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F E D E R A L I S M

Conditions for its Successful Working

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A thesis presented to the Department of
Political Science in partial fulfillment
of the requirements for the Master's
degree in Political Science.

American University of Beirut,

(June 1952)

To My Professor

Roger H. Saltau

With Respect and Gratitude.

"Un régime fédéral plus ou moins
étroit sera généralement adopté
dans l'avenir parce que c'est le
seul moyen d'assurer l'union des
races et plus tard de l'espèce
sans briser les diversités locales
et sans asservir les hommes à une
étouffante uniformité -

Laverleye, "le Gouvernement
dans la démocratie."

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P R E F A C E

Between the unitary state and the league of states lie different types of states which intermerge by "imperceptible nuances." The difference is, sometimes, one of degree: the test is the authority enjoyed by the central organ, and its capacity to enforce its measures.

I have chosen to deal with a definite and particular type which is "federalism." The essential principle behind this system is compromise: a compromise between the happiness of a small people and the glory of a great one, between centrifugal and centripetal forces, between equality and liberty, between self-government and the belonging to a strong power.

Federalism is not, to me, a stage towards unitary government; it is an end in itself and a stage sought for its own merits.

The advantages of this system are fully recognized; some post-war governments adopted it - Western Germany, Italy, Indonesia, Libya - and a plan is proposed for a Central African Federation embracing Southern Rhodesia, Northern Rhodesia, and Nyasaland. Discussions are also taking place in the Strasbourg Assembly to adopt this system for the whole of Europe.

My method will be descriptive in the first place and comparative in the second, but it is in no way an essay in comparative government. My purpose is to clarify the ideas and practices behind a successful federation.

I shall study the five federations of: the United

States of America, Switzerland, Germany, Canada, and Australia, and deduce therefrom the conditions for the successful working of federalism.

Had I confined myself to the study of "true" federations - strictly defined - I should have omitted Germany from such a work. But I do consider the failure of the German Federation throughout its different phases (until 1939) as important as the success of the other four federations on the basis of the light it throws on my study.

However, I did not include the Union of South Africa because the problems faced by this Union are more or less similar to the ones raised and solved in the other systems which I have treated. There are, besides, good reasons to exclude South Africa from the rank of "true" federations.

In this study, it goes without saying that my aim is not to deal with the machinery of each state in detail, or to discuss its internal institutions, but to state the fundamental principles on which the federation rests, to look at its general organization in the light of federalism, and to see, in each case, how did this form of government solve the problems it confronted. On this premise it would be far less important for me to know the number of Senate members, for instance, in the U.S.A. and their qualifications than to understand the role they play in the federal system.

A last chapter will deal with the existing conditions in the Arab world, and the possibility of applying federalism to certain parts of it.

For correct usage, I shall refer to the government of the union in a federation in various terms as the "Common", "Central", "General", or "National" government, and to that of the provinces or cantons as "Member", "Regional", "Local", or "Part-State" government.

The lack of reports, periodicals, and of essential sources on the subject such as: Freeman, Waitz, Calhoun, Webster, Jellinek, Proudhon, Borel and many others, was a gap which could hardly be overcome. I was therefore left with the only possibility of getting my informations in this respect from the writings of other authors, especially S. Mogi and K.C. Wheare.

For the completion of this work, I am greatly indebted to my advisor Prof. R.H. Soltau and to my fellow students J. Makinadjian, W. Kheir, and L. Ajjan who have facilitated my work during my stay at Latakia.

R. Azhari.

June 1952.

The Federal
and
The so-called Federal Countries
in the Modern State.

By the last constitution of

Argentina	1949
Australia	1900
Austria	1920
Brazil	1946
Canada	1867
Germany	1949
India	1949
Indonesia.....	1950
Italy	1948
Libya	1951
Malaya	1927
Mexico	1917
Pakistan	1949
South Africa	1908
Switzerland	1848
U. S. A.	1787
U. S. S. R.	1936
Venezuela	1947
Yugoslavia	1946

PART

I

AN ABSTRACT OF THE THESIS.

The thesis is divided into two parts containing eight chapters. The first part is mainly descriptive and the second analytical and comparative.

To reach the conditions for the successful working of federalism, I discussed certain successful federations, described their machinery and the way they solved their problems. In the second part, I deduced the conclusions that are, as a matter of principle, necessarily present in each federal system, and are, to a certain degree, responsible for the success of federalism. The prospect of an Arab Federation is the last item of this study.

In the first chapter, I mentioned the several definitions that have been given of federalism, and my own definition. I also briefly referred to the most famous early confederations.

In the second chapter, I described the first truly federal state; the United States of America. Particular stress has been put on the circumstances that led to federation, and on those that led to Civil War. The chapter is concluded by some characteristics of American Federalism.

Switzerland is the subject of the third chapter. This country has a long past of federal history and one among the most successful. Federalism is the only solution to the heterogeneous character of that nation, be it in religion, or language. The settlement of religious differences, and the Executive System are ^{two} the/most remarkable achievements in the Swiss Confederation.

Germany, with its different federal regimes since the downfall of the Holy Roman Empire, is the subject of the next chapter. Although Germany has never been "truly" federal, yet her failure gives many lessons in federalism. The last federal government sitting at Bonn is not discussed in detail.

Then comes Canada which has contributed by applying the federal principle to "Cabinet" government for the first time. Its formation under the shadow of the American Civil War, led the Canadian statesmen to draft a Constitution allocating the residuary powers in the Dominion government.

The sixth chapter deals with Australia, which is, like Canada, a member of the British Commonwealth. The federal history of Australia is the result of the "Convict Settlement" in that country. Recent tendencies in Australia, however, threaten centralization and totalitarianism.

In the second part dealing with the conditions for the success of a federation, the pre-requisites are given the priority. They are of three kinds: spiritual (including political and social), geographical (including economic) and rational. Similarity is, in this respect, as important as circumstances.

The other conditions are: a written sovereign constitution, a Federal Supreme Court, a two-party system, a bicameral legislature, the illegality of secession or nullification, the adequate division of powers between the general government and the regional governments, the control of financial resources, independence in economic matters and federal economic supremacy, the allocation of social services according to necessity and circumstances, federal control over foreign relations and war power, the results of war on federalism, the flex-

ibility of the federal ~~constitution~~ constitution and modes of change and the prospect of socialism in federal government.

A last section of Chapter VII mentions the different criticisms of federalism and its inconveniences.

The last chapter (VIII) deals with the possibility of forming an Arab Federation. It reviews, very quickly, the history of organized Arab Nationalism, its disappointment in the Western attitude and the opinions of Political Parties. After a comparison between the Alexandria Protocol and the Pact of the Arab League, and after the study of factors making for disunity in the Arab World I conclude that several federations (four in all) should be formed by popular will, and should, thereafter, be united in an Arab Confederation for the cause of common Arab interests. The first of these federations is, most probably that of the Fertile Crescent.

CHAPTER I

DEFINITION

AND

ANCIENT HISTORY

DEFINITION

It is rather difficult, and almost embarrassing, to find a limited and precise definition of federalism. It is the more difficult that the term has undergone evolution and that the concept of federalism has changed through the ages like every human concept. In fact, under the title of federalism - broadly speaking - come all political systems which establish a relation - of some effectiveness - among political bodies which would have been sovereign and independent states without federalism. This relation may oscillate between the limits of a vague and abstract link among almost completely independent states, and is called "Confederation" then like the League of Arab States, and of a centralized state to which all the smaller organs are substituted and which may be called "totalitarian federalism" like the Soviet Union and Argentine.

The ethnological origin of the word is from Latin "foedus" and is connected with ideas of treaty and of contract.¹

Federalism is based on the principle of relativity and pragmatism and creates a pluralist political organization where diversities are kept, either because they cannot be abolished, or because they are worth while preserving. It permits the distribution of state function between the central state and part-states and thus gains the advantages of the power and glory

1. Encyclopaedia of the Social Sciences, Vol. VI, p. 173.

of great states, while retaining the advantages of a happy and self-governing local units.

Accordingly, a federal state always includes two sets of government: a central one, and the regional ones which are not considered as administrative districts, but as units free from interference in local matters and subordinated to the general will in general matters. A characteristic feature of federalism is that both sets of government act directly upon individuals.

Federalism may be explained according to two theories: the treaty theory and the constitution theory. The first one interprets federalism as the voluntary union of communities which have been previously separated and that, therefore, the union is based on voluntary agreement which could be withdrawn at will. The constitution theory finds the origin of the union in a constitution to which the various parts adhered and by whose terms they are bound. The logical consequence of the treaty theory is the justification of the right of ^csecession. The advantage of the constitution theory is to provide for the amendment of the federal constitution by majority and not unanimous consent.

A.B. Hart classifies federal states into three categories:¹

1. The Staatenstaat (or state founded on states) i.e. a state which deals with sovereign states and not with individuals.

1. A.B. Hart, Introduction to the Study of Federal Government, pp. 19 and 20.

The central organ has no direct relations with the citizens of the several states, but with their governments.

2. The Staatenbund (or union of states) and corresponds to a Confederation. George Jellinek, a German writer on the subject, defined it saying: "When states form a permanent political alliance, of which common defence is at the very least the purpose, with permanent federal organs, there arises a¹ staatenbund."

3. The Bundesstaat (or united states). This form of government is the subject of our study. It differs essentially from the two preceding types in kind and purpose. A Bundesstaat creates a nation and carries direct relations with the individuals. It guarantees the rights and freedoms of these individuals and follows the way of positiveness and evolution. "The federal state", says Sobei Mogi, "is the highest form of federal organisation in which the highest aim - the balance of unity and plurality - may be achieved."²

Some Definitions of Federalism

J.A. Corry defines federalism as that "form of government calculated to reconcile unity with diversity and provides for a common government for common purposes generally called the³ Federal or National Government."

Ivor Jennings defines it rather negatively. "Feder-

1. Ibid, p. 20.

2. Sobei Mogi, The Problem of Federalism, Vol.II, p. 1070.

3. J.A. Corry, Elements of Democratic Government, p. 399.

alism," he says, "is not a magic formula. It is nothing more than the name of a complicated system of government which nobody would wish to see established if he could think of a better."¹

According to K.C. Wheare who adopts a strict definition of the term "federal", only the United States of America, Switzerland, Canada and Australia, are examples of federal governments. The test which he applies for federal government is this: "does a system of government embody predominantly a division of powers between general and regional authorities each of which, in its own sphere, is co-ordinate with the others and independent of them? If so, that government is federal."² However, it is not enough to him that the federal principle should be embodied predominantly in the written constitution of a country "for what determines the issue is the working of the system." For this reason he has distinguished in his study between federal constitutions and federal governments in which the federal principle is important although not predominant; and these he has called "quasi-federal constitutions and quasi-federal governments."

Borel's definition: "L'etat federatif est l'etat dans lequel une certaine participation a l'exercice du pouvoir souverain est accordee a des collectivites inferieures, soit qu'on les adjoigne a l'organe souverain pour la formation de la volonte nationale, soit que, prises dans leur totalite, elles

1. Ivor Jennings, A Federation for Western Europe, p. 3.
2. K.C. Wheare, Federal Government, p. 32 and 33.

forment elles-memes cet organe souverain."¹

Another definition found in Marriot's book² is this: "A Federal Commonwealth, in its perfect form, is one which forms a single State in its relations to other nations, but which consists of many states with regard to its internal government." In Sidgwick's words, "Federality implies a constitutional division of powers between the governments of the part-states and the government of the whole, by which a substantial autonomy is secured to the former; and some expression of the separate political existence of the part-states in the structure of a federal government is natural, though not essential."³

Describing federalism Proudhon wrote in 1863: "Only federation can solve, in theory and practice, the problem of an adjustment between the principles of liberty and authority by leaving to every one his proper sphere, his true competence, and his full initiative. Therefore federalism alone warrants on one hand the ineffaceable respect for the citizen as well as for the government, and on the other, order, justice, stability and peace."⁴

A Report by the United States Treasury Department⁵ states that "An ideal federal system in our modern era contemplates a group of semi-independent democracies held together by a constitution and a common tradition, and functioning smoothly

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1. Marriot, The Mechanism of the Modern State, Vol. II, p. 384.
 2. Ibid.
 3. Henry Sidgwick, The Elements of Politics, p. xxx.
 4. Encyclopedia of the Social Sciences, Vol. VI, p. 169.
 5. Ferguson and McHenry, American Federal Government, p. 124.

through a statecraft that includes a large factor of cooperation. This cooperation must be partly in the field of interstate and partly in that of Federal-State relations. The true spirit of the Federal system is sustained by efficient voluntary relationship, which make the compulsions of the unitary state unnecessary."

I would rather define federalism as this system of duplicate government where, on the one hand, the component states have agreed to bind themselves in a common government for the realization of unity in certain domains such as military, economic and foreign policies, and where, on the other hand, the part-states enjoy such a degree of autonomy as to make them independent in their local affairs and to respect their constitutional entity. The federal principle is disturbed whenever the central government gains large powers of centralization and unification, or when the regional governments increase their feelings of separateness or their claims to sovereignty.

The problem of sovereignty in federalism is an academic one. Three theories at least are given: The first is that sovereignty is divisible and that it is accordingly divided between the central and local governments. The second is that sovereignty resides in the central government alone and the part-states are accordingly denied any right to sovereignty. The third theory holds that neither general nor regional governments are sovereign, but that sovereignty resides in the people as a whole, but finds two ways of expression: the one for local, the other for general affairs.

I maintain, with international law that sovereignty is divisible and especially in the field of federalism. But it is also true that the sovereignty of the member-states is limited by that of the Federation, and can only express itself in so far as it is allowed to do so by the Federal Constitution.

ANCIENT FEDERATIONS

Early Greek Leagues:

Modern federalism can be dated with the modern State and with Bodin, the founder of the modern theory of sovereignty. But if federalism is to be considered a problem of practical politics in its essence, early unions can be taken as kinds of federations more or less perfect to the degree that their behaviour was along a federalistic mechanism. To Edward A. Freeman, a historian who published in 1863 his book "The History of Federal Government in Greece and Italy", the Greek religious union called "The Delphic Amphictyonic Council" - in the 6th Century B.C. - is the earliest union. Others wait until the third Century B.C. to find the first confederacy in the Achaean League.

Although it is held that before the Greeks, "The Government of the Israelites was a federation held together by no political authority, but by the unity of race and faith, not on physical force, but on a voluntary covenant,"¹ yet it is

1. S. Mogi, op. cit., Vol. I, p. 21.

commonly agreed that the first federations arose on Greek soil and that, too, "In the Leagues, Greece made its last contribution in political experiment."¹ The growth of leagues on Greek soil was not in conformity with Greek Philosophy. Aristotle touched in his "Politics"² nearly all political institutions existing at his time, but he did not discuss the federal form of government. A state, in Aristotle's view, "exists for the sake of a good life, but not for the sake of alliance or maintenance of injustice."³ Aristotle omitted federalism as a good form of government in his survey.

In more than one respect, conditions were favorable among the Greek cities for the application of federalism: they had common race, language, religion and religious festivals. Their unions were for special purposes, and primarily trade. The failure of Greek federalism was, in most cases, due to their selfishness in action and to the fact that foreign danger rather caused division than unity. Another important reason for their failure in federalism was that the central power was either too much loose and lacked efficiency, or too much centralized and lacked moderation.

The Delphic Amphictyonic Council was a religious one that met periodically at Thermopylae or at the temple of Delphi. Twelve cities were represented in the Council. Its organization can hardly be called a League and its importance lays in the

1. F.R. Glover, Democracy in the Ancient World, p. 154.
2. Aristotle, Politics, Books III and IV.
3. Ibid, p. 118.

fact that it gave to the Greeks the sense of common action.

The Delian League:

It was born around 480. This League¹² Confederation had members from the Ionian cities of the Aegean Sea and the Asiatic shore. Being naval cities, and in need of naval defence, it was natural that Athens, the great naval power, assumed the presidency from the first. The supremacy of Athens in the Confederacy of Delos made it rather an Athenian Empire where Athens could impose its will. The Federalist mentions the "inefficiency of the union, the ambition and jealousy of its most powerful members, and the dependent and degraded condition of the rest. The smaller members ... had become in fact, satellites of the orbs of primary magnitude."¹

This is the main reason of the downfall of the League after the defeat of Athens in the Peloponnesian war. The Council of the League was theoretically endowed with large powers, but the experiment was very different from the theory. "Athen could act entirely as she deemed good without going through the form of consulting a body whose decisions must necessarily be hers, as the great majority of the members were her own subjects."²

After Athens, Sparta obtained the hegemony. But the conquest of the Maccenians in 339 began a new phase in the history of Greece. During three-quarters of a century, no progress in federation took place. "Had Greece been united by a

1. The Federalist, No. XVIII, p. 84.

2. J. Bury, History of Greece, p. 339.

stricter confederation, and preserved in her union, she would never have worn the chains of Macedonia; and might have proved a barrier to the vast projects of Rome."¹

The Achaean League: (from the district of Achaia)

It was formed of ten city states near the southern coast of the Gulf of Corinth about 274 B.C. The League became powerful after the accession of Sikyon with its large population and wealth. In the Senate, the cities were equally represented, and in it the power of sending and receiving foreign representatives, of waging war and concluding peace and of entering treaties, was vested. "It appears that the cities had all the same laws and customs, the same weights and measures, and the same money."²

All historians agree on praising the Achaean League. Mogi considers it the first confederacy in history and the first glimpse of the federal principle. "The Achaean League", he says, "in the strict sense of confederation, was a perfect union on paper and in theory; but the members of the League held independent political power in various forms of government and no direct contact between the populace and the senate was permitted."³

In the words of Freeman, "for a hundred and forty years, the League had given to a larger portion of Greece than any previous age had seen, freedom, unity, and general good government."⁴ Hart, of the same opinion, wrote: "Of all the confeder-

1. Ibid, p. 85.

2. Ibid, p. 86.

3. Mogi, op. cit., Vol. I, p. 32.

4. Hart, op. cit., p. 32.

ations of history before 1781, the Achaean had the best military and foreign system; it had an excellent executive and even the rudiments of federal judiciary. The duration and success of the League depended on the spirit of concession and forbearance which distinguished this from all other leagues."¹

The Achaean League seems to be the most important one of all early confederations and "If we praise Athens for giving the world a great example in Democracy, the same praise cannot be withheld from the Achaeans; and it can at least be urged that the future lay (though far away) more decisively with federal governments than with city states."²

Other so called leagues took place among the Greeks. We mention: the Aetolian, the Boetian and the ^L Syeian; but all these did not obtain the fame of the preceding two. Nevertheless, Mogi observes, "Modern federalism has gained little from the legacy of Greek politics except a vague experience of confederation, and it is experience which is the real root of political philosophy."³

Italian Leagues:

Early in history, the Etruscans had leagues, each of twelve cities. But under the Roman Empire, one can hardly talk about leagues because the Roman yoke was dominant. "The feeble imitations of former federations set up by Rome were the last

1. Ibid.

2. Glover, op. cit., p. 146.

3. Mogi, op. cit., Vol. I, p. 23.

flicker of the old federal spirit. When in A.D. 54 the Lycian League ceased to exist, no other federal government appears in the world's history for more than a thousand years.¹ About the twelfth century, however, a new era of federalism began. The Lombard cities united in a league for military and commercial purposes. The consuls to this confederation took the oath "that every Lombard should unite for the recovery of the common liberty; that the league, for this purpose should last twenty years; and, finally, that they should aid each other in repairing in common any damage experienced in this sacred cause, by any one member of the confederation."²

The Swiss Confederation:³

In 1291, three cantons members of the Holy Roman Empire formed among themselves the "League of the three Lands." It was primarily a defensive league, and provided for peaceful settlement of internal disputes. These cantons were: Uri, Schwyz and Unterwalden. The league was then extended to include Luzern, Zug, Glarus, Zurich and Bern and became "the League of Eight." By 1513, more members were admitted to the League, the number of which reached thirteen. "The League of the Thirteen" remained unchanged till 1798, the date of the French invasion. Among these thirteen, six were democracies, four aristocracies and three oligarchies. The ties between these cantons were loose

1. Hart, op. cit., pp. 55 and 56.

2. J.C.L. De Sismondi, A History of the Italian Republics, p. 45.

3. A detailed chapter shall deal with Switzerland later in this work.

and each one was sovereign. A federal army or a federal budget were unknown to the Swiss confederation. Civil wars took place between Protestant and Catholic cantons and the Diet could not bind the members to its resolutions.

The Netherlands:

The first impulse to union dates back to 1576. In that year "in consequence of religious persecution Holland and Zeland openly rebelled, and in 1579 five North Provinces concluded the celebrated Union of Utrecht by which they declared themselves independent of Spain." ¹ On paper, the organization of the Netherlands was federal; its Congress of Delegates had power of war and peace and of levying custom duties. Its weakness, like all ancient confederations, was the lack of power in the hands of the central government and its incapacity of securing obedience to its decisions. Every member was free to accept or refuse these measures. In its history, it bears some resemblance to what later came to be the U.S.A. previous to 1787.

The constitutional monarchy of Netherlands today has almost no connection with the federation of the early period. "This is the sole instance in which a loose confederation has issued in the formation not of a federal republic, but of a unitarian monarchy." ²

1. Encyclopedia Americana, 1944 Edition, p. 91, (Vol. 20)
2. Marrison, The Mechanism of the Modern State, Vol. II, p. 406.

CHAPTER II

THE UNITED STATES

OF

AMERICA

THE UNITED STATES OF AMERICA

The United States of America marks a distinction in the history of federation. Federal government owes its maturity to the American Constitution of 1787. No federation before it had established a central power with jurisdiction over inter-state and foreign commerce, over foreign relations, or established a Supreme Court of Justice. Since then, the U.S.A. has been an example and a model to the subsequent federations.

But before it reached its final form in 1787, the Union passed through a stage of weakness. It was the failure of this transitory period that induced the Colonies to federate.

The Roots of the Federation:

The roots of the federation are as deep as 1637 when four of the New England Colonies confederated under the name "United Colonies of New England." In the following period there were "Congresses" for the settlement of disputes with Indians. These Congresses were usually composed of Governors or of representatives of Colonies. In the Stamp Act Congress of 1765 nine colonies were represented. But these occasional meetings did not result in any permanent body or in a common way to action.

The first Continental Congress¹ met at Philadelphia on September 5, 1774. Of the thirteen continental British Colonies, twelve were represented. It decided to unify the

1. The name American had not yet been established.

military, foreign and financial policies of the participating members. It also decided not to import British goods. The proclamation of the independence of the Colonies came later in July 1776. In a sense, the Congress was a real government, though without a permanent constitution. In The Declaration of Independence, however, showed the dependence of the Congress upon the will of every single state. Even though the states bound themselves together "for their common defence, the security of their liberties, and their mutual general welfare," each one retained "its sovereignty, freedom and independence, and every power, jurisdiction and right which is (was) not expressly delegated to the United States, in Congress assembled."

In 1778 the Articles of Confederation were submitted to Congress, but the complete ratification of which was delayed until 1781. By these Articles, a confederation was formed with no powers to levy taxes or to regulate commerce or secure obedience to its resolutions. Thus Congress had to depend upon the good will of the States. As early as 1784 Washington described it as "A half-starved, limping government, always upon crutches, and tottering at every step."¹ The Confederation itself declared its impotence on Feb. 21, 1787 when "it officially proclaimed its inability to conduct the government and appealed to the constituent authority."²

The origin of the Constitution of 1787 is to be found

1. John Hawgood, Modern Constitutions, p. 15.

2. A. de Tocqueville, Democracy in America, Vol. I, p. 113.

in the Annapolis Convention, a trade convention to which all the States were invited to discuss commercial interests. These interests are said to have been the "cement of the union."¹ The revision of the Articles of Confederation was proposed in this Convention and a meeting was appointed for this purpose at Philadelphia in 1787. The Constitution that resulted was not wholly ratified until 1789. By 1780, however, eleven states had already ratified it.

