CHAPTER III

STUDY OF FEDERAL FEATURES:

(WITH SPECIAL REFERENCE TO 1909,1919 AND 1935 ACTS)

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The Morley Minto Reforms, as embodied in the Indian Councils Act of 1909,marked an important stage in the development of 'representative institutions' in India[1]. They introduced significant changes in the administrative set-up of our country. The expansion of the Central and Provincial Legislative Councils, the corresponding increase in their non-official element and the introduction of separate electrorates were some of their significant features. They also provided for the appointment of the Indians to the highest executives and for the principle of election side by side with that of nomination.

a) Expansion of the Central Legislative Council:

The Morley Minto Reforms greatly enlarged the size of the Central Legislative Council. The additional members of the Council were increased from 16 to a maximum of 60, and the total strength was fixed at 69. Out of these 69 members, 37 were to be officials and 32 non-officials. Of 37 officials

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1. Refer Sikri S.L., A Constitutional History of India, S.Nagin and Co.,1954, pp.104.

28 were to be nominated by the Governor General, while the remaining 9 were to be the Ex-Officio Members consisting of the Governor General, the 6 ordinary members of his council and 2 extraordinary members, viz., the Commander-in-Chief and the Governor of the Province were the Central Legislative Council happened to sit. The 32 no-official members of the Central Legislature consisted of 5 nominated non-officials and 27 elected non-officials. The 27 elected non-official members of the Imperial Legislature were to be chosen in this manner[2].

i) General Electorates - 13 Members- Eight of them were to be returned by the non-official members of Bengal, Bombay, Madras and U.P.Legislative Councils in the order of two by each province. The remaining five were to be selected by the non-official members of the Punjab, Bihar and Orissa, Assam and Burma and C.P.Councils in the order of one by each province.

ii) Class Electorates - 12 Members, consisting of (i) 6 members returned by special landholders constituencies of the six provinces (one member from each of the Provinces

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2. Ibid.,p.104.

of Bengal, Bombay, Madras, U.P., C.P.,Bihar and Orissa)

ii) 6 members by separate Muhammadan constituencies (two members from Bengal and one each from the provinces of Madras, Bombay, Bihar and Orissa and U.P.)

iii) Special Electorates - 2 members, one each by the Bengal and Bombay Chambers of Commerce.

b) Expansion of the Provincial Legislative Councils:

Like the Central Legislative Council the size of the Provincial Legislatures was also enlarged. Their actual strength as fixed by the Regulations was as under[3].

a)	Bengal Legislative Council	...	52
b)	Madras Legislative Council	..	47
c)	Bombay Legislative Council	..	47
d)	Uttar Pradesh Legislative Council.		47
e)	Eastern Bengal & Assam Legislative Council	..	41
f)	Punjab Legislative Council	..	25
g)	Burma Legislative Council	..	16

In the Provincial Councils also the members were classified into elected official and nominated non-officials. The

3. Sikri S.L., "A Constitutional History of India", S.Nagin & Co.,New Delhi,1964, p.105.

official majority was however, dispensed with. The strength of the elected members in the Provincial Councils was fairly large. The 21 elected members of Bombay Provincial Legislative Council were taken in this manner-

i) 8 members were sent by the General Electorates comprising Municipalities, District Boards etc.

ii) 7 members returned by the class Electorates, were to be consist of (i) 3 from the Landlords constituencies, and (ii) 4 from the Muhammadan electorates.

iii) 6 members were to be sent by special Electorates, consisting of Bombay Corporation, Bombay University, etc.

c) Changes in the Functions of the Councils:

" The Act of 1861 had strictly limited the functions of the Councils into the field of legislation. The Act of 1892 gave members the power to discuss the budget but not to remove resolutions about it or to divide the Council"[4]. The Act of 1909 enlarged the scope of the functions in three ways[5].

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4. Pylee M.V.,Constitutional History of India, Asia, Bombay,1970, p.47.

5. Ibid.

1) To discuss the budget at length before it was finally settled[6];

2) To propose resolutions upon it, and;

3) To divide upon those resolutions.

4) The right to ask questions by members was enlarged and supplementaries were also allowed[7].

"However, the resolutions had little efficency as they were meant to operate as recommendation to executive Government"[8].

d) Restricted & Discriminatory Franchise:

"The Franchise, as introduced by the Act, was neither wide nor uniform but it is a great improvement upon the Act of 1892"[9]. For the Imperial Council, only those landowners from the landholders constituencies were entitled to vote who had certain special income (Rs.15,000/- annual for Madras) or certain minimum land revenue. Payments (ordinarily Rs.10,000/- a year) or high titles (in Bengal the holders of the titles of Raja and Nawab). The qualifications for the voters varied with the Muslims and non-Muslims. All Muhammadans who paid an

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6. The Indian Councils Act, 1909, Section 5.
7. Pylee M.V. 'Constitutional History of India, Asia, Bombay, 1970, p.48.
8. Mont Ford Report, Para 78.
9. Pylee M.V., 'Constitutional History of India, Asia, Bombay, 1970, p.48.

income tax on an income of Rs.3,000/- had the right to vote, while a Parsee, Hindu or Christian who might be paying an income tax on three lakhs ruppees a year was entitled to vote. Again a Muhammadan graduate of five years standing had the right to vote, while Hindu, Parsee and Christian graduates of thirty years standing had no such right. Pandit Madan Mohan Malaviya in his presidential address at the annual session of Indian National Congress (1906) at Lahore remarked:

" Men like Sir Gurdass Bannarjee, Dr.Bhandarkar, Sir Subramania Iyer and Dr.Rash Behari Ghose have not been given the right to vote, which has been given every Muhammadan graduate of five years standing"[10].

SEPARATE ELECTRORATES FOR THE MUSLIMS:

The most unfortunate feature of Morley Minto Reforms of 1909 was the introduction of separate electorates for the Muslims. On the ground of their alleged political importance, they were accorded special treatment in matter of representation instead of securing their proper share of representation to the Councils by general electorates, it was secured by their communal and exclusive suffrage. Besides, the Muslims were

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10 Sikri S.L., 'A Constitutional History of India, S.Nagin & Co.,1967, p.107.

favoured with the representation much in excess of their population on account of their services to the Empire. In this connection Lady Minto who wrote that Lord Minto received the congratulations of Anglo Indian bureaucrats for having separated sixty million Muslims from the Hindus and kept them away from joining the ranks of the 'Seditions opposition'[11].

Principle of Election along with Nomination:

Much to its credit, the Morley Minto constitution definately accepted the principle of election. Elected element was introduced both in the Imperial and Provincial Legislatures. Out of 69 members of the Central Legislative Council, 27 were to be the elected members. Every Provincial Council was also to have an fixed number of elected members - Bengal 28, Madras 21 and Bombay 21. But side by side with the principle of election, the principle of nomination was also maintained to secure the representation of Minor interests and small classes[12].

Repudiation of Parliamentary Government:

The reforms were, however, disappointing in so far as they negatived the grant of responsible government to the Indians.

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11. Lady Minto, Minto and Morley, p.48.
12. Sikri S.L., A Constitutional History of India, S.Nagin & Co.,1967,p.108.

"Mr. Morley had absolutely no mind to introduce a Parliamentary type of Government in our land. He openly declared in the House of Lords, in December 1908:

> " If I were attempting to set up a Parliamentary system in India, or if it could be said that this chapter of reforms (led directly or necessarily up to the establishment of a Parliamentary system in India, I, for one, would have nothing to do with it... it is ambition of mine; at all events to have any share in begning that operation in India. If my existence, either officially or corporeally, were to be prolonged twenty times longer than either of them is likely to be Parliamentary system, it not at all the goal to which I would for movement aspire"[13].

