
CHAPTER II

ORIGIN OF FEDERALISM UNDER THE BRITISH RULE

" A CRITICAL ASSESSMENT "

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From the Regulating Act of 1773 to the Constitution of free India, the form of government was unitary. "Under British rule, the evolution of quasi-military political system upto the Mutiny of 1857 and the development thereafter of a theory of paternalism, dictated political and administrative centralisation and unitarism in government. Nowhere till the end of world war I, does one find any serious suggestion to reconstruct the government of India on a federal basis"¹.

"The defects of this extremely centralised system disharmony, extravagance and irresponsibility"². As a learned writer puts it, "if one would could sum up the post -1858 administration of the British in India it was decentralisation ..."³ with the beginning of this process of decentralisation Legislative Councils began to grow in the provinces. On June 6th, 1861, Sir Charles Wood, the then Secretary of State for India, emphasised in the House of Commons in his introductory speech to this bill, which became the Indian Councils Act 1861,

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1. Coupland Reginald, The Indian Problem, Oxford University, New York, 1944, p.10.
 2. Prasad Bisheshwar, Origin of Provincial Autonomy, Delhi, Atmaram, p.269.
 3. Pylee M.V., India's Constitution at work, Asia Publishing House, Bombay, p.11.

the advantages of legislation being enacted by those who reside 'on and nearer the spot'. The Indian Councils Act 1861, consequently restored the power of legislation to the Councils of Bombay and Madras⁴. There was allocation of subjects of legislation between the Centre and the provinces. In certain cases⁵, mentioned in the said Act, "previous sanction of the Governor-General was necessary and all acts required his subsequent assent"⁶.

The Governor-General was directed to establish a Legislative Council in Bengal. Subsequently, Legislative Councils were established in other newly created provinces.

"In the direction of finance also, decentralisation of a limited character⁷ beginning from 1870 onwards was noticeable". The fiscal position of the provinces was considerably improved by some amount of financial control being transferred to their hands. By the Resolution of December 14th, 1870, associated with the name of Lord Mayo, the then Governor General of India, "certain heads of expenditure were transferred to provincial control together with the revenues accruing therefrom; and provision was made for certain fixed grant also"⁸. In 1892,

4. Section 37 and 42 of the Indian Councils Act, 1861.

P. Mukherji, Tripathi, Bombay, pp. 204 & 206.

5. Section 43, Ibid., P. Mukherji, Op. cit. p. 206.

6. Section 39, Ibid., P. Mukherji, Op. cit. p. 205.

7. Prasad Bishwaswar, Op. cit. p. 371.

8. Mukherji P. Op. cit. p. 625.

during the Viceroyalty of Lord Ripon, the system of fixed grants being given to the provinces was abolished and all sources of revenue were divided into three broad categories - Imperial, Provincial and Divided. Income from the Provincial heads was given wholly to the Provinces, while the revenue from the Divided heads was to be shared mostly in equal proportions between the Central and the Provincial Governments." This system gave some amount of fiscal certainty no doubt; but as has been truly observed, this financial system 'had nothing of federal character about it'⁹. "The supreme authority regarding the whole Civil and military administration remained as before in the Governor-General in Council. The entire Governmental system was in theory . . . indivisible"¹⁰.

The Act of 1909:

"The Decentralization Commission was appointed under the Chairmanship of Sir Henry William Frimrose¹¹", by His Majesty's Government to enquire into the problem of decentralization. "The Decentralization Commission submitted its report in February, 1909"¹². Lord Morley, the Secretary of

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9. *The* Cambridge, ^{Shorter} History of India, Vol.VI,
(Edited by Dodwell H.H.), New Delhi, S.Chand, 1969, p.320.
10. Report of the Indian Statutory Commission, Vol.1,
para 120.
11. Report of the Royal Commission upon Decentralization
in India, 1909, Vol.1, p.IV.
12. Ibid., Vol.1, pp.297-301.

State, justified his proposals for reforms amount to "admission of the Indians to a larger and more direct share in the Government of their country... without for a moment taking from the central power its authority", on grounds of their indispensability "to fortify the foundations" of British rule in India. He declared unquestionably that "a Parliamentary system in India is not at all the goal to which I would for one moment aspire"¹³.

The Decentralization Commission held the view that, the provincial Governments should be subject in all respects to the general control of the Government of India, through, "the future policy should be directed to the enlargement of the share of detailed administration entrusted" to the provinces¹⁴.

"In 1909, Lord Morley introduced the Indian Councils Bill which was finally made into a law on May 25th, 1909, and brought into operation on 15th November, 1909, the Act abandoned official majority in the provincial Councils and enlarged the Indian Legislative Council with a provision of nomination and reservation of seats for minorities and special interests. The Act empowered the Councils to discuss

13. Lord Morley's speech in the House of Lords on December, 17th, 1908.

14. Decentralization Commission Report, Para 46 and 49.

the budget at length and to propose resolutions and to divide upon the budget and all matters of general public importance"¹⁵. However, the resolutions had little efficacy as they were meant to operate as recommendations to executive Government"¹⁶.

The reforms of 1909 failed to meet the demands of the Indian nationalists. "The responsibility of administration remained undivided... The conception of a responsible executive, wholly or partially amenable to the elected Councils, was not admitted. Power remained with the Government and the Councils were left with no functions but criticism. It followed that there was no reason to loose the bounds of official authority which subjected local government to the government of India and the latter to the Secretary of State and Parliament"¹⁷. "The Morley-Minto reforms did not embody any new policy, they were a natural extension of previously existing system and"¹⁸ at best sought to devise a system of 'Constitutional autocracy' for India"¹⁹. "The executive government retained the final decision of all questions"²⁰.

15. The Indian Councils Act 1909, Section 5.

16. Mont Fort Report, Para 78.

17. Ibid., Para. 61.

18. Ibid., Para. 9.

19. Ibid., Para. 73.

20. Ibid., Para 81.

Reporting in 1916 the Montague Chelmsford Committee recorded, " In nine years the Morley Minto Reforms have spent their utility. They are no longer acceptable to Indian opinion²¹... and official opinion²² also view them with a critical eye"²³.

Act of 1919:

On June 2nd, 1919, after a careful study of the several reports and despatches, the Government of India Bill was introduced in the House of Commons²⁴.

In most respects, the bill sought to translate into law the scheme of the Montague Chelmsford Report²⁵. A Joint Parliamentary Committee under the Chairmanship of Lord Salborne went into the details of the bill and submitted its report in November 1919. The bill became an Act on December 23rd, 1919, and came into full operation in 1921.

The devolution of power to the provinces was carried out by rules made under the act and approved by both Houses of Parliament²⁶. The Indian legislatures were not authorized

21. Ibid., Paras, 99-101 and 14-19.

22. Speech of Lord Sydenham (Governor of Bombay) in the Bombay Legislative Council, 17th March, 1913.

23. Lord Harding's Despatch August 25th, 1911, published in the Gazette of India Extraordinary, 12th December, 1911.

24. Announcement of August 26th, 1917; Mont Ford Report.

25. Report of the Indian Statutory Commission, 1930, Para 140.

26. Ibid., Para 141.

to repeal or alter these rules, framed by the Governor General, the rules were to be approved by both the Houses of the Parliament either after formulation or as draft rules before actual codification²⁷. In command paper 765 the draft rules were provisionally presented to both the Houses of Parliament. A joint select committee of the both the Houses submitted its first report on July 6th, 1920, and the second report on August 10th, 1920, on the draft rules. On December 1st, 1920, the Parliament sanctioned Devolution rules which were published in Notification No. 308-S dated December 16th, 1920, Delhi by the Government of India.