Its aim reads as follows: "... in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of Liberty to ourselves and our prosperity..."²

Force of Circumstances:

"The Federalists emphatically urged the necessity for union in order to prevent the catastrophe of political and economic peace under the ineffective bond of the Confederation of 1781, and called for united action in the face of the existing external and internal emergencies."³ Against these dangers, there was a need for a "Cordial Union under an efficient national government."⁴

It was the bitter experience under the Articles of Confederation that instigated the Americans to seek a closer

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1. Hart, op. cit., p. 56.
 2. Preamble of the Constitution of the U.S.A.
 3. Mogi, op. cit., Vol. I, p. 50.
 4. The Federalist, No. III (Jay) p. 9.

kind of Union. "Force of circumstances played a great role. The founders of the U.S. never for a moment imagined that they were legislating for all time - they were merely practical and patriotic men who did their best with the material at hand."

To give an illustration of the forces of circumstances I would mention the non-existence of any article in the Constitution regarding the real supremacy of the Union (like the prohibition of secession) because, under the conditions that prevailed, "no constitution could be adopted which did not recognize the equality of the States and their independence of one another, and, to a large extent, of the central government itself."

The Constitution Not a Novelty:

The Constitution was, as Lord Charnwood pointed out, "the work of a few, to which popular aspiration contributed nothing." But it was not as William Gladstone observed "that as the British Constitution is the most subtle organism which has preceded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." For it was mostly adaptations and hereditary features from cantonal status. The novelties in the Constitution are few and almost every feature has its explanation in the past of American history. Even the office

1. Charles Petrie, History of Government, p. 190.

2. J. Macy and J. Gannaway, Comparative Free Government, p. 4.

3. Petrie, op. cit., p. 191.

4. Ferguson and Mc Henry, The American Federal Government, p. 44.

of the President of the U.S., which was unfamiliar to the Americans and which has nothing parallel in the English procedure, may be interpreted on the light given by the lesson of the weak Confederation and its inefficient executive. This office was modelled on the position of State Governors, but was later on changed beyond recognition by custom, convention and amendment.

James Bryce, in his historical survey, held that the Constitution was "not a new thing,"¹ but was based on the form of government previously existing. The underlying influences on the statesmen of 1787, according to him, were the following:

1. The experience of the English Constitution, and its theoretical development by Mr. Justice Blackstone, and
2. The effect on their political philosophy of the treatise "L'Esprit des Loix" of Montesquieu.²
3. Thirdly; "the federal system of American colonial and state governments which had been tested by administration under the English prerogative or by the necessity for united action during eight years of the revolutionary period."³

Similarity of Conditions:

All the elements of unity were present in the States and the fact that America is a New World is not to be underestimated. "The European critic seeks in vain for national traditions where they do not exist."⁴ It might be said that tradi-

1. James Bryce, The American Commonwealth, Vol. I, p. 28.

2. Ibid, p. 29.

3. Ibid, p. 38.

4. Petrie, op. cit., p. 188.

tions in America have always belonged to the future rather than to the past. Alexis de Tocqueville remarks that the federal compromise in America avoided friction because the states were "young and contiguous and their customs, their ideas and their exigences were not dissimilar."¹

Constitutional Development:

The Constitution was most fortunate, in its early stage, to be applied and interpreted by the same men who framed it and believed in it: like Hamilton, Washington and Marshall. Until 1815 the federation was faced with foreign complications and with the enlargement of its frontiers to include a size much wider than the origin. Between 1815 and 1835 it struck economic prosperity: a bank was initiated, commercial treaties were concluded, and internal communications were improved. But a dangerous movement was growing all over that period: the hostility between North and South.

In the Philadelphia Convention itself (in 1787) Madison warned the Convention that "The great danger to our general government is the great Southern and Northern interests of the continent being opposed to each other."² Madison was not pessimistic when he said that because the cycle of events will justify his fears. Of the events of this period we shall deal exclusively with the Civil War which was the climax of the struggle over State's rights and which was a landmark in American Federal history.

1. Tocqueville, op. cit., Vol. I, p. 119.
2. Hawgood, op. cit., p. 17.

THE CIVIL WAR

Its Causes

More than one problem led to the Civil War. There was the problem of the location of sovereignty, the problem of state's rights, that of slavery and that of conflicting economic interests between North and South. All these problems were, however, interrelated and they, together, contributed to bring about the rebellion of 1864. The question of the location of sovereignty, whether it was vested in the people as a whole or in the several states, gave rise to the contest which culminated in the struggle between Calhoun's state right theory and Webster's nationalist theory, and led to the Civil War.¹

Tocqueville lists jealousy among the causes of the Civil War. The North is wealthier and the weak, he says, "generally mistrusts the justice and the reason of the strong. The states that increase less rapidly than the others look upon those that are more favored by fortune with envy and suspicion."²

In 1820 South Carolina complained that "the Tariff"³ was "unconstitutional, oppressive and unjust." The states of Georgia, Virginia, North Carolina, Alabama and Mississippi followed in complaint. "The Tariff", Carolina said again in 1832 "enriches the North and ruins the South; for, if this were not the case, to what can we attribute the continually increasing power and wealth of the North, with its inclement skies and arid

1. C.E. Merriam, American Political Theories, p. 265.

2. Tocqueville, op. cit., Vol. I, p. 407.

3. Ibid, p. 410.

soil; while the South, which may be styled the garden of America, is rapidly declining." ¹ A doctrine then arose; that of Nullification.

In the struggle between the Southern planting interests and the Northern industrial ones, the issue of Slavery became the pivot of the controversy. The South wanted to keep slavery a legal institution for its own benefit. But the victory of Lincoln in the presidential election of 1860 was a clear and decisive step towards the abolition of Slavery.

Side by side with these acts, a political philosophy developed on both attitudes: John Calhoun was the spokesman of the South and Daniel Webster represented the Nationalist school. ²

Calhoun's theory is based on the sovereignty of every State as part of the "Constitutional compact." He rejected the theory of divided sovereignty and objected to the supremacy of the Supreme Court of Justice. He finds the remedy of this "spoiled system" in giving to each of the States a "concurrent voice in making and administering the laws and administering the laws and a veto in action." ³ He was a protagonist of Nullification, and his writings gave the South a belief in their "Right of Secession" when the problem of Slavery was critical in 1861.

Webster denounced Calhoun's state rights theory and considered the Union as "perpetual and immortal." The state rights claim seemed to him "the wildest illusion and the most extravagant

1. Ibid, p. 402.

2. Due to the inaccessibility of the Works of both thinkers, all quotations are reproduced from Mogi, op. cit., Vol. I, Part I, Chapter VI.

3. J. Calhoun, A Disquisition on Government, p. 35.

folly." Secession was, to him, a revolutionary act: "To reject an established government, to break up a political constitution, is revolution." Nullification also was "as revolutionary as secession."

Webster was the first to lay down the foundation of the Nationalist theory which, in the last quarter of the nineteenth century, became the school of political thought in America.

Settlement of the War:

South Carolina declared its independence on December 20, 1860. On January of the next year, Alabama called for a Convention of the Southern States. Seven States were represented in the Convention held on February 4, 1861: South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana and Texas. They formed a provisional government, then drafted a permanent constitution, and elected Jefferson Davis of Mississippi as President. Richmond was to be the Capital of the Confederacy.

The Northern States had raised an Army and decided to meet this rebellion with force. It was by actual fighting that the conflict was settled. Hostilities continued for four years, after which the Northern forces, with greater economic and military advantages, won the war. In 1865 the capital Richmond was occupied, the Government dispersed and all acts under it were declared by U.S. Courts without any legal validity.

Toqueville was definitely wrong in his prediction that "if any portion of the Union seriously desired to separate itself

from the other states, they would not be able, nor indeed would they attempt, to prevent it."¹

Results of the War:

This war, very meaningful to American federalism, has two results: explicit and implicit.

Explicitly, the victory of the North brought about the abolition of Slavery and the equality of every citizen in the American Union. The amendments to this effect were: "The rights of citizens of the U.S. to vote shall not be denied or abridged by the U.S. or by any state on account of race, color, or previous conditions of servitude..."² and "Nor (shall any State) deny to any person within its jurisdiction the equal protection of the Laws."³

Implicitly, a vague and undecided question has been clarified once for all in American history. What seemed to Bryce a "remarkable omission"⁴ from the federal constitution, i.e. a power to coerce a "recalcitrant or rebellious State" has been solved by this war. "The union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument for perpetual efficiency emanating from the whole people and alterable by them only in manner which its own terms prescribe - indestructible union of indestructible states."⁵

1. Foerqueville, op. cit., Vol. I, p. 389.

2. Amendment XV of the Constitution.

3. Amendment XIV (Section I) of the Constitution.

4. J. Bryce, The American Commonwealth, Vol. I, p. 321.

5. Ibid, p. 382.

The claim to the right of Nullification has also been settled by that war; no State could declare a federal act invalid. Nor could any State withdraw from the Union; secession was either insurrectionary or revolutionary. In Willoughby's words "The supporters of the National sovereignty had good reason for saying that the leaders of the secessionist movement in 1861 were fairly estopped, at that late time, for claiming, on behalf of the States, a juristic status of sovereign bodies -¹ politic."

Bryce said that the verdict of the Civil War in 1865 brought general agreement on the following principles:²

1. "Every State on entering the Union renounced its sovereignty and was for ever subordinated to the federal authority as defined by the Constitution."
2. "The functions of the State as factors of the national sovereignty are satisfactory" i.e., enough to express the local desires of the communities.
3. The distribution of powers between the central and regional governments, as defined by the Constitution, "is convenient and needs no fundamental alteration."

However, the importance of the date 1865 should not be overestimated, because it was no more than the culmination of a long historical experience. National sovereignty was manifested long before 1860, but its fundamental recognition was tested on that date.

1. William W. Willoughby, Concepts of Public Law, p. 252.
2. Bryce, The American Commonwealth, Vol. I, p. 313.

New Forces of Federalism:

The Industrial Revolution brought new factors in federalism. There was a greater need for the administration of the complexity of industry and commerce. The improvements of communications and the prosperity of economic life caused a need for more federal legislation: a federal income tax, federal control over railways, control of immigration, federal labour legislation, etc...

The increase in federal power was not always the result of Constitutional Amendments. Much has been gained by the particular occasions. An example of this is the Military powers exercised by the central organ and which are of great importance today. When America was "isolationist" these powers did not have the same significance as today. The division of powers has not been greatly changed since 1787. What changes is the meaning and the exercise of a certain power in a certain time.

DIVISION OF POWERS
BETWEEN THE UNION AND THE STATES

Sovereignty in the United States resides in the Union and the general government acts directly upon the people. Authority has been divided between the two sets of governments: the regional and the general. Each one is independent of the other and is supposed to go its own way in the regards to the matters provided for in the Constitution.

"Friction does not arise between these two agencies because the central government is not dependent upon the States as such for the power it exercises or for the accomplishment of its purposes. Its laws are passed and enforced by its own agents."¹ This does not deny completely the existence of friction, because it sometimes does arise, but it is to say that the sphere of each body is defined, and the residuary powers left to the States so that each one goes its own way without encroachment from the other. The explanation of the smooth running of governmental functions lies in this freedom from interference. "The citizen owes allegiance to both governments, but this double allegiance involves no practical conflict of duty."²

The limited powers of the central government are sometimes called "enumerated" powers. The nation cannot exercise any function which has not been explicitly granted to it or interpreted to have been so by implication. "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively."³

It is, however, a fact that legislation is mainly decentralized and done by each State for its citizens. "The subjects of legislation that are placed within the control of the national Congress, though very important, are not many in number."⁴

1. Macy and Gannaway, op. cit., p. 12.

2. Ibid.

3. Xth Amendment of the Constitution.

4. Willoughby and Rogers, The Problem of Government, p. 460.

POWERS OF THE STATES

All local questions and institutions are granted to the States. "They possess all the ordinary legal choices that shape a people's life. Theirs is the whole of the ordinary field of the law; the regulation of domestic relations and of the relation between employer and employee, the determination of property rights and of the validity and enforcement of contracts, the definition of crimes and their punishment, the definition of the many and subtle rights and obligations which lie outside the fields of property and contract and the rules governing the conduct of every kind of business."¹

FEDERAL POWERS

These powers are responsible, constitutionally, for the establishment of the supremacy of the federal union. Very vital functions are conferred upon the federal government. They may be grouped under the following topics:

1) Judicial Powers:

Very important indeed is the Judicial supremacy in the United States. That is why the ideal of the Federalists is said to have been "a government of laws, not of men." With the Supreme Court lies the authority to determine whether a controversial question belongs to the States or to the Union. It also has the right to interpret the Constitution, and by this way, to extend

1. Woodrow Wilson, Constitutional Government of the U.S., p. 188.

the powers of the Nation. The individuals, like the States, are directly under its jurisdiction, and no individual can justify his violation of the federal laws in his State laws because these latter would be illegal in this condition.¹

The supremacy of the federal judiciary is unique in the world. It extends to nearly all fields. It extends "to controversies between two or more States; - between a state and citizens of another State; - between citizens of different States; between citizens of the same State claiming lands under grants of different States, between State or the citizens thereof, and foreign states, citizens or subjects, and to controversies to which the United States shall be a party."²

2) Powers over Civil Rights:

The Constitution, firstly, denied to the States the prohibition of Civil Rights: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."³ It also assured to every citizen the right to go to another State and be treated there as if he were in his own State, i.e. "to be protected, to travel, to reside, to secure habeas corpus, to sue in courts, to make contracts, to marry, to hold property, to enjoy tax equality and to engage in trade and business in any other State."⁴ In the text of the

2. "The Constitution and the laws of the U.S. ... shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Art. VI, No. 2).

3. Article III, Section 2, No. 1 of the Constitution.

4. Amendment XIV, Sec. I of the Constitution.

4. Ferguson & Mc Henry, op. cit., p. 125.

Constitution "The citizen of each State shall be entitled to all privileges and immunities of citizens in the several States."¹

3) Foreign Powers:

All foreign relations of common concern are conferred upon the national government. The President of the United States is invested with the right to receive ambassadors and to make treaties (Art. II). No State can be a part to any treaty, league or alliance (Art. I), and the consent of Congress is required for a State to enter into an agreement with a foreign power (Art. I). To Congress also is given the power to regulate commerce with other nations. So is the power to levy war and conclude peace.

4) Inter-State Relations:

Nor can the States enter into any agreement with each other unless the consent of Congress is secured. Commercial transactions between the States need such a consent (Art. I). The Constitution, moreover, imposes upon each State, the obligation to "accept another State's statutes, charters, deeds, vital records, judicial decisions and court records."² Article 4 of the Constitution (Section 1,) reads as follows: "Full faith and credit shall be given in each state to the public acts records, and judicial proceedings of every other State..." Two exceptions, however, exist: 1- criminal law is excluded, and 2- divorce decrees are not always acceptable in the courts of another State.

1. Art. IV, Sec. 2, No. 1 of the Constitution.
2. Ferguson & Mc Henry, op. cit., p. 125.

5) Financial Powers:

It is evident that the Union, to be strong, should enjoy certain financial prerogatives. One of the reasons for the weakness of the government under the Articles of Confederation was the lack of such powers. It is this financial right that allows the Union to support itself and not to depend upon the States. The National government was given an independent revenue and a power to regulate the economic policy of the nation which is as important as politics. To the Treasury of the Union all imposts and duties are due, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the U.S.; and all such laws shall be subject to the revision and control of the Congress." ¹ The Congress is also charged with the collection of taxes, duties, and ² imposts all over the U.S. in a uniform manner.

In these and like measures, the Union established its financial supremacy.

6) Military Powers:

Congress alone has the right to raise and support armies (Art. I), to declare war, and make rules regarding captures on land and water (Art. I). In a war, the United States indulges

1. Article I, Sec. 10, No. 2 of the Constitution.

2. Article I, Sec. 8, No. 1 of the Constitution.

itself as a collectivity and every State is granted protection by the Union (Art. IV). The States, respectively, abstain from entering into a war, except after the consent of Congress, unless when actually invaded, or in such imminent danger as will not admit of delay.¹ Certain local functions are, however, assigned to the States like the appointment of officers and the training of the militia, while all military powers are reserved to the Union.

7) Institutions of Common Interest:

These are many in number and varied in kind; they make for uniformity throughout the several States and for practicability in every day's life. Coinage of money is an instance. Congress has the sole power to coin money and to evaluate foreign coin. Another instance is the power to establish post offices and post roads which belong to the federal organization too.

These are, in brief, certain federal powers exercised by the United States and provided for in the Constitution. They give to the Union the aspect of one State rather than forty-eight, with one policy in world politics, world economics and judicial status.

I do not over estimate the value of the constitutional text, because it would have remained a "dead letter" unless the people had put the soul and the spirit.

1. Article I, Sec. 10, No. 3 of the Constitution.

CHARACTERISTICS
OF THE AMERICAN FEDERATION

The first principle to be understood about America is its being a New Country where it was possible to make experiments which would have been fatal in Europe. The absence of diverging traditions and of multiple loyalties were blessings in American history. A young country, in the stage of evolution, whose people was impressed by the legal habits that flowed from Colonial status, such was America. An instance may be found in the religious conditions; the Catholics of the United States have proved to be moderate and nationalistic in the first place. They have not looked to Rome for their discipline, nor have they shown any separatist or isolationist tendency. They have been able to live peacefully side by side with the Protestant majority and spared the country from the massacres and catastrophes that took place in Switzerland. The United States was fortunate to have its Catholics adaptable and with a great sense of citizenship. "In France I had almost seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country." All States are neutral as far as religion is concerned.

Another peculiarity is the geographical security of the United States. Its contiguity and isolation made it in safety

1. Tocqueville, op. cit., Vol. I, p. 308.

from a direct foreign attack and provided for its free development and expansion. Its frontiers were not threatened by potential enemies, as was the case in European countries. "One can hardly imagine France or Poland remaining unmoved if Bavaria precipitated a German Civil War by insisting upon her right to secede from the Union."¹

It has also been a characteristic of American political life that best men go into business rather than politics. Many famous politicians - Harriman for instance - have spent years in business before coming to the administration field. Many others go back to business once they leave their political posts.

While giving to the temper and circumstances of the people their due regard, I hold that the nature of the political machinery is of great importance in this respect. It is true, as Bryce maintains, "that the devices which we admire in the Constitution might prove unworkable among a people less patriotic and self-reliant, less law loving and law abiding than are the English of America,"² but it is also true that the American Constitution is "one of the first (perhaps also one of the last) wonders of our present civilization."³

Merits of the Constitution:

The short Constitution of the United States, much shorter than that of Switzerland, was designed by people who

1. Petrie, op. cit., p. 189.

2. Bryce, The American Commonwealth, Vol. I, p. 358.

3. Hawgood, op. cit., p. 14.

learnt from experience and aimed at the creation of an efficient central government. The first principle on which the Constitution rests is that of "co-ordination," between the central and local authorities. The States are equal; no one is subordinated to another one, or to the general authority. Wheare maintains that this fact distinguishes the United States from any other form of states, from the Articles of Confederation and "from other federations like the Austro-Hungarian Empire (1867-1918), the German Empire (1871-1918) and the Union of South Africa."¹

Although great and small States exist in the Union, no one is allowed to gain supremacy and all are equally represented in the Senate.

Another feature of the Constitution is its elasticity. Amendments have been rarely necessary and the text of the Constitution proved to be enough malleable to be adapted to new functions as they arise. Through judicial interpretation and custom, the Constitution did satisfy the needs of the age. A proof of its elasticity is that it is now applied to a hundred and fifty millions, distributed in forty-eight States, while it was originally framed for four millions living in thirteen States. All this has been achieved without almost fundamental changes.

"Thus, although the principles remain, the Constitution has been by no means static."² This is the explanation of the unwritten features of the American Constitution. They have been brought

1. Wheare, *op. cit.*, p. 6.

2. Ferguson & Mc Henry, *op. cit.*, p. 55.

up by judicial construction mainly. The Supreme Court of the U.S., in interpreting the Constitution, has slowly expanded it and kept it in pace with evolution and progress.

I find no more adequate conclusion to this chapter than this quotation from David Hume (Rise of Arts & Sciences) in which Hamilton justified his utilitarian philosophy: "To balance a large state or society, whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflexion to effect it. The judgment of many must unite in the work; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into their first trials and experiments."¹

1. The Federalist, Hamilton No. LXXIV, p. 451.

CHAPTER III

SWITZERLAND

SWITZERLAND

Switzerland is of particular interest to the student of federal government. She has her federal roots very deep in the past and the heterogeneous character of the nation offers many problems in federalism, the solution of which are worth careful study.

All writers on the subject are inclined to make constant comparisons between the Swiss and the American systems. It is evident that the similarity is great, and one is tempted to draw parallel lines from the two federations, but the differences are also great and must not be overlooked. "Swiss federalism has been considerably influenced by American federalism, and it is almost impossible for an intelligent student not to compare the most successful federal and democratic government of Europe with the most successful and democratic government of the New World, for the history and institutions of America and Switzerland exhibit just that kind of likeness and unlikeness¹ which excites comparison."

We shall refer to the Swiss Union as a "Confederation" as it is officially called, but this term does not have here the meaning we gave it at the beginning of this thesis. Switzerland is a Federation in the usual sense of the term.

Geographical Position:

Situated in the heart of Western Europe and adjacent

1. A.V. Dicey, Law of the Constitution, p. 526.

to four big states, Switzerland has to preserve its unity in order to preserve its existence. "For about forty per cent of the length of its frontiers it is contiguous to Italy, for about thirty per cent to France, for about twenty per cent to Germany and for about ten per cent to Austria." ¹ Being a buffer-state, she rather owes her independence "to the mutual jealousies of her neighbours than to their friendliness." ² Four international rivers have their sources in Switzerland: The Rhine, the Danube, the Po, and the Rhone. This geographical position has made her a neutral state in international conflicts, and in this way she has kept her unity.

Languages:

Until the beginning of the nineteenth century, the official written language of Switzerland was German. The spoken was a variety of German dialects. The Constitutions of 1789 and 1803 were drafted in French, but the reaction of the Congress of Vienna against the Napoleonic regimes brought back German as the official language. In 1848, however, it was recognized that "the three main languages of Switzerland, German, French and Italian, are the national languages of the Union." Romanche is another national language, but it is not considered an official one.

German is spoken by the majority of the inhabitants in 14 cantons. French is the official language of three cantons. Italian is an official language of the Ticino. Romanche is

1. William S. Rappard, Government of Switzerland, p. 1.

2. Hart, p. cit., p. 62.

spoken by the Grisons and, along side with German and Italian, has an official character there.

German and French are both official languages in the three cantons of Berne, Fribourg and Valais where they both are spoken by the people.¹

German, French and Italian are official languages of the Confederation, i.e. spoken in the Parliament, in the Federal Tribunal and in which all statutes are printed and published. Each canton corresponds with the federal authorities in its own official language, and each language is considered as original, not as translation. Practically, however, Italian being spoken by a minority has not "claimed an absolute parity of position. Even Italian-Swiss representatives usually speak French in the Federal Parliament, as do Italian-Swiss lawyers appearing before the Federal Tribunal."

Although used by a part of the nation, Romansh is not guaranteed official recognition in the Constitution.