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 with the government and the councils were left with no functions but criticism. The Morley Minto reforms did not

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13. Sikri S.L., Ibid.,p109.

embody a ny new policy, they were a natural extension of a previously existing system and[14] at best sought to devise a system of 'constitutional authoracy' for India[15]. The executive government retained the final decision of all questions[16].

Reporting in 1918 the Montague Chelmsford Committee recorded, " In nine years the Morley Minto Reforms have spent their utility. They are no longer acceptable to Indian opinion[17]... and official opinion[18] also view them with a critical eye"[19].

FEATURES OF 1919 ACT:

The Morley Minto Reforms had little to command themselves in the interests of the Indians. The rules and regulations framed under the Act were so intricate and lengthy that they practically wrecked the reform scheme. The quote Dr.Zacharias " The essence of these reforms lay in conceding what at once was evacuated of all meaning. The elective principle of democracy was adopted yet at the same time the anti-democratic representation was added. The official majority was done away with but the elected members remained in a minority. The membership was considerably enarged; but an emphatic disclaimer

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14. Mont Ford Report, Para.9.
15. Ibid.,Para 73.
16. Ibid.,Para 81.
17. Ibid.,Paras 99-101, also Paras 14-19.
18. Speech of Lord Syndenham (Governor of Bombay).
19. Lord Hardinge's despatch August 25th,1911, published in the Gazette of India, Extraordinary, 12th Dec.1911.

was issued simulaneously that the new councils in no wa y meant the introduction of Parliamentary system"[20].

The idea of Provincial autonomy was given a fuller expression in the Report on the Indian Constitution Reforms, 1918, which is commonly known as the Montagu Chelmsford Report. In this report it was mentioned that the eventual future of India was to become, ' a sisterhood of states, self-governing in all matters of purely local or provincial interest'[21].

The Government of India Act of 1919 was the first step towards the implementation of Montagus's Declaration. It brought about changes of far rëaching importance and began a new era in the development of representative institutions in India. To quote, N.Srinivasan, " It was the first breach in the old system of bureaucratic rule, and made a real beginning in representative government"[22].

The basic scheme of the Act embodied four general principles[23]:

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20. Renascent India... p.216.
21. The Report on Indian Constitutional Reforms 1918, Para 349.
22. Srinivasan N., Democratic Government in India, Bombay, Somaya, 1965, p.41.
23. Pylee M.V., op.cit., 1600-1950,1967, p.52.

a) Complete popular control, as far as possible, in the field of Local Government.

b) The Provincial Governments to be in a large measure independent of the Government of India, and to be responsible in some measure to popular representatives.

c) The Government of India to remain responsible to Parliament, yet the Indian Legislative Council to be enlarged and popular representation and influence in it to be enhanced.

d) The control of Parliament and the Secretary of over the Government of India and the Provinces to be relaxed proportion.

As a preliminary to the transfer of more powers to the provinces under the Act, it was thought desirable to standardize the provinces themselves. There had been three categories of Provinces according as they were under Governors, Lieutenant Governors of Chief Commissioners. Of these, the Chief Commissioners were at the head of relatively small and less important provinces. But Lieutenant Governors were in charge of extensive areas. Under the new scheme, these were upgraded and placed on a par with the Governor's provinces. The title of Lieutenant Governor was abolished. The Governors of the Presiencies of Madras, Bombay and Bengal still enjoyed

certain previleges which were not given to the Governors of the newly created or upgraded Provinces. All the same, the standardization achieved was real[24].

Legislative Decentralization:

"For the purpose of distinguishing the functions of local governments and local legislatures of Governor's provinces...[25] from the functions the Governor General in Council and the Indian Legislature, " the Central and Provincial lists of subjects were prepared and set out in Schedule I of the Devolution Rules[26]. The residuary subjects were given to the Centre[27].

The classification was made on the following basis. Part I of schedule I to the Devolution Rules specified 47 central subjects which were all India importance. Where a subject was of predominantly local interest it was categorized under Devolution Rule Part II of Schedule I, 52 provincial subjects[28]. However, the division was not a rigid as that under a federal constitution. In reserved subjects, though the authority of the Central Government was legally

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24. Ibid.,p.53.
25. Gazettes of India (Extraordinary),1923, p.43.
26. Government of India Act 1919, Section 45-A.
27. Devolution Rules, op.cit.Schedule I, Para I Rule 47.
28. Gazettes of India (1920), Part I, Page 1921.

unimparied and complete, it was generally qualified by the principle that even in the reserved sphere provincial Governments must try their utmost to act in co-operation with the legislature.

The Local Legislatures were empowered to make laws for the peace and good government of the province and were authorised to repeal or alter laws in their application to the said provinces[29]. The Government of India must be the sole judge of the propriety of any legislation which it may undertake. Under any one of these categories, and that its competence to legislate should not be open to challange in the court"[30]. Subject to these reservations... within the field which may be marked of for provincial legislative control the sole legislative power shall rest with provincial legislatures"[31]. To secure against intolerable harassment of the Government by the Court and enable the Government of India to carry out its large responsibilities, for defence law and order a statutory limitation upon its legislative functions was avoided. It was left to convention and constitutional practice that " the central government will not

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29. Government of India Act 1919, Section 80-A.
30. Mont Ford Report, Para 212.
31. Ibid.,Para 212.

interfere in provincial matters unless the interest for which it is itself responsible are directly affected"[32].

Financial Decentralization:

Financial dependence of the provincial Governments on the Government of India and the Central 'doles' was to be discontinued by introducing " a complete separation in theory of provincial revenues"[33]. It was suggested that an estimate should first be made of the scale of expenditure required for the upkeep and development of services which clearly appertain to the Indian sphere, that revenues with which to meet the expenditure should be secured to the Indian Government, and that all other revenues should then be banded over to the provincial Governments which will thenceforth be held wholly responsible for the development of all provincial services"[34].

The separation of revenues was bound to lead to separation of central and provincial budgets. The provinces also were to be freed from the restriction on their spending powers which the provisions of the codes and other standing orders imposed

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32. Ibid.
33. Mont Ford Report, Para 202.
34. Ibid.,Para 201.

upon them". " If provinces are to have a relatively forehand in expenditure in future it will be necessary to relax the India office control"[35].

The new scheme suggested abolition of divided heads of revenues. The heads which were as divided in most of the provinces were land revenue, stamps, excise, income tax, and irrigation. " The revenues from stamp duty should be discriminated under the sub-heads general and Judicial and that the former should be made an Indian and the latter a provincial receipts"[36]. The arrangement sought to preserve uniformity in the case of commercial stamps, to give provinces a free hand in dealing with Court fee stamps, and to provide them with an additional means augmenting their resources. Excise was already an entirely provincial head in Bombay, Bengal and Assam and was therefore, recommended to be made a provincial receipt throughout India. Owing to their revenue, and irrigation were recommended to be made wholly provincial receipts. The liability of famine relief and protective irrigation works sought to be shifted to the provinces and the Income tax was recommended as an Indian receipt[37].