The Joint Select Committee accepted the list of Central provincial and transferred subjects prepared by the Functions Committee with certain alterations suggested by Government of India²⁸, after consultations with the India office²⁹. It observed that, since India was 'not yet ripe for a true federal system the central Government could not be relegated to functions of mere inspection and advice. The committee, however, favoured extensive delegation, statutory and otherwise, of powers and duties to the provinces and hoped that the control of the Government of India over provincial matters would be exercised with a view to preparing the provinces for the gradual transfer of power³⁰.

27. The Government of India Act 1919 (9 and 10 Geo.V.C.101 Section 129 A (3).

28. Fourth Despatch of the Government of India, (16th April, 1919) Para.7.

29. Report of the Joint Select Committee of Parliament (17th November, 1919), Part-I, Clause 1.

30. Ibid., Part I, Clause 3.

The reform scheme introducing popular elements in provincial administration was implemented under Section 46 of the Government of India Act 1919, in the nine major provinces called the 'Governor's Provinces' in the Act³¹.

"The rest of British India so far as the devolution of authority from the centre is concerned, remains essentially in the same position as before the passing of the Act of 1919³².

While the Devolution Rules were to specify the purposes for which the power of superintendence, direction and control over local governments, rested in the Governor General in Council, was to be exercised in relation to the transferred subjects, it was clearly stated the Governor General was to remain the sole judge of their validity³³.

For the purpose of distinguishing the functions of local Government and local legislatures of Governor's provinces³⁴.
From the functions of the Governor General in Council and the

31. The nine Governor's provinces were Bengal, Madras, Bombay, U.P., Punjab, Bihar and Orissa, the Central provinces, Assam and Burma.

32. Report of the Indian Statutory Commission, Para. 141.

33. The Government of India Act 1919, Section 45 A.

34. The words "and the province of Burma" were deleted by Notification No. 519-V dated 2nd June, 1923, Gazette of India, 1923, p. 43.

Indian Legislature", the central and provincial lists of subjects were prepared and set out in schedule I of the Devolution Rules³⁵. The residuary subjects were given to the Centre³⁶.

Despite the devolution, the constitution of India remained unitary. The lack of the principle of exclusive, legislative and administrative jurisdiction and the absence of judicial review, rendered the decentralization a matter of mere administrative expediency. No provincial had assented thereto³⁷. The previous sanction of Governor General was necessary to make or to take into consideration certain laws in the provincial legislature³⁸. It is interesting to note that, all matters of provincial concern "subject to legislation by Indian legislature, either in whole or part" required previous sanction of the Governor General for their introduction and consideration in the provincial legislature.

It is clear that the phrase " subjects to legislation by Indian Legislature" was an ingenious device to enable the Governor General to acquire a firm hold over some twenty-eight provincial subjects. The Governor General was also given,

35. General Rules and Orders made under Enactments in Force in British India (1926), Vol.I, Pp.209-10 and 221-233.

36. Devolution Rules, Op.cit.Schedule I, Part I, Rule 47.

37. The Government of India Act 1919, Section.81.

38. Ibid., Section 30 A(3).

under Part II of Schedule I to the Devolution Rules, power to regulate nine provincial subjects directly³⁹.

Of the twenty subjects earmarked for 'transfer'⁴⁰ to the provinces, eleven⁴¹ were subject to legislation by the Indian Legislature and therefore, subject to previous sanction of the Governor General⁴². His control over these matters consequently remained intact as a matter of routine.

With regard to provincial subjects the provincial Governments still remained responsible to the Government of India and ultimately to the Parliament through the Secretary of State. Therefore, Joint Select Committee had opposed any "statutory divestment of control except over the transformed field"⁴³.

It is, therefore, clear that out of fifty-one provincial subjects enumerated in Part II of Schedule I of the Devolution Rules; technically speaking the Government of India or rather the Governor General in Council retained unfettered authority and control over thirty-one subjects as reserved subjects and its authority over the rest of the twenty transferred subjects

39. According to Devolution Rules, Item 5 (a) (1) (11).

40. Devolution Rules, Schedule 11.

41. Ibid., Items Nos. 1, 3, 5, 6, 11.

42. The Government of India Act 1919, Section 80 A (3) (f).

43. Second Report of the Joint Select Committee on the Government of India Act 1919 (Draft Rule 33).

the Governor General in Council retained the authority of previous sanction and his authority of assent to provincial legislations covered all the transferred subjects. In addition to this the power of superintendence, direction control vested in the Governor General in Council was to be exercised in connection with the transferred subjects also in certain circumstances⁴⁴.

Administrative Decentralisation:

Under the Government of India Act 1919, the Central Government legally remained "responsible for the good government of this country to Parliament and the... Secretary of State"⁴⁵. However, in view of the declared purpose of Reforms⁴⁶, restraint on the powers of the parliament and the Secretary of State and devolution of authority to the provinces in actual practice was considered necessary⁴⁷. The Crow Committee, in the report (1919), emphasised that were the provincial Governments found themselves in agreement with a conclusion of the legislature, their joint decision should ordinarily be allowed to prevail⁴⁸. The British

44. Devolution Rule 49; and the Governments of India Act 1919, Sections 33 and 45 (A) (3).

45. The Indian Annual Register (1923), Vol. II, p. 76.

46. Refer Preamble to the Government of India Act 1919.

47. Refer Debates of Indian Affairs (House of Lords), Session 1921, Col. 62.

48. Report of the Crow Committee, Para 17.

policy was to transfer autonomy in the field of 'transferred subjects' only⁴⁹. In the 'reserved subjects', the position remained unaltered i.e. the Secretary of the State remained theoretically responsible to the Parliament for the Government in India⁵⁰.

The Rules framed by the Secretary of State in Council under Section 19 A of the Government of India Act defined the extent of the authority of the Home Government in relation to 'transferred subjects'. The Secretary of the State was to exercise his powers of superintendence, direction and control in relation to transferred subjects; for the following purposes only.

1. To safeguard the administration of Central subjects.
2. To decide questions arising between two provinces.
3. To safeguard imperial interests.
4. To determine the position of the Government of India in respect of questions arising between India and other parts of British Empire; and,

 49. Indian Statutory Commission Report (1930), Vol. I, Para 256.

50. Statement of the Earl Lytton, 8th March, 1921, op.cit. Cols. 59-61.

5. To safeguard the due exercise and performance of any powers and duties possessed by... the Secretary of State... Under or in connection with or for the purpose of the following provisions of the Act, namely section 29 A, Section 30 (1A), Part VII-A⁵¹, or any rules made by or with of State in Council⁵².

The exact legal position in connection with the administrative control of the Provincial Governments by the Centre under the Government of India Act 1919, can be summed up as follows.

"Subject to the provisions of the Act and rules made thereunder (1). The superintendence, direction and control of the civil and military government of India is vested in the Governor General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State⁵³."

Every local Government shall obey the orders of the Governor General in Council and keep him constantly and

51. Section 29 A was concerned with the appointment and Powers of a High Commissioner of India.

52. For Rules framed under Section 19 A of the Government of India Act, 1919.

53. Government of India Act 1919, Section 33.

diligently informed of its proceedings; and if all matters which ought, in its position, to be reported to him or as to which he requires information, and is under his superintendence, direction and control⁵⁴.

Every local government was required to furnish to the Governor General in Council from time to time such returns and information on matters relating to the administration of provincial subjects as the Governor General in Council might require and in such forms as he might direct. The provincial Governments were also required to submit their own proceedings to the Government of India⁵⁵. "The Governor General in Council was empowered to declare appoint or alter the boundaries of of any of the provinces"⁵⁶.

About the position of the public services, the Joint Select Committee stated⁵⁷, "In the provinces, an officer serving in a reserved department will be controlled by the Governor in Council and in transferred department by the Governor acting with ministers, but in both cases alike the personal concurrence of the Governor should be regarded as

54. Ibid., Section 45.

55. Devolution Rules, Op.cit. Rule 5.

56. Government of India Act (1919), Section 60.

57. The Joint Select Committee Report, Part IV.

essential in the case of all orders of any importance prejudicially affecting the position or prospects of officers appointed by the Secretary of States⁵⁸. The Governor in this respect was to function under the close supervision of the Governor General in Council⁵⁹.