Religious Divisions:

The linguistic differences in Switzerland have never seriously threatened the unity of Switzerland as religion has done. The roots of religious hatred are very deep in the past of Switzerland, and have been the cause of long and bitter conflicts. Ever since the first half of the sixteenth until the middle of the nineteenth century this division had led to separate

1. All statistics of languages are reproduced from Sauser-Hall's book, "The Political Institutions of Switzerland," pp. 99 ff.

alliances, to civil wars and to foreign entanglements." ¹ Fortunately for Switzerland, religious lines follow "the most bizarre directions" and do not correspond to the linguistic lines. They cut across each other. The Protestants are 57,3 per cent of the population, and the Catholics are 41 per cent. "The Protestants outnumber the Catholics in twelve cantons which nine are German and three French speaking. The Catholics, on the other hand, outnumber the Protestants in ten Cantons of which seven are German, two are French and one Italian speaking." ²

This distribution of confessional groups into intersected geographical areas, has been a factor for some moderation.

The Unity of Switzerland:

The unity of Switzerland has been achieved in the middle of the nineteenth century, when nationalism was at its zenith and the community of language was taken to be the first factor in nationalism. Although surrounded by Germany, Italy and France, the force of traditions has proved to be an effective centrifugal pivot around which all Swiss Cantons assembled. "The memories of battles waged in common and a like spirit of independence which revolted at all foreign oppression proved stronger than the disruptive influences of opposing religious faiths and divergent political ideals." ²

The minorities are today, legally and socially protected,

1. Rappart, op. cit., p. 11.

2. Ibid.

3. Ibid, p. 17.

and they do not constitute a problem as it is expected in a state where people as so heterogeneous as are the Swiss. Measures for their protection are seen in the equality of all languages, in the freedom of conscience embodied in Federal and cantonal Constitutions, in the provision for the equality of all Swiss citizens before the law, and in the autonomy left to the cantons to organize education according to its own wishes.

In the successful operation of federalism and its application to new problems as they arise, Switzerland has also contributed much to the growth of confidence in the federal principle.

THE HELVETIC REPUBLIC¹
(1798 - 1802)

Although German was the official language in the Old Confederation, yet French was spoken by the more cultured society, and French influence was felt in economics and politics. A remnant of the privileged position that France enjoyed may be seen today in that only France is represented at Bern by an ambassador, while all other states send pleni-potentiary ministers.

It was in 1798 that French troops invaded Switzerland under the pretext of a cantonal treaty and the independence of the country was over. "Under French influence there was set up the so-called Helvetic Republic, one and indivisible."²

1. For the "Old Confederation" see above pp. 12 ff.

2. Hart, op. cit., p. 65.

The system of government introduced by the French was strong and centralized, a system unknown to Swiss history. One set of administration was adopted for the whole country under French direct supervision. Legislation was unified. "Thus Switzerland, which had been the weakest of leagues with the largest possible measure of local autonomy and the greatest diversity of local institutions, was at one stroke converted into a highly uniform, centralized, bureaucratic state."¹

ACT OF MEDIATION
(1803 - 1814)

After the fall of the Directory, French troops were withdrawn from Switzerland in 1802. But Civil War broke out between the Centralists (protagonists of federalism) and the Federalists (antagonists to federalism, unlike the Federalists of America). The French then returned, for the cause of order.

Representatives of the two parties were called to Paris to draw a new Constitution, "The Act of Mediation" much influenced by Bonaparte. Six new cantons were added and the Government gained more federal features. Foreign affairs and the power over war and peace were given to a Federal Diet and Inter-cantonal commerce was organized. "Although Switzerland enjoyed immunity from military occupation during the fierce wars of the next eleven years, and was peaceful and prosperous under the Act of Mediation, it was felt to be the work of a foreigner

1. Robert Brooks, Government and Politics of Switzerland, p. 36.

and a master."¹ Its end was in 1813, with the end of Napoleonic occupation.

THE PACT OF 1815
(1815 - 1848)

The Congress of Vienna proposed a Constitution to the Swiss and promised them the guarantee of their neutrality in return. It was a compromise between the loose bonds of the old Confederation and the centrifugal^{act} claims of some cantons. The Constitution was accepted and three cantons were admitted to the old union.

The highest organ was again a Diet of instructed Ambassadors in which each canton had one vote regardless of its population. But the weakness of the Diet was in its inability to enforce its decrees. It explicitly denied to itself any power of interference, when it declared in 1830 that "every state in the Confederation by virtue of its sovereignty was free to undertake any changes in its constitution which seemed desirable, as long as these changes were not in opposition to the articles of union, and that the Diet would not interfere in any way with the Constitutional reforms, already effected, or any that may be taken in the future."² When the Diet was asked to guarantee new Constitutions in some cantons, it abstained from doing so because of its weakness.

1. Hart, op. cit., p. 64.

2. John Martin Vincent, Government in Switzerland, p. 34.

Compared with the growth of political institutions, the Confederation has been rightly described as an "evident anachronism."

Inspired by the Revolution of 1830 in France, the Swiss proposed to amend the Articles of their Union in 1832, but these amendments were refused. In the same year the first "Sonderbund" or separate confederation was formed. Its attempted rebellion was crushed down by the force of arms. Reformation was to follow this path: the use of violence. In 1845, another "bewaffneter Sonderbund" or armed separate confederation, was formed by the seven Catholic cantons which were against the centralization of power with the Confederation. The Diet ordered the dissolution of the Sonderbund in 1847 and took upon itself to enforce this decree by military power. It raised 100,000 soldiers against 79,000 of the Sonderbund and in a campaign that lasted nineteen days, the federal forces completely crushed the rebellion.

As a result, the necessity for a new organization was felt. The Diet drafted, and the people adopted, the Constitution of 1848.

THE CONSTITUTION OF 1848
(1848 - 1874)

It is the first Constitution, after 1797, that the Swiss adopted without foreign interference, except for the indirect influence of American federalism. Its main principles are still prevalent today. "It has, however, in the course of

eighty-seven years, (from 1848 to 1935) undergone thirty-seven partial and one total revision (in 1874)."¹

Before going into the details of the Constitution as revised in 1874, we should mention certain problems which were of special meaning to that period.

The founders of the Constitution had two objects in mind: the establishment of an efficient federal system and the provision for the fundamental rights and liberties of the citizens. Yet the local independence of the cantons was still jealously desired by all cantons. "By confederation this people became strong, but after all, the motive of union, the mainspring of political combination, was desire for local independence."²

At the beginning, a unicameral legislature was favored by all cantons: large and small. The large ones desired a legislature in which the states are represented according to population. The latter were in favour of an assembly where each state would have a single vote, as in the old Diet. It was to reconcile their conflicting desires that, contrary to all historical precedents, a bicameral legislature was adopted as a compromise to which neither party fully agreed nor disagreed.

As the permanent federal organs which survived the revision of 1874 will be dealt with in the next section, we are going to consider here an organ that was to be completely changed in 1874, and by this we mean the Federal Tribunal. The germ of this court is to be found in the Committees of referees which

1. Rappard, op. cit., p. 24.

2. Vincent, op. cit., p. 38.

used to settle disputes, when occasions demanded, at the beginning of the Confederation in the thirteenth century.

The powers of the Tribunal, as defined in 1848, were very narrow and limited. "In its organization, in its composition and its very narrow jurisdiction, it was entirely subordinated to the two other branches of the government."¹ It could not settle disputes between the Confederation and the Cantons or between the latter. Its jurisdiction over civil law cases between the cantons and the Confederation was dependent upon the willingness of the Federal Assembly or the Federal Council to refer such cases to the Tribunal.

Achievements of the Period:

Much progress towards national unity derived from this period. "With a strong, continuous, central power in control, there was an immediate and marked decline of party and religious rancor."²

A post-office was soon created and the telegraphs nationalized. In 1850 all cantonal currencies were unified in a national coinage. Weights and measures were also unified in this period.

But after the success of the Civil War in the United States of America, and the creation of the North German Confederation with its strong central government in 1867, it was suggested that the Swiss Confederation should be strengthened. A

1. Rappard, op. cit., p. 88.

2. Brooks, op. cit., p. 45.

project to this effect was submitted in 1872 and providing for entrusting the Federal Government with jurisdiction over civil and criminal law. The amendments were, however, rejected by a narrow popular and a heavy cantonal majority. These same amendments were revised in a way as to render them acceptable and re-introduced in 1874 when they were finally adopted.

THE CONSTITUTION OF 1848
AS REVISED IN 1874

The Constitution of 1848, as revised in 1874, has a long text. It is much longer than that of the United States and much more detailed. It defines very precisely the administrative, legislative and executive rights of the Confederation and those of the Cantons respectively. "Hence comes much of the prolixity of the Swiss Constitution. Prolixity is tiresome, of course, but when it anticipates and prevents causes of internal friction and possibly of civil strife, it takes high rank among the political virtues."¹

The Confederation is a true federation and not a "league" as it may occur to the mind from its name. As Switzerland has bitterly suffered from religious controversies, one would like to know, before anything else, how was this problem solved. Religious freedom was established in the Constitution in more than one article. Freedom of conscience and belief was declared to be inviolable; persecution because of confession

1. Brooks, op. cit., p. 48.

would not be tolerated neither from the State, nor from sectarian societies. This is the reason why the order of the Jesuits was not allowed to have any activities or branches in the country because it lacked toleration. Public schools were to be conducted on such a line as not to hurt any religious feelings. Civil and political rights could not be affected by the confessional status of the citizen in any part of Switzerland.

Cantonal Status:

Although Sovereignty resides with the Confederation, the first article of the federal constitution speaks of the "twenty-two sovereign cantons of Switzerland". In fact, when compared with the American States, the cantonal sovereignty seems "confined to limits which are much more narrow, and even in the restricted circle of the powers attributed to them, their independence is less real and not so well guaranteed. In addition to the fact that it opens to the direct intervention of the federal powers numerous domains which remain closed to the American Union, the Swiss Constitution really erects the Confederation in some measure into a tutor and inspector of the Cantons."¹

Cantonal rights are provided for in the third article of the Swiss Constitution which reads: "The cantons are sovereign in so far as their sovereignty is not limited by the Federal Constitution. As such they exercise all the rights which are not delegated to the federal power." To this, corresponds the Tenth

1. Brooks, op. cit., p. 61. (Quoting Dupriez.)

Amendment of the American Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people."

One should not, however, deduce that the cantons in Switzerland are mere administrative localities. They have, in the contrary, an autonomous political life and a wide range of internal freedom. "They also continue to have far greater hold on their sons than do the American States. The average Swiss is apt to declare that he feels himself a Bernese, Basleese or a Geneveese first and only secondly a Swiss, whereas one would hardly expect a corresponding statement from an American, even were he a Bostonian."¹ It is also provided in the Constitution that Federal citizenship cannot be granted unless the person has been a citizen in one of the cantons.

This autonomy given to the cantons is the remedy of the heterogeneous character of the people and the channel through which every canton finds the satisfaction of its peculiarities and uniqueness. It is, moreover, a compromise between two conflicting tendencies: a centralizing one, favouring more powers to the Union, and a Federalist one claiming the rights of the states. The Constitution guarantees the number of Cantons which could not be altered without a constitutional amendment. There are nineteen cantons and six half-cantons, and no division, fusion, or suppression of any of them is permitted without such

1. Rappard, op. cit., p. 13.

an amendment. Each one has its own constitution drafted by itself with the condition of being in conformity with certain federal provisions. Whereas the American Constitution requires from each State to have a "Republican form of government" the Swiss Constitution is more precise. Three conditions must be fulfilled in order that the cantonal constitution is granted federal validity;¹

1. It must contain no provisions contrary to those of the Federal Constitution,
2. It must assure the exercise of political rights according to republican - representative or democratic - form of government,
3. It must have been accepted by, and be susceptible to amendment at the demand of the absolute majority of the people.

Inter-Cantonal Relations:

The Civil War of Switzerland took place, as we have seen, before 1848, and its immediate cause was the formation of Cantonal leagues or "Sonderbund." It was, therefore, natural that the Constitution forbid to the Cantons any separate groupings among themselves; "all separate alliances and all treaties of a political character between cantons are forbidden."² Such agreements, if permitted, would create blocks that might endanger the harmonious functioning of federalism. Further, "in case of differences arising between cantons, the states shall abstain from

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1. Article 6 of the Swiss Constitution.
 2. Article 7 of the Swiss Constitution.

violence and from arming themselves; they shall submit to the decision to be taken upon such differences by the federation."¹

The Cantons, however, were allowed, in the sphere of the federal constitution, to make treaties regulating legislation or administration between themselves, but not defence or offence. "These provisions are to be expected because nothing is more glaring in the history of that country than the evil of separate alliances."²

FEDERAL ORGANS AND POWERS

There are three organs of federal authority in Switzerland: the federal legislature or "Federal Assembly", the federal executive or "Federal Council" and the Federal Tribunal.

A. The Federal Assembly:

It is composed of two councils, the National Council which represents the people, and the Council of States which represents the Cantons.

In 1945 they were 194 deputies in the National Council. These deputies do not have a fixed salary; they are given an "indemnity" from the Federal Treasury.

"The Council of States seems at first glance to be almost exact replica of the American Senate, but the resemblance is only superficial."³ Although it contains, like the Senate, two members from each canton and one member from each half-canton,

1. Article 14 of the Swiss Constitution.
2. Vincent, op. cit., p. 48.
3. Munro, Governments of Europe, p. 779.

the mode of election of these representatives and their powers are very different from the American Senators. In the United States, all Senators, from all States, are chosen for six years, and in the same manner. In Switzerland each Canton may choose the Senators according to its own laws and for such term as the Canton decides. Furthermore, the Council of States does not enjoy any special prerogatives in any matter; the two houses of legislature are completely equal. The influence acquired by the Senate in American political life, is unknown to the Swiss Council of States.

But the Swiss legislature - including both houses - is the supreme authority of the land. Its powers include, besides federal laws and ordinances, the ratification of treaties, the approval of the budget, the amendment of the Constitution and a wide range of exceptional legislative prerogatives. It also enjoys certain executive, administrative and judicial powers.

B. The Federal Council:

The Constitution of 1848, and again that of 1874, entrusted the "directorial and superior executive authority of the Confederation" to a Federal Council composed of seven members: ¹ They are seven in number and their tenure of office is for four years. The chairman and vice-chairman are annually elected by the Federal Assembly. This chairman is, for one year, the head of government - like a prime minister - and in the same time the

1. Article 95 of the Constitution.

titular head of the State, like the American President. But he is on equal footing with the other six members without any right of appointment or legislative veto. He has been chosen, like the other members, by the Federal Assembly and, therefore, cannot claim any privilege in the deliberations of the Cabinet as do prime-ministers in parliamentary governments. Each of the seven Councillors is the head of one of the following departments.

1. Department of Political Affairs
2. Department of the Interior
3. Department of Justice and Police
4. Department of Military Affairs
5. Department of Imposts and Finance
6. Department of Industry, Commerce and Agriculture
7. Department of Posts and Railways.

Such departments as those of public instruction and public works belong to the cantons. The only Federal institution for education is the "Polytechnicum" in Zurich. All roadways belong to the Cantons.

The powers of the Federal Council are very important. "The Federal Council is, in fact, the centre of the whole Swiss federal system."¹ All military matters are administered by it. Federal officials are supervised by it and it is the organ through which the Budget is introduced. Its sanction is required to any alteration in a cantonal constitution and, as Bryce says, "It is a guide as well as an instrument and often suggests draft measures."²

1. Dicey, Law of the Constitution, p. 519.
2. Bryce, Modern Democracies, Vol. I, p. 354.

0. Distribution of Administrative Functions:

While in the United States, federal laws are usually executed by federal officials and state laws by state officials, in Switzerland this division is not found. These functions are combined so that we find hydraulic power, the legislation of which is federal, administered by the Cantons. The contrary is found in alcohol, the monopoly of which is administered by federal officials, while the profits belong to the cantons.

Sauser-Hall groups these functions into four categories¹ which we thought practical to reproduce:

1. "Monopolies belonging to the Confederation:" i.e. matters exclusively under the administration of the union. They are customs, alcohol, post-office, telegraphs and telephones, coinage and issuing of banknotes, and war explosives.
2. "Matters legally controlled by the Confederation, but administered jointly by it and the Cantons," like the military organization, and land register.
3. "Matters ruled entirely or in part by federal laws, but the administration of which is entirely left to the Cantons." Few examples may be given: inspection of waters and forests, hunting and fishing, the protection of labour, banks, etc....
4. "Matters which have remained entirely within the canton's competence, but the administration of which can be controlled by the Confederation," for example the Alpine roads.

1. Sauser-Hall, op. cit., pp. 55, 56.

D. Federal Revenue:

As in the United States, so in Switzerland, the Confederation was faced with the problem of providing itself with an adequate revenue to live on. The same problem in both countries led to a similar solution: direct taxes would be left to the Cantons and indirect taxes would go for the use of the Confederation.

The regular sources of federal revenue are in:¹

1. The income from federal property
2. Proceeds of the federal customs levied at the Swiss frontier
3. Proceeds of posts and telegraphs
4. Proceeds of the powder monopoly
5. One-half of the gross receipts from the military exemption tax
6. Contributions of the cantons which shall be determined by federal legislation with special reference to their wealth and taxable resources.

It is evident that the tariff on imports is the most important of all these sources.

The New Federal Bank:

Although Article 39 of the Constitution necessitated the foundation of a federal bank for the issue of money and bank notes, it was not until 1907 that the Federal Bank was established with headquarters in Bern and Zurich. Its achievements were to

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1. Article 42 of the Constitution.

stabilize the credit of Switzerland and to provide a uniform currency, besides its financial services.

The Federal Court:

We have seen that under the Constitution of 1848, Switzerland was practically without a federal court. In 1874, a Federal Tribunal was provided for, but "it can hardly be said to have created a supreme court in any way analogous to that of the United States."¹ It received an autonomous status but with small jurisdiction which extends over civil law cases arising between the Confederation and the cantons or between these latter and to cases involving a sum of 4,000 francs at least. Its jurisdiction covers, sitting with a jury, cases of treason and revolt against the federal authority and the violation of international law. The tribunal, however, was not invested with the power of interpreting the Constitution or of deciding the constitutionality of a law. This function was given to the Federal Assembly whose authority is much comprehensive than that of the Federal Tribunal. That is how it is said that "it was not raised to a level of the American Supreme Court."²

Features of Centralization in Switzerland:

Since the middle of the nineteenth century, a rapid growth towards centralization is visible in the federal history

1. Hawgood, op. cit., p. 192.
2. Rappard, op. cit., p. 89.

of Switzerland. Today there are whole fields of legislation and administration which belong to the Confederation and which were unthought of in 1848. These fields were not originally belonging to the Cantons and then taken over by the Union; they are new fields which have arisen out of evolution and scientific progress. The federal control over aviation is an instance, and it necessitated a Constitutional amendment for its adoption. Other features of centralisation were the result of the development in communications and in trade as a result of which there was a demand for the unification of commercial, civil and also criminal law. The growing consciousness of national unity led to the concentration of military matters in the hands of the Confederation. The powers of the Federal Tribunal have also been increased by this process. "The widening of the function of the national government by the purchase of railroads, by the assumption of monopolies, or by superseding cantonal law by general legislation, adds in every instance to the body of federal law which must come under the cognizance of the Federal Tribunal."¹

Although direct taxation is still a cantonal business, the cantons, like the States of America, have been, ^{obliged} since the first World War, "to share it more and more generously with the federal state."²

The Confederation has the power of intervention in a canton where troubles arise and the cantonal forces are unable to bring order. The federal intervention has two ways: either

1. Vincent, op. cit., p. 209.

2. Rappard, op. cit., p. 52.

the cantonal authorities are subordinated to a "Federal Commissioner" to make investigations and establish order, or the federal army is called upon to restore peace. In both cases, a state of emergency is declared and the cantonal government is subordinated in all matters to federal authority until order is restored. "Since 1848 (until 1921) there have been eleven cases of internal disturbances in various Swiss cantons which have required the intervention of federal authorities. Five of these cases occurred in the Canton of Ticino."¹

The trend towards centralization has been shown in many spheres, and this led Rappard to believe that the Constitution of 1798 - which was formulated by the French invaders and created a strong central government - was in conformity with subsequent experience. "However unpopular at the time of its promulgation," he says, "the Constitution of 1798 was more premature than fundamentally contrary to the constant needs of the Swiss people."

The Confederation and the Federal Principle:²

Wheare accuses the Swiss Constitution to have modified the "Federal Principle" in two matters. The first is the mode of election, term of office, and salary of the federal upper house being left to the discretion of each canton. This fact makes them dependent upon their governments while they are supposed to be independent federal agents. In certain cantons,

1. Brooks, op. cit., p. 57.

2. As conceived by Wheare, see "Definition" below, p. 4

3. Rappard, op. cit., p. 28.

these representatives are even elected by the cantonal councils themselves.

The second modification is the power given to the Federal Assembly to interpret the Constitution and the non-existence of a body that decides upon the validity of the laws passed by the Federal Assembly.

As to the first modification, it is not very serious because the powers of the Council of States are limited as we have seen and their influence is not compared to the American Senators. In the second place, "it does not follow that it was the intention of the framers of the Constitution that the general legislature should be permitted to make laws on any subject it chose. On the contrary its powers are carefully enumerated."¹

Two Lessons from Switzerland:

Among the many contributions of the Swiss system to the successful practice of federalism, two are most remarkable: the organization of the Executive, and the settlement of the relation between Church and State.

The "directorial" executive feels responsible to the legislature, not because of the "Confidence vote" - which is unknown to Swiss parliament - but because it has been elected by the National Council, or lower house, and derives from it its legislative and financial powers. Like members of the National Council, the seven members of the executive are elected for four years and in this period they cannot be removed from office, nor

1. Wheare, op. cit., p. 18.

can they dissolve the National Council. It might be expected that deadlocks would arise from this system with no way of settlement. But in practice, the Federal Council always submits to the will of the nation as represented by the lower house. When a proposal is defeated, another is submitted.

Members of the Federal Council are not necessarily members of either house of legislature nor representatives of a particular political party; they are usually elected from several parties. Moreover, they are usually re-elected as long as they desire to remain in office and able to do so.¹ In 1935, for instance, two members have been in office since 1912; five spoke German, one French and one Italian; five were Catholics and two Protestants; one belonged to the Catholic Conservative Party and six to the Radical Party. Between 1935 and 1940 there was one change only. From 1848 to 1929 members had an average period of tenure of eleven years. During that time, only one Councillor failed to secure re-election when he was a candidate.

This system is peculiar of the Swiss and has not been copied by other federations. Its remarkable success is due to the wisdom in which the Swiss people manage their public duties and to their mature political experience.

State and Church:

Whereas in other federations (the U.S. for example) the States have not the right to establish any Church or endow

1. The following statistics are from Jennings, op. cit., p. 66.

any form of religion, in Switzerland the cantons have that freedom. This means that some have an established Catholic Church (Fribourg), some have an established Protestant Church (Geneva) and some have no established Church. This is a very interesting aspect of local freedom in a matter in which everywhere else the central government insists on a unified policy.

SWITZERLAND AND THE UNITED STATES

COMPARATIVE ASPECTS

We have gone through certain features in Switzerland which invite to comparison with corresponding features in America. We shall mention here some of them without detailed analysis.

1. In both countries the regional governments have existed long before the Confederation. The Swiss system is the result of a long historical process which took more than five ^{centuries} years, while American one took a little more than five years.
2. Both are republican democracies. In the nineteenth century Switzerland was the only republic in Europe.
3. In both cases, local patriotism was the pivot of federalism, then slowly shifted to the union.
4. In Switzerland, as in the United States, federalism was the product of experience and the result of necessity.
5. Both countries suffered from local separatism: religious controversies led to the Sonderbund war in Switzerland, and Slavery led to the Civil War in the United States.