Administrative Decentralisation:

Under the Government of India Act 1919, the Central Government legally remained " responsible for the good

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35. Mont Ford Report, Paras 208-9.
36. Ibid.,Para 203.
37. Mont Ford Report,Para 203.

government of this country to Parliament and the ... Secretary of State"[38]. However, in view of the declared purpose of reforms[39], restraint, on the powers of the Parliament and the Secretary of State and devolution of authority to the provinces in actual practice was considered necessary[40]. The Crew Committee in its report (1919) emphasised that the provincial Governments found themselves in agreement with a conclusion of the legislature, therefore, their joint decision should ordinarily be allowed to pravial[41]. The British policy was to transfer autonomy in the field of 'transferred subjects', only[42]. In 'reserved subjects' the position remained unaltered.

Changes in the Provincial Governments:

The Provincial Executive, "Dyarchy with background of the devolution of powers, under the Act of 1919, some more vital and radical changes were introduced in the provincial Governments because it was in the provinces that the earlier steps towards the progressive realisation of responsible Government were to be taken. A new type of Government known as 'dyarchy' was introduced in some of the provinces. This

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38. Sir Tej Bahadur Sapru's speech on 28th January,1923, The Indian Annual Register,1923, Vol.II,p.76.
39. The Government of India Act 1919.
40. The Speakers' remarks in the House of Commons on the Government of India Bill 1919 on 1st March,1921.
41. Report of the Crew Committee,Para 17.
42. The Indian Statutory Commission Report,1930, Vol.I.

was done by means of (a) dememarcating a number of subjects as provincial subjects and giving the provincial governments a large measure of freedom in their administration (b) separating provincial finance and allocating separate heads of revenue to the provincial governments (c) distinguishing between the 'transferred' subjects and the 'Reserved subjects etc"[43].

The administration of Reserved subjects was entrusted to members of the Governor's Executive Council, appointed by the crown for a period of five years and receiving a fixed pay. They were not responsible to the provincial Legislature[44].

The transferred subjects were entrusted to ministers who were to be nominated by the Governor from among the elected members of the Provincial Council and were to hold a office during his pleasure. Their salary was to depend on the vote of the Legislature[45].

The Governor's role as the link between the two executive was not only pivotal but also complex. He was to lead the two wings of the Government which were operating in two

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43. Sikri S.L., Op.cit.,1967,p.131.
44. Pylee M.Y., Op.cit.,p.56.
45. Ibid. p. 57

distinctly separate fields and responsible to two masters. "As such he was obliged not only to yoke the councilors and the Ministers to the chariot of provincial administration but also to drive it"[46].

The Legislature:

The Provincial Councils while the Minto Morley Reforms envisaged the principle of 'assoiations' of the people in the provincial government, the ten years that preceded the Mont Ford Reforms constituted a kind of probation for the new principle which it envisaged, namely, responsible government, however, rudimentary it was. The Legislative Councils, therefore, had to be formed with the regard to their constitution and functions[47].

Whereas the Act of 1909 laid down the maximum number, the Act of 1919 specified the minimum. Further this minimum itself substatially bigger than the maximum under the previous Act.

The essential weakness of the Councils in the special powers of the Governor with regard to both Legislation and

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46. Ibid.,p.58.
47. Ibid. P. 59

the budget. In the field of Legislation, his powers were both positive and negative and had referance to both essential and non-essential legislation. In the matter of budget, he had to power to authorise such expenditure as might in his opinion be necessary 'for the safety or provinces'."This dispite the acceptance of the principle of responsible government, the Act of 1919 in actual operation did not bring that principle into practice"[48].

The Legislature: Central Government:

Under the Reforms, a bicameral legislature, the Indian Legislative Assembly and the Council of States - was established. The Council had a maximum of sixty members of whom not more than twenty could be officials, and not less than thirty were to be elected. The assembly had a minimum strength of 140 members. At least five-seventh of these were to be non-officials.

The method of indirect election to the Indian Legislative Council, which had been prevent under the Act of 1909, was abolished, for the first time, direct election was introduced to fill a large majority of the seats in the Assembly. The election however, recognised the principle of communal

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48. Pylee M.Y., Op.cit.,1600-1950, p.60.

representation. Similarly industry and commerce and landholders were also given special representation.

Thus, dyarchy failed. Even its staunch supporters soon found it uninspiring when once they were associated with its operation. For the people of India it became soon clear would not be satisfied with this half way house between autocracy and responsible government. In the words of Sir Courtney Ilbert, " it was like one of those caravanserais which would be run up rapidly for an Indian prince to meet a temporary need"[49]. But even as a caravanserais it did not satisfy those for whom it was intended, when Lord Oliver, the Secretary of State for India in the first Labour Government, compared the Act to sea worthy vessel and observed that it would carry Indians across if only they would get into it and row. Motilal Nehru replied: " It may be sea worthy but what we want is not only a sea worthy vessel but a vessel big enough for our cargo, big enough to accommodate the millions of passengers that have to cross over from sevility to freedom"[50]. When put to the tests of practice it was found that the Act had nothing to offer by way of substantial transfer of power to the representatives of the people. Every one felt the need of a constitution

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49. Ilbert and Meston, The Constitution of India, 1960, London, p.13.
50. Debates in the Central Assembly, 10th March, 1924.

which would suit the conditions existing in India. The only difference of opinion was as to the nature of the constitution, particularly whether it should be federal or unitary in character. "Thus, for the first time in the history of India, the possibility and the feasibility of an All India Federation became the most important subject for discussion among Indian and British Political Leaders"[51].

GROWTH OF FEDERALISM UNDER THE BIRTH RULE:

Several years prolonged efforts to set up a constitutional structure of India at last took shape in the Government of India Act 1935. As previously stated, a scheme was made now for the first time, for the union of the British Indian provinces and the Indian States in federation. The type of federation contemplated in the Government of India Act 1935, was unique in all respects, through it possessed the usual appearance of a federal union. The structure and pecularities of the federal system as envisaged in the Government of India Act 1936 is described and expounded in several competent works and are familiar to students of federalism[52].

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51. Pylee M.V., Op.Cit.p.68.
52. Keith A.B., A Constitutional History of India, 1600-1935, Central [illegible],1961. P.56

1. In order to create a federation the constitution Act sought to perform a double operation at one stroke. It first wanted to break up the then existing British Indian Government into autonomous provinces and then unite them together in a federal framework, which was expected to include the Indian States. The Act was powerful enough to bring all the provinces compulsorily into the federation but was powerless to bind the princely states.

2. The Government at the centre was not to be a fully responsible government, although the units were to be autonomous and expected to operate on the basis of responsible government. The principle of Dyarchy experimented in the provinces under the Act of 1919, was transplanted to the Centre under the Act of 1935. The Governor General was responsible not to anybody in India but to the British Crown through the Secretary of State for India[53].

3. Some of the important activities of the Central Government such as defence, external affairs, etc. were placed under the exclusive control of the Governor General,

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53. Pylee M.V., Op.cit.,p.79.

and the Central Ministers responsible to the Federal Legislature had no right to question the actions of the Governor General with respect to these subjects. Even if he acted in a dictatorial manner and to the dftermingnt of the interests of the country, the federal Legislature would have no right to review his conduct or question has actions.

4. The Federal Legislature was to be a curious combination of democratic and autocratic elements. While the provinces send elected representatives on their behalf, the States were given the freedom of sending the nominees of the Rulers as their representatives to the Central Legislature. Further, the States were given a larger representation in the Legislature then they deserved on the basis of their population.

