms of the oath prescribed for members of the Legislature by Schedule IV.

In the case of a member who is a British subject the form of the oath is as under :

“I, A.B., having been elected (or nominated or appointed) a member of this Council (or Assembly), do solemnly swear (or affirm) that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.”

In the case of a person who is a subject of a Ruler of an Indian State the form of the oath is as follows :

“I, A.B., having been elected (or nominated or appointed) a member of this Council (or Assembly), do solemnly swear (or affirm) that saving the faith and allegiance which I owe to C.D., his heirs and successors, I will be faithful and bear true allegiance in any capacity as Member of this Council (or Assembly) to His Majesty the King, Emperor of India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.”

The subject of an Indian State, it is obvious from the terms of the oath, owes a double allegiance. He owes allegiance to the ruler of his State and also to the King. Superficially the position seems not very different from what one find in the United States. In the United States the individual is a citizen of the Union as well as of the State and owes allegiance to both powers. Each power has a right to Command his obedience. But ask the question, to which, in case of conflict, is obedience due and you will see the difference between the two. On this question this is what Bryce has to say :

“The right of the State to obedience is wider in the area of matters which it covers. *Prima facie* every State-law, every order of a competent State authority binds the citizen, whereas the National government has but a limited power; it can legislate or command only for certain purposes or on certain subjects. But within the limits of its power, its authority is higher than that of the State, must be obeyed even at the risk of disobeying the State.

“Any act of a State Legislature or a State Executive conflicting with the Constitution, or with an act of the National Government, done under the Constitution, is really an act not of the State Government, which

cannot legally act against the Constitution, but of persons falsely assuming to act as such government, and is therefore ipso jure void. Those who disobey Federal authority on the ground of the commands of a State authority are therefore insurgents against the Union who must be coerced by its power. The coercion of such insurgents is directed not against the State but against them as individuals though combined wrongdoers. A State cannot secede and cannot rebel. Similarly, it cannot be coerced.”.

Can the Federal Government in India take the stand which the Union Government can when there is a conflict of allegiance? There can be no doubt that it cannot, for the simple reason that the allegiance to the King saves the allegiance to the Ruler. This is a very unhappy if not a dangerous situation.

(5) Strength of the Federal Frame

The existence in the country of one Government which can speak and act in the name of and with the unified will of the whole nation is no doubt the strongest Government that can be had and only a strong Government can be depended upon to act in an emergency. The efficiency of a Governmental system must be very weak where there exists within a country a number of Governments which are distinct centres of force, which constitute separately organized political bodies into which different parts of the nation's strength flows and whose resistance to the will of the Central Government is likely to be more effective than could be the resistance of individuals, because such bodies are each of them endowed with a government, a revenue, a militia, a local patriotism to unite them. The former is the case where the unitary system of Government prevails. The latter is the case where the Federal form of Government prevails.

The Indian Federation by reason of the fact that it is a Federation has all the weaknesses of a Federal form of Government. But the Indian Federation has its own added weaknesses which are not to be found in other Federations and which are likely to devitalize it altogether. Compare the Indian Federation with the Federation of the United States. As Bryce says, “the authority of the national Government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State Government. For most purposes the National Government ignores the States, and it treats the citizens equally bound by its laws. The Federal Courts, Revenue Officers and Post Office draw no help from any State Officials, but depend directly on Washington There is no local self-Government in Federal Matters the Federal authority, be it executive or judicial, acts upon the citizens of a State directly by means of its own officers who are quite distinct from and independent of State Officials. Federal indirect taxes, for instance, are levied all along the coast and over the country by Federal custom-house collectors and excisemen acting under the orders

of the treasury department at Washington. The judgments of Federal Courts are carried out by U.S. Marshals, likewise dispersed over the country and supplied with a staff of assistants. This is a provision of the utmost importance, for it enables the central, national Government to keep its fingers upon the people everywhere, and make its laws and the commands of its duly constituted authorities respected whether the State within whose territory it acts be heartily loyal or not, and whether the law which is being enforced be popular or abnoxious. The machinery of the national Government ramifies over the whole union as the nerves do over the whole body, placing every point in direct connection with the Central executive.”

Not one of these things can be predicated of the Indian Federation. It is a dependent Government and its relation with the people is not direct.

In the United States, the States as States have no place in the Central Government and although the States elect representatives to the Federal Legislature, political action at the centre does not run in State channels. There is no combination of States into groups and it is not the fashion for States to combine in an official way through their State organizations. How different is the Indian Federation! States, as such, have been given *de jure* recognition, they have been given *de jure* exemptions, and immunities from law. There are great possibilities of combined action and counteraction by States and Provinces over these exemptions and immunities. This is another reason which leads to the feeling that the Indian Federation will have very little vitality.