6. In both countries the powers of the federal government are enumerated and the residuary are left to the regional governments.
7. While in the United States the enactments of legislature - whether local or federal - may be annulled by the Supreme Court as unconstitutional, in Switzerland all enactments of the federal legislature must be treated by the Courts as valid.
8. "The Federal Tribunal was from the beginning, and is still, a very different body from, and a much less powerful body than the American Supreme Court." It neither has jurisdiction over "administrative law," nor does it have officials to carry on its decisions.
9. The Executive in each country is very different from the other. In the United States the President is elected by the people and he nominates his board which is subordinated to him. In Switzerland all members of the Council are elected by the Federal Assembly and are responsible to that Assembly, not to any chief.
10. In both countries, the federal government has no power of disallowance over local state legislation with the provision that such legislation remains in conformity with the federal Constitution.
11. In the United States, the Senate acquired a preponderant role and became to be regarded as the most influential house. In

1. Dicey, op. cit., p. 523.

Switzerland the role of the Council of States has been secondary and it is the National Council that took the lead.

12. In the United States, three-fourths of the States have to give their adherence for a constitutional amendment; in Switzerland a combined majority of the Cantons and the people is required.

C H A P T E R I V

G E R M A N Y

G E R M A N Y

Introduction:

The study of German Federalism will take a different course from that of the United States or Switzerland. In the former, the federation established in 1787 by the Constitution is continued to this day. In Germany, there has been more than one constitution, and, since federalism was recognized and introduced in the governmental machinery - in a rather imperfect form - several regimes has come and gone in the country. The last one is the Federal Government sitting at Bonn under the authorities of occupation for Western Germany. Few words will be said about this recent form of government because it does not yet give us any experience or any problem in federalism. Nor has the new mechanism acted in a free or independent Germany.

Permanent Factors in German History:

Most important of all is the geographical factor, that Germany has no natural frontiers. "If a natural cataclysm had placed a broad sea between the Germans and the French, the German character would not have been dominated by militarism." ¹ Four great rivers divide the land and make for differences and regionalism. The split between North and South was not only due to religious loyalties, but to natural resources too.

1. A.J.P. Taylor, The Course of German History, p. 15.

Separatism has been an essential factor throughout German history. In fact Germany was never united until Hitler imposed union upon it by force. Prussia, as it will be seen, has always tried (since Bismark) to have the last word in German affairs and this attitude was contrary to the old federal traditions in Germany. The desire for power of Prussia on the one hand, and the separatist tendencies in some regions on the other, were the main permanent causes which prevented Germany from becoming a truly federal state.

FEDERAL HISTORY OF GERMANY

The territories which came to be called later on "Germany", were formerly parts of the Holy Roman Empire. The Emperor was the titular head of the Empire, but his powers were almost null. Among the German lands, Austria had the hegemony. Throughout the seventeenth and eighteenth centuries, the power of Prussia was constantly growing until it took the lead.

When Napoleon occupied Prussia in 1806, the German States were around three hundred in number. The French incorporated many of them with their neighbours and in this way they may be said to have ended medieval Germany. The two newly created Kingdoms of Bavaria and Wurtemberg, with Baden and thirteen other states, joined together on July 17, 1806, in the "Confederation of the Rhine" under the presidency of Napoleon. Each received a Constitution modelled by France and each adopted

the French code of law. The total members of the Confederation reached the number of 39 most of which were under the direct rule of France. In 1813, after the withdrawal of Napoleon, the Confederation ceased to exist.

The German Confederation (1815-1866):

"The German union between 1815 and 1867 somewhat resembled the Confederation of states which existed in America during the ten years prior to the framing of the Constitution, and, like the latter, it proved a failure."¹

This Confederation was the child of the Congress of Vienna which tried to bring back the old system. The South asked and was granted its autonomy. There were, therefore, three blocks: Austria, Prussia and the other states. But either Austria or Prussia alone was stronger than all the rest and it is evident that no true federation could exist with the presence of two great members hostile to each other. The Congress of Vienna tried to preserve the independence of the states, and, at the same time, to establish among them a cooperation on a federal line. The Federal Act provided for unity in defence, in weights and measures, in custom duties, and in a code of law. But the Federal Diet could not enforce its resolutions and the union was a mere "staatenbund." The central organ had no power and the union had no army. None of the provisions of the Federal Act was executed and no federal judiciary was established.

1. Munro, op. cit., p. 600.

The Zollverein (1834-1871):

In 1818 Prussia abrogated all federal tariffs within its frontiers. Its intentions were commercial at the beginning, but this economic agreement came to be a political instrument in the hands of Prussia. In 1828 the Grand Duchy of Hesse was the first to adhere to that arrangement, followed by the Southern States. In 1834, this union embraced all German states except Austria and few others. Prussia had to make most of the concessions: no import, export or transit duties between members of the Deutscher Zoll-und Handelsverein. In the following year, the Zollverein was the only bond of unity between German states. It had two houses: the Zollbundesrath and the Zollparlament. It continued till 1871, when a more comprehensive union took its place.

The Frankfort Assembly:

In 1848, a meeting was held at Frankfort with 586 delegates - not representing the ruling Princes. "The meeting was a landmark in German federal history just as the Convention of 1787 in Philadelphia formed one in the United States." ¹ But the difference between the conditions are great: the one had uniform regimes in all the colonies, and the other had a variety of state forms. The delegates choosed the King of Prussia - Frederick William IV - as a German Emperor in 1849. But he refused the Imperial Crown because it was not presented by the

1. Mogi, op. cit., Vol. I, p. 337.

Princes and said: "I would not pick up a Crown from the Gutter." With the failure of the Assembly "the golden opportunity was past and the chief result was the precedent of union under Prussian¹ hegemony."

From 1848 onward the Confederation was inactive and the only effective tie was the Zollverein.

In 1864 the conflict over Schleswig - Holstein came to the front and threatened the peaceful relations between Austria and Prussia. It was settled for the moment, but it came to be a test for the supremacy of one of these countries over Germany.

War of 1866:

War broke out in 1866 between Prussia and Austria over the Schleswig-Holstein question. German States were divided into their allegiance to one of the belligerent states. The southern States fought against Prussia. Prussia was waging war against the forces of the Confederation. She gained the victory and occupied South Germany. "Thus the conquest of Germany by Prussia² was complete."

Prussia dissolved the Confederation and Austria gave up any claim in German affairs. A "North German Confederation" was to replace the old union.

1. Hart, op. cit., p. 70.

2. J.W. Headlam, Bismarck and the Foundation of the German Empire, p. 264.

THE NORTH GERMAN CONFEDERATION

(1866 - 1870)

The Peace of Prague (1866) put Austria a l'ecart of German politics. The new federal union created by Prussia "the North German Confederation" was proclaimed on 1867 and no hard measures were taken against the South.

It was the policy of Bismark to unite the Northern States in a strong union and leave it to the discretion of the Catholic South to join voluntarily when it wished. He also perceived the impossibility of including the whole territory in one stroke, and said: "If the necessary consolidation of the Federation is to be made certain, it will be at present impossible to include South Germany in it. The present moment is very favourable for giving our new creation just that delimitation¹ which will secure it a firm union."

But Bismark had negotiated an offensive and defensive treaty with the South; he would guarantee their territories if they, in return, would join with Prussia in case of war. The next step was, naturally, to create a state of war, and to unify Germany under this pretext.

The Constitution:

The Constitution of the North German Confederation had no preamble, no introduction and no explanation. It was a political pact drafted for particular circumstances. The question of

1. Ibid., p. 266.

diplomatic representation is an example.¹ What counted to Prussia was her military supremacy, and this was provided for. All the armies were unified under Prussian command. The Government had two agencies: a Federal Council and a Reichstag newly created. The Bundesrath, or Federal Council, was the most powerful and enjoyed executive and legislative powers. Laws had to be introduced in it.

The real power, however, resided with the Chancellor of the Federation which presided over the Council and represented the supremacy of Prussia. The smooth running of the constitution depended upon the understanding between the Prussian interests and the Federal authority.

This Constitution continued till 1914. When the Empire was proclaimed in 1871, only few changes were necessary, and the same instrument was adopted to the German Empire. The North German Confederation was enlarged to embrace the whole of Germany and that is why it is said that "complete legal continuity existed between the North German Confederation and the Empire."

Between 1871 and the outbreak of the first World War, only thirteen amendments were made to this Constitution which remained "what it was in the beginning - an admirable document for concentrating power in a few hands, for permitting army domination, and for preventing popular control."²

1. Ibid., p. 294.

2. J.K. Pollock, The Government of Greater Germany, p. 24.

THE GERMAN EMPIRE
(1871 - 1918)

After the victory of Prussia over France, the German Crown was offered to William I and the Empire was proclaimed in the Palace of Versailles, January 18, 1871. The Constitution was not altered. "A few changes of phraseology only were necessary."¹ The Southern States joined the Empire by private treaties, each one separately. They were not obliged to do so, but rather pushed by their own interests.

Certain privileges were granted to Bavaria: she was allowed to command her armies in time of peace, to have its foreign representation, its own post and telegraph and certain financial privileges. She was also allowed to retain her own laws regarding citizenship and marriage. In justification of these concessions, Bismark said: "The newspapers will not be satisfied, the historian may very likely condemn our constitution; but I was more anxious that these people should go away² heartily satisfied."

The Empire was composed of twenty-five states and Alsace-Lorraine. Each of these was free to choose the system of government it pleased and to adopt the constitution it liked. The result was a great variety in their status: three free cities and twenty-two monarchies with different titles such as kingdoms, grand duchies, duchies and principalities. "Germany was thereby the only federated state which thus left, at least

1. Hext, op. cit., p. 74.

2. Headlam, op. cit., p. 368.

theoretically, such a latitude to its member states."¹

The Imperial Constitution was the same as under the North German Confederation with a difference in name only. The Reichstag, except for some financial prerogatives, possessed little power. The Chancellor was supreme and could not be removed even by the majority of the Reichstag voting against him. In this case he would merely dissolve the Reichstag.

The Bundesrat (Federal Council) was at the same time an upper house and a government. Although Prussia always pretended to have a minority in the Council, yet it had seventeen members when fourteen were enough to defeat any constitutional change - and that was the most important.

Evolution Towards Centralization and Unitarism:

This evolution manifested itself in three ways. First, in military matters the states, although nominally enjoying certain rights, became mere dependencies. Only Bavaria kept a certain degree of autonomy. The Emperor was the direct Commander of all forces. "As for Bavaria, at the outbreak of the first World War, its reserved rights had almost completely disappeared."²

In the second place, the development of legislation in the Empire was along this line. Functionaries executing national legislation were under the control of the Bundesrath and susceptible to the supervision of the Reichstag.

1. Rene Brunet, The New German Constitution, p. 59.

2. Ibid, p. 5.

Thirdly, in financial matters, the powers of the states were more and more reduced. Duties and taxes belonged to the localities, but whenever new items of revenue were discovered, the Empire imposed upon the states more "contributions." Slowly the financial power of the states decreased while that of the union increased. "The Reichstag which approved the expenditure did not have to provide the money, and the states which provided the money had no control over its expenditure."¹

The Supremacy of Prussia:

The dictatorship of Prussia was evident in the German Empire. The Chancellor was, after the Emperor, sovereign, and Prussian by necessity. The law of Substitutes (of 1879) did not create a government; it only provided for agents to help the Chancellor. In fact "the Government of Germany was a dictatorship in the hands of Prussia."

The Empire; Federal or Not?:

Prussia, being larger than the other twenty-four states combined, it might be said that "Germany was a veritable Prussia enlarged."² No equality could, therefore be expected in this federation. Munro describes it as a compact between "a lion, a half-dozen foxes, and a score of mice," to deduce that "although federal in form, this First Reich was not a true federation."³ The German Empire deviated, in this matter, from the American or

1. Taylor, op. cit., p. 116.
3. Munro, op. cit., p. 601.

2. Brunet, op. cit., p. 7.

Swiss practice which recognized the equality of the component members. Prussia had 17 votes in the Bundesrat, whereas Bavaria, which comes next, had only six. The case was similar in the Reichstag.

Taylor, in his turn, considers the federalism of the Empire as "fraudulent, window-dressing to make the dictatorship of Prussia more respectable."¹ The rights granted to Bavaria seem to him empty and interesting to constitutional lawyers. The form of government under the Empire was, however, federal in one sense, that it divided, theoretically at least, the field of powers between two sets of government: the Reich and the states. If we apply a broad definition to "federalism" we may call the Imperial Constitution a "federal" one; but in no way can we call the regime "federal". Wheare, who adopts a strict definition of federalism, describes the Constitution as quasi-federal,² and the Government as not federal at all.

Lessons of the First Reich:

From this period we should keep in mind the factors that shaped the political psychology of the people, and formed a temperament which was destined to forge German history for more than seventy years. Bismark should not be blamed for subsequent events. "He had to deal with Germans, to deal, that is, with a nation which had learnt from long centuries of bitterness and disappointment to admire only force, and to follow only authority."³

1. Taylor, op. cit. p. 117.
3. Ibid, p. 96.

2. Wheare, op. cit., p. 32.

THE WEIMAR REPUBLIC
OR SECOND REICH

After the defeat of Germany in the first World War, a National Assembly was elected (January 19, 1919) to draft a new constitution. It met at Weimar and its work came to be called The Weimar Constitution. This Constitution^was described as the "most mechanically perfect of all democratic constitutions, full of admirable devices, a textbook constitution for the Professor of Political Science." The Republic, thus created, lasted fourteen years in theory. In fact, its real life was shorter and did not last more than six years.

Problems of the National Assembly:

The first problem with which the National Assembly was confronted, was to decide whether the Reich should remain a federal state or should become unitary or whether a compromise between these two principles could be adopted.

On the one hand there were unitary tendencies which favoured the unity of the Empire and the concentration of power in few hands. Voices were heard in the streets of Berlin "Down with the Princes." These centrifugal^{not} movements were thought of as the only alternative to save Germany.

On the other hand, separatist tendencies were also felt and above all separation from Prussia. The Rhineland claimed a Republic which would include a part of Westphalia, and the territories of Oldenburg and Bremen. The representatives of

Hanover demanded the revision of their annexation accomplished in 1866. Other territories also demanded independence and an autonomous status.

But the National Assembly adopted, after long discussions, a provision that no territorial changes would be carried before the elapse of two years after the acceptance of the Constitution. The National Assembly was either unwilling or unable to ordain the dismemberment of Prussia.

Unitary Features in the Constitution:

One feature was the power given to the Reich to regulate the territorial status of the states, although this power was not used effectively. Another feature was in the division of powers between federal and state organs which increased the sphere of federal powers at the expense of the members.

Unlike the previous Constitution which allowed diversity of state regimes, the Weimar Constitution formulated to the States the principles on which their constitutions must be based in order to provide harmony between the two agencies.¹

In the elections for the lower house, all Germans could elect even though they were in another member state, i.e. a Bavarian who happened to be in Prussia had the right to vote in the elections of the Prussian Diet. "This provision is clearly characteristic of the unitary tendency of the Constitution."²

Legislative powers were also concentrated in the

1. Article 17 of the Weimar Constitution.

2. Brunet, op. cit., p. 61.

national hands more than before. The same could be said about administration.

Authority of the Reich:

Brunet names three categories of this authority, which are, in Germany, referred to as "Exclusive, concurrent, and normative."¹

A. "The competence of the Reich is exclusive when it alone has the right to legislate." In this field the states cannot legislate, although even if the Reich abstains from using that right. (Art. 6)

Under this clause come the foreign relations of the country, army and defence, posts and telegraphs.

B. "Concurrent" legislation embraces matters, the legislation over which belongs to the Reich "by priority", without excluding the legislative rights of the states. The states are therefore allowed to legislate on these matters as long as the Reich does not use his own right.²

Article 7 enumerates these concurrent subjects and adds considerably to the previous Constitution (Article 4 of the Imperial Constitution).

Most important of all in this regard is the establishment of the financial sovereignty of the Reich. Article 8 empowers the Reich to take hold of all sources of revenue leaving to the states that amount necessary for their subsistence.

C. "Normative legislation is provided by Articles 10 and

1. Brunet, op. cit., p. 62 ff.

2. Articles 7, 8, 9 of the Constitution.

ll and consists in the right of the Reich to lay down principles simply leaving the details to be enacted and carried out by the legislation of the states." ¹ These articles cover financial matters also, because the Reich was afraid the states claiming the right to legislate on these matters and ^{would} "drain sources of revenue needed by the Reich."

Administrative Spheres:

The Reich had the exclusive administration over functions given to it by the Constitution. Its administration over these functions was direct and envisaged all what concerned foreign affairs, the army and navy. Furthermore the Reich had the power of control over all concurrent or state functions. It could supervise the administrative authorities of the states and - a quite new power - it could send commissioners to the governments of the states with the consent of the latter.

Degree of Centralisation:

The centralising measures brought by the Weimar Constitution covered almost every sphere: legislative and judicial, as well as administrative. The importance of the States was greatly diminished and that of the Reich emphasized. "In reality ² the states no longer count and the Reich is all powerful."

One face of this centralization was the setting up of a High Court of Justice whose authority extended to all important

1. Brunet, op. cit., p. 65.

2. Ibid, p. 72.

questions. It had jurisdiction over cases involving territorial claims, over questions arising in states where no competent courts exist, over conflicts between two or more states, or between a state and the Reich.

The Position of Prussia:

Prussia lost many privileges that she used to enjoy when the Prussian King was the head of the Empire. Her legislative and military supremacy was over. The Chancellor was no more a Prussian agent nominated by the Prussian King, nor was his will what it had been in the Bundesrat. The powers of the new Reichsrat were limited, and a President elected by the people replaced that Emperor.

But the preponderance of Prussia was still felt. The territory of Prussia was not divided and its population represented three sevenths of the total German population. She, therefore, had a majority in the democratic Republic, a majority which was sovereign. She could again, and in the name of democracy this time, impose her will on Germany and have her wishes accomplished. Prussia still remained above the Reich.

The Federalism of Weimar:

Branet, writing in 1921, was undecided as to whether Weimar was federal or not. "Formerly," he said, "when one spoke of the German Constitution the question was: Is the German Empire a federal state or a confederation of states? Today when

speaking of the Constitution of Weimar the question is asked: Is the Reich a federal state or a single state?¹ The fact that the states shared in the governmental machinery, and were equally represented there, seemed to him an illustration of its federal character.

According to K.C. Wheare, the Weimar Republic does not provide us with an example of federal government "because the practice of the general government was progressively unitary. The financial powers alone provide a good example of this. They were used to bring state finance under the control of the general government. The states were soon made dependent." As to the text of the Constitution it was hard for him to say whether it was quasi-federal or not federal at all.²

In fact this is an academic question and permits for more than one opinion. Weimar seems to me neither federal, nor unitary, but somewhere in between. The states were more than dependencies, but less than autonomous members.

The Self-Destruction of Weimar:

We shall not go over all the crisis that took place in Germany before the rise of Hitler, but we shall content ourselves saying that the Weimar Constitution contained the seeds of its destruction. The coming of Hitler to power was by constitutional means and most of his acts after he reached power were legal according to a very dangerous provision in the Constitution

1. Ibid., p. 69.

2. Wheare, op. cit., p. 26.

itself. By this I mean Article 48 which gave to the President special power which, with the concurrence of the Chancellor, would enable him to deal firmly with any serious national emergency by decree.

This is why it is generally said "Weimar committed suicide."

THE THIRD REICH
(1933 - 1939)

We have seen that Germany was a variety of traditions and conditions, and that its unification was achieved, for the first time in history, by Hitler. And although the Hitlerian regime was imposed upon Germany yet "it represented the deepest wishes of the German people." ¹ It, also, was the first political system of German origin: the Old Confederation was an Austrian organism, then a French instrument, later on, Imperial Germany was due to Prussian supremacy and Weimar was brought by the influence of the Allies. The Third Reich was, therefore, the work of Germans. "Never before have they been able to use their united strength over a considerable period of time in the service of ² one great plan."

Since 1930 the Reichstag was meeting under terror. Permanent dictatorship was finally established in 1933 when Hitler got an "enabling act" to rule by decree. The Third Reich was a government of decrees, without any constitution or legal

1. Taylor, op. cit., p. 213.

2. Pollock, op. cit., p. 1.

standards. The Weimar Constitution was not formally suspended; it was referred at from time to time by the courts. The Reichsrat was dissolved and the Reichstag continued in existence but without any real powers. In the elections of 1933, only members of the National Socialist Party were elected and the Party program was the virtual constitution of the country.

The Nazi State was based on twelve acts which "taken together, they have given Germany a unitary, centralized, monocratic, one-party state in place of the federal, parliamentary, democratic, multi-party state which preceded it."¹

Liquidation of the German "Lander":

The first "Coordination Act"² dated March 1933 was a "Provisional Law for the Unification of the States with the Reich." The second Coordination Act of April 1933 was called "the Law on the Unification of the German States." Of more importance was the Law of January 30, 1934, "for the Reconstruction of the Reich" by the terms of which the state legislatures were dissolved, state ministers put under the control of the Nation, and all powers denied to the individual states. National governors were entrusted with the administration of affairs in the various states except for Prussia which was privileged to remain under the direct control of the Fuhrer. All German lands - Austria included - were divided into twenty districts for purposes of

1. Ibid, p. 70.

2. The word used in Germany was "Gleichschaltungsgesetz" and is not easily translated into English. It means "the casting of all metals into the same mould." (See Munro, op. cit., p. 645.)

administration and the federal system was replaced by national control. Germany became a unitary state, and its districts, mere administrative units under the immediate control of the Reich. Nothing could be carried out, except after the approval of the appropriate national minister has been secured. The administration of justice, army and air force were placed in the hands of the central authorities of the Reich without any jurisdiction over them left to the intermediate organs.

The Status of Prussia:

No conflict between Prussia and the Reich could arise because all powers were fused in the National Ministers, each one according to his appropriate field, and Hitler being, in title, the National Governor of Prussia. But Prussia, being large, had kept a local administration of its own which was not exactly like other districts, and enjoyed a certain degree of peculiarity in its own affairs. Its "predominance was still indicated in the fact that it had 52 per cent of the area and 54 per cent of the total population of Greater Germany."¹

Federalism Abolished:

All state courts have been abolished and a unitary judicial system was adopted for the whole of Germany. All courts became the agents of the National Government.

1. Pollock, op. cit., p. 134.

The police system was also unified. A uniform police procedure was applied all over the Reich with a centralized control. The "coordination" of the states with the Reich has been complete. Germany had ceased to be a federal and had become a thoroughly centralized nation.¹ The German districts had become similar to the French departments, with almost the same rights and autonomy.

"Coordination" did also include municipal government. The municipal system of each state was considerably different from that of the other. By the Municipal code of 1935, a unified system was framed for all of them, with common principles to guarantee full cooperation with the Reich. In reality, municipal life ceased to exist and was replaced by appointed councils with advisory powers. The subordination of municipalities was ordained "in order to be sure that their affairs are managed according to the purposes of the Reich's leadership and in harmony with the policy of its Government."

The Fuhrer was the symbol of the German unitary regime. He was chief legislator, chief judge, commander of the armed forces, of the civil service, of the party, and of the entire political life of the state.

In such conditions, it is evident that there is no room to speak of federalism, neither in theory, nor in practice.

1. Munro, op. cit., p. 645.

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THE NEW POST-WAR FEDERATION

The post-war territorial division of Germany was not the country's own choosing but a result of the war and allied decisions. While the outcome of the war disposed of the hitherto insoluble Prussian problem, it created, in Western Germany alone, a host of new territorial difficulties: for example, the artificial dismemberment of the former states of Wuttemberg and Baden, and the creation of something like a new Prussia in the form of the mammoth state of North-Rhineland Westphalia. However, the territorial problem is overshadowed by the question of the viability of the new federal establishment. Let me quickly recapitulate its main features: their essence is not in the few changes in the distribution of legislative jurisdiction between federation and state. Somewhat more important is the accentuated role of the Bundesrat as compared with its predecessor the Reichstag. The essential change lies in the tighter guarantees against the mushrooming of new federal administrations and in the attempt to force the federation into a more equal partnership with the states in the tapping distribution and administration of financial resources. Both guarantees are to be enforced by making the consent of the Bundesrat a prerequisite for federal action in a number of specific instances in both the legislative and administrative fields.