5. In the federation contemplated under the Act 1935, the federal principle was modified by the unitary elements in the form of control by centre to an extraordinary extent. The Governor General was given vast powers of invervention in the affairs of provincial governments which to a great extent modified the application of the federal principle. As a result of this peculiarity, the government established under the Act is characterized by some authors as 'quasi-Federal'.

6. The provision of legislative powers into three elaborate lists the central, provincial and concurrent lists - embodied in the constitution Act of 1935, was for the first time attempted under any federal system. The clear demarcation almost exhaustive enumeration of powers as shown in these three lists was unparalleled and create a record in application of the federal principal.

7. The residuary legislative power is normally located either in the central or in the units in the all federations. But in the case of the federation under the Act of 1935, it was vested under neither in the center nor in the units but in the Governor General who at his discreation might empower the Federal Legislature or the Provincial Legislature to enact a law in respect of any matter not enumerated in the central or provincial lists. The residuary power in the case of the Indian States was vested in Rulers thereof.

8. The Centre had more administrative powers over the provinces than over the states, according to the Act. Thus federal officials could administer the federal laws in the provinces. Even in the administration of the provincial subjects, the Governor was placed under the control of the Governor General in his discretion. On the other hand, federal laws could be administered in the States only by the Rulers thereof.

In the constitution Act of 1935 did not evoke any enthusiasm either in Britain or in India. In Britain, according to Keith " Whether a federation built on incoherent lines can operate successfully is wholly conjectural, if it does, it will probably be due to the virtual disappearance of responsibility and the asseration of the controlling power of responsibility of the Governor General backed by he conservative elements of the States and of British India[54].

Federal Executive Under the Act of 1935:

The Federal Executive was to consist of the Governor General, the Counsellors (of the Governor General) and the Council of Ministers[55]. The scheme of administrative relations between the centre and the provinces imposed additional limitations on provincial autonomy. Provision in the Act reserved in the hands of the number of basic powers which ought legitimately, to have belonged to the provincial government answerable to the legislature. As Sir Chimanlal Setalvad, remarked that " responsibility is buried in a file of reservations safeguards and discretions". " The Governor General was authorised in his discretion to direct the

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54. Keith A.B., A Constitutional History of India 1600-1935, London, Methucn, 1936, pp.474-75.
55. Pylee M.V., Constitutional History of India, 1967,p.81.

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 affairs"[56]. With the consent of the Government of 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 extended[57]. 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. [illegible] 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"[58]

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 direction[59]. The executive authority of the Federal Government

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56. Government of India Act 1935, Section 123 (1),(2) & (3).
57. Ibid., Section 124 (1).
58. Government of India Act 1935, Section 126 (1).
59. Government of India Act 1935, Section 126 (2).

also extended to the issuing of directions to a province in respect of the construction and maintenance of communication of military importance[60]. 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 meance to the peace or tranquility of India or of any part thereof"[61]. 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 gave them excessive administrative and legislative powers over the provinces"[62]. Disputes between the provinces and the federation relating to construction and use of transmitters and receiving appartatus in the provinces, these provisions were to be settled by the Governor General in his discretion"[63].

Section 130 to 134 of the Act of 1935 dealt with inter provincial water disputes comprehensively. If it 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 Federated State had been or were likely to be affected prejudically, the Provincial Government was required to lodge a complaint with the Governor

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60. Ibid., Section 126 (3) and (4).
61. Chintamani & Masani, India's Constitution at work, pp.26-33, Bombay, Allied, 1940.
62. Sir Sharafat Ahamad Khan, op.cit.pp.113-118.
63. Government of India Act 1935, Section 129.

General[64], who was authorised to create a commission of enquiry in his regard. The decisions taken and orders made by the Governor General after considering the Commission's reports were final and the provincial legislations repugnant to such orders were void to the extent of the repugnancy. In respect of inter provincial water disputes, jurisdiction of courts was barred"[65].

It is strange that the Joint Parliamentary Committee did not consider these powers as inconsistent with the basic principles of responsible Government. " It would seem that there was no genuine intention on the part of Britain to transfer any real power to Indians"[66]. In the words of English author, Professor A.B.Keith, " Too narrowly interpreted the special responsibilities (of the Governor General) might destory the possibility of Ministerial responsibility[67]. "Naturally, there was little scope for establishing a system of responsible Government or an attempt to create a facade of it. After Dyarchy was abandoned in the provinces on account of its failure, it was curious that such a system was recommended for the Centre under the Act of 1935. The Ultimate creation of responsible government at the centre could not be

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64. Ibid.,Section 130.
65. Ibid.,Section 131.
66. Pylee M.V., Op.cit.,1967, p.84.
67. Keith A.B., Op.cit.,pp.447-75.

reached by devising a central executives, one half of which was not responsible for the other. Such a plan was unworkable and was real advance in the direction of developing central responsibility at all. This was demonstrated later during Lord Wavell's Governor Generalship when both the Congress and Muslim League joined the executive council of the Governor General.

The Central Legislature:

Under the Act of 1935, the Central Legislature was to consist of His Majesty represented by the Governor General and two Chambers, the House of the Assembly and the Council of State.

The House of the Assembly has to have a maximum of 375 members of whom 250 were to be from British India and the rest from the Indian State. (The population of the States was only one forth of the total population of India) of the 250 from British India, three were to represent Commerce and Industry and one Labour. The remaining 246 were to be elected from the Provinces on the basis of territorial consistuencies largely formed in proporation to population.

The Assembly's tenure was normally for a period of five years.

The Council of State was to have a maximum of 260 members. Of these, 156 seats were allotted to British India and the other 104 to the States. This meant that the States were given a 40 per cent representation in the Council. Of the 156 seats which belonged to British India, seven were reserved for Europeans, one to an Anglo Indian, two to Indian Christians and six to others to be nominated by the Governor General at his discretion. The remaining 140 were distributed among the provinces. The Council was intended to be a permanent body with one third of its membership retiring at the end of every second year. The members were to be elected by the Provincial Legislatures.

The Bicameral Central Legislature was a curious mixture of many principles and interests. While members from British India were to be directly elected those from the States were to be selected by their Rulers in a manner, they considered expendient. "The States were vien an unduly large representation in contrast with British India. The Principle of Communal representation was given recognition in the case of a number of small communities. There was in addition, the principle of nomination by the Governor General in his discretion[68].

The Governor General and the Legislature:

The most striking feature of the Central Legislature was its relationship with the Governor General in fact, the

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68. Pylee M.V., Op.cit.1967, p.85.

powers of the Governor General in relation to the Legislature were so over whelming that the latter had hardly any power which could be claimed as its own.

No bill or amendment could 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 properiety of the provision in view of the nature of the emergency[69].

The Parliament reserved to itself the ultimate authority to legislate for British India, or any part thereof[70]. Except in cases where it was expressly permitted, under the provisions of the Act of 1935, the Federal and the provincial Legislatures were debarred from making any law amending any provisions of the Act or any order in Council made thereunder or any rules made under the Act by the Secretary of State, The Governor General or a Governor either in his discretion or in the exercise of his individual judgement[71].

"The Governor General had also the right to address or send messages to both the Chambers. Even Governor General had the power to issue ordinance when the legislature was not

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69. The Government of India Act 1935, Section 102 (1).
70. Ibid.,Section 110 (a).
71. Ibid.,Section 110 (b) (ii).

in session or issuing such ordinances with respect to certain subjects even when the Legislature was in session or enacting permanent laws, in the form of Governor General's Act, with respect to those subject which were his special responsibility[72].