The Secretary of the State authorised the local Government to censure, demote, suspend or withhold promotions of the officer of the All India Services subject to the sanction of the Governor General. The officers were entitled to appeal to the Governor General and the Secretary of the State⁶⁰.

In the administration of the central subjects the Governor General in Council was empowered to use the agency of the Governor in Council. With the previous sanction of the Secretary of State, the Governor General was also authorised to revoke or suspend, for such period as he thought necessary, the transfer of any provincial subject⁶¹.

In actual practice, however the Government of India recognised the statutory distinction between reserved and

58. Refer Devolution Rules under Section 45 A of the Government of India Act 1919.

59. The Calcutta Gazette, (Extra-Ordinary) January 3rd, 1921, pp.6-7, para 3.

60. Devolution Rules, Section 96 B(2) of the Act of 1919.

61. Devolution Rules, Op.cit. Rule.45.

transferred subjects in exercising its general powers of superintendence, direction and control⁶².

In the reserved sphere, the control of the Government of India was intensive particularly in matters relating to 'land revenue' and Law and order⁶³. It had also come to be established that the powers exercised by the Provincial Governor, as distinct from the Governor in Council, were subject to the authority of the Governor General in Council⁶⁴.

Legislative Decentralisation:

The local legislatures were empowered to make laws for the peace and good government of the provinces and were authorised to repeal or alter laws in their application to the said province⁶⁵.

It was provided that a law made by a local legislature, and subsequently assented to by the Governor General was not to be deemed invalid by reason only of its requiring previous sanction of the Governor General under the Act (1919). The local legislatures had no power to make any law affecting any Act of Parliament⁶⁶. It was further

62. The Government of India, memorandum submitted to the Statutory Commission.

63. The Indian Statutory Commission Report, Vol.1, Para 257.

64. Memorandum of the Government of India to the Statutory Commission, op.cit.

65. Devolution Rules, Schedule I, Part II.

66. Government of India Act 1919, Section 80 A (4).

laid down that no measure affecting the public revenues or imposing any change on the revenues of a province could be introduced in a local legislature without the previous sanction of the Governor⁶⁷.

The assent of the Governor and the Governor General was essential for a local Bill to become law⁶⁸. The head of a province could also return a Bill to the Council for reconsideration either in whole or in part together with any amendments which he felt like recommending⁶⁹.

The Rules for the Reservation of Bills also laid down that the Governor could reserve for the consideration of Governor General any Bill if its provinces (in respect of which it had not been previously sanctioned by the Governor General under sub Section (3) of Section 80 (A) of the Government of India Act, appeared to the Governor⁷⁰:

- a) " to affect any matter wherewith he is specially charged under his Instrument of Instructions or,
- b) to affect any central subject, or
- c) to affect the interests of another province"⁷¹.

67. Government of India Act 1919, Section 80 C.

68. Ibid., Section 81.

69. Ibid., Section 81 A(1).

70. The bracketed words were submitted by Notification No.142, 6th December, 1921, Gazette of India, 1921, Part I, P.1631.

71. The Reservation of Bill Rules, Op.cit. Rule.3.

A bill reserved for the consideration of the Governor General, became law if it was assented to by him within a period of six months, and lapsed otherwise unless before the expiry of six months either the bill had been returned to the Council for further consideration or in case of the Council not being in session, an notification had been published of an intention to return the bill to the Council at the commencement of the next session⁷². The Governor General instead of assenting to or with-holding his assent from a local bill, (except where the bill had been reserved for his consideration), could reserve the bill for the signification of His Majesty's pleasure, and in such a case the bill could only become valid after His Majesty in Council had signified his assent to the enactment and the same was notified by the Governor General⁷³.

The extensive restrictions on the legislative authority of the provincial councils were officially justified on grounds of maintenance of uniformity and safeguarding 'the observance of the general policy of the country'⁷⁴.

72. The Government of India Act, Section 81 A (2) (C).

73. The Government of India Act, Section 81 A (3).

74. Madras Administrative Report (1921-1922), Para 335.

The Governor deriving his powers from the provisions of the Act, the Devolution Rules and the Instrument of Royal Instruction issued to him, occupied the key position in the entire legislative sphere of the province.

The Governor was authorised to address the provincial councils and for that purpose to require the attendance of its members⁷⁵.

The legislative devolution under the Act of 1919 was in conformity with the approach outlined in the Mont Ford Report which sought to "reserve to the Government of India a general overriding power of legislation for the discharge of all functions" which it had to perform⁷⁶.

About the 'previous sanction' provisions of the Act, Sir Tej Bahadur Sapru observed that their imposition led to the subordination of the provincial Legislative Councils to an "irresponsible executive authority"⁷⁷.

Dyarchy was confronted in the sphere of legislation as in the field of administration with the basic problem

75. The Government of India Act, Section 72 A (1).

76. Mont Ford Report, op.cit. Para. 312.

77. Sir Tej Bahadur Sapru, Indian Constitution, Madras, 1929, pp. 110-111.

of fortifying the non-responsible part of the Government the encroachments⁷⁸ of the legislature. Hence the spectacle of a dual executive linked to the same legislature in the provinces with enormous and overriding powers secured to the Governor and the Governor General. The entire governmental structure devised under the Reforms of 1919 was covered up with security traps and safety latches. All possible precautions against failure and abuse of the newly devolved authority and set-up appeared to have been taken⁷⁹.

Financial Decentralisation:

The government of India in their first despatch on Indian Constitutional Reforms urged the appointment of a Committee on Financial Relations to go into financial devolution before the reform scheme was initiated⁷⁹. The Joint Select Committee endorsed this suggestion⁸⁰ and the Secretary of State accordingly appointed under Lord Meston, a Financial Relations Committee popularly known as the Meston Committee⁸¹.

With regard to income-tax it recommended that the whole of the income-tax proceeds be credited to the Central Government. For financial and administrative reasons, it recommended

78. The Government of India Act, Section 73 (3).

79. Government of India's Despatch on Indian Constitutional Reforms, March 5th, 1919, Para 61.

80. Joint Select Committee Report, Op.cit.1, Page.9.

81. Chairman of the Committee, Lord Meston, Report of the Financial Committee, 1920.

that 'general stamps be made a provincial head'. The Weston Committee found doles and temporary assistance to the inconsistent with the whole policy of Reform⁸³.

As regards the question of provincial contribution the committee appreciated the disadvantages in ordinary circumstances of a system of provincial contributions. The Committee, however, followed the line of least resistance and decided to assess the initial provincial contributions on the basis of the "increased spending power" of each province regulating from the new scheme of distribution⁸⁴. The Committee considered each province on its merit in recommending the ratio of provincial contributions to the deficit of the Government of India in the first year⁸⁵.

The draft rules made on the basis of the recommendations of the Weston Committee were reviewed by a Joint Committee of Parliament and only the scheme of initial contributions was accepted. It suggested that the ideal ratio suggested by the Weston Committee should be reached, not by a process of redistribution but by a gradual reduction of the aggregate contributions⁸⁶. While definitely opposed to the provincialisation of the taxation of income the Joint Select Committee

83. Ibid., para 8.

84. Weston Committee Report, Para 14.

85. Ibid., para 17.

86. The Joint Select Committee Report, (10th August, 1920).

recommended that on ground of policy expediency, provinces should be given some share in the increase of revenue from income-tax. The British parliament adopted in substance to there recommendation, and the scheme of fiscal relations between the central and provincial Governments was thus codified in the Devolution Rules made under the Act of 1919⁸⁷.