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1. Extracts from an article "The Decline of Intra-State Federalism in Western Europe", by Otto Kirchheimer, presented before the comparative Government Panel of the American Political Science Association meeting held in Washington, D.C. on December 29, 1950.

Any examination of German federal practice in the last sixteen months will have to take into account: 1) the novelty of the experience, and 2) the appearance of great blocks of refugees without any previous connection with or interest in the regions, which has strengthened the tendency to organize according to group and class interest rather than according to regional interest.

A look at the statute books of the various states in Germany since the creation of the Federal Republic will show that the states have not been anxious to legislate in any field except that pertaining to the organization of the states themselves and otherwise are "passing the buck" as much as possible to the federation.

The state bureaucracies, lacking as they do the tradition of their Prussian predecessors, will scarcely be able on their own to withstand the increasing drives toward centralisation.

The federalist emphasis of the Bonn Basic Law notwithstanding the political and administrative centralization well under way under Weimar and consummated under the Third Reich is again around the corner. The greatest difference now is that administrative and political centralization - of different types - is taking place within two separate entities, the West German Bundesrepublik Deutschland and the East German Demokratische Deutsche Republik.

C H A P T E R V

C A N A D A

C A N A D A

Historical Background:

Until the independence of the American Colonies, Canada was predominantly French. But after the War of Independence, those Americans who remained "Loyalists" to the British Empire were given refuge in Canada and that country was to become British henceforth.

In the following years Canada was ruled by the "Regime Militaire" which the Canadians did not abhor. It was replaced, in 1764, by a civil government with a Council and a Governor as an executive, and a Representative Assembly was proposed.

Conflicts soon arose between the natives and new settlers who had inhabited the St. John valley. These latter, in 1784, established a new colony in that region by the name of New Brunswick. The new colony had its own governor, an elected Assembly and an appointed Council, and it was fortunate to have its first Governors among the most able statesmen who had previous experience in government.

The Maritime provinces also did improve greatly after the Loyalist immigration.

A large number of Loyalists had settled in Ontario (then known as Upper Canada) from the beginning. They reached 30,000 by 1795, as compared with 10,000 only in Quebec (Lower Canada). In the latter province with its large French population of 150,000, the immigrants formed a small minority.

The Quebec Act (1774):

This Act was intended to guarantee the French rights in this province and to give them legal assurance and protection. French law was recognized (except in criminal trials), the social institutions and traditions, the feudal land tenure were guaranteed. The Roman Catholic Church was established permanently and was given a parliamentary title to its property and to dues paid by Catholics. "This timely and statesman like concession, though deeply resented by the New England Puritans, undoubtedly secured the loyalty of the French Canadians for all time."¹

This Act may be said to have prevented any secessionist feeling in Quebec.

The Constitution Act (1791):

A Representative Assembly had existed in Nova Scotia since 1758, in Prince Edward Island since 1773, and in New Brunswick since 1784. In Canada (Lower and Upper) the French had been satisfied without one, the English were not. Moreover, many differences of outlook were felt among these two communities: in religion, in agricultural methods, and in land-tenure. The two legal methods were widely divergent, and, in short, the whole social and political concepts had nothing in common.

It was, therefore, wisely thought to separate Ontario from Quebec. The Act of 1791 provided for a Governor-in-Chief for the whole, with a Lieutenant-Governor for each province

1. J.A.R. Marriot, The Evolution of the British Empire and Commonwealth, p. 84.

assisted by an Executive Council. A legislature of two houses was also provided for in both provinces. The English criminal code was to apply in Upper and Lower Canada alike; for other purposes the French system was granted validity in Quebec. In the latter province, the Catholic Clergy continued to receive its dues and tithes, while in Ontario the Protestant Clergy secured means for its subsistence and parsonages were to be maintained "according to the establishment of the Church of England."

Rebellion of 1837:

Yet, the Constitution Act of 1791 proved not to be a solution to the problems faced by any of the two provinces. Complaints were heard from each regarding common and distinct matters. In 1837 both Canadas had rebelled against the Act.

In Lower Canada the French rebelled against the concentration of power in the hands of English Protestants. But, as the majority there was English, the rebellion was confined to a small minority and discouraged by the British residents. This racial antagonism drew the attention of Lord Durham who wrote in his report: "I expected to find a contest between a government and a people, I found two nations warring in the bosom of a single state. I found a struggle not of principles, but of races."¹

The question of finance between the two provinces led also to conflict: Upper Canada was at the mercy of its neighbour

1. J.A.R. Marriot, The Evolution of the British Empire and Commonwealth, p. 112.

as far as custom duties were concerned. The rebellion, however, did not last long. In about three months, it had been crushed down.

The Union Act (1840):

The main theme of the Durham Report was the establishment of a responsible government. But the act of 1840 was silent on that point and it was not until 1847 that the Cabinet system was introduced there. The union between Upper and Lower Canada was the main object of the Union Act. English was recognised as the official language, French being freely used in debate and translation from English to French to be carried on governmental expense.

The Union Act resulted in an unwise measure: the union between the legislatures of Ontario and Quebec. These two hostile provinces with a Catholic population in Quebec attached to the traditions of pre-revolutionary France, and a Protestant creed in Ontario including American-Loyalists, progressive and liberal, these two provinces could not unite.

The Legislative Assembly was a mirror of that racial and religious dualism. The French were afraid of being segregated by the English increasing population, and of losing their culture, their educational system and their institutions. In the United Legislature, antagonism between the two parties was evident and it led to ten changes of Cabinet in ten years. These measures were, however, useless and dualism was still there. The United

Legislature was obliged to sit successively in Quebec and Toronto to please both parties. Afterwards, for the sake of convenience, Queen Victoria decided on a village situated on the border of the two provinces to be the capital. The great town of Ottawa was built on this location.

Circumstances culminating in Federation:

The federal movement was, at the same time, a centrifugal and a centripetal one. It aimed at the dissolution of the unhappy union between Upper and Lower Canada, and, on the other hand, at the establishment of a closer union between these and the Maritime Provinces. There was also the North West and British Columbia to be considered, and Newfoundland too.

Federal tendencies were already present among the Maritimes. In 1864, the legislatures of Nova Scotia, New Brunswick and Prince Edward Island had sent delegates to meet in Convention at Charlottetown. Eight Canadian ministers attended the Convention and asked the Maritimes to think in terms of a larger union including the whole of British North America.

The Convention was, henceafter, adjourned, in order to meet in Quebec where seventy-two resolutions were agreed upon by the delegates. These resolutions were the basis of the scheme to be proposed to the Imperial Parliament later in 1865.

The Federating Provinces:

The federation started with four member states only:

Quebec, Ontario, New Brunswick and Nova Scotia. But the Act of 1867 left the federation open to admit new members. Manitoba was the first to join in 1870. In 1871 British Columbia and Vancouver, after having been united, were admitted to the federation. Prince Edward Island became a member in the Dominion in 1873, Alberta and Saskatchewan in 1905.

Yukon had been given a separate entity in 1898, and the North West territory was reconstituted in 1906, the administration of which was confined to commissioners.

Newfoundland preferred to keep her autonomous rule, but was obliged, in 1934, to ask financial help from the Dominion. That help was granted at the condition of the suspension of home rule there. Since that date, Newfoundland was administered by Commissioners appointed in Whitehall.

The British North America Act:

It was introduced in the House of Lords by the Earl of Carnarvon, Secretary of State for the Colonies, on February 19, 1867. In explaining the characteristics of the federation he said that its organization was twofold: a "central parliament" and "local legislatures." The central parliament was to be composed of two houses: the upper one or "Senate" and the lower one, or "House of Commons." Lord Haldane described the British North America Act of 1867 to be widely divergent from the true federal government because of limiting the powers of

1. Megi, op. cit., Vol. I, p. 232.

the several states to those enumerated in the Constitution, leaving the residuary to the federation.¹

J.A. MacDonald justified this measure, or rather anticipated it in a speech in 1865 declaring that: "Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislature shall be conferred upon the general government and legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States."²

The Constitution of Canada has been much criticized on that basis and has been described as unitary. But the practice of government is very different and, in fact, no government which tried to adopt unitary policies could remain in office for a long period. The Canadian experience has proved to be federal in action and this is all what matters. "Although the Canadian Constitution is quasi-federal in law, it is predominantly federal in practice. Or, to put it in another way, although Canada has not a federal constitution, it has a federal government."³

1. Marriot, *The Mechanism of the Modern State*, Vol. II, p. 411.
2. Megi, *op. cit.*, Vol. I, p. 230.
3. Wheare, *op. cit.*, p. 21.

DIVISION OF POWERS

A. The Sphere of National Powers Covers:

1. The control of the militia, naval and military matters, and defence.

2. All powers necessary for the control of taxation, borrowing, property and other services.

3. Economically the national government has wide powers such as the regulation of trade, navigation, currency, coinage, banking, weights and measures, and post services. Its powers extend to all functions that take place between two provinces, or that go beyond the frontiers of a province. Another important power is that over works - although situated in one province - which are declared by the parliament to be of general interest to Canada or to more than one province. This declaration may be done either before or after the construction, and the works belong henceforth to the national government.

4. The regulation of naturalisation, of the status of Indians and their lands.

5. In legal matters, the Union was given jurisdiction over marriage and divorce, criminal law and procedure. The constitution of criminal courts was, however, left to the provinces.

6. Treaties entered into by the Empire, should be accepted and implemented by the Federation to become binding on Canada.

7. A Federal Court of Appeal was provided for, together with other federal courts.

B. The Powers of the Provinces Included:

1. All necessary measures for the maintenance of order, supervision of provincial officers, direct taxation, and land management.

2. All local works and installations, except what has been specifically assigned to the Union.

3. Municipal and local institutions such as hospitals.

4. Questions of property and civil rights.

5. The administration of justice, the constitution of courts - both civil and criminal - and civil law.

6. All matters of a private character concerning the province only.

7. As to agriculture and immigration, the provinces have power to legislate over them concurrently with the Dominion, and in so far as the provincial decisions are not superseded by the Dominion.

Inter-trade:

That problem caused many difficulties in its interpretation. The Constitution spoke of the "internal freedom of trade", but the definition of freedom in this respect was not clearly defined. Logically, it should envisage all kinds of restrictions between provinces. Keith summarised it in three points: "It is clear that: 1) appropriation of goods to prevent them being sold outside is illegal; 2) it is illegal to impose a special burden on goods in any state simply because they have come from another

state; 3) all specific restrictions on passage from state to state are illegal."¹

Other features of Canadian federalism will be discussed comparatively in the next chapter with Australian federalism.

The Working of the System:

The North America Act of 1867 was widely different from true federalism because of the large powers given to the central government. These powers were of two kinds: First, the reservation of residuary powers to the Dominion, and, second, the power given to the central government to disallow provincial acts. This power of disallowance was not only confined to cases of national policy or contradiction with the Constitution, but on the grounds that the acts were unjust or unsuitable in the eyes of the Dominion.

But the practice of the Canadian system was definitely federal and the power of disallowance was not frequently used.² Between 1867 and 1900 seventy-two provincial acts were disallowed. Then from 1896 to 1911 the Dominion government declared that she would no more disallow any acts on the basis of being unjust or unsuitable, but only on the basis of their contradiction with Imperial or Dominion policies. Between 1911 and 1924 the test of injustice was brought again, but in two cases only: one in 1918, and the second in 1922. Then, for seventeen years this

1. A. Berridale Keith, *The Dominions as Sovereign States*, p. 462.
2. The following statistics are found in Wheare's book, *Federal Government*, pp. 238 and 239.

power was not exercised at all. Again in 1937, 1938 and 1939 Acts passed by the legislature of Alberta were disallowed, and among the reasons given for disallowance was the injustice of two of these Acts.

It may be observed, however, that the evolutionary process tends towards less use of these powers. "It may be said that there is a Constitutional convention to this extent at least, that the power should be used sparingly and in exceptional cases; that it should not be used by the Dominion to unify the Canadian system of government."¹

The Settlement of Racial and Religious Antagonism:

The people that lived in Canada was divided into two races, having distinct language, religion, customs and historic traditions. Quebec had refused to join any union which would not recognize its particularism and its separate personality. But the French cannot be blamed alone for being narrow in their views and fanatical in their attitude. "The Catholic hierarchy in Canada might hinder, as was alleged, all intermixture of the two races; but if it did so, it had its counterpart in the influential Orange lodges equally determined to uphold pure Protestantism.

But the national unity of Canada was soon established despite these separating tendencies. An illustration of this unity was given before the end of the century; in 1896, Sir Wilfrid

1. Ibid.

2. Walter Phelps-Hall, Empire to Commonwealth, p. 130.

Laurier, a Roman Catholic French Canadian had been Prime minister of the Dominion's government.¹ Under his ministry a conflict between Catholics and Protestants broke out in Manitoba over Education. The French immigrants from Quebec demanded the establishment of French schools where Catholic religion would be taught, and the exemption of the French from paying taxes for other schools. The English-speaking population insisted on imposing their language as the only official language in schools. Sir Laurier reached a statesman compromise between the two parties; it was provided for introducing instruction in the French language and religious instruction carried by Catholic Bishops, but no separate schools would be maintained by the State and put under the direction of any Church.

But although, tolerance and understanding allowed the two races to live peacefully side by side, yet the dualism was never abolished. Its last manifestation may be observed in the resentment of Quebec to the overseas conscription in the second World War (as it has also been in the first one.). The Royal Commission on Dominion Provincial relations, wrote in its Report what follows: "The French speaking Canadians had been established in Canada for centuries. They were the oldest Canadians of European stock, and they were much more firmly rooted in North America than their English-speaking fellow-citizens. Their political connection with France had been severed 150 years before and they had never claimed a close sentimental attachment for

1. A French Canadian, St. Laurent is also the actual Prime minister of Canada.

republican France with its anti-clerical associations. Their undoubted loyalty to Great Britain was a reasoned rather an instinctive loyalty. It lacked the emotional pull which was essential to command deep sacrifice in a remote European war. While the rest of Canada was deeply affected by living in remembered links with the British Isles and by United Empire Loyalist and Imperial tradition, their experience and memories were essentially North Americans. It was unlikely, therefore, that the attitude of the French---speaking Canadians towards a prolonged war in Europe would differ from that which prevailed in the rest of Canada.¹

The Contribution of Canada in Federalism:

Although Canada has proved that federalism can successfully solve the problem of divergent races, languages and religions, yet Switzerland had preceded her in this field. What Canada introduced in federal government for the first time was the Cabinet system of Executive. The United States had a Presidential system, Switzerland a "directorial" one, and both were essentially different from the Cabinet principle. Canada, in adopting this system, proved the malliability of the federal principle to adapt itself to more than one form of democratic government. Marriot said: "Whether a parliamentary executive, the successful working of which depends almost wholly upon pre-
eient custom and convention, can permanently co-exist with a

1. Wheare, op. cit., p. 216.

federal constitution which is necessarily written and rigid, is a question which it were premature to attempt to answer." ¹ History has proved that the federal constitution was not as rigid as this statement gives the impression, and, secondly, that the Cabinet government could successfully co-exist with federalism in both Canada and Australia and in other so-called federal countries.

Canada has the priority of having been the first attempt to organize federal government on the Cabinet system.

1. Harriot, *The Mechanism of the Modern State*, Vol. I, p. 224.

CHAPTER VI

A U S T R A L I A

A U S T R A L I A

Origin of the Commonwealth:

There is a great resemblance between the origin of Canada and that of Australia. Both owe their development to a common reason: the independence of the American Colonies. Previously, convicted criminals were sent from England to the Colonies; now another place was needed and that place came to be Australia.

James Cook:

In 1768, James Cook, of the Royal Navy, was sent out to the Pacific in a mission. In his way back, he sailed round New Zealand, reached the land hitherto known as "New Holland" and, in the King's name, took hold of it and gave it the name of New South Wales because of its resemblance to Northern England. That was the first page in Australian history.

In 1783 the problem of the Loyalists was still partly unsolved and it was suggested to give them a home in that land. But New South Wales turned to be a solution to the convict problem instead.

Convict Missions and Free Settlers:

The first mission of convicts was on January 26, 1788, and the natural harbour in which the fleet dropped anchor is known today as Sydney. Beginning with 1793, free settlers arrived

to New South Wales but on a small scale only and the place remained for the first three decades a convict settlement. In 1821, free immigrants were allowed without restriction. Tasmania became, in 1800, another penal settlement and was preferred to Port Philip. Not until 1829 that the British settled in Western Australia where progress was to come very slowly because of its lack of inhabitants. In 1840 its population amounted to 2,300 inhabitants only. A petition was sent to the London government to convert it into a convict settlement and that was effected in 1850. The first convict envoy reached the place accompanied with an equal number of free settlers. A Parliamentary Act was passed in 1834 creating "the British Province of South Australia" on the condition of selling a certain quantity of land and raising a given sum of money. In spite of difficulties, South Australia, with its capital at Adelaide, came into existence in 1836. By 1841, she had 15,000 inhabitants, some of whom were immigrants who turned from Canada to Australia at the time of the rebellion in the former (1837). South Australia soon became very prosperous.

The date of the discovery of gold in Victoria (1851), was also the date of its independent history. Previously forming a part of New South Wales, Port Philip then became a home for settlers from Tasmania. The Act of 1850 placed Victoria on equal footing with New South Wales and that evidently meant their separation.

Constitutional Development in the Colonies:

An Act passed in 1842 defined the Constitutional organis-

action of the colonies. It established representative bodies; a legislative council containing twelve members appointed by the Crown and twenty-four elected by the people on a franchise with certain property qualifications. A Governor was to be nominated (from outside the Council), and he (with the Council) was given power to make laws "not repugnant to the law of England."

The first Colony to apply the terms of the Constitution was New South Wales, and in the next ten years, other Australian colonies followed.

In the constitutional history of Australia the Act of 1842 was a stage parallel to that of the Canada Act of 1791. It was also natural that Australia would ask to be granted responsible government after the example of Canada. In 1850 the Australian Colonies Government Act was the key to future. Victoria was established as a Colony and the Colonies were given power to amend their Constitutions. By 1854 the four Colonies of New South Wales, Victoria, South Australia and Tasmania, all submitted constitutional amendments for the approval of the Crown. That approval was secured in the following year and they all adopted a bicameral legislature and a responsible Cabinet government.

The case in Western Australia was different. Because of the convict element in its population, it had to wait until 1870 to have a legislative council on the model of that adopted in New South Wales in 1823. But Western Australia could not wait for the slow evolution throughout several decades to reach self-government. The intermediate stages to that end were abbreviated

and in 1890, cabinet government was established there.

Queensland was separated from New South Wales as late as 1859 and it is on that date that she received an independent and responsible government.

Factors Making for Federation:

Three conditions gave the impulse to federation in Australia: "The expansion of the United States and Europe within Pacific waters, the economic situation within Australia, and the growing fear of Asiatic immigration."¹

1. A growing fear of foreign pressure was worrying the Australians as to the safety of their domain. European Powers had manifested great interest in the Pacific and it was a matter of security to Australia not to have hostile neighbours threatening its existence. French activities in New Caledonia and the New Hebrides, German interest in New Guinea, and the American annexation of the Sandwich Islands in 1884, all had accentuated the external fears of Australia.

In front of this international rivalry, the Australian Colonies had no power to defend themselves except their reliance on the British Navy. The federation of the several Colonies meant the increase of their strength and that was the first pressure to federate.

2. From an economic point of view, the division of Australia into six units was an absurdity. There were six different

1. Phelps-Hall, op. cit., p. 99.

tariffs which stood a hindrance in the way of business development. Any economic progress depended upon the union of the Colonies.

3. The problem of Asiatic immigration was among the reasons making for federation. Besides Japanese and Chinese immigrants, a flood of Indians covered the country, and India being a British possession, it was difficult not to admit these Indians.

The Commonwealth of Australia:

The Australian Federation Bill was introduced in the House of Commons on May 14, 1900. Joseph Chamberlain, in his introductory speech, remarked that: "It is true to say, that on the whole this new constitution, although it is in important respects unlike any other constitution at present existing, still in the main, and more than any other, follows the constitution of the United States of America."¹

That constitution was held to be the best example of true federalism. "It is perhaps the most obvious example of a Federal Constitution, at any rate in the form in which it was originally enacted, before later amendments modified it."² For it established a central government for the whole of Australia with definite powers that it can exercise without the interference of the states.

The different states were also independent in the spheres left to their discretion. Neither the general, nor the regional

1. Mogi, op. cit., Vol. I, p. 259.

2. Wheare, op. cit., p. 17.

governments, from one part only, can change the division of powers as laid down in the constitution. The legislatures of the states and that of the Commonwealth were independent of each other, co-ordinate with each other, and subordinate to the constitution. A very peculiar feature to the Australian Constitution, was to declare the people of the states as forming a "federal Commonwealth."

Division of Powers:

Unlike the Canadian model, the Australian Constitution leaves to the states the residuary powers, i.e. all those not exclusively vested in the Commonwealth or denied to the states.¹ Sections 51 and 52 enumerate the powers belonging to the Commonwealth. They may be conveniently classified as follows:

1. Those necessary for the business of government; like matters concerning the public service and taxation.
2. Powers relating to the foreign affairs of the country, to its defence, and the use of railways for that end.
3. The regulation of citizenship, immigration and emigration, and the status of aliens.
4. The control of trade, commerce and industry. The Commonwealth regulates trade among the states and with other nations. It also has power over navigation, telephones and telegraphs, currency, banking (other than state banking), and the administration of railways after the consent of the states. When industrial disputes arise between two or more states, the Common-

1. Section 107 of the Constitution.

wealth has the power to regulate arbitration and conciliation to settle the conflict.

5. In matters of social services, the union has jurisdiction over marriage, divorce and quarantine.

6. It has power of legislation over any matter referred to it by the states.

In short, the Commonwealth has exclusive powers as regards the seat of government, the Commonwealth departments, customs and coinage. But it is also forbidden to act in certain fields. It may not establish or prohibit any religion, or give preference to any state in matters of trade and commerce, or deprive any state from the use of rivers.¹ The states, in their turn, are forbidden to raise military forces of their own, or to put taxes on Commonwealth property.

Right of Secession:

No specific reference was made as to the right of secession in the constitution itself. Western Australia, however, demanded secession in 1933. The reasons given were various, but the most important was economic injustice. This factor responsible to a certain degree for the American Civil War, led to a like secessionist movement in Western Australia. This state complained that economic free competition with the more industrially advanced eastern states was fatal to the progress of economy in the west. The petition was sent to the Imperial Parliament but was not

1. Keith, op. cit., p. 500.

discussed by either House. A Joint Committee reported that the petition could not be considered, because the proposed demands falls outside the scope of legislative power. "The Joint Committee expressed the view that the power of amendment does not extend to a power to alter the federal character of the Constitution in view of the purpose of the Constitution to create an indissoluble federal Commonwealth."¹

The High Court of Australia:

Differences about the interpretation of the Constitution are decided, in the last resort, by the Crown in Council (i.e. the Judicial Committee of the Privy Council in England which is the Supreme Court of Appeal from the British Colonies). This is done only when the High Court of Australia itself feels that such question should be referred to the Privy Council for determination. In all other cases, and in disputes "as to the limits interse of the Constitutional powers of the Commonwealth, and those of any state or states or as to the limits interse of the constitutional powers of any two or more states," the judgment of the High Court of Australia is final. In its organisation it is similar to that of Canada. The Judges are appointed by the federal executive and can be removed by a petition from the two houses of the federal parliament.