"Thus, the Central Legislature contemplated under the constitution Act of 1935 was more a legislature by courtesy than by its powers. If ever it had come into being, it had to act as a body subordinature to the executive dominated by the Governor General[73]. Both in the legislative and the financial fields, its hands were tied and powers were severely restricted. It had no power of initiative in rising revenues and hardly, any control over items charged on the revenues of the Federation. "What British India got was nothing but a system of responsibility halved in part and multilated in substance by conditions and restraints[74]".

<u>The Federal Court:</u>

As the constitution Act of 1935 had envisaged a federal system of Government, it was only natural that it should provide or the setting up a federal Court. The division of powers on which a federal State is based may lead to disputes between

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72. Pylee M.V., Op.cit.,1600-1950,1967, p.86.
73. Ibid.,p.86.
74. Ambedkar B.R., Federation Versus Freedom, Bombay, Tacker, 1946, p.138.

different sets of Governments about the limits of their powers. As Wheare said, " since language is ambiguous it is certain that in any Federation there will be disputes about the terms of the division of powers"[75]. So there must be some authority to solve these ambiguities, if any, and to settle these disputes. This was very lucidly explained by the Joint Parliamentary Committee which said, in order to tress the necessity of a Federal Court for India, " A Federal Court is an essential element in a Federal constitution. It is at once the interpreter and the guardian of the constitution and a tribual for he determination of disputes between the constituent units of the Federation"[76].

According to the Act, "the Court was to consist of at least three judges, a Chief Justice and two associate judges. And it was located at Delhi"[77].

The judges were to be appointed by the Crown and were to hold office until they completed the age of sixty five. For appointment to the Federal Court, the minimum qualification prescribed was either five years of experience as judge of High Court or ten years as a Lawyer in an Indian High Court or

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75 K.C. Wheare, The Federal Government, op. cit, p.60.
76. Report of the Joint Parlaimentary Committee, Para 322.
77. Pylee M.V., Op.cit., 1600-1950, 1967, p.80.

a higher Court in Britain. In the case of the Chief Justice, such minimum was fifteen years.

"The judges of the Federal Court were given high salaries and it was provided that the salaries fixed at the time of their appointment could not be altered later to their disadvantage. They could be removed from office only on proved misbehaviour. They were entitled to a pension on retirement on the basis of their length of service. Their conduct as judges could not be made a subject of debate in the central Legislatures"[78].

The Court had three different kind of juridiction, original, appellate and advisory. It had exclusive original jurisdiction to hear all disputes between two more following parties, that is the federation, any of the provinces or any of the federated states ,if that dispute involved a question of law or fact on which the existence or extent of a legal right depended. So, where any legislation was within the legislative competence of the legislature concerned was now to be determined by the judiciary, which was not the case under the Government of India Act 1935. The Federal Court dismissed

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78. Pylee M.V., Op.Cit.,1950, 1967, p.87.

the suit on the ground that the Provincial Legislature was competent to enact such a law as it fell within entry 48 of list II of the seventh schedule to the said Act[79]. The Federal Court, it may be noted, could exercise jurisdiction in cases of disputes involving a dispute under the Government of India Act also.

In the case of the Federated States, the original jurisdiction of the Federal Court was to extend to cases involving the interpretation of the Act of 1935 or of an order in council made thereunder or to cases concerning the extent of legislative and executive authority vested in the Federation by virtue of the Instrument of Accession of the State. By Section 128 and sub-section (2), section 204 of the Act of 1935, the Indian States could invoke the jurisdiction of the Federal Court while contesting the directions given by the Federal Executive under Part VI of the Act of 1935. However, in the case of disputes to which a State was a party, the jurisdiction of the Federal Court would not extend if that dispute arose under any agreement specifically excluding the jurisdiction of the Federal Court.

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79. Governor General in Council, V.Province of Madras, 1943.

Regarding appellate jurisdiction, appeals from any judgement, decree or final order of High Court in British India might go to the Federal Court, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Act of 1935 or of an order in Council made thereunder. It was however, held that if the High Court was to grant such a certificate, such a substantial question of law regarding the interpretation of the constitution was to be raised and decided in the proceedings in the High Court. Where no such question had been raised at all in the proceedings before the High Court no certificate could be granted[80]. Sub-Section (2) of the Section 205 of the Act of 1935 provided that where such certificate was given by the High Court any part might not only appeal to the Federal Court on the ground that any such question as aforesaid was wrongly decided, but also on any other ground which might have formed a ground of appeal to the Privy Council without special leave, if no such certificate had been given and with the leave of the Federal Court on any other ground.

An appeal to the Federal Court from a High Court in a Federated State could be made on the ground that a question of law had be wrongly decided regarding any of the following matters.

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80. Pasupuleti Goddam V., A.I.R. 1943, Madras, 481 (482).

a) a question about the interpretation of the Act of 1935 or of an order in council made under it,

b) a question concerning the extent of legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, and;

c) a question arising under an agreement made under PartVI of the said Act in relation to the administration in that State of a law of the Federal Legislature.

The procedure prescribed in the Act of 1935 was that the case was to be stated for the opinion of the Federal Court by the High Court in a Federated State. The case might be stated on the initiative of the Federal Court also[81]. The Federal Court if it required a case to be stated before it might cause to be sent letters of request in that behalf to the Ruler of the State, who would then communicate the matter to the judiciary of his State[82]. There was no similar procedure to be followed in the case of Indian provinces. In order to justify this procedure the Joint Parliamentary Committee observed. " It was urged before us that to permit a litgant in a State Court to apply to the Federal Court of leave to appeal, if the State Court had already refused leave, would be to derogate from

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81. Section 207 (2) of the Act of 1935.
82. Ibid., Section 211.

the sovereignty of the Ruler of the State and that the refusal of a State Court to grant leave to appeal, at any rate in a case concerning the interpretation of Federal laws should be treated as final. Since it is proposed that all appeals to the Federal Court should be in the form of a special case to be stated by the court appealed from. We think the position of the State would be approximately safeguarded if it were provided that the granting of leave to appeal by the Federal Court were in the form of letters of request directed to the Ruler of the State to be transmitted by him to the court concerned[83].

Regarding its advisory jurisdiction, the court could give its opinion on a matter of law or fact whenever the Governor General sought its advice in the matter. "Section 213 of the Act of 1935 empowered the Governor General to refer to the Federal court of India any question of law, which was of great public importance"[84].

A major weakness of the Federal Court, however, was that it was not the final or ultimate interpreter of the Constitution Act. In the course of debates in the British House of Commons

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83. Government of India Act 1935, Section 213.
84. Parliamentary debates Commons, 1st April,1935, Vol.300, Col.147.

the Solicitor General explained: "Nothing in the clause affects the right of appeal to the Privy Council in case outside the clause. In cases that final within clause, which involve matters of interpretation of the constitution, parties will have to go to the Federal Court. There is a further right of appeal from the Federal Court to the Privy Council in a later clause"[85]. This was serious limitation of the powers of the court. Yet the court functioned as an independent and impartial institution interpreting the constitution and laying down the function of a real federal judiciary in the country. " It was the commendable work of the federal Court that made it easy for the Supreme Court of India under the present constitution to establish itself and effectively function as true and final interpretor of the constitution of India[86].