Distribution of Power Under the Act of 1935:

The statutory provisions relating to the distribution of powers between the central and the provincial governments figured in parts V, VI and VII of the Government of India Act 1935.

Resumption of all rights, authority and jurisdiction by the Crown and their redistribution between the federal government and the units constituted the legal basis of the distribution of power under the act of 1935⁸⁸. The Federal scheme that emerged at the conclusion of the Round Table Conference was whittled down by the Joint Select Committee and the House of Commons. Provincial autonomy " was substantially reduced and the Federal Centre was vested with powers

87. Government of India Act 1919, Section 1-2 and 10 (3).

88. Government of India Act 1935, Section. 2.

which would have been deemed incredible to framers of the federal scheme of 1930⁸⁹.

Distribution of Legislative Powers:

The Government of India Act of 1935, sought to implement the scheme of Provincial Autonomy by attempting a distribution of the legislative authority . . . between the Centre and the Provinces and by specifying that " the executive authority of each province extends to the matter with respect to which the legislature of the Provinces has power to make laws⁹⁰. The Act attempted a statutory allocation of powers⁹¹ between the Centre and the Provinces. In the seventh schedule of the Government of India Act 1935, were comprised three legislative lists laying down the subjects earmarked for Federal Provincial and concurrent legislations. The lists were generally in conformity with those suggested in the white paper⁹².

To resolve possible conflicts between the Federal and the Provincial laws on concurrent subjects, it was laid down that the Federal law, whether passed before or after

89. Sir Sharafat Ahmed, The Indian Federation, Asia, Bombay, pp.88-89.

90. Government of India Act 1935, Section 49 (2).

91. Report of the Joint Parliamentary Committee, Para 229.

92. Ibid., Vol I, Part I, Section 11 (2).

the provincial law shall prevail, and the provincial law shall, to the extent of repugnancy, be void. The Federal Legislature was empowered to enact further legislation on such matters, subject to " the previous sanction of the Governor General in his discretion"⁹³. So a clear division of legislative competence was necessary when the Government of India, ^{Act} 1935 was passed. The Joint Parliamentary Committee said " We are fully sensible of the immense practical advantages of the present system, and of the uncertainties and litigation which have followed elsewhere from a statutory delimitation of competing jurisdictions; but we are satisfied that a relationship between centre and provinces, in which each depends in the last resort for the scope of its legislative jurisdiction on the decision of the Central Executive as represented by the Governor General would form no tolerable basis for an enduring constitution and would be inconsistent with the whole conception of autonomous provinces"⁹⁴.

Federal Legislative List:⁹³

This list included 59 items of all India importance.⁹⁵

Some of these items were: His Majesty's naval, Military and

93. The Government of India Act 1935, Section 107 (1) and (2).

94. Joint Parliamentary Committee Report, Vol.I, Para 230.

95. The Government of India Act 1935, Schedule VII, List I.

air-forces, cantonment boards, ecclesiastical affairs, currency, Post and Telegraph, Benaras Hindu University and Aligarh Muslim University, Census, Federal Railways, Import and Export, Shipping and Navigation, Arms, Ammunition and Explosives, Custom duties, Salt, Corporation tax, Weights, and measures, Income tax, Federal Public Service Commission and fees in respect of any of the matters in List I.

Provincial Legislative List⁹⁶.

The list comprised of 54 items including Public Order, Police, Provincial Public Service Commission, Land acquisition, Local Government, Public Health and Sanitation, Education, Agriculture, Forests, Land Revenue, and Fees, in respect of any other matters in List II.⁹⁶

Concurrent Legislative List⁹⁷.

The Concurrent legislative list was divided into two parts.⁹⁷ While the items in Part I were to be legislated upon, in accordance with the provisions of Section 100, the items in Part II of the concurrent list were subject to the provisions

96. Ibid., Schedule VII, List II.

97. The Government of India Act 1935, List III.

of sub-clause (2) of Section 126 of the Act of 1935. The executive authority of the federation extended to the issuing of directions to a province regarding the execution of any Act of the Federal Legislature relating to a matter specified in Part II of the concurrent Legislative List, provided the Bill or amendment envisaging the issue of such directions was moved in the Federal Legislature with the previous sanction of the Governor General in his discretion⁹⁸. There were 25 items in Part I of the concurrent list, including criminal law, criminal procedure, civil procedure, evidence marriage and divorce, removal of prisoners, transfer of property, will and succession, trusts and trustees, contracts, arbitration, bankruptcy, stamp duties, legal, medical and other professions, news papers and printing press, lunacy, poisonous and dangerous drugs, mechanically propelled vehicles, prevention of cruelty to animals, European vagrancy, criminal tribes, and fees in respects of the matters in Part I of the concurrent list.

Part II of the concurrent list contained 11 items, including factories, labour welfare, unemployment insurance, trade unions and industrial and labour disputes, infections

 98. Ibid., Section 126 (2).

or contagious diseases, electricity, shipping and ^Navigation, and land water ways, exhibition of cinematograph films, preventive detention, and inquiries and fees in respect of any of the matters in Part II of the concurrent list.

^{Q.}
Residuary Powers:

In the sphere of residuary powers ^a as in that of the concurrent powers⁹⁹, the Governor General was given the role of real arbiter over the Federal and the Provincial Legislatives. The residuary powers were ^a neither given to the federation nor to the units. It was the Governor General acting in his discretion, who was to decide which of the two (Federal Legislature or the Provincial Legislature) would enact a law with respect to any matter not enumerated in any of the lists in the seventh schedule¹⁰⁰. The Federal Legislature was authorised to make laws on provincial subjects for two or more provinces if the legislatures of the provinces concerned passed resolutions to that effect. Acts of the Federal Legislature, " so passed may, as respects any province to which it applies, be amended or repealed by an Act of the Legislature of that Province"¹⁰¹.

99. The Government of India Act, 1935, Section 107 (1) and (2).

100. The Government of India Act, 1935, Section 104 (1) & (2).

101. The Government of India Act 1935, Section 103.

For applying the Naval Discipline Act to the Indian Naval Forces, the Federal Legislature was given power to make provision by enactment¹⁰².

Under Section 102, the Federal Legislature was authorised to make laws for a province or any part thereof with respect to any of the matters enumerated in the provincial legislative list of a proclamation of Emergency had been issued by the Governor General, in his discretion, no bill or amendment in this connection would be introduced or moved in the Federal Legislature without the previous sanction of the Governor General in his discretion, who was directed not to give his sanction unless he was assured of the propriety of the provision in view of the nature of the Emergency¹⁰³. If any provision of a provincial law was found to be repugnant to any provision of a Federal Law enacted under Section 102, the Federal Law, whether passed before or after the provincial law was to prevail and the provincial law to the extent of the repug^{an}cy was void¹⁰⁴.

102. Ibid., Section 105.

103. The Government of India Act 1935, Section 102 (1).

104. Ibid., Section 102 (2), Clause (3) of Section 102 laid down the following:

A) Proclamation of Emergency:

- a) may be revoked by a subsequent proclamation.
- b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each house of Parliament, and;
- c) shall cease to operate at the expiration on six months, unless before the expiration of that period, it has been approved by resolution of both the Houses of Parliament.

A grant of previous sanction did not restrain the Governor from exercising his right of withholding the assent to or reserving a bill after passage¹⁰⁵. However, an act was not to be deemed invalid only for want of previous sanction or recommendation if assent to the said act had been given after passage¹⁰⁶.

The Parliament reserved to itself the ultimate authority to legislate for British India, or any part thereof¹⁰⁷. Except in cases where it was expressly permitted, under the provisions of the Act of 1935, the Federal and the Provincial Legislature were barred from making any law amending any provisions of the Act, or any order in council made thereunder, or any rules made under the Act the Secretary of State, the Governor General or a Governor either 'in his discretion' or in the exercise of his individual judgement¹⁰⁸.