The Court has been established in 1903, and until 1920, in all its decisions, the Court has maintained the principle of

1. Ibid, p. 522.

non-interference with state matters or vice versa. This attitude was quite in conformity with the federal character of the Constitution. But in 1920, the Court adopted a different attitude and emphasized the powers of the Commonwealth at the expense of the states. By such interpretations, the Court has chosen a unitary rather than a federal attitude. This is one of the reasons which allow Wheare to write: "tendencies are at work in Australia which may make it necessary soon to describe its constitution and its government as quasi-federal."¹

Such tendencies may be found in steps taken by the federal government to concentrate power in its hands. We may refer, in this line, to the decision of the Commonwealth government to acquire new powers so as to deal with communism. The referendum held in September 1951, to amend the Constitution for this purpose, defeated the proposal by a large majority of the people at large and of the states. The opposition said, the powers asked for would make of Australia a Fascist state where the central authority is all powerful and in which the balance of federalism is disturbed.

AUSTRALIA, CANADA, AND THE UNITED STATES

(A COMPARATIVE STUDY)

1. In both Canada and Australia, the Constitutions were influenced by the American model either in a positive or a passive

1. Wheare, op. cit., p. 22.

way. All three systems are written, all state the supremacy of the constitution over regional governments and legislatures, divide the powers between federal and local authorities, and establish a federal judiciary - although various from case to case.

2. The differences, however, between the American federation and that of Canada and Australia are great, and in many matters, the Australian Constitution adheres more closely to the American precedent than does the Canadian. The fact that Canada federated under the shadow of the American Civil War was of great influence. The Canadians were afraid of giving the states unlimited powers, and the fathers of the North America Act were persuaded that the errors done in the United States should not be repeated in Canada. They, therefore, limited the rights of the states.

A common problem to America and Australia at the time of federation was to find a compromise between larger and smaller states.

3. The circumstances that led to federation in Canada and Australia were very different from each other. In Canada the movement was partly centrifugal and partly centripetal, while in Australia it was wholly centripetal. In fact, the centripetal forces in Canada were so strong that, unless for the fierce opposition of Quebec, the state should have taken a unitary form. But the particularism of Quebec was jealously maintained and the only solution to please that province was federalism. The presence of the United States, with its growing power, was among the reasons

to convince the Canadians of the necessity of a strong union that would not succumb to American pressure. Australia had no such close neighbour threatening it, nor had it any racial or religious separatist movements. The movement to federate was therefore mostly centripetal except for the small states that wanted to see their equality with larger ones guaranteed.

4. Sir John Mac Donald and other members who framed the Canadian Constitution were believers in a unitary government and they only "perforce yielded to the necessity of a confederation as the only means to please Quebec and to make up for the lack of local institutions of government in the maritime provinces." They, therefore, tried to limit the powers of the provinces as much as possible.

In Australia, the colonies enjoyed autonomous status, and they were asked to surrender some of their authorities to a central organ. So, while in Canada the Dominion gave to the states certain powers, in Australia the states gave to the Commonwealth some of their powers.

5. Comparing the federalism of the Commonwealth and that of the Dominion, Chamberlain said of the Canadian federation that it "was substantially to amalgamate the provinces into one dominion, whilst the constitution of Australia created federation for distinctly definite and limited objects, for a number of independent states, and state rights have throughout been jealously preserved."

1. Keith, op. cit., p. 427.

2. Megi, op. cit., Vol. I, p. 259.

6. Not only the circumstances were different, but the method of achievement too. The movement of Canadian federalism was the work of delegates meeting behind closed doors in Charlotte-town first, and then in Quebec. The movement in Australia took a popular character, and the people, side by side with the governments, brought about the federation.

7. In the field of federal centralization, Australia stands in mid-way between the United States and America. It is neither so much centralized as Canada, nor so much decentralized as America.

The commonwealth legislature was enabled to legislate for a state upon the state's demand, and this is unknown to the American practice. Nor were there any restrictions upon the Australian Parliament regarding the abuse of legislative powers, like a Bill of Rights.

8. Elections for the Lower House of the federation, are held in both Canada and Australia on the same representative basis. But Canada, diverging from American and Australian methods, elects the members of the Senate on the basis of proportional representation according to the population of each state while in America and Australia, states are equally represented.

9. The "enumerated" powers in the Australian constitution are much longer than those of the United States.

10. The powers to regulate trade and commerce, in the United States and Australia are similar. In the former these powers are limited by the phrase "with foreign nations and among

the several states," and in the latter by "with other countries and among the states." That means they both leave intra-state commerce to the states' legislatures, the federal authority being confined to foreign and inter-state trade.

11. Both Canada and Australia, in adopting the Cabinet form of executive, presuppose the "responsibility" of government in the English sense, while the Presidential executive of America - although responsible in other ways - is under no such "responsibility."

12. The head of state in Australia is appointed by the King and each state is directly related to the British government. The head of each province in Canada is appointed by the Dominion government and removable by it.

13. The Dominion government has power to disallow provincial acts, while in Australia, state acts may be disallowed by the King only.

14. As we have seen earlier, the States in Australia - like those in the United States - retain all powers that have not been expressly denied to them by the Constitution. In certain matters they exercise these powers concurrently with the federation when they fall under the jurisdiction of both sets of government. In Canada, all powers not expressly granted to the provinces, remain under the jurisdiction of the Dominion, although the practice of government has not over emphasized that rule.

15. As to federal judiciary, each system has its peculiarity. In Canada there is only one organ of judiciary which,

at the same time, hears federal cases. Federal and local judiciaries are not separated from each other. In the United States they are separate and distinct: state courts for local matters and federal courts for federal matters. Each system is complete and independent from the other. No appeal can be made from state courts to federal courts. In Australia, the judiciary, like other institutions, stands in between the Canadian unified courts and the American independent ones. "On the one hand there is a Federal Supreme Court known as the High Court of Australia, on the other, the state courts are invested with federal jurisdiction. Further, an appeal lies from the state courts to the Federal Supreme Court."¹

16. The provincial constitutions in Canada were subject to federal veto and subject to federal interference, while in Australia, the constitution of 1900 kept the constitutions of the states as before with no change necessary "except as the federation controls or supersedes them."

17. The Canadian constitution cannot be amended unless through the King in the Imperial Parliament, while Australia may amend its constitution by legislative methods, with royal approval.

Constitutionally at least, the federalism of Australia is more parallel to that of the United States, and more democratic and liberal than that of Canada.

1. Harriet, The Mechanism of the Modern State, Vol. I, p. 241.

P A R T

II

C H A P T E R V I I

C O N C L U S I O N S

FOREWORD

To speak of the conditions for the successful working of federalism in the abstract is a field where no definite conclusions could be reached. Much depends upon the particular circumstances of the country where federalism is to be applied. Certain conditions which seem profitable to one nation may prove disadvantageous or unpractical to another one. We cannot state dogmatically what kind of Executive is best suited for a federation. There are three kinds of Executive which are appropriate to the countries in which they are applied: the system prevailing in Switzerland and known as "directorial", that applied in the United States and generally called "presidential", and the system of "responsible" government based upon British precedent and operated in Canada and Australia. Each system is so much linked with the history and politics of every nation that its success there gives no guarantee of a similar success in another federation.

The working of federalism, therefore, is bound to a great extent with a right choice of the method in each case. "It is this need of determining the suitability of the machinery for the workmen and its probable influence upon them, as well as the capacity of the workmen for using, and their willingness to use the machinery, which makes it so difficult to predict the operation of a political contrivance, or, when it has succeeded ¹ in one country, to advise its imitation in another."

1. Bryce, The American Commonwealth, Vol. I, p. 357.

Cases differ very widely from country to country and the solutions are relatives. This will lead us to concentrate on the pre-requisites and necessary qualities of a country which is to become federal, because these factors determine to a large extent the future success or failure of this form of government. We must also keep in mind that we are not seeking for principles for the working of federalism, but for its "successful working". It is obvious that "the conditions favourable for creating a federation are not necessarily identical with those favourable to its success when it is once established."¹

I. Pre-Requisites.

Federal government is "rare because its pre-requisites are many. It requires the co-existence of several national characteristics which are not often found in the world, and which should be perceived more distinctly than they often are."²

Most writers agree upon ^{two} facts: the first is the role of circumstances and the second is centripetal procedure of federalism. From his historical survey, Freeman deduced that federalism is formed out of a "closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united."³

Toequeville gave to circumstances their due consideration and made them, in importance, equal to good laws: "The Federal

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1. Rudolf Schlesinger, Federalism in Central and Eastern Europe, p. 470.
 2. Walter Bagehot, The English Constitution, p. 225.
 3. Mogi, op. cit., Vol. I, p. 294.

system cannot succeed without the presence of favourable circumstances added to the influence of good laws." ¹ In Bryce's words, "The true value of a political contrivance resides not in its ingenuity but in its adaptation to the temper and circumstances of the people for whom it is designed." ²

A.V. Dicey conceives of the circumstances under which a federation is likely to grow as the existence of states or provinces so closely connected "by locality, by history, by race or the like, as to be capable of bearing in the eyes of their inhabitants an impress of common nationality." ³ Federation, to him, should be a "slowly matured fruit" of a long historical process. Another condition to the formation of the federal state is "the existence of a very particular state of sentiment among the federating people, that is They must desire union, and must not desire unity." ⁴

The circumstances in which the federations that we covered in this study came into being are various and many. Military insecurity and the need to unify defence programs were mostly felt in Canada because of its neighbourhood with the United States and in Germany at the War of 1870. The desire to be independent and to preserve independence was the main reason behind Australian federation because it was only through federal co-operation that its independence could be secured. This same factor

1. Tocqueville, op. cit., Vol. I, p. 169.

2. Bryce, The American Commonwealth, Vol. I, p. 357.

3. Dicey, Law of the Constitution, p. 137.

4. Ibid.

was a constant dynamism in Swiss history. The Swiss were aware that their independence from foreign interference would be maintained as long as they remained federated. Economic advantages flowing from federation were effective in all the described federations and especially in the United States of America where Conventions were, in their origin, commercial. A helping factor was the previous association of the component members in a common political organisation. Before taking the present federal form, Switzerland had a Confederation that lasted many centuries, America had a short-lived confederation, but a long common colonial history; the Canadian and Australian provinces shared also the same Imperial status; Germany had, for a long time, been a weak confederation under Austrian hegemony. The similarity of political institutions is a consequence of the community of history and is of great importance. Geographical neighbourhood is another pre-requisite.

Of all these factors I hold that the most effective is fear. Fear is not only military, but could be financial and political. The Australian colonies were not met in 1900 with immediate military fear, but with a political one; that their influence in the Pacific reduced and their supremacy in their hemisphere superseded. "The compelling reason which brought into existence the Federal Commonwealth was undoubtedly the presence of European neighbours in the Pacific. Federation would probably have come in any case, but its coming might have tarried for many years." ¹ The Philadelphia Convention of 1787 was confronted with

1. Marriot, Mechanism of the Modern State, Vol. I, p. 256.

financial fear and induced by that fear to draft the Constitution for more efficient cooperation among the various states.

But, it may be added, "that the mere presence of all these factors in a given territory will not necessarily produce itself a desire to unite,¹ a desire of sufficient strength as to prevail over contrary forces. A great deal will depend, for example, on leadership or statemanship at the right time." An illustration of this truth may be taken out of German history. At the Frankfort Assembly of 1848, the conditions were most favourable to create a German federation. But the unwillingness of Frederick William IV to receive a Crown offered by the people postponed the realization of federalism another twenty years, until Bismark managed, through his leadership, to bring about the North German Confederation, and, later on, the German Empire. Nor can we ignore the influence of Hamilton and Washington in the American federal movement. The articles which were published by Hamilton, Madison and Jay (and then collected in the Federalist) were of great weight in driving the American opinion towards federalism.

The Importance of Similarity:

William Maddox gives three conditions for the effective operation of federalism:²

1. "The parts of the federation must not represent too

1. Wheare, op. cit., p. 40.

2. Eaton and Others, Federation ... p. 119.

great a diversity in size, culture, and the level of their economic and political development."

2. "Geographical contiguity is unquestionably desirable. Part of its advantages has to do with compactness for defence purposes, part for the similarity of internal problems, and part for the practicability of legislative assemblage and administrative control."

3. "Unifying forces of a spiritual, emotional, or ideological character not only contribute to the formation of union, but give it sustenance and vigor in its struggle for survival."

We shall first deal with spiritual conditions, then with geographical, and thirdly with political ones.

A. Spiritual Factors

They are important in so far as they make for common sympathy among the people of the different states. This sympathy should not be a passive feeling, i.e. arising of a common threat or danger, but should be the outcome of an interrelated history and of interdependent interests. The community of race, language and religion has been over-estimated as far as federal government is concerned. Georges Jellinek held the community of race to be one of the basis of the federal state.¹ History, however, proved that federalism did develop in countries where there was no uniformity of race: like Switzerland and Canada. I do not believe that this community is indispensable for the smooth running of a

1. Mogi, op. cit., Vol. I, p. 502.

federation. I agree with Freeman that "it requires a sufficient degree of community in origin or feeling or intent to allow the ~~community in origin or feeling or intent to allow the~~ several members to work together to a certain point", but also "it requires that there should not be that perfect degree of community, or rather identity, which allows the several members to be fused together for all purposes."¹

Uniformity of language, race, and religion cannot be overemphasized because experience has given examples to the contrary. Four races, speaking four different languages, professing two separate confessions, have federated and lived happily since 1848. Two races, with two distinct languages and churches, have lived side by side in the Canadian federation. A desire for union has been produced in these countries in spite of all these differences. And while a Civil War took place in the United States which is, comparatively speaking, unified in race, religion and language, nothing of the sort took place in Canada.

"If there is a real desire on all hands to make the experiment successful, there needs seldom be any difficulty in not only preserving these diversities, but giving them the guarantee of a constitutional provision against any attempt at assimilation, except by the voluntary act of those who would be affected by the change."² Community in these matters cannot be described as an essential pre-requisite of federal government. We may go a step

1. Ibid, p. 296.

2. J.S. Mill, Representative Government, p. 310.

further and say that their identity paves the way to unitary government. In fact, the Dominion of Canada would not have taken a federal form of government except for the particularism of Quebec in language and religion. Had Quebec been Protestant in creed, and English-speaking, Canada would have been a unitary state. It may also be asserted that the operation of federalism is a solution to the diversity of race, language and religion, and that it is likely to prove successful in a heterogeneous country if co-ordination and cooperation are practiced. Federalism is advisable, if not necessary, to a country that lacks such similarities. "But although it is possible for a state which differs in race, religion, language and the like to form a union, and although such differences provide a good basis for a federal union, it is also desirable that some feeling of common attachment to the general government should be developed."¹

B. Geography:

The magnitude of a country sometimes decides whether that country is to become unitary or federal, for, I believe, there is a limit for the territory which can be efficiently administered from one centre. It might be argued that the development in communications has considerably reduced the distances and brought the world nearer; but the fact still remains that it is preferable to give local autonomy to the various parts of a country if they are widely separated by sea, deserts or mountains. An

1. Wheare, op. cit., p. 51.

essential condition for the success of federalism was, to Dicey, "the physical contiguity" ^I of the states that entered the union; i.e. an approximate equality in size and wealth was desirable among the component members. This factor is one, among others, that will lead me - in the next chapter - to affirm the impossibility of creating a federation for the whole Arab world. The case of the Arab lands is far different from that of the United States. In the latter, the territory is compact and contiguous while, in the former, dislocated and shapeless. The territorial magnitude, therefore, decides whether the state should be unitary, federal, or a mere confederation.

In case a territory is suitable to federation, other problems arise. The member states should not be very unequal in size, for, otherwise, the powerful member would enjoy hegemony and rule the country in his own interests. The history of federal Germany is glaring with the damages brought upon it by Prussia which had the last word in German affairs due to its supremacy in size and population. The essential is, as Mill puts it: "that there should not be any one state so much more powerful than the rest as to be capable of vying in strength with many of them combined. If there be such one, and only one, it will insist on being master of the joint deliberations: if there be two, they will be irresistible when they agree; and whenever they differ everything will ^{be} decided by a struggle for ascendancy between the rivals." ¹
An agreement between two rivals is, however, unlikely, and supremacy

1. Mill, op. cit., pp. 297 and 298.

will be decided, in the last resort, by actual fighting, as was the case between Austria and Prussia.

Henry Sidgwick brings about a new element: when the states are numerous, their inequality is not as dangerous as when they are few. This is true to a certain degree because when the states are numerous, inequality among them is not so much felt. But, on the other hand, no one state should be stronger than the rest combined. If some states are larger than others in the United States (with its 48 members), the inequality would not have the same meaning as if it were among the six Australian states. "The federal state, to be in a satisfactory condition, the part-states ought to be either numerous or not unequal in size; the fewer they are the smaller is the inequality that would be dangerous."¹

Economic conditions are not to be separated from geography. The natural resources of a country and their distribution are among the factors that affect the success of a federation. In the United States and Australia, the differences of outlook between industrial and agricultural regions led to secessionist movements. In Germany the precedent of an economic union in the Zollverein, was a precedent to the political union. On the other hand, it is held that a country, to become federal, should have enough national resources to maintain both local and central governments. "For federalism is expensive and it is always a question whether the independence it gives is worth the price that must be paid for

1. Henry Sidgwick, Elements of Politics, p. 541.

it."¹ This question, however, has two sides. In the first place, many expenses are reduced; those of raising and maintaining separate armies before federation, those of having separate foreign representation, and the like. In the second place new expenses are needed for a duplicate administrative system and for a duplicate judiciary. Two governments are to be fed with a revenue so as to make them financially independent from each other. This face of federalism is considered a disadvantage by Finer. "It is financially expensive, since there is much duplication of administrative machinery and procedure. It is, again, expensive, because it does not allow of the full technical integration required in such services as transport, utilities, health, and employment placement."²

C. Political Conditions:

As to the political conditions in which federalism may be successfully adopted, they are three in number, at least:

1. Federalism can only prove successful among people who have had similar political institutions and served common political interests. "Each of the separate states should have approximately equal political rights, and should thereby be able to maintain the limited independence."³ It was among the characteristics of Imperial Germany and its failure in federalism that the member states were allowed to adopt different regimes: there

1. Wheare, *op. cit.*, p. 55.

2. Herman Finer, *The Theory and Practice of Modern Government*, p. 184.

3. Dicey, *op. cit.*, p. IXXV.

were Kingdoms, Duchies, Free Cities, Principalities and other forms of governments. Until Weimar, Germany stood as the only federation that left such a latitude to the member states. The United States, Switzerland, Canada and Australia had all inherited similar political institutions before federating. If a country that envisages federation, had known no such similarity among its parts in history, she should at least possess the potential capacity of bringing about this similarity, not by force, but by convincing all the members to adapt the same political and social institutions. "This force is one of the strongest of the forces which help states to work together."¹

2. Federalism is the twin-brother of democracy; i.e. a true federation is always a democratic one. Not only should there be similarity of political institutions, but it is also essential that these institutions should not be dictatorial. The relative freedom that each government enjoys - each in its own sphere - is destroyed in dictatorship. The balance of powers between general and regional authorities loses any meaning when power is concentrated in one centre. The compromise between centrifugal and centripetal forces on which federalism is based is replaced by centralizing forces only. We have seen how federalism was abolished in Germany by the "coordination" acts enacted by Hitler. Representative institutions in which the rights of the members are defended become of no value. As a matter of fact no free elections are allowed under a dictatorship, as a result of

1. Wheare, op. cit., p. 46.

which no play or counter-play of political tendencies takes place. There are many dictatorships today that^c all themselves federal, among whom we mention the Soviet Union and Argentine. The Soviet Union has its own conception of "federalism" as it has its own conception of "democracy." The process of dividing its huge territory into administrative spheres, strictly controlled by central Communist agents, is called by the Soviets "federal government."

Certain authors go a step further and affirm, that not only should there be democratic political institutions, but a federal constitution must be assumed to be republican. Freeman, following the line of Tocqueville, asserted that "on the whole the general tendency of history is to show that, though a monarchic federation is by no means theoretically impossible, yet a republican federation is far more likely to exist as a permanent and flourishing system."¹ Although this statement is logically correct, yet the working of federalism in Canada and Australia has proved to be no less flourishing and successful than that of Republican America or Switzerland.

3. It is also held that political institutions, besides being similar, democratic and republican, should be mature. Federalism is not devised for a people who is not politically educated, and who is in an earlier stage of development. Freeman, like Tocqueville, believed that "it is hardly possible that federal government can attain its perfect form except in a highly refined age, and among a people whose political education has already

1. Mogi, op. cit., Vol. I, p. 295.

stretched over many generations." ¹ In his view, "the federal form is a more delicate and artificial structure" than other forms of government, and can only be reached "in a late growth of a very high state of political culture." So did Tocqueville emphasize the "uniformity of civilization" ² as a condition for the durability of a federation.

The Importance of Reason:

Federalism should not be the outcome of an improvised movement. It must be carefully studied and deeply weighed before being adopted. Nor should it be imposed upon a people, who, either does not desire it, or is unable to decide on the matter because of his political immaturity. On the other hand, it should not be the culmination of a given emotional tendency. That federalism is based "not on sentiment, but on the reason of its citizens" is not to be underestimated. Reason, together with particular circumstances, should both lead to federalism. In America the movement towards federation was a reasoned one: for otherwise the Americans would not have persisted in their bitter war with England. In Switzerland, says Freeman: "the federal system, has here, out of the most discordant ethnological, political and religious elements, raised up an artificial nation, full of as true and heroic national feeling as ever animated any people of the most unmixed blood." ³

1. Ibid., p. 290.

2. Tocqueville, op. cit., Vol. I, p. 169.

3. Mogi, op. cit., Vol. I, p. 297.

In conclusion to the pre-requisites of federalism, we quote Finer:¹ "In the formation of federations, the impulses have been given by spiritual ideals of national unity, by the prospect of the fullest extension of certain desired rights, by the economic motive, by a common language, literature, by considerations of defense and international prestige, by the peaceful settlement of fears produced by the contiguity of human groups which tend to form collective dislikes, by the amical resolution of common problems, and by the energies and aspirations of specific leaders."

II. A Written Constitution

The success of federalism depends, to a large extent, upon the exact definition of the spheres of the general and the regional governments. Each one should exercise the powers prescribed to it with no attempt of encroachment upon those of the other. The federal constitution, should, therefore, be written. If it were unwritten, no exact border line could be drawn between the rights of the states and those of the union, and constant conflicts would result. Among the conditions put by Marriot for the success of federalism are the two following: "1. A federal constitution must be made, not born;² 2. It should be written."

In a unitary government the House of Representatives should be supreme, but in a federation the constitution should be so. And "while it is essential for federal government that its

1. Finer, op. cit., p. 161.

2. Marriot, The Mechanism of the Modern State, Vol. II, p. 409.

constitution be supreme, it is essential for good federal government that the supreme constitution must be written."¹

The constitutions of the federations that we studied are all written. The constitution of Switzerland goes into minute details in defining the spheres of powers, while that of the United States is much shorter and limited to general principles. The latter is supreme, and is, in reality, the best example of a supreme constitution. In Switzerland the federal legislature is supreme, not the constitution.

III. A Supreme Court

De Tocqueville believed that "federal government stands in greater need of the support of judicial institutions than any other."² The enforcement of the national resolutions necessitates a national judiciary to make it effective. The constitution, without the support of a federal judiciary would remain "a dead letter."³ Dicey, in his turn, emphasized the importance of the legal system and the reverence of law for a federation to flourish. He concluded that "federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law."⁴

When conflicts arise between the union and the member states as to the division of powers, the federal judiciary is most

1. Wheare, op. cit., p. 56.

2. Tocqueville, op. cit., Vol. I, p. 140.

3. Ibid, p. 151.

4. Dicey, op. cit., p. 175.

needed, because the last word in such conflicts should not rest with either parties, but with a body above the interests of both and which is by necessity the Supreme Court. The Supreme Court, has, however, a much larger influence, and a more serious duty than that of settling disputes either between the central and member governments or between the latter, and that function is to interpret the constitution and the ordinary law. Through this interpretation, the scope of the national government may be extended so as to deal with new problems and to keep pace with evolution. The influence exercised by the Supreme Court in this way, though imperceptible and slow, is of great importance.