The federal court, however, was not a Supreme Court of appeal. The Federal Court could only exercise constitutional appellate juridiction. But here also it was not the final judicial authority to interpretethe constitution. In the course of debates in the British House of Commons the

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85. Parliamentary Debates, Commons, 1st April, 1935.
86. Pylee M.V., Op.cit., 1600-1950, 1967, p.87.

Solicitor General explained: "Nothing in the clause affects the right of appeal to the Privy Council in cases outside the clause. In cases that fail within the clause, which involve matters of interpretation of the constitution, parties will have to go to the Federal Court. There is a further right of appeal from the Federal Court to the Privy Council in a later clause[87].

Provincial Autonomy:

Of all the provisions under the constitution Act of 1935, the most important from thepoint of view of the Indian People were those relating to provincial administration. The system of government that was set up under these provisions was popularly referred to as provincial autonomy. " As M.V.Pylee said, " Nevertheless, the Indian public understood it as a system of Government wherein the Provinces had substantial freedom to perform the functions given to them under the Act without interference from above"[88]. Perhaps, the best explanation of the term was provided by Ramsay MacDonald in his concluding speech at the Second Round Table Conference. He said " We are all agreed that the Governor's provinces of

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87. Parliamentary Debates, Commons, 1st April,1935.Vol.300,Col.147.
88. Pylee M.V., Op.cit.1600-1950,1967, p.88.

the future are to be reponsible governed units, enjoying the greatest possible measure of freedom from outside interference and dictation in carrying out their own policies in their own sphere"[89].

According to the Joint Select Committee, " it is a scheme whereby each of the Governor's Provinces will possess an executive and a legislature having precisely defined spheres, broadly free from control by the Central Government and Legislature"[90].

The idea of Provincial autonomy was given a fuller expression in the Report on the Indian Constitutional Reforms, 1918, which is commonly known as the Montagu Chelmsford Report. In this report it was mentioned that the eventual future of India was so become, 'a sisterhood of State, self-governing in all matters of purely local or Provincial interest"[91].

Subsequent constitutional reforms, based mainly upon the recommendations of the report on Indian Constitutional Reforms, 1918, was made in 1919. Under it though the unitary

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89. Indian Round Table Conference (Second Session), Proceedings, pp.415-418.
90. Joint Select Committee Report, op.cit.para 25.
91. The Report on Indian Constitutional Reforms, 1918, para 349.

form of Government was retained, the provinces were given a more distinguished status. According to Sir Fedrick Whyte, the preamble to the Government of India Act was a 'finger-post to Federalism'[92], as in the fifth paragraph of Premable it was said, 'Concurently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those provinces in provincial matter the largest measure of independence of the Government of India, which is compatible with the due discharge by latter of its own responsibilities'.

Section 45 A of Government of India Act laid down that provision was to be made by rules under the Act regarding the classification of subjects and devolution of authority (in respect of provincial subjects) to the Provincial Governments. The Central Government was invested with duties which are normally undertaken by a federal government, such as defence, external affairs, railways and other strategic communications, currency and coinage posts and telegraphs, civil and criminal law and criminal procedure, commerce and certain all India functions not inumerated in the provincial list.

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92. Sir Fedrick Whyte, India-A federation, pp.33-34.

The list of Provincial subjects included items the most important of which were the maintenance of law an order, the administration of justice and jails medical administration, public health, education, agriculture, irrigation, co-operation and local self government.

Although the scheme of allocation of functions between the centre and the Provinces follows some closely a federal pattern, the Provinces were legally subordinate to the centre. The allocation of functions was settled in rules made by the government of India, and in cases of doubt as to whether a matter did or did not relate to a provincial subject the decision of the Governor - General in Council was to be final[93].

Thus though the provinces were vested with a devolved and not an original authority, they were provided with new fields to work upon in every respect.

The P,ovincial Executive:

Under the Act, the executive authority of a province was vested in the Governor who was appointed by His Majesty by a Commission under the Royal Singh Manual[94], the Governor of Province, exercised the executive authority in a province

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93. Devolution Rules, No.4, Part I, Gwyer & Appadorai, Speeches & documents on the Indian Constitution,Vol.1, p.153.

94. Government of India Act 1035, Section 48 (1).

on behalf of His Majesty, either directly or through officers subordinate to him[95]. Usually a Governor was for the period of five years. The office of the Governor in the Provinces was being manned by experienced and reliable senior civil servants[96]. The Governor was paid a high salary and a number of allowances which were charged on provincial revenues and which were not, therefore, subject to the vote of the legislature.

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. If a question arose as to whether any matter was or was not one in respect of which the Governor was required to act in his discretion or to exercise his individual judgement, the decision of the Governor in his discretion was final. The Governor was authorised to preside over the meetings of the Council of Ministers[97]. The Ministers, chosen summoned and sworn by the Governor in his discretion were to hold office during his pleasure.

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95. Ibid., Section 49, (1).
96. Chintamani and Masani, Op.cit.p.48.
97. Government of India Act 1935, Section 50 (1) (2) & (3).

Section 52 specified the 'special responsibilities' of the Governor. The responsibilities were in the nature of principles and purposes which were enumerated by way of duties imposed on the Governors and Governor General. The Governor was to exercise his individual judgement in matter relating to his special responsibilities and such was subject to the supervision and control of the Governor General[98].

The following were the special responsibilities of the Governor.

a) the prevention of any grave menance to the peace or tranquility of the province of any part thereof.

b) the safeguarding of legitimate interest of minorities.

c) the safeguarding of rights and interests of the members of the public services and their dependents.

d) the securing in the sphere of executive action of the purposes which the provisions of chapter III of part V[99] of the Act were designed to secure in relation to legislation.

e) the Securing of the peace and good government of partially excluded areas.

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98. Ibid.,Section 54.
99. Government of India Act 1935, Chapter III of Part V.

f) the protection of the rights of any Indian States and the rights and dignity of the ruler thereof.

g) the securing of the execution of orders or directions lawfully issued to him under Part VI of the Act[100], by the Governor General in his discretion[101].

Sir Sharafat Ahamad 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 Parliament"[102].

To advise the provincial government on legal matters and to perform duties of legal character, the Governor was to appoint an Advocate General[103].

If the Governor felt that the peace or 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 discr..tion and untill otherwise provided by a those functions shall... be exercised by him accordingly"[104].

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100. Ibid.,Part VI.
101. Ibid.,Section 52 (1) (2) & (3).
102. Sir Sharafat Ahmgd, The Indian Federation, p.51.
103. Government of India Act 1935, Section 55.
104. Ibid.,Section 57 (1).

While such directions were in force, the Governor could authorise an official to speak in and otherwise take part in the proceedings of the Legislature. The official however, was not entitled to vote[105].

Section 59 laid down that " all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

The Governor was to make rules specifying the manner in which the orders and other instruments made and executed in the name of the Governor were to be authenticated. It was also for the Governor to make rules " for the more convenient transaction of the business of the Provincial Government, and for the allocation among Ministers of the said business"[106].

The draft instrument of instructions to be Governors[107] presented to Parliament in November 1936, sought to indicate the manner in which the Act were to be exercised. Obviously, the instrument of instructions did not create any new rights and as such did not entitle a subject to bring any action in

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105. Ibid., Section 57 (2).
106. Government of India Act 1935, Section 59.
107. Government of India Act 1935, Section 53.

a Court of Law[108].

The Governor was instructed to take such action as he thought fit in cases in which has special responsibility was involved, even if it were contrary to the advice tendered by the Ministers[109].

The Governor was responsible for the execution of provision relating to commercial discrimination[110] and for the safeguarding of the interests of Indian States[111].