A brief reference to the all embracing reserve powers of the Governors, projecting into the fields of legislation, and administration is indispensable for a balanced understanding of the distribution of power between the Centre and the provinces. From the preceding analysis of the distribution of Legislative powers it is apparent that the Governor General and the Governor were given exceedingly crucial roles in the scheme¹⁰⁹.

105. The Government of India Act 1935, Section 109 (1).

106. Ibid., 109 (2).

107. Ibid., Section 110 (a).

108. Government of India Act 1935, Section 110 (b) (11).

109. Government of India Act 1935, Section 102, 104, 105, 107, 108, 109, 110 and 126.

Legislative Powers of the Governor:

The Legislative powers of the Governor also lay scattered in other chapters of Part III¹¹⁰. It has to be noticed that almost all the legislative powers of the Governor were to be exercised by him either 'in his discretion' or on his 'individual judgement', and according to section 54 of the Government of India Act, 1935, in the execution of all these powers, was 'under the general control' of the Governor General, and was to comply with such particulars directions " as may from time to time be given to him by the Governor General in his discretion"¹¹¹. There was the statutory provision that the validity of the Governor's action was not questionable on grounds of its inconsistency with any instrument of instructions issued to him¹¹².

The Governor could summon, address, prorogue and dissolve the provincial legislature at his discretion¹¹³. The Governor in his discretion was to appoint, from amongst the members, a presiding officer in each house of the provincial legislature to perform the duties of the Speaker

110. Government of India Act 1935, Chapter 11 of Part III, Section 57; Chapter 12 of Part III Section 62,63,65,67, 69, 74 to 77, 84 & 86.

111. The Government of India Act 1935, Section 54 (1).

112. The Government of India Act 1935, Section 53 (2).

113. Ibid., Section 62 and 63 (1) (2).

or the Deputy Speaker (President and Deputy President in the case of Legislative Council) in their absence¹¹⁴.

Acting in his discretion, the Governor was empowered to remove some of the disqualifications for the membership of provincial legislature¹¹⁵. Enactment by the provincial legislature, providing for the punishment of persons refusing to give evidence or produce documents before a legislative committee, when duly required by the Chairman of the Committees were subject to "such rules... safeguarding confidential matter from disclosure, as may be made by the Governor exercising his individual judgement¹¹⁶". The Governor could summon Joint meetings of the Chambers of Provincial Legislature¹¹⁷. The Governor, in his discretion was also authorised to return the Bill together with a message requesting its reconsideration in whole or in part and recommending such amendments as he deemed fit¹¹⁸. Even Governor could take any of three courses; he could give his assent to it or could veto it or he could reserve the bill for the consideration of the Governor General¹¹⁹. The Governor General was also free to give his assent to the bill or to withhold

114. Ibid., Section 65 (3) and (5).

115. Ibid., Section 69 (e) and (f).

116. The Government of India Act 1935, Section 71(4) and (5), Section 68(1) and (2).

117. Ibid., Section 74 (2).

118. Ibid., Section 75.

119. Ibid., Section 75.

his assent from it, or he could further reserve the bill for the signification of His Majesty's pleasure thereon¹²⁰. A bill reserved for the signification of His Majesty's pleasure would not become an Act of the Provincial Legislature unless and until, within twelve months from the day on which it was presented to the Governor the latter made it known by public notification that His Majesty had assented thereto¹²¹. By way of extreme precaution it was further provided that any Act assented to by the Governor or the Governor General may be disallowed by His Majesty within twelve months from the date of the assent¹²². After consultation with the Speaker and the President, the Governor was authorised to make rules as to the procedure with respect to joint sittings of and communications between the two chambers of the provincial legislature¹²³. He was also empowered to direct that "no proceedings shall be taken in relation to a Bill, clause or amendment" on the ground that the same would affect the discharge of his special responsibility for "the prevention of any grave menace to the peace and tranquility of the province or any part thereof"¹²⁴. The Governor was

120. Ibid., Section 76.

121. Government of India Act, 1935, Section 76 (2).

122. Ibid., Section 77.

123. Government of India Act 1935, Section 84.

124. Government of India Act 1935, Section 86 (3).

empowered to promulgate ordinances at any time including the period when the provincial Legislature was in session - one matters in respect of which he was required to act in his discretion, or to exercise his individual judgement. Such ordinances were operative for six months in the first instance, but could be extended for a further period of six months¹²⁵. It was further provided that an ordinance belonging to this category would be "deemed to be an act of the Provincial Legislature which has been reserved for the consideration of the Governor General and assented to by him"¹²⁶. This provision ensured that in concurrent subjects the ordinance would prevail over the Federal Law¹²⁷. In exercising these powers under Section 89, the Governor was to act in his discretion but it was specifically provided that "he shall not exercise any of his powers thereunder except with the concurrence of the Governor General in his discretion"¹²⁸.

Chapter VI of Part III of the Act contained emergency provisions. If at any time the Governor of a province felt satisfied that a situation had arisen in which the government

125. Government of India Act 1935, Section 89.

126. Ibid., Section 89 (4).

127. Ibid., Section 107.

128. Ibid., Section 89 (5).

of the province could not be carried on in accordance with the provisions of the Government of India Act, he was authorised to declare by proclamation that " his functions shall, to such extent as may be specified in the proclamation, be exercised by him in his discretion". " The Governor could assume to himself all or any of the powers vested in any provincial body or authority¹²⁹". A proclamation could remain in force by subsequent resolutions up to a period of three years¹³⁰. The Governor was to exercise these functions in his discretion but no proclamation was to be issued by a Governor without the concurrence of the Governor General in his discretion.

Administrative Relations Between the Federal & the Provincial Governments!

The scheme of administrative relations between the centre and the provinces imposed additional limitations on provincial autonomy. Part VI of the Act (1935) enumerated the provisions relating to administrative relations between the centre and the provinces. The first principle laid down in this regard " The executive authority of every province... shall be so exercised as to secure respect for the laws of

129. Government of India Act 1935, Section 93 (a) & (b).

130. Ibid., Section 3 (2) and (3).

the Federal legislature which in the province¹³¹. The Governor General was authorised in his discretion to direct the Governor of any province to discharge, as his agent either generally or in any particular case, any functions in relation to the tribal areas, defence external affairs or ecclesiastical affairs¹³². With the consent of the government of a province, the Governor General was authorised to entrust to that Government or to its officers, functions in relation to any matter to which the executive authority of the centre extended¹³³. The federal legislature could confer powers and impose duties upon a province, or officers and authorities thereof, even in respect of matters outside the jurisdiction of the provincial legislatures¹³⁴. Extra costs of administration incurred by the province in this regard were to be paid by the Centre¹³⁵.

Section 126 of the Act enjoined upon every province so to exercise its executive authority as not to impede or prejudice the exercise of the executive authority of the Federation. The executive authority of the Federation extended to the giving of such directions to a province "as may appear to the Federal Government to be necessary for that purpose."¹³⁶

131. Government of India Act 1935, Section 122 (1).

132. Ibid., Section 123 (1) (2) & (3).

133. Ibid., Section 124 (1).

134. Ibid., Section 124 (2).

135. Ibid., Section 124 (4).

136. Government of India, Act 1935, Section 126 (1).

It also extended to the giving of directions to a Province as to the implementation of any Act of the Federal legislature relating to "a matter specified in Part II of the concurrent legislative list". A Bill proposing the authorization of issuing of any such directions was subject to the previous sanction of the Governor General in his discretion¹³⁷. The executive authority of the Federal Government also extended to the issuing of directions to a province in respect of the construction and maintenance of communication of Military importance¹³⁸. The Governor General, acting in his discretion, also had the power to issue orders to the Governor of a province for the purpose of preventing any grave menace to the peace and tranquility of India or any part thereof¹³⁹. Section 126 of the Act whittled down the restrictions suggested by the white paper on the powers of the Federal Government and the Governor General and gave them successive administrative and legislative powers over the provinces¹⁴⁰. The Centre could require a Province to acquire land on its behalf¹⁴¹.