The position of the federal judiciary is different from one federation to another. The United States presents the best judicial system. Side by side with State Courts, there exists a complete federal judiciary which is independent by itself with no relation whatsoever with State Courts. The case in Canada is diametrically opposed; no particular federal courts exist; "Canada has one set of courts and one staff of judges." Australia is better than Canada, but less perfect than the United States. There is a supreme court called the High Court of Australia, but, in the same time, state courts have jurisdiction to deal with cases of federal character. In Switzerland a Federal Tribunal is provided for, but the power to interpret the constitution is denied to it and vested in the Federal Assembly.

Mill, agreeing with Tocqueville, asserted that the beneficial working of a Court of Justice necessitates that it abstains

from deciding on a law which is still in the abstract. The Court should wait until a case, involving the point in dispute, is presented to it "from which arises the happy effect, that its declarations are not made in a very early stage of the controversy; that much popular discussion usually precedes them; that the court decides after hearing the point fully argued on both sides by lawyers of reputation."¹ The federal judges should not only be intellectually pre-eminent and superior, they should also be above private interests or partial feelings. Tocqueville went further and asserted that the federal judges "must not only be good citizens and men possessed of that information and integrity which are indispensable to the magistrate, but they must be statesmen."²

In fact, the federal judiciary is of peculiar importance to the successful working of federalism. Its normal functions are those of settling conflicts between states or between them and the union, of interpreting the constitution and of deciding upon the constitutionality of state laws. In certain federations they may be less, in others more.

"The main pillar of the federal state", as Mill put it, "was the highest confidence and the fullest reliance on the supreme court of justice for federal functions."³

When this confidence is lost, it is usually the sign of a perverted federalism. The aggression of Premier Malan's government on the Supreme Court of the Union of South Africa with the

1. Mill, op. cit., p. 302.

2. Tocqueville, op. cit., Vol. I, p. 152.

3. Mill, op. cit., p. 303.

consent of the legislature last month, clearly shows that the conditions of the country are not ripe enough for federalism.¹ The lack of respect to the federal judiciary is a denunciation of the federal principle.

IV. A Two-Party System

It is important in a federation that political parties should all embody the national spirit. No one must represent or defend sectional interests because national unity would then be lost in the struggle of various elements. Political parties should cut across boundary lines, religious, racial or linguistic divisions. If voting is carried along these lines, no harmony may be expected in the federal organization and the result would be a collection of separatist tendencies. "The Swiss constitution has been supremely successful only because the representatives of the cantons think themselves primary as Swiss."²

It is also desirable that a two-party system should prevail in a federation. By this we mean the existence of two main parties without excluding the possibility of having other minor parties. When two big parties strive for power, sectional interests are generally fused into wider programs. They lose their particularism as do sources when joining the river. In a multi-party system regional interests find easier ground for asserting their claims. In the United States, the two-party system

1. The Parliament approved Malan's measures on May 24, 1952.

2. Jennings, op. cit., p. 20.

has been of great meaning to the successful working of federalism. The Democratic and the Republican parties differ in many respects, but not in their conception of the national supremacy of the Union. "If there is one single factor which can be selected to explain why, as I believe, the government of the United States is the most successful federal government in the world, it is the existence of this two-party system which provides a unifying influence through the whole framework of government."¹

V. A Bicameral Legislature

A bicameral federal legislature is obviously necessary in each federation, although there is no evidence that the federal system works badly without it. It is, however, a guarantee for the good working of the system. One house, the lower, represents the people as a whole, and the upper house is devised to represent the component members of the federation. The senate, or upper house, as advocated by Mill,² is the expression of the ideal plural representation and the securing of the authority of intellect in politics.

While members of the lower house are elected according to the population of each region, the states are usually equally represented in the senate. This is provided for to give some security to the smaller states that the federal system will not be exploited to serve the interests of the larger states. "Unless

1. Wheare, op. cit., p. 90.

2. Mill, op. cit., p. 306.

there is this feeling of security and unless there are the checks and obstructions which such a second chamber provides, it may be impossible to initiate a federation or to work it successfully."¹ We have seen that Prussia enjoyed a supremacy in the senate or Bundesrat (of Imperial Germany) in that she was represented by seventeen members, when the next state in number - Bavaria - had only nine. In that Bundesrat fourteen votes could bar any constitutional change, and we can see how the unequal representation of the states has turned the federation to be the servant of Prussian desires.

In the other four federations, the part-states are equally represented in the senate. But the way of election and the tenure of office are not the same. In the United States a uniform law of election is followed in all the States, with the same qualifications required from the senators, and for an equal term of office. In Switzerland each canton is free to apply its own requirements for senatorial elections and for the number of years that it decides. Again, the powers of the Senate in the United States are many and important; those of the Swiss Council of States are limited and secondary. Australia stands in mid-way between the two: its upper house is neither as strong as the American Senate, nor as weak as the Swiss Council of States.

The federal legislature of the United States, Canada and Australia - with both chambers - does not have the last sovereign word. Its supremacy is limited by the Constitution and by

1. Wheare, op. cit., p. 93.

the judicial interpretation thereof. It cannot enact laws if declared by the Supreme Court unconstitutional. It is otherwise in Switzerland where the Federal Tribunal cannot challenge the authority of the federal legislature or decide on the constitutionality of its legislation. All laws enacted by the Federal Assembly are treated as valid.

The difference of authority enjoyed by the federal legislature from country to country, and by the second chamber in particular, does not, in any way, change the belief in the necessity of a bicameral system. When the Swiss were drafting their constitution of 1848, both Centralists and Federalists were in favour of a unicameral system; the former asking for elections to be according to population, the latter according to states. The necessity of reconciling their diverging claims drove them to adopt a bicameral system, a system alien to all their national traditions.

VI. No Right of Secession

The only so-called modern federal government that provides in its constitution for the right of its members to secede, is the U.S.S.R.¹ This right is left to those "autonomous" parts situated at the borders of its frontiers because even if the parts situated in the heart of the country were allowed to secede, they would have nowhere to go. But the exercise of this power is least likely to be permitted at all and remains a matter of theory like

1. Article 36 of 1936 Soviet Constitution.

other features of the Soviet constitution.

In federal constitutions, the question of secession is not usually mentioned. It has been asserted, however, that neither the general government acting alone, has power to expel a member state, nor a regional government, acting alone, has power to secede from the union. Among the federations that we studied, only two of them were faced with the problem of secession. In one of them, the U.S., it took the path of violence and resulted in a Civil War that lasted for several years. In Australia, on the other hand, it manifested itself in a peaceful petition presented to the United Kingdom Parliament asking for the right to secede. In both cases, the attempt has been turned down, and the members that claimed secession live today, side by side, in the federal union as of before.

It is not, therefore, necessary to prohibit secession when drafting the constitution, nor is it sometimes possible. Circumstances in 1787 would not have allowed the inclusion of such a clause in the American constitution. What is important is the readiness of the federal forces to suppress any secessionist movement when this measure is the only solution left.

We must, here, distinguish between the right of nullification and that of secession. The former does not claim separation from the federation as does the latter; it simply gives the states to choose which federal laws to obey and which to ignore. A state may remain a member of the federation and at the same time use the right to nullify the laws of the general government. "The

right to secede does not make the general government the agent of the states as does the right to nullify; on the contrary it recognizes that the general government is to be either co-ordinate with a state government within the area of the states, or it is to have no connection with it."¹

Nullification, however, ultimately leads to secession. When the right to nullify is denied to a state, it will seek to secede in the last resort. That is exactly what happened in the case of South Carolina between 1830 and 1860. The claim to nullification has already been known in the United States before that period. As early as 1799 the Kentucky legislative passed a set of resolutions proclaiming the right of states to nullify "unconstitutional acts of Congress."

Nullification and secession, although distinct, cannot be separated, because the one leads to the other.

When one considers the matter from the point of view of logic or ethics, he gives to the member state full right in nullifying laws disadvantageous to it, and to secede from the union whenever it pleases. But from a political or statesman point of view, these rights are inconsistent with good federal government. The Soviet provision for the right of secession - although theoretical - is unjust; because it depends upon the strike of chance, whether the territory is situated at the Soviet frontier or not. And on the other hand it is wise to ask ourselves the same question that the Soviets faced: where would the locked parts go if allowed secession?

1. Wheare, op. cit., p. 92.

The conclusion seems to be that no member may unilaterally decide to secede, nor may the union unilaterally expel a member, regardless of any geographical situation.

VII. Division of Powers

This question is of the utmost importance in the organization of a federal system, and one of the main pillars on which the success of federal government is based: how to divide powers between central and member governments?

A. Opinions of Authors on the Subject:

James Bryce maintained that federalism is the balance between the centrifugal force of state rights and the centripetal force of the federal constitution.¹ Federalism, from this angle, is the intermediate organ between these conflicting forces, and the guarantee of their harmonious cooperation.

He divided powers into five categories according to the particular nature of federal government:²

1. "Powers vested in the national government alone."
2. "Powers vested in the states alone."
3. "Powers exercisable by either the national government or the states."
4. "Powers forbidden to the national government."
5. "Powers forbidden to the state governments."

1. Bryce, *Studies in History & Jurisprudence*, See Vol. I, pp. 260 and 300.
2. Bryce, *The American Commonwealth*, Vol. I, p. 314.

Besides the usual division of powers into "external" and "internal", Sidgwick conceives of another classification:¹

Firstly, "matters external to the parts but not to the whole - matters that concern the mutual relations of the parts" - (like trade among the member states) should be included in the province of the common government.

Secondly, "matters that must be admitted to be strictly internal to each part" but of serious common interest to the whole (such as currency, patents, copyrights, etc...) should also be included in the sphere of the common government.

In the third place, matters related to the foreign relations and the control of military forces and defence, should be naturally confided to the federal authority.

"It may further be noted that the federal character of the whole state becomes more marked if the powers of the common government are defined, while those of the partial governments are left indefinite in the constitutional division; so that the residuary powers belong to the part-states."²

In dividing the affairs of the state, Waits assigned to the federal government the following activities: foreign affairs, commercial affairs, transport, railways, shipping and canals, communications, post-services, and universal rights such as patents and copyright. All other internal affairs are left to member states, including "what the state carries out because of the higher duty to promote the life of mankind in its sphere - church, sciences

1. Sidgwick, op. cit., pp. 533 and 534.

2. Ibid.

and so forth."¹

Streit confines the rights to be given to the Union to the following:²

1. "The right to grant citizenship."
2. "The right to make peace and war, to negotiate treaties and otherwise deal with the outside world, to raise and maintain a defence force."
3. "The right to regulate inter-state and foreign trade."
4. "The right to coin and issue money, and fix other measures."
5. "The right to govern communications, to operate the postal service, and regulate, control, or operate, other inter-state communication services."

Woodrow Wilson had a clear and deep perception of the issue. He said: "Approached at not as a theoretical question of federal distribution of powers, but as a practical question, the principle to be adopted must be based on the actual circumstances of national life; in other words the determination of whether a particular matter should be included in the federal or state powers must be reached by an adequate analysis of the life of the nation."³

We shall not go again over the division of powers in the different federations because this problem has been covered, in some detail, in the preceding chapters. We may, however, repeat that there is general agreement among them all as to include matters of general concern in the sphere of the national powers. The test

1. Mogi, op. cit., Vol. I, p. 383.

2. K. Streit, Union Now, p. 179.

3. Woodrow Wilson, Constitutional Government in the U.S., p. 197.

of whether a matter is of general concern or not is not agreed upon by all of them in a uniform way. Among the powers that are definitely national, we mention foreign relations, war and peace, military matters and defence, foreign trade, currency, and the like.

B. Residual Powers:

It has been discussed at length whether the residual powers should be vested in the member states or in the national government. Some people went so far as to deny the name of federation to a state which gives the residuary powers to the central organ.

From the historical formation of the federal government, one is inclined to maintain that these powers should be left to the individual states because they were older than the union and they have right to exercise their powers, except what has been expressly denied to them and vested in the federation. We may consider the formation of a federation as the process by which the individual states have given up an amount of their powers and sacrificed some of their rights for the sake of a common good in return in consequence thereof. As such, the states have a righteous claim to the residuary powers, and in fact ^{do} exercise these powers in the United States, Australia and Switzerland.¹ The Dominion of Canada is the only true federation that locates these powers with the central government and has been, on this basis, denied the

1. Australia gives 35 matters to the federal legislature.

name of true federation by some people. But it is the practice of government in, and the historical traditions of the Dominion, that give confidence in its federal system because no government who emphasized unitary tendencies, was allowed to hold power for a long time. The fear is that when the residual powers are given to the union in a country which lacks the force of traditions that refrain the government from centralization, these powers will be used to concentrate the whole policy of the federation in few hands.

The main objection to allocating these powers to the states is that some day, a new function may arise which may be of a common concern to the whole nation, and it belongs ipso facto to the states. Aviation was such a subject and is still the cause of controversies. It needed a constitutional amendment in Switzerland (in 1921) to give the power of legislation over aerial navigation to the central government. In Australia this power still belongs to the separate states, and much time and effort have been wasted in this state of affairs.

"The aim must be to get an exclusive list for the general government which contains as many as possible of the important subjects of general concern and to hope that if any new subject of general importance arises, the need for general control will ensure that it will be handed over to the general government."¹

C. Concurrent Powers:

If the division of powers were confined to the enumeration

1. Wheare, op. cit., p. 79.

of certain functions as belonging to one agency, and the residual being left to the other agency, the matter would have been very simple. But, far from being so simple, the division of powers must make provision for a wide range of functions which belong, at the same time, to both sets of governments, and do not wholly belong to either. These powers are called "concurrent" because they are under the jurisdiction of both authorities. An example is usually found in taxation, direct taxation belongs mainly to the states, while indirect taxation is regulated by the central government. In other "concurrent" powers, the states retain the right to legislate over them, as long as the federal government does not exercise its rights in this sphere. When it does, the provincial or cantonal legislation is overruled by the national power.

The Constitution of India of 1935 referred to them in this way: "Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a central or provincial legislature, and for which, though it is often desirable that provincial legislation should make provision it is equally necessary that the central legislature should also have a legislative jurisdiction to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial efforts, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province."¹

1. Ibid, p. 83.

Concurrent powers were enumerated in the Weimar Constitution in articles seven, eight and nine. Police force is usually subject to concurrent legislation, banks and so forth.

By "concurrent" we do not only mean concurrent legislation. We include all powers whose legislation, administration, control, or regulation is not exclusively vested in one agency. On this premise hunting, fishing, lotteries, the supervision of the Alpine roads, and many other matters are "concurrent" in Switzerland. "But if there is to be federalism, one condition must be fulfilled. There must be some matter, even if only one matter, which comes under the exclusive control, actual or potential, of the general government, and likewise under the regional government. If there were not, that would be the end of federalism."¹

D. Separation of Powers:

The separation of powers is devised for federal government when weak government is desired. It is a guarantee that unless strong popular pressure is behind a policy, that policy has a small chance of being carried out.

A country where powers are separated is the United States of America. The executive there, directly elected by the people, does not depend upon the legislature for remaining in office, nor does it sit in Congress. It is only occasionally that the President sends addresses to Congress asking its approval on money expenditure. The judiciary is independent from the other

1. Ibid, p. 79.

two branches and supreme in the sphere allotted to it. The decisions of the Supreme Court are not impressed by either. The judges are completely independent, except in so far as they are appointed or may be relieved by the other authorities.

Thus, federalism in the United States with its powers separated, is a restraint against centralization. The federal principle is so deeply rooted in the American history and political life, that Petrie believes in the impossibility of replacing federalism by unitary government in the United States, without shaking the very basis of democracy there: "If a day comes when all effective power is centered at Washington, the end of democracy in the United States will be at hand."¹

The test of whether separation of powers is advisable for a federation or not, depends upon the strength of the system in a particular country. If it is weak, there is no need of weakening it furthermore; if it would otherwise be stronger than necessary, separation of powers would serve a useful federal purpose. This is the case in the United States of which Laski says: "The American system, in its ultimate foundations, is built upon a belief in weak government."²

VIII. Federal Finance

The life of every government depends upon its financial sources, as human body depends upon daily food. In a federation,

1. Petrie, op. cit., p. 205.

2. Wheare, op. cit., p. 86.

the two governments - central and local - must possess sources sufficient enough for their subsistence. To quote the words of the Federalist: "It is, therefore, as necessary that the state governments should be able to command the means of supplying their wants, as the national government should possess the like faculty in respect to the wants of the union."¹ If one is dependent upon the other for finance, it becomes automatically subordinated to it. The sources should, therefore, be independent and preferably self-sufficient. The general government has hitherto controlled currency and customs revenue almost exclusively.

Taxation is a concurrent source of revenue. Indirect taxation goes usually to the federal treasury and is the means by virtue of which the general government carries out the duties prescribed to it in the constitution. Direct taxation is supposed to be left to the various states, but, in fact, the national government has exercised constantly increasing power in taxation, that a very limited prerogative is left to the member states. These latter have become more or less financially subordinated to the general government which has shared with them the control over direct taxation.

Grants are listed among the independent sources of revenue. To be so, they should be permanent and periodical, and should not depend upon the generosity of the contributing government. As finance has been greatly under the control of the federal body, it is natural that grants should lie on the shoulders of

1. The Federalist, op. cit., No. XXXI, p. 149.

this government. By this method, the federation can re-allocate the national wealth justly in the different parts. In granting the less developed areas, it merely takes from the wealthier and gives to the poorer. The effect of this process is a very happy one: it prevents the malcontent of the economically unfavoured members such as the cases of the Southern States in America and of Western Australia. Besides these obligatory grants, there should be occasional ones in case of an unexpected catastrophe such as the Missouri flood in the United States last month.

In a federation, financial resources cannot be dogmatically divided between the union and the parts and remain unchanged. Changing conditions must be taken into consideration, and the line of division should be readjusted consequently. The good working of federalism depends, in this matter, upon the right adjustment of the financial resources in a particular country for a given time and on the light of particular circumstances.

IX. Federal Economy

In all federations, economic life has been greatly controlled by the central government. All those previously described grant to the general government coinage, legal tender, copyrights and patents, currency, bankruptcy, emigration and immigration, etc... Other economic powers - which are not exclusively controlled by the central government - are shared with it, like navigation, railways, marketing. Banking is a concurrent power in the United

States and Australia only.

The control over trade, foreign and interstate, is given to the general government and has been, except in Switzerland, the cause of trouble and conflict. The tariff, as imposed by the union, has been considered unsatisfactory by some states and has been accused of operating in favour of others; Calhoun denounced it in these words: "The tariff, however distinguished, is but a tax on our process, to be given as a bounty, to the process used by the other sections. It compels us to take less in our exchanges with the rest of the world in order that the other sections may secure more in their exchanges with us ... it is thus our industry is discouraged, that theirs may be encouraged - ours spoiled and theirs may be protected."¹

The sections that usually complain from the tariff are the agricultural ones, and those which have their interests protected are the industrialists. The tariff system has been as important as to induce the complaining areas to claim secession. But the bad effect of the tariff may be remedied if the central government compensates the suffering sections by periodical grants, and by following an economic policy that would reallocate the division of population, industry and agriculture. Add to this that the continuous evolution of the separate areas may result in such a reallocation, and the discovery of new sources of production may alter the situation completely.

However great is the criticism against concentrating

1. Wheare, op. cit., pp. 128 and 129.

interstate trade in the union, there seems to be no other way of doing it. The complexity of economic life makes it necessary for the federal government to assume a greater degree of responsibility in this field.

X. Social Services

1. Education:

In countries where there is no uniformity of language and religion, the question of education presents many difficulties. In the first place the general government cannot and should not unify the system of education. In the second place, the diverse confessions may demand that there should not be religious teaching in the schools, or that, if there is, each confession must be taught by its own clergy. They even go as far as asking the government to maintain these denominational institutions.

Education, in Switzerland is entirely left to the cantons where each confession is guaranteed cantonal recognition and maintenance. Only one institution, the "Polytechnicum" is a federal one.

In the U.S.A. the intervention of the general government has not been, so far, direct in education. Its contribution has been financial; "more than one-third of the total expenditure on vocational education in 1941 was met by grants from the general government."¹

1. Ibid, p. 164.

in health matters should be considered basic and residual. Dominion activities should be considered exceptions to the general rule of provincial responsibility and should be justified in each case on the merit of their performance by the Dominion rather than by the Province. Mere importance of a service does not justify its assumption by the Dominion."

XI. Foreign Relations

The control of foreign affairs has been one of the factors which led to the formation of federal government. In all federations, the principle of federal control over these matters is recognized. No part-state is allowed to have relations with a foreign country except through the intermediary of the federal authorities. This measure is wise because the federation should have one foreign policy and should be represented as a unit in the international sphere. The last instance when a federation permitted to one of its members to have direct foreign relations was Bavaria in Imperial Germany.

But the defenders of state rights claim a certain share in the conduct of foreign policy. This share cannot be exactly defined, and it is sometimes defined ^{as} to a power of ratifying the treaties entered into by the union.

The most expedient solution to this problem seems to be an adequate control of both federal legislative houses over the executive. In this way the interests of the several component members are safeguarded.

But once the union enters into any agreement, it is obvious that it should possess all the capacity to fulfill its clauses without dependence on state consent.

War Power:

It was the need for common defense that brought about most federations into being. It is very natural therefore that this power should be given in its entirety to the general government in all federations. It is also a natural consequence of allocating the foreign affairs with the Union.

Tocqueville thought, "war renders the weakness of a government most apparent and most alarming; and I have shown that the inherent defect of federal government is that of being weak."¹ The facts, however, gave proof to the contrary. Federal government has assumed very large powers and acquired much strength either in case of war or in threat of war. These powers went sometimes beyond the limits of the constitutional text and manifested themselves in the economic field mainly. During the Civil War, President Lincoln suspended the habeas corpus and said in justification: "Was it possible to lose the Nation and yet preserve the Constitution."² In 1941, Franklin Roosevelt seized aircraft and shipbuilding companies. Last month (April 1952) came President Truman's seizure of the steel industry because of its importance in the American defense program.

1. Tocqueville, op. cit., Vol. I, p. 171.

2. Time Magazine, Vol. LIX, No. 16, April 21, 1952, p. 11.

All these examples show clearly that war, or the threat of war, lead a federal government to behave on a unitary line and to centralise power for the time being. It is therefore true to say that "the price of victory in war and the price of economic recovery are temporary unification. Peace and prosperity are in truth pre-requisites for the successful working of federal government."¹

XII. Flexibility

Marriot considers the rigidity of the federal constitution as a condition for the success of federalism.² But federalism has been criticised on the ground that it is too rigid and too conservative and cannot be easily adaptable to change and evolution.

Laski is aware of this criticism and says that there is, today, a "growing impatience with its rigid encasement, the ever insistent demand that the form shall be made equally elastic with the spirit."³

There are two channels through which changes may be brought about in federal government; one is legal, and the other practical.

The legal methods^{or} accomplished either by the amendment of the constitution or by the judicial interpretation of the constitution. The second method, although effective, is limited. In

1. Wheare, *op. cit.*, p. 254.

2. Marriot, *The Mechanism of the Modern State*, Vol. II, p. 409.

3. Laski, *Studies in the Problem of Sovereignty*, Appendix A, p. 275.

Dr. O.D. Skelton's words: "Courts may modify, they cannot replace. There are barriers they cannot pass. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another."¹

Each federal state has adopted a different way of constitutional amendment. In the United States it requires a two-thirds' majority in each House of Congress and a three-fourths' majority of States, or the approval of a three-fourths' majority on a proposal made by the Convention of two-thirds of the States.