The Governor was also instructed to ensure that the Finance Minister was consulted upon any proposal by any other Minister affecting the finance of the province[112]. 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 provisions of any Act of Parliament extending to British India, (b) which would be derogatory to the powers of the High Court, (c) regarding which he had a doubt whether it did or it did not offended against the purposes of chapter III of Part V or Section 299 of the Act[113] and (d) which would alter the character of the

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108. Ibid.,Section 53 (2).

109. Instruments of Instructions to Governors (Cmd.4805) ParaVIII.

110. Ibid.,Para XI.

111. Instrument of Instructions to Governors, Para XII.

112. Ibid.,Para XIII.

113. Chapter III of Part V contained provision relating to discrimination and 299 provided for compulsory acquisition of land etc.

permanent settlement.[114] 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 (1) (a), unless in his judgement the public discussion of the Bill, clause of amendment would itself endanger peace and tranquility[115].

The Governors power as a whole presented a formidable list seldom found in the case of an executive head functioning under a responsible system of Government. Hence, many Indian critics though that "Provincial Autonomy was an autonomy more for the Legislatures or the Ministeries of the Provinces"[116]. The fact that the Governor, in the exercise of his special responsible only to the Governor General largely supported this criticism. Yet, " if the Governor had a genuine interest in the working of a responsible system of Government in the Province, he could contribute a great deal towards it"[117].

<u>The Provincial Legislature:</u>

Under the Act of 1935, the Provincial Legislatures need some changes of the eleven Governor's provinces, six had

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114. Instrument of Instructions to Governors, op.cit.Para XVIII.
115. Instrument of Instructions to the Governor,Op.cit,Para XVIII.
116. Pylee M.V., Op.cit.,1600-1950, 1967, p.90.
117. Ibid.

bicameral legislatures, that is Assemblies and Council while the remaining five had unicameral legislatures, that is Legislative Assemblies only. The following table show the maximum number of members prescribed for each provincial Legislatures.

Table 1

PROVINCIAL LEGISLATURE

	Name of the Province	Maximum No.of Members in the Assembly.	Maximum No. in the Council
1)	Assam	108	22
2)	Bihar	152	30
3)	Bengal	250	65
4)	Bombay	175	30
5)	Madras	215	56
6)	United Provinces	228	60
7)	Central Provinces and Beras.	112	-
8)	North West Frontier Province	50	-
9)	Orissa	60	-
10)	Punjab	175	-
11)	Sind	60	-

The Provincial Legislatures did not represent the people through general constitutencies. Instead, they were composed of members elected on the basis of contuencies organised according to religion or race, interest or sex. The main communities recognized on a religious or racial

basis where Muslims, Sikhs, Anglo Indians, Indian Christians and Europeans. Besides, there were what are known as 'General constitutencies' where the voters belonged to the different castes or sects of Hindu religion. Even here a certain number of seats were reserved for the "Scheduled Castes" or depressed classes. "Special interests recognised for representation were industry, Commerce, Landholders, Universities and Labour. A small number of seats were reserved for woman who had no bar as women to contest in any other constituency"[118]. "Members of the Assembly were elected directly. The Franchise was determined on the basis of a minimum land revenue a person paid or house rent. A certain minimum educational qualification or military service also was considered adequate for the purpose"[119]. It was estimated that some 14 per cent of the population got the right to vote under this system in contrast to 3 per cent under the Act of 1919. The Assembly had a normal life of five years.

The Council was to be a permanent body with one third of its membership being renewed at the end of every third year. A great majority of its members were to be elected, some directly and other indirectly, and the rest to be nominated

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118. Fylee M.V., Op.cit.,1600-1950, 1967, p.91.
119. Ibid.

by the Governor at his discretion. Those who voted in the elections to the Council had high property qualification or paid heavy income-tax or rent or held high position in Government or were title holders.

"Except in financial matters, both Houses had equal powers". All money bills were to be initiated in the Assembly and the Council had no voice in the matter of grants. In case of persisting conflict between the two Houses for a period of twelve months, the Governor could summon a joint sitting of the two Houses in order to solve the deadlock"[120].

The Provincial Legislatures were competent to pass legislation on all matters included in the provincial Legislative list. Therefore, however, two limitations in this field. Firstly, when two or more provinces by resolution of their legislatures authorised the federal legislature to legislate on a subject included in Provincial list. Secondly, when the Government by issuing a proclamation of emergency authorized the Federal Legislature to legislate on provincial subjects. The Provincial Legislatures had also power to legislate on all items included in the concurrent Legislative list so long

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120. Fylee M.V., Op.cit.,1600-1950,1967, p.92.

as such legislation did not conflict with any federal law. Even when there was such a conflict, if the Governor General had given his assent to the provincial law it could prevail over the Federal Law.

Legislative Powers of Governor:

The Act of 1935 provides the legislative powers of the Governor, enumerated in chapters III of the Act[121]. The Governor could summon,address,progogue and dissolve the provincial legislature of his discreption[122]. 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 or the Deputy Speaker (President and Deputy President in the case of Legislative Council) in their absence[123].

Acting in his discretion, the Governor was empowered to remove some of the disqualifications for the membership of Provincial Legislature[124]. The Governor could summon Joint meetings of the Chambers of Provincial Legislature[125]. In respect of Bills passed by the Provincial Legislature and

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121. Government of India Act 1935, Chapter III, Section 57.
122. Ibid.,Section 62 & 63 (1) & (2).
123. Ibid.,Section 65 (3) & (5).
124. Government of India Act 1935, Section 69 (e) & (f).
125. Government of India Act 1935, Section 74 (2).

presented to the Governor for no bill could become an Act unless assented to by the Governor in His Majesty's name, it was in his discretion to declare whether he assented to the Bill or withheld his assent therefrom, or reserved the Bill for the consideration of the Governor General. 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 fit[126]. Bills returned by the Governor General for reconsideration to the Provincial Legislatures and repassed by them were to be presented again to the Governor General for his consideration[127].

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 thereto[128].

During the recess or the Provincial Legislature, the Governor was empowered to promulate ordinances. In respect

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126. Ibid.,Section 75.
127. Government of India Act 1935, Section 76 (1).
128. Government of India Act 1935, Section 76 (2).

of matters requiring previous sanction or a pproval of the Governor General in normal course. Ordinances were subject the power of disallowance by His Majesty and could be withdrawn at any time by the Governor[129].

In addition to the above mentioned power of promulgating an ordinance during the recess of the Provincial Legislature, the Governor was armed with the authority to promulgate ordinances at any time including the period when the Provincial Legislature was in session - on matters in respect of which he as 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 months[130]. 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 by him[131]. This provision ensured that in concurrent subjects the ordinance would prevail over the Federal Law[132]. In exercising his powers under Section 89, the Governor was to act in his discreation but it was specifically provided

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129. Government of India Act 1935, Section 88.
130. Government of India Act 1935, Section 89.
131. Ibid, Section 89 (4).
132. Ibid., Section 107.

that "he shall not exercise any of his powers thereunder except with the concurrence of the Governor General in his discretion"[133].

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 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 authority[134]. Operation of any provisions of the Act of 1935 relating to any provincial body or authority except the High Court could be suspended by the Governor. The proclamation was to remain valid for six months unless revoked earlier and had to be communicated to the Secretary of State and laid before each House of Parliament. With a resolution of approval passed by both House of Parliament, the duration of a proclamation could be further extended by 12 months.