The Provinces were entitled to be entrusted with the functions relating to broadcasting which would enable them

137. Ibid., Section 126 (2).

138. Ibid., Section 126 (3) and (4).

139. Ibid., Section 126 (5).

140. Keith A.B. "Constitutional History of India", described 126 Section for an illuminating discussion on this point see Sir Sharafat Ahmad Khan, op.cit.pp.113-118.

141. Government of India Act 1935, Section 127.

to construct and use transmitters, and to impose fees on construction and use of transmitters and receiving apparatus in the provinces. But in the exercise of these functions the provinces were subject to such conditions as may be imposed by the Federal Government. Disputes between the provinces and the federation relating to these provisions were to be settled by the Governor General in his discretion¹⁴².

Section 130 to 134 of the Act of 1935 dealt with interprovincial water disputes comprehensively. It is appeared to the Government of a province that its interests, in the water from any natural source of supply in any Governor's or Chief Commissioner's province or Federal State had been or were likely to be affected prejudicially, the Provincial Government was required to lodge a complaint with the Governor General¹⁴³. In respect of interprovincial water disputes, jurisdiction of courts was barred¹⁴⁴, the parties, however, had a right to appeal to His Majesty in Council¹⁴⁵.

Section 135 provided for the possibility of the creation of an inter-provincial council by His Majesty in Council charged with the duty of inquiring and advising on inter-provincial disputes or subjects of mutual and common interest to the provinces and the Federation¹⁴⁷.

142. Ibid., Section 129.

143. Government of India Act 1935, Section 130.

144. Ibid., Section 131.

145. Government of India Act 1935, Section 133.

147. Ibid., Section 48 (1).

Executive Powers of the Governor:

The powers (executive) and position of the Governor as head of the provincial Government, deserves special attention.

Appointed by His Majesty by a commission under the Royal Sign Manual¹⁴⁸, the Governor of a province, exercised the executive authority in a province on behalf of His Majesty, either directly or through officers subordinate to him¹⁴⁹. The Executive authority of each province extended to matters in respect of which the legislature of the province had power to make laws¹⁵⁰. The Act provided for a council of Ministers to aid and advice the Governor in the exercise of his functions, except in so far as he was required to exercise his functions in his discretion or on his individual judgement. The decision of Governor in his discretion was final. The Governor was authorised to preside over the meetings of the Council of Ministers¹⁵¹. The Ministers, chosen summoned and sworn by the Governor in his discretion were to hold office during his pleasure.

148. Government of India Act 1935, Section 48 (1).

149. Ibid., Section 49 (1).

150. Ibid., Section 49 (2).

151. Government of India Act 1935, Section 50 (1), (2) & (3).

It has to be noticed that instead of providing for conventions whereby the Governor of a province could gradually acquire the constitutional position analogous to the Governor of other Dominions, he was assumed with overriding powers which enabled him to function as the virtual head of the Provincial Government. Contrary to the unanimous resolution of the provincial and constitution sub-committee that "the Chief Minister should preside over meetings of the Cabinet", except on any special occasion¹⁵², the Act empowered the Governor in his discretion to preside over the Council of Ministers¹⁵³. The Governor was made Pivotal of the entire provincial administration. The legal position of the council of Ministers, in the context of Sections 48 to 51 of the Act was that it did not legally form part of the executive authority of the province, as it did under the Act of 1919. The Calcutta High Court, after taking into account sections 49-53 and 59 of the Government of India Act, observed. "Although in popular language the Ministers may be referred to as "the Government", they are not the Government within meaning of Section¹⁵⁴ 17 and 124 of the Indian Penal Code. Whatever may

152. Government of India Act, 1935, Section 50 (2).

153. Section 17 of Indian Penal Code 1939.

154. Chintamani of Masani, op.cit.pp.49-51.

happen in practice, the Ministers are in law, the Governor's advisors¹⁵⁵."

Section 52 specified the 'Special responsibilities' of the Governor. The Governor was to exercise his individual judgement in matters relating to his special responsibilities, and as such was subject to the supervision and control of the Governor General¹⁵⁶. The following were the special responsibilities of the Governor.

- a) the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof,
- b) the safeguarding of legitimate interests of minorities,
- c) the safeguarding of rights and interests of the members of the Public service and their dependent,
- d) the securing in the sphere of executive action of the purposes which the provisions of chapter III of part V¹⁵⁷ of the Act was designed to secure in relation to legislation,
- e) the securing of the peace and good government of partially excluded areas,

 155. Government of India Act 1935, Section 54.

156. Government of India Act 1935, Chapter III of Part V.

157. Ibid., Section 52 (1) (2) and (3).

- f) the protection of the rights of any Indian States and the rights and dignity of the ruler thereof.
- g) the securing of execution of orders or directions lawfully issued to him under part VI of the Act¹⁵⁸ by the Governor General in his discretion¹⁵⁹.

Sir Sharfat Ahmad wrote, " The Governor in the sphere of his special responsibilities is responsible to the Governor General who is responsible to the Secretary of State, who in his turn, must carry out the policy of the British Parliament¹⁶⁰."

Section 53 provided for the issue of an instrument of instructions by His Majesty to the Governor of a province. It was, however, clarified, that no action of the Governor "shall be called in question on the ground that it was done otherwise than in accordance with any instrument of instructions issued to him¹⁶¹."

The superintendence and general control of the Governor General over the Governors was ensured in all spheres of

158. Ibid., Section 52 (1) (2) and (3).

159. Sir Sharafat, The Indian Federation, p.51.

160. Government of India Act 1935, Section 53 (2).

161. Report of the Joint Select Committee of Parliament, Para 75.

activity involving exercise of direction or by the Governor¹⁶². The Governor General, however, was required before giving any directions to the Governor, under this authority, to satisfy himself that the directions were not contrary to the instrument of instructions issued to the Governor¹⁶³.

To advise the Provincial Government on legal matters and to perform duties of legal character, the Governor was to appoint an Advocate General¹⁶⁵.

If the Governor felt that the peace of tranquility of the province was endangered, he could direct that " his functions shall to such extent as may be specified in the direction, be exercised by him in his discretion and, until otherwise provided by a subsequent direction of the Governor, those functions shall... exercised by him accordingly¹⁶⁶.

While such directions were in force, the Governor could authorise an official to speak in and otherwise taken part in the proceedings of the legislature. The official, however, was not entitled to vote¹⁶⁷. The Governor was empowered to make rules for securing that no records or information relating

162. Government of India Act 1935, Section 54 (1) & (2).

163. Ibid., Section 55.

165. Ibid., Section 57 (1).

166. Ibid., Section 57 (2).

167. Government of India Act 1935, Section 58, para 95, p.53 of the Report of the Joint Select Committee furnished the basis of this section of the Act of 1935.

to the sources of information pertaining to the operations of persons referred to in Section 57, " shall be disclosed or given" except in accordance with directions of the Governor in his discretion¹⁶⁸.

Section 59 laid down that " all executive section of the Government of a province shall be expressed to be taken in the name of Governor". It was also for the Governor to make rules, " for the more convenice transaction of the business of the Provincial Government, and for the allocation among Ministers of the said business¹⁶⁹.

The Draft Instrument of Instructions to Governors¹⁷⁰ presented to Parliament in November, 1936, sought to indicate the manner in which powers of the Governor specified in the Act were to be exercised. Obviously, the Instrucent of Instructions did not create any new rights and as such did not enable a subject to bring any section in a court of law¹⁷¹.