VI

BENEFITS OF THE FEDERAL SCHEME

The protagonists of the Federal Scheme have urged three grounds in favour of the acceptance of the Scheme. The first ground is that it helps to unite India. The second ground is that it enables British India to influence Indian India and to gradually transform the autocracy that is prevalent in Indian India into the democracy that exists in British India. The third ground is that the Federal Scheme is a scheme which embodies what is called Responsible Government.

These three arguments in favour of the Federal Scheme are urged in such seriousness and the authority of those who urge them is so high that it becomes necessary to examine the substance that underlies them.

1. Federation and the Unity of India

The advantages of common system of Government are indeed very real. To have a common system of law, a common system of administration and a feeling of oneness are some of the essentials of good life. But they are all the results which follow from a common life led under a common system of Government. Other things being equal, a federation as a common system of Government for the whole of India should be welcome. But does this Federation unite under one governmental system the whole territory called India in the Government of India Act, 1935 ? Is this an All India Federation ?

That this federation includes British India is of course true; when Provinces are declared to be the units of the Federation it means that British India is included in the Federation. Because the Provinces which are declared to be the units of the Federation compromise what is called Indian India. Indian India is no small tract. The following figures of area and population will give a comparative idea of the extent of British India and this Indian India:

	Area in square miles (1931)	Population (1931)
British India excluding Burma and Aden.	8,62,630	2,56,859,787
Indian States 	7,12,508	81,310,845

It will be seen that Indian India comprises 39 per cent of the population and 31 per cent of India as a whole.

How much of this Indian India is going to be brought under this Federation?

Many will be inclined to say that as this is spoken of as an All India Federation every inch of this area will be included in the Federation and will be subject to the authority of the Federal Government. Such an impression is no doubt created by the wording of Section 6(1) which relates to the accession of the states. This section speaks of a Ruler declaring his desire to join the Federation and thereby suggesting that every State is entitled to join the Federation. If this is true, then no doubt the Federation can in course of time be an All India Federation. But this impression is wrong. Such an impression cannot arise if Section 6(1) is read with Schedule I of the Act. Schedule I is merely thought of as a schedule which contains a Table of Seats for the Rulers. This is a very incomplete reading of the Schedule. The Schedule does more than that. It not only gives a table of seats, but also enumerates the States which are entitled to join the Federation and thereby fixes the maximum number of States which can come within the Federation if they wish to do so. In other words it is not open to every State to join the Federation. Only those enumerated can join. This is the significance of the Table of Seats given in Schedule I.

What is the total number of the states which can join the Federation? Schedule I limits the number to 147. A number of questions crop up by reason of this limit fixed by the Schedule. According to official figures there are in all 627 States in India. That means 480 States will remain outside the Federation and can never become part of the Federation. Can this be called an All India Federation? If it is to be an All India Federation, why are these States excluded? What is the position of these excluded

States ? If they are not States with sovereignty why are they allowed to join the federation ? If they are not States with sovereignty and if the sovereignty is with the Crown, why has the Crown not transferred its sovereignty to the Federation in respect of these territories ? What will be the ultimate destiny of such excluded States? Will these be merged in some Indian States or will these be merged in some Indian Provinces? I mention all this, firstly because I want to show that this Federation is not an All India Federation and secondly because I want to draw attention to the move of some Indian States to get these excluded States to merge into them.

A second question may be raised. Will this Federation help to unite the people of British India and the Indian States into one nation ?

A Federation is necessarily a composite body. Within it are units which are smaller political communities. Above the units is a larger political community called the Federation. Whether these different political communities will remain merely political associations or whether they will develop a common social fabric leading ultimately to the formation of a nation will depend upon what form their association takes. As Bryce points out—

“When within a large political community smaller communities are found existing, the relation of the smaller to the larger usually appears in one or other of the two following forms. One form is that of the League, in which a number of political bodies, be they monarchies or republics are bound together so as to constitute for certain purposes, and especially for the purpose of common defence, a single body. The members of such a composite body or league are not individual men but communities. It exists only as an aggregate of communities, and will therefore vanish so soon as the communities which compose it separate themselves from one another. Moreover it deals with and acts upon these communities only. With the individual citizen it has nothing to do, no right of taxing him, or judging him, or making laws for him, for in all these matters it is to his own community that his allegiance is due.

“In the second form, the smaller communities are mere sub-divisions of that greater one which we call a nation. They have been created, or at any rate they exist, for administrative purposes only. Such powers as they possess are powers delegated by the nation, and can be overridden by its will. The nation acts directly by its own officers, not merely on the communities, but upon every single citizen and the nation, because it is independent of these communities, would continue to exist were they all to disappear”.

The former is the case where the form of Government is a confederation. The latter is the case where there exists a unitary form of Government. A Federal Government is between the two. It must not however be assumed that nationalism is compatible only with a Unitary Government and