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133. Ibid.,Section 89 (5).

134. Government of India Act 1935, Section 93 (1) (a) & (b).

A proclamation could remain force by subsequent resolutions upto a period of three years[135]. 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.

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 responsibilities[136].

The Provincial Legislative Assembly had power to assent or to refuse assent to estimates categorized as "other expenditure". However, no demand for a grant could be initiated, except on the recommendation of the Governor"[137].

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

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135. Ibid., Section 93 (2) & (3).
136. Government of India Act 1935, Section 78 (1) & (2).
137. Ibid., Section 79 (2) and (3).

the due discharge of any of his special responsibilities'. The schedule specifying the sums authenticated and restored by the Governor was to be laid before the Assembly but it was not open to discussion or vote[138].

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 Province or for amending the law with 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 expenditure[139]. No Bill involving expenditure from the revenues of a province could be passed unless the Governor had recommended it to the legislature[140].

Amendment of the Constitution:

The Government of India Act 1935 provided for Indian an elaborately written constitution which technically belonged to the category of rigid constitution. Because, a rigid constitution

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138. Ibid.,Section 80 (1) and (2).
139. Government of India Act 1935, Section 82 (1).
140. Ibid.,Section 82 (3).

requires that a constitutional law making procedure should be something different from ordinary law making procedure. Under the Government of India Act 1935, the Federal Legislature and the Legislatures of the units were vested with the power of law making within their respective limits. But they were not vested with any constituent powers. The Joint Parliamentary Committee did not think it practicable to grant constituent powers to any authority in India at that movement[141]. The ultimate authority of amendment was the British Parliament. The Indian Legislatures, however, were allowed to request suitable changes in the certain cases. The Joint Parliamentary Committee, though reluctant to give general constituent powers to the Indian legislatures, added: " We are satisfied that there are various matters which must be capable, from the beginning of modification and adjustment by some means less combrous and dilatory then amending legislation in Parliament"[142]. Section 308 (1) of the Government of India Act 1935 provided the procedure for making such a request. The Federal Legislature or any provincial legislature might in certain cases specified in Section 308 (1), pass a resolution recommending the amendment on the motion proposed in each chamber by a Minister acting

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141. Joint Parliamentary Report, 1934, Vol.I, Part I,para 380.
142. Joint Parliamentary Report, 1934, Vol.I, Part I,para 376.

on behalf of the Council of Ministers. An address then was to be presented to the Governor General or to the Governor as the case might be requesting him to submit the resolution to His Majesty who would communicate it to the British Parliament.

Such motions for amendment to be taken by any legislature in India, where limited by Section 308 (1) of the Government of India Act 1935 to the following four items only:

I) The size and composition of Federal Legislature and the method of choosing its members or the qualifications of the members of that Legislature,

II) Any amendment relating to the number of chambers in a provincial Legislature, or to the size and composition of the chambers or to the method of choosing the members or to the qualifications of members of a provincial Legislature,

III) Substitution of literacy for any higher educational qualification for women's franchise and the entry of the names of duly qualified x women in the voters list without applicant; and

IV) Any Amendment regarding the qualification of voters.

Amendments, except in the case of women's franchise, were to be proposed only after the expirty of ten years after the inauguration of the Federation or the introduction of Provincial Autonomy as the case might be, Sir Samuel Hoare explained the provision thus:

> "It is provided that after a specified period, an Indian Legislature should have a formal procedure under which its resolutions on the points set out in the clause would have to be taken into account by the imperial Parliament. Parliament is not tied in any way. All that would happen would be that resolutions sent to the Secretary of State under the procedure set out in the clause would be taken into account. I attach importance to the safeguard that this procedure cannot come into operation for 10 years. I think it is very important that we should have as much stability as possible in the early years of constitutional changes"[143].

Excepting these four items the Indian Legislatures could take no part in the amendment procedure and all authority belonged to the British Parliament. As Prof.Keith remarked, " that the Act confers on the Federation no general constituent power nor does it give any authority to the provinces, such as it is enjoyed by the provinces of Canada and the states of commonwealth to mould their own constitution in detail, within the federal framework. The only power of change is vested in the

imperial Parliament with the exception that in a number of minor points change by the Crown in Council is permitted[144].

With reference to the position of Indian states limited this power of the British Parliament. Full authority to amend the constitution of British India remained doubtless with the British Parliament. The Ruler of the Indian State could join the federal structure by executing an instrument of Accession. Clause (5) of Section 6 of the Act of 1935, mentioned that every instrument of Accession executed by the ruler of a State was to contain provisions indicating acceptance on the part of the Ruler concerned of matters mentioned in the Second Schedule of the Act of 1935 as matters to be amended without affecting the Accession of a State.

The Federal scheme contemplated in the Government of India Act 1935 was full of peculiarities. The provinces of British India which were not hitherto autonomous units were to be united with the Indian States which were largely autonomous within their own territory. This disparity in the states of the constituent units of the proposed federation was the cause of many complicated features introduced into the constitution of India which were not to be found in any other federal Government. As Prof.Keith explained " This combination

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144. Keith, A Constitutional History of India, 1600-1935, p.438.

of wholly disparate elements gives a unique character to the federation and produces certain abnormal features"[145]. Moreover, as Prof.D.N.Banerjee observed, " The States represent in a special manner the centrifugal forces in Indian politics. If they are left out of any scheme of reconstruction of the Governmental system of India, they may apart from any sentimental consideration, impede the smooth working of the constitutional machinery that may be set up and may even become sources of danger in times of internal disturbance or external invansion"[146].

Another conspicuous feature of the Federal system was the tendency towards excessive centralization in the case of the British Indian Provinces for which Prof.K.C.Wheare termed it " Qusi-Federal"[147].

However, inspite of these anomalies, inspite of the existence of several provisions derogatory to provincial Autonomy, we should accept that the nucleus of federalism was there in the Act of 1935. And though it is not possible to concur fully with such view points as that the Act of 1935 constituted a 'great improvement'[148]. The constitution existing

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145. Keith, A Constitutional History of India 1600-1935,p.320.
146. Banerjee D.N., The Reforms Scheme: A Critical Study, Appendix-A, Calcutta, Orient Longman,1943,p.148.
147. Wheare K.C.,Op.cit.p.28.
148. Khan S.A., The Indian Federation, Madras University, 1942, p.364.

at the time it must be admitted that provisions for cooperation and concerned action included in the said Act.

. The Act of 1935, failed to attract Indian people. The Indian congress in its Haripur Session in 1938, resolved that the 'imposition of this Federation will do grave injury towards India, as it excluded from the sphere of responsibility vital functions of Govern@ment[149].

Chimanlal Setalbad observes: "The Congress, it had accepted the Act of 1935, unsatisfactory though it was, and had pressed for an early inauguration of the Federation, things might have been dirrerent[150]. Prof.D.N.Banerjee, also remarked, " Defects and anomalies are bound to disappear in a few years, even if the scheme is brought into operation as it is"[151]. But destiny proved to be otherwise. To the clash of different political interests the scheme of an All India Federation became a tragic victim and it never saw the light of the day.

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149. Banerjee A.C., Indian Constitutional Documents, Calcutta, Mukherjee, Vo..3, p.327.
150. Chimanlal Setalbad, Recollections & Reflections, Bombay University,1967, p.306.
151. Banerjee D.N., The Future of Democracy and other Essays, Calcutta, World Publication,1970, p.182.

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