The Governor was instructed to make such actions as he thought fit in cases in which his special responsibility was involved, even if it were contrary to the advice tendered

168. Ibid., Section 59.

169. Government of India Act 1935, Section 53.

170. Ibid., Section 53 (2).

171. Instrument of Instructions to Governors (Cmd 4805),
Para VIII.

by the Ministers¹⁷². The Governor was required to safeguard the legitimate rights:

- i) of minorities and securing them due proportion in the service¹⁷³,
- ii) of members of Public Services and securing them against inequitable action¹⁷⁴.

The Governor was responsible for the execution of provisions relating to commercial discrimination¹⁷⁵ and for safeguarding of the interests of Indian States¹⁷⁶.

The Governor was also instructed to ensure that the Finance Minister was consulted upon any proposal by any other Ministers affecting the finance of the provinces¹⁷⁷. The Governor was to keep himself informed on irrigation in his province¹⁷⁸ and could appoint a special officer to inform and advise him on matters relating to excluded or partially excluded areas or pertaining to the legitimate interests of minorities¹⁷⁹. He was instructed to withhold his assent from and to reserve for the consideration of the Governor General, any bill (a) which would repeal or be repugnant to the

172. Ibid, Para IX.

173. Ibid., Para X.

174. Ibid., Para XI.

175. Ibid., Para XII.

176. Instruments of Instructions to the Governor (cmd 4805) para XIII.

177. Ibid., Para XIV.

178. Ibid., Para XV.

179. Chapter III of Para V contained provisions relating to discussion & Sec. 299 provided for compulsory acquisition of land Act.

provisions of any Act of Parliament extending to British India; (b) which would be derogatory to the powers of high Court; (c) regarding which he had a doubt whether it did or did not offend against the purposes of chapter III of Part V or section 299 of the Act¹⁸⁰, and (d) which would affect the character of the permanent settlement¹⁸¹. The Governor was not to resort to his power to stay proceedings upon a bill, clause or amendment, in the provincial legislature in the discharge of his special responsibility under Section 52 (a), unless in his judgement the public discussion of the Bill, clause or amendment would itself endanger peace and tranquility¹⁸².

Financial Relations between Centre and The Provinces:

Part VII of the Act of 1935 embodied the statutory provisions relating to finance. The division of powers, which is one of the most important features a federal form of Government, requires a division of resources also resources assigned either to the centre, or to the units, must be adequate to fulfil their responsibility. As Prof. Adarkar, has rightly said that besides the principles of independence

180. Instrument of Instructions to the Governor, Op.cit.
Para XVII.

181. Instrument of Instructions to the Governor, op.cit.,
Para XVIII.

182. Adarkar B.A., The Principles & The Problems of Federal Finance, pp.218-24.

and responsibility, the principles of adequacy and elasticity and administrative economy must be observed in the division of resources between the centre and the units¹⁸³. It is, however, extremely difficult to secure a proper balance between the needs of the centre and the needs of the units and in most federations adherence to scientific principles has seemed unsuitable and historical reasons have played a predominant part¹⁸⁴. As the Joint Parliamentary Committee aptly described: "As far as British India is concerned the problem is not new one. Though the separation of the resources of the Government of India and the Provincial Governments under the existing constitution is in legal form merely an act of statutory devolution, which can be varied by the Government of India and Parliament at any time, nevertheless, from the practical financial point of view there is already in existence British India a federal system of finance¹⁸⁵".

Section 136 defines Federal revenues as "all revenues and public money raised or received by the Federation, "and provincial revenues as "all revenues and public money raised or received by a provincial¹⁸⁶". The definition, as such,

183. Bhargava R.N., The Theory & Working of Union Finance in India, p.77.

184. Report of the Joint Parliamentary Committee, Vol.I, Part I, Para 245.

185. Government of India Act 1935, Section 136.

186. Sha K.T., Op.cit., p.376.

included not only 'the normal recurrent income, but also the extraordinary non-recurrent receipts e.g. borrowed funds or the proceeds of the sale of property¹⁸⁷.

Certain revenue were to be levied and collected by the Federal Government, and distributed among the Federating units in accordance with the principles of distribution formulated by the Act of the Federal Legislature. The Federal Legislature, was entitled to increase the said duties or taxes by levying a surcharge for Federal purposes. The following sources of revenue were specified under this category:

- i) Succession duties on property other than agriculture land;
- ii) Stamp duties mentioned in the Federal Legislative list;
- iii) Terminal taxes on goods or passengers carried by railway or air; and,
- iv) Taxes on railways fares and freights¹⁸⁹.

The Federal Government was to levy and collect taxes on income other than agricultural income. A prescribed percentage of the annual net proceeds¹⁸⁹ of income tax;

187. Government of India Act 1935, Section 137.

188. Government of India Act 1935, Section 144.

189. Government of India Act, 1935, Section 138.

except in so far as those proceeds represented proceeds attributable to Chief Commissioner's provinces or to taxes payable in respect of Federal emoluments, was to be assigned to the provinces and to the Federated States, if any, within which the tax was leviable in that year¹⁹⁰. It was provided that the percentage originally prescribed could not be increased by any subsequent order in council, and that the Federal Legislature was authorised to increase the said taxes at any time by levying a surcharge for Federal purposes¹⁹¹.

Sub-Section (2) of Section 138, enabled the Federation to retain, for its own purposes, a prescribed sum from the money assigned to the provinces or the Federal States under sub-Section (1) of Section 138. The Federation was entitled to retain:

- a) "in each year of a prescribed period such sum as may be prescribed; and,
- b) in each year of a further prescribed period of sum less than that retained in the preceding year by an amount, being the same amount in each year, so calculated that the sum to be retained in the last

190. Ibid., Section 138 (1).

191. Government of India Act 1935, Section 138 (2).

year of the period will be equal to the amount of each such annual reduction¹⁹².

Section 139^a dealt with the corporation tax, a tax levied on the capital, or other standard indicators of the companies wealth¹⁹³. 'In view of item 46 of the Federal legislative List (Schedule VII), the corporation tax appeared to be meant entirely for the purpose of the Federal Government¹⁹⁴. Owing to the insistence of the Indian rulers on their rights in respect of levying and collection of taxes at the Third Round Table Conference, the Act granted numerous exemption to the Indian States with regard to corporation tax¹⁹⁵. No bill or amendment imposing or varying any tax or duty in which provinces were interested; or varying the meaning of the expression 'agricultural income', or affecting the principles on which money was to be distributed to provinces or States, or imposing any federal surcharges could be introduced or moved in the federal legislature without the previous sanction of the Governor General in his discretion¹⁹⁶. Before giving his sanction to the imposition of a federal surcharge, the Governor-General was required to satisfy himself that all

192. Government of India Act 1935, Section 311 (2).

193. Shah K.T., Op.cit., p.389, also see Joint Select Committee Report, Para 256.

194. Government of India Act 1935, Section 139 (1), (2), and (3).

195. Government of India Act 1935, Section 181 (1).

196. Ibid., Section, 141 (2).

practicable measures for otherwise increasing the proceeds of federal revenues were inadequate¹⁹⁷.

Assistance to deficit provinces to the extent of such sums as may be prescribed by His Majesty in Council chargeable on the revenues of the federation in each year, was to be extended as grant-in-aid¹⁹⁸.

Section 143 provided "Any taxes, duties, cesses or fees which immediately before the commencement of Part III of this Act, were being lawfully levied by any provincial government, Municipality or other local authority or body under a law in force on the first day of January, 1935, may notwithstanding that those taxes, duties, cesses or fees are mentioned in the federal Legislative list, continue to be lived and to be applied to the same purposes until provisions to be contrary is made by the Federal Legislature¹⁹⁹.

The Governor General and the Governor of a province were to make rules for the purpose of securing that all moneys received on account of the revenues of the federation or of the province, were paid, withdrawn and kept in custody in a prescribed way²⁰⁰.

197. Ibid., Section 142.

198. Government of India Act 1935, Section 143 (2).

199. Government of India Act 1935, Section 151.

200. Ibid., Section 155 (1) (a).

Section 154 exempted Federal property from provincial taxation and Section 155 rendered provincial property immune to Federal taxes. The provinces, however, were not exempted from Federal taxation in respect of trade or business carried on by or on behalf of the provincial Government in any part of British India outside that province²⁰¹.

Borrowing and Audit:

During the discussion in the Federal Finance Committee, grievances were voiced by Provincial representatives regarding their limited borrowing powers²⁰². The first Peel Committee expressed itself opposed to the exercise of complete Federal control over internal borrowings by a province. It, however, favoured the Federal Government, to be provided with a "suitably restricted Power of Control over the time at which provinces should issue their loans²⁰³".

The Act of 1935, laid down that the executive authority of province extended to borrowing upon the security of the revenues of the province²⁰⁴, Subject to such conditions as it thought fit to impose the Federation could make loans to, or so long as any limits fixed under sub-section (1) of Section 163, were not exceeded, give guarantees in respect loans raised by an province.²⁰⁵

201. Sir Sharafat Ahmed, Op.cit.p1170.

202. The First Peel Committee Report, Para 22.

203. Government of India Act 1935, Section 163 (1).

204. Ibid., Section 163 (2).

205. Ibid., Section 163 (3).

Consent of the Federation was necessary to enable a province to borrow outside India or to raise any loan while any part of Federal loan made to the province or of a loan in respect of which the Federation or the Governor General in Council had given a guarantee remained unpaid²⁰⁶. All disputes relating to the justifiability of a 'refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon' by the Federation were to be referred to the Governor General or his decision²⁰⁷.

Audit and Accounts:

An Auditor General of India was to be appointed and his service conditions were to be prescribed by His Majesty. He was to perform such duties and exercise such powers in relation to the Provinces as were prescribed by rules made under an order of His Majesty in Council or by any subsequent Act of the Federal Legislature varying or extending such an order. However, no bill or amendment could be introduced or moved without the previous sanction of the Governor General²⁰⁸. After the expiration of two years from the commencement of part III of the Act, and on the initiative of a provincial

206. Ibid., Section 163 (4).

207. The Government of India Act 1935, Section 166 (3).

208. Ibid., Section 167.

legislature, an Auditor General for a province could also be appointed by His Majesty²⁰⁹.

With the approval of the Governor General, the Auditor General of India was to prescribe the form in which the accounts of the Federation were to be kept and it was the duty of every provincial government to comply with the directions given by the Auditor General of India with regard to the Methods or principles of maintaining provincial accounts²¹⁰. His reports on Federal and Provincial accounts, were to be submitted to the Governor General and the Governor respectively who in their turn were to place them before the Federal or the Provincial Legislature²¹¹.

Financial Powers of the Governor:

The Governor had far reaching powers in financial matters. He laid the annual financial statement of the estimated receipts and expenditure of the province, before the Provincial Legislature and was empowered to direct the inclusion of such sums in the financial statement as were considered necessary by him for the due discharge of any of his special responsibilities²¹².

209. Government of India Act 1935, Section 168.

210. Government of India Act 1935, Section 169.

211. Ibid., Section 78 (1) & (2).

212. Government of India Act 1935, Section 78 (3), (4) and Section 79 (1).

Expenditure on the administration of excluded areas; sums required to satisfy judgement or award of any court or tribunal, etc. Any question whether any proposed expenditure belonged to this category or not was to be decided by the Governor in his discretion²¹³.

The Provincial Legislative Assembly had power to assent or to refuse assent to estimates categorised as, "other expenditure". However, no demand for a grant could be initiated, except on the recommendation of the Governor²¹⁴.

The Governor was also authorised to restore the reductions made by the Legislative Assembly in respect of any demand for a grant if he felt that the refusal or reduction would affect the due discharge of any of his special responsibilities. The Governor was to be laid before the Assembly but it was not open to discussion or vote²¹⁵.

The Governor's recommendation was essential for the introduction of a bill or amendment in the Provincial Assembly making provision " for imposing or increasing any tax, or for regulating the borrowing of money or the giving of any guarantee by the Provinces; or for the amending the law with

213. Government of India Act 1935, Section 79 (2) & (3).

214. Ibid., Section 80 (1)&(2).

215. Government of India Act 1935, Section 82 (1).

respect to any financial obligations undertaken or to be undertaken by the Province or for declaring any expenditure to be expenditure charged on the revenues of the Province or for increasing the amount of any such expenditure²¹⁶. No bill involving expenditure from the revenues of a Province could be passed unless the Governor had recommended it to the legislature²¹⁷.

A One Man Committee composed of Sir Otto Niemeyer was appointed on December 6th, 1935, to inquire and review the matters referred to under Sections 138 (1 and (2) 140 (2) and 142 of the Government of India Act²¹⁸. On April 6th, 1936, Sir Niemeyer submitted his report. The proposals of the Niemeyer Committee, after an exchange of views between the Provincial Governments, the Government of India and the Secretary of State for India, 133 were approved by His Majesty's Government and Parliament. The Government of India (Distribution of Revenues) Order, 1936 gave validity to the proposals.

216. Ibid., Section 82 (3).

217. The following were the terms of reference of the Niemeyer Committee:

- 1) The period within which the distribution of income tax receipts collected by the Federal Government should be made among the Provincial Governments.
- 2) Proportion of jute export duty to be assigned to the jute growing provinces.
- 3) The amount and mode of offering further subvention from Federal resources to such of the Provinces as were found to be deficit provinces.

218. Cml., 5181, 1936.

CONCLUSION:

In the light of the above analysis of the Centre Provincial relations under the Act of 1935, it can be summarised that the real and effective power remained secured in the hands of the Central Government²¹⁹.

In the context of the strong centre, however, what needs to be understood is that centralization of power and its placement in the British hands was an imperial as well as an administrative necessity. "To hold India, the British had to control it, and as a result of their tight control the balance of power tipped heavily towards the Central Government²²⁰. Improvement in the means of communication during the British times enabled the central government to wield its powers more effectively and resulted in the curtailment of authority and initiative of the regional governments. Apparently the general acceptance of 1935 scheme of division of power between the Centre and the Units; by the constituent Assembly of free India²²¹, and the resultant establishment of co-operative federalism²²², can only be explained in term of administrative necessity of a centralized

219. Austin, Granville, *The Indian Constitution-Cornerstone of a Nation* (Clarendon Press, Oxford, 1966), pp.188-189.

220. *Ibid.*, p.188.

221. *Ibid.*, pp.194-234.

222. Birch H.A., *Federalism, Finance and Social Legislation in Canada, Australia and the United States* (Oxford, Clarendon Press, 1955), pp.305-306.

authority for India in the content of its immense diversities. The only suitable governmental system for India is one in which local initiative and strong central control are blended together.

Thus, in the scheme of division of power, envisaged under the Act of 1935, it was not in the allocation of an excessive authority to the centre but in the placement of the overriding powers in the hands of the British Chief Executives both at the Centre and in the Provinces²²³, and in the absence of any legislative accountability in the exercise of those powers that the real colonial stuff lay. The basic flaw of the scheme 1935 did not consist in its emphasis on centralization but in its insistence on the supremacy of irresponsible colonial executive authority over popular Governmental institutions.

It was this colonial manoeuvring in the scheme of division of power, which was rejected by the Constituent Assembly of India when it adopted voluntarily the centralized federalism that had originally been designed to support and preserve colonial domination in this country²²⁴.

223. Report of the Joint Parliamentary Committee, Paras 23 & 29.

224. Austin Granville, Op.Cit.p.322.