The practical methods of change are usage and custom. An example of usage is the periodical meeting of the head executive of the general government with representatives from the regional government in conferences or the like. Custom has asserted itself in different considerations that an American President has, for example, to remember in assigning his Cabinet. He should see to it that sectional interests are represented conveniently.

Each federal state has been influenced by one of these several methods of change more than the other. "Constitutional amendment has been most influential in Switzerland, judicial review and governmental co-operation in the United States and Australia."² Canada has proved so far to be the most rigid.

1. Wheare, op. cit., p. 237.

2. Ibid., p. 251.

XIII. Federalism and Socialism

Federalism is faced in the modern state with a new problem: how to compromise between the local autonomy it gives to the component states and between the recent trends of socialism which necessitates planning. It is said that central planning means the determination of the whole economic life, and consequently of the cultural and political life of the whole territory. It is a question whether federalism may comply with the need to have a centralized national economy without losing its essential features, mainly the distribution of powers between federal and central organs. Herman Finer lists among the disadvantages of federalism that "there are governmental tasks which it does not succeed in doing, because, being the product of bygone decades, and even centuries, the distribution of powers resists the centralization essential to various modern large-scale economic and social needs."¹ This might be taken to mean that federalism can only take place in a capitalist state. Another such argument is that "since power over a man's purse traditionally is power over his will, the autonomy of the federal areas is, in practice, severely limited."²

This principle, however, suggests that federalism belongs to the past rather than to the future, and that it is not an efficient instrument to meet the needs of economic evolution. Modern

1. Herman Finer, *The Theory and Practice of Government*, p. 185.
2. Ranney and Carter, *The Major Foreign Powers*, p. 563.

life tends towards centralization, and if federalism is to present barriers in the face of this force, it will be classified as an outdated political organization.

The only state that describes itself as federal¹ and embodies the principle of central planning in its extreme is the U.S.S.R. In my opinion the federalism of Soviet Union is more apparent than real and we cannot therefore study the experience of the working of federalism with socialism in this particular case. A writer on the federations of Central and Eastern Europe, K. Schlesinger, presents the fact in another way. "There is," he says, "in the fundamental principles of the political structure of the U.S.S.R. nothing incompatible with true federalism, although its political record has certainly so far supplied more opportunities for realizing the centralizing than the decentralizing aspects of this political system."²

But the untrue application of the federal principle in Social Russia, should not lead us to the conclusion that federalism is compatible with the capitalist state only and not with state socialism.

We are quite aware of the fact that federalism was first born and applied in capitalist societies, but to confine it in this sphere, "the term would certainly loose all practical connection with the actual social facts of our time."³

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1. Article 13 of the 1936 Soviet Constitution.
 2. Schlesinger, Federalism in Central and Eastern Europe, p. 413.
 3. Ibid, p. 406.

It is therefore a vital necessity for the dynamic permanence of federalism to adapt itself to the new forces behind social life, such as planning and centralization. I believe that socialism and federalism could co-exist side by side if each system respects the fundamental features of the other. The central authority can control the economic matters of general concern, leaving, at the same time, questions of local concern to the regional authorities. Concentration of power in this way is not only inevitable to modern society, but also in conformity with the federal principle which gives to the general government power over general matters and to the regional governments power ^{over} the regional ones.

The future of federalism, therefore, is bound with its elasticity. I believe that socialism is the dynamism behind the future of political organizations and that federalism will prove to be malleable enough to abide by this truth and to review its institutions on this light.

The main driving force of the new federalism is "not only the general change in political and legal theories, but the general need for federal control over the complexity of administration and the rapid progress of industry and commerce."¹

XIV. Views on the Demerits of Federalism

We have already pointed out to the criticism of federal government on the basis of its weakness. Laski defends it saying:

1. Mogi, op. cit., Vol. I, p. 201.

"Federal government may be weak, but it is weak only as other governments are weak - that is, in the degree to which it commits acts of trespass."¹ Sidgwick has a different opinion: "The inconveniences of a federal state are chiefly weakness of internal cohesion and diversity of localised legislation."²

Bryce classified the demerits of the federal system as compared with unitary government in the following points:³

1. "Weakness in the conduct of foreign affairs."
2. "Weakness in home government, i.e. deficient authority over the component states and the individual citizens."
3. "Liability to dissolution by the secession or rebellion of the states."
4. "Liability to divisions into groups and factions by the formation of separate combinations of the component states."
5. "Want of uniformity among the states in legislation and administration."
6. "Trouble, expense and delay due to the complexity of double system of legislation and administration."

Discussing the weakness of the federal system, Tocqueville compared federalism to "those exquisite productions of human industry which ensure wealth and renown to their inventors, but which are profitless in any other hands."⁴ He also named the complexity of the means used in federalism among the demerits. The division

1. Lasaki, op. cit., p. 275.

2. Sidgwick, op. cit., p. XXXI.

3. Bryce, The American Commonwealth, Vol. I, p. 341.

4. Tocqueville, op. cit., Vol. I, p. 167.

of sovereignty leads to legal friction, and federal organization is based on a "theory which is necessarily complicated, and which demands the daily exercise of a considerable share of discretion on the part of those it governs."¹

According to Keith, "one of the genuine defects of federal government is the loss of efficiency through the inability of any government to adopt a coherent plan for the whole of governmental activities and another is the friction engendered by the duplication of authority."²

Laski believes that the success of federalism is bound to a large extent with economic prosperity, and it is a criticism of capitalism rather than of federalism when he says: "A contracting capitalism cannot afford the luxury of federalism. It is insufficiently positive in character and does not provide for sufficient rapidity of action..."³

This is, however, to show that federalism should either take place in a prospering capitalism, or otherwise in socialism.

Another inconvenience of the federal system is the diversity in the legal systems of the component states. Only criminal law is usually uniform throughout the whole territory, but civil law and procedure may widely differ from one part to another.

These accusations are not groundless, but the answers to most of them are found in our conclusions previously stated.

1. Ibid.

2. Keith, op. cit., p. 444.

3. Ferguson and McHenry, op. cit., p. 145.

C H A P T E R VIII .

Towards An

A R A B F E D E R A T I O N

I N T R O D U C T I O N

The next chapter deals with the necessity of an Arab Union and tries to define that Union. The Arab League which is the only modern confederation - except if we define the Atlantic Pact and the United Nations as Confederations - cannot fulfill the needs of the age, i.e. centralization and planning. The inefficiency of the League is not, however, due to its organization as to the bad spirit in which it was carried on. This leads us to the conclusion that the conditions of the Arabs need reform, and not the Pact of the League. Inside the League, there are states very similar, and others widely different. It is therefore natural that states able to federate, should do so regardless of anything else.

The Arab World is much wider than the League, and we cannot discuss the plans of union except with some regard to all its parts, and with some considerations to the relations between these different parts. But the development of this subject requires a whole thesis, and that is why we are under the obligation of surveying the matter generally, and of limiting ourselves to the point where a detailed analysis should form the theme of another work.

The Need for an Arab Federation

"Neighbouring States of the second rank inevitably become confederates or enemies...."

(Report of the Committee of the Victoria Assembly, drafted by Gavan Duffy.)¹

To trace the history of the organized Arab movement, we have to go back to the first Arab society al-Ikha al 'Arabi al-Uthmani (the ottoman Arab fraternity) in 1908 at Constantinople. Another Arab society was al-Muntada al-Adabi (the Literary Club) founded in Constantinople also in 1909. Two other secret societies were established: al-Qahtaniya (in 1909) and al-Fatat (the Young Arab Society) which was founded in Paris in 1911. Other important societies were: the "Ottoman Decentralization Party" founded in Cairo towards the end of 1912, and a society of Army officers only formed in Constantinople in 1913. Among these various societies, no one envisaged the national autonomy of the Arab lands in an Arab political entity. Their claims could be summarized in the next points: 1. The real equality of the Arabs with the other races of the Empire. 2. To adopt Arabic as the official language in the Arab Provinces. 3. To bring about the internal autonomy of the Arab Countries in a Union with the Ottoman Empire, similarly to the Austro-Hungarian Empire,"so as the Ottoman Sultan in Constantinople should wear, in addition to his own Turkish Crown, the Crown of the Arab kingdom."²

We have to wait, therefore, till the Arab Revolt in 1915 to witness the first glimpse of Arab national consciousness. The Hussein-Mac Mahon correspondence is the first document of

1. Marriot, the Mechanism of the Modern State, Vol. I, p. 233
2. Antonius, the Arab Awakening, p. 110.

the Arab aspiration to independence and unity.

We have, so far, used the term Arab to mean the Eastern Arab World, i.e. Syria, the Hachemite Kingdom, Iraq, Lebanon, and the States of the Arabian Peninsula. Egypt and the Sudan, although being a part of this Eastern Arab World, were under a particular status which kept them away from the events that took place before and after the first World War. There is also a "Western Arab World" which includes Libya, Tunisia, Algeria, French and Spanish Morocco.

We shall use the term "Arab" in the following pages to indicate the Eastern Arab World and Libya, except when provided otherwise. By the "Arab Fatherland" we understand, however, all those countries where Arabic is the mother tongue, including semi-independent and occupied areas (like Kuwait and Tunisia) together with the Arab Irredenta: The Sanjak of Alexandretta and Palestine.

The Arab wishes as to a post-war settlement were clear enough: the establishment of a State from geographical Syria (i.e. Syria, Lebanon, Palestine and the Jordan) with absolute political independence, and "that there should be no dismemberment of Syria, and no separation of Palestine or the coastal regions in the west or the Lebanon from the mother country; and that the unity of the Country be maintained under any circumstances."¹ These claims, together with that of the independence of Iraq and the economic freedom between these two countries, were the main resolutions taken by the General Syrian Congress meeting

1. Ibid, Appendix, p. 441

in Damascus, July 2, 1919. Not only Arabs were aware of this necessity, but the King-Crane Commission (August 28, 1919) gave recommendations in conformity with Arab hopes: "We recommend that the unity of Syria (meaning Geographical Syria) should be preserved... The territory concerned is too limited, the population too small and the economic, geographic, racial and language unity too manifest, to make the setting up of independent States within its boundaries desirable... The country is very largely Arab in language, culture, traditions and customs."¹

The decisions taken by the Great Powers - at the Versailles settlement - were very different from the Arab expectations:

1. The Fertile Crescent and the Arab Peninsula were separated. The Fertile Crescent itself, was also divided into two zones: Iraq and geographical Syria.

2. Geographical Syria was divided into two areas: one, the northern, under a French mandate, and the second, the Southern, under a British mandate.

3. Each zone was also subdivided: Lebanon was enlarged to become a separate state, the Jebel Druze and the Alawis were organized, each, in an autonomous government, and all under French direct control.

4. The mandate territory under Britain was also divided into Palestine and Transjordan.

The least that can be said of such a deliberate and artificial action is that it intended to create barriers in the

1. Ibid, p. 445

way of Arab unity so as to weaken the Arabs in their strife for independence and liberation. The intention of its authors was to divide the Arabs in such a way that it would be easier to smash their national energies and exploit their wealths peacefully. The natural result of this imperialist policy was that "the separate development of each territory, produced in time differences of outlook, culture, and political loyalty."¹

The method was, however, only partially successful: the Iraq Revolt of 1920, the Syrian Revolt of 1925-26, the Palestine Revolt of 1936, cost the rulers a lot of men and munitions and proved the vitality of the Arab nation.

Many steps were also taken in the interval between the two World Wars to strengthen the ties among Arabs. Some of these efforts were treaties:

1. A Treaty of Friendship and Bon Voisinage between Transjordan and Saudi Arabia (July 1933).

2. A Treaty between Saudi Arabia and Yemen for regulating their differences in a friendly way (1934).

3. A Treaty regulating the differences between Egypt and Saudi Arabia (May 1936).

4. A Treaty of Arab Brotherhood And Alliance between Iraq and Saudi Arabia (April 1936).

5. Yemen adhered to the precedent treaty on April 1937.

Other steps towards Arab understanding were the popular and governmental Conferences, such as:

1. In December 1931, the meeting of a general Islamic

1. The Middle East An Economic & Political Survey, p. 31

conference was held in Jerusalem, and the "Arab Covenant" was drafted.¹

2. The Bludan Congress was called (Sept.1937) by the Damascus Committee for the Defence of Palestine.

3. "The Inter-Parliamentary Congress of the Arab and Islamic Countries for the Defence of Palestine" took place in Cairo in 1938. It is in this meeting that the Syrian delegate Farès El-Khourî proposed the plan of Greater Syria for the first time.

4. "The Palestine Conference" (or St. James Conference) was held in London by an invitation from Great Britain to the independent Arab States in 1939.

In the "Arab Covenant", decisions have been taken to fight the division of the Arab lands and struggle against imperialism in all its features. The safety of Palestine as an Arab land was the main theme of the other three Conferences.

To these treaties and Conferences should be added other factors which brought the Arab World closer: the revolution in transportation (automobile and Airplane), the rapid communication of ideas through the press and the radio, the use of the telephone and telegraph, the movies, all these innovations helped in bringing the Arab World together and in reducing the distanced between one place and another.

Proposals of Arab Unity:

Many proposals have been given to the solution of the

1. Refer to a pamphlet by C. Hourani, "Arab Unity", p. 3

problem of Arab Unity. Most famous is Nuri Said's plan, the Prime Minister of Irak for a long time. He had already "advanced tentative proposals to the British Government for an Arab Federation, and the very phrase, 'Arab League' had already been coined in 1939"¹. But his official note was presented in 1942, in the form of a Blue Book and consisted of the unification of geographical Syria into a unitary state and its union with Iraq in an Arab League.² He did not include the Arab Peninsula in that Union because it differed widely in its economic and political life from the rest of the Arab World. Nor did he include Egypt because it had particular problems of its own. The text of the Blue Book was, however, never published, although it is known that it provided for a League with a Council responsible for defence, foreign affairs, currency, communications and customs. But the Arabs did not trust Nuri El Said because of his friendship with the British and because the realization of his plan might have kept Egypt outside the Arab cause, and forever perhaps. He has also been criticized for differentiating between the Arab countries on the basis of the existing conditions in each of them, and for having considered these conditions as permanent.³

Another popular idea of union - not exactly a plan - was the widespread wish of an Islamic Unity to embrace all Islamic peoples - Arabs and non-Arabs - in a bond not clearly defined. This idea was built on the belief that co-operation among the Islamic nations is possible because of the common religious tie

1. Ibid, p. 8

2. See the Middle East, op. cit., p. 32.

3. See C. Hourani, Arab Unity, p. 8.

that links these countries.

The most fantastic proposal is the one published in Egypt and which was called the "Union of the Nile".¹ It was suggested that peoples living on the Nile Valley (Egypt, the Sudan, Ethiopia, Uganda and Eritrea) should form a single state as the nucleus for an Arab Union which, itself, will be enlarged into an Oriental Union including all Islamic states.

Birth of the Arab League:

Because of the role Egypt played in the Second World War, and because of her strategic position and her relative supremacy among the Arab states, she became the center of Arab activity. After private negotiations between Nahas Pasha, Prime Minister of Egypt then, and officials from the Arab countries, he convened a general Arab Conference which met in Alexandria from 25 September to 8 October 1944. To this Conference were invited representatives of the Governments of Egypt, Iraq, Syria, Lebanon, Transjordan, Saudi Arabia, and Yemen. Musa Al-Alami attended it on behalf of Palestinian Arabs. The result of this Conference was to lay down the Alexandria Protocol which was the root of the Arab League. The Pact of the Arab League was signed in Cairo on March 22, 1945.

The Protocol and the Pact:

But between the Protocol and the Pact, there is a difference in the text, and in the spirit. The League was in

1. Al-Mokattam, (Sept. 16, 1941)

fact the denunciation of the Arab hope (especially in the Fertile Crescent) to build a central state with wide powers.¹

A. The Pact emphasizes the "independence and sovereignty" of the various states while the Protocol is silent on this point.

B. The Pact also forbids member states to interfere in the regimes obtaining in other League States and pledges each state "not to undertake any action tending to alter that regime."² In the Protocol this provision did not exist.

C. The Protocol provided that "in no case would a state be permitted to pursue a foreign policy which could be detrimental to the policy of the League or to any of its member states." But this clause was omitted in the Pact.

D. Article III of the Protocol was also omitted from the Pact. This Article laid down the principle that the League would be a step towards closer ties of union between the Arabs and a stage in the way of unification.

The Pact of the Arab League shows, therefore, a clear denunciation of the soul of the Alexandria Protocol. The latter envisaged the Arab Nation, while the first turned to the states and governments. One believed in evolution, the other in stagnation."

Defects of the Arab League:

It is obvious that the Arab League has failed as an instrument for collaboration between the member states. Many

1. Refer to Y. Haykal, *Nahwa al-Wihdah al-Arabiyyah*, p. 115, to N. Faris, *Qhuyūm Arabiyyah*, p. 90 and to C. Hourani, *op. cit.*, p. 11

2. Art VIII of the League.

illustrations of its failure may be given:

1. It has, unjustifiably preserved the sovereignty of each member.

2. In respecting the independence of every state, it has cristallized the existing conditions in the Arab World.

What, therefore, was intended to be a stage in the evolutionary process, came to be a chain and a hindrance in the way of progress. It came to be, as N.A. Farès calls it, like "the iron moulds in which the Chinese keep their daughters' feet in order to keep them from developing."¹

3. One of the most important Articles of the Pact is Article IX which gives the States the right to "conclude such agreements between themselves, towards the realization" of closer ties. But events proved to be a violation of this Article. The Agreement of Common Interests between Syria and Lebanon was abolished and a period of economic hostility followed between the two countries. The Treaty recently concluded to end that hostility, is far from being satisfactory.

4. The so-called "Balance of Power" among the Arab States prevented the realization of any kind of union between two or more states.

5. The League gave to politics more importance than to economics. Some statistics of Inter-Arab trade shows the deficiency of its "Economic Commission": Iraqi exports to the Arab States is 11% only of its exportation, while its exports to England is more than 16%. Iraq, on the other hand, imports 3% from

1. N.A. Farès, Al-'Arab, al-Ahyā', p. 17

the other Arab States, and Imports 36% from England. The exports and imports of Egypt with the Arab world is not more than 1%. The average Inter-Arab States trade is around 8% of its general figure.¹

6. So many speeches were delivered on every occasion and sometimes without occasions, by the Secretarial of the League, boasting with the great achievements of the League,² while very few and unimportant deeds accompanied them.

7. A spirit of mistrust reigned among the delegates, and, accordingly, among the governments. King Ibn Saud is said to have described King Abdullah as "just a minor Ottoman official who has managed to get himself crowned King... and a secret ally of the Zionists". King Abdullah, in his Memories, described the Al-Saud as "a dynasty that rose to power on bloodshed and plunder."³

8. Most detrimental was the comedy played by the Arab League in the Palestine war; in these critical hours for the life of all the Arab nation, the League could not achieve a common policy, and could not agree on a common policy. "The same moment in which Israel was attacking the Egyptian Army in the Negeb without the help of any other Arab forces, in that same moment the Arab League was lying on its death bed."⁴

9. Many evils derived from Article VII of the Pact.

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1. A. Badre, the Economic Future of the Arab World. Lecture delivered at West Hall, March 31, 1952.
 2. The last one is found in Al-Misri, March 23, 1952, on the occasion of the seventh anniversary of the Pact's signature.
 3. The Middle East, op. cit., p. 89.
 4. M.J. Beyhoun, Kawafil al-Urubah wa Kawakibuha, Vol. I, p. 232.

which says that "Decisions of the League by majority (vote) shall be obligatory on those who accept them...". The result of this measure is to paralyze the activities of the League.

10) The Arab League proved to be impotent in face of crisis. In March 29, 1952, the Assembly of the League met in its sixteenth periodical meeting, but decided to adjourn the session because of the problems that the Arab World faces today, as if the League were supposed to meet for dinners and speeches.

It is convenient in this respect to quote a part of the most courageous note presented by a Delegation to the Secretariat of the League: "Every^{one} knew that the spirit which reigned over the League was not in conformity with the realities of the age, the rapidity of evolution and the advance of the national will. It did not follow the constructive way in any economic, military, educational, or social field. The Arab individual did not feel its presence because it did not satisfy any of his necessities or revive any of his hopes in evolutionary progress."¹

Necessity of Change:

It may have been true that the Arab League, when founded, represented the highest degree of unity obtainable among the Arab States. But this degree is no more sufficient. A factor, responsible to a great extent for the failure of the League is the bad spirit in which its Pact has been executed. Although the

1. A Note presented by Nazem El Koudsi, Prime Minister of Syria, to the Secretariat of the Arab League on Jan. 23, 1951.

Pact provided for settling disputes through arbitration, no dispute was settled in this way. And although Article XIX provided for the amendment of the Pact "in order, especially, to render the ties between the States firmer and closer, to found an Arab Court of Justice...", no amendment was carried on, or even proposed.

The Arabs are today faced with vital and serious problems. As long as they remain disunited, the sum of their conflicting decisions has no weight in World Politics. From the military point of view, they are not ready to encounter any danger, not even the Jewish danger threatening their frontiers, their economy and their security. The continuity of the existing relations among Arab States does not promise strength, nor could it succeed more than it did in the past.

The elements of union are potential in the Arab World and need is felt to put them into actuality. The Arabs are united by: religion, language, history, traditions and aspirations. But although Arab nationalism does not stop short than the union of all Arab lands, from the Atlantic to the Persian Gulf, to Taurus, the statesman has to take certain conditions into consideration which necessitate several steps to reach that ultimate goal.

Before going into the study of the next steps that should be taken in this concern, I shall refer to the opinions of certain Arab Political Parties on the matter.

1

Arab Unity as viewed by some Political Parties:

A. In Syria:

1. The Peoples Party: believes in the formation of a federation between Syria and the Arab lands. It also believes in using the Arab League to attain; a. the unification of foreign policy and foreign representation. b. the unification of the army command and organization. c. the unification of legislation. d. the consideration of the Arab States as one unity in custom duties and the unification of a planned economy. e. the ^{canceling of} pass-ports between States members of the League. g. the unification of Arab currency and the establishment of a common bank of issue. ²

2. The Renaissance Party. Among the Basic Principles of the Party that the Arabs are a nation that has a natural right to live in one state...

The Rebirth (or Renaissance) Party therefore considers:

a. The Arab Fatherland is an indivisible political and economic unity and none of the Arab lands could fulfill the conditions of life if isolated from the other.

b. The Arab Nation³ is a cultural and spiritual unity, and all the divergences that exist between its sons are temporary and superficial and will vanish away with the awakening of the Arab Conscience.

B. In Iraq:

1. The Independence Party: seeks to strengthen the Arab League and to make it a factor in the construction of a federal

1. Refer to S. Al-Husari, Al-'Urūbah, Part 4
2. Ibid, p. 151
3. Ibid, p. 152

system among the Arab States.¹

2. The National Socialist Party; believes in the organization of a political federal union embracing all of them. That union, however, should start with those countries which agree to adhere to it, and should be affected through the Arab League.²

C. In Lebanon:

The League of National Action; considers the Arab nation as one single body, where every organ fulfills a particular function which is, alone, a standard for its value. The League also believes that the Arab countries in their entirety form one single Fatherland.³

I have named these parties, not because they are the only ones that believe in Arab unity but because they have embodied this belief more clearly in their programmes than others. Several other parties are as much Arab nationalists as those named in the various Arab countries, although they are not as much precise.

Factor of Unity and Disunity

It is an important historical fact, as Marriot observes, "that a Staatenbund frequently preceded, in the ordered process of constitutional evolution, the more highly developed Bundesstaat. Examples of this truth are Switzerland, the U.S.A. and Germany.

The analysis of factors making for unity and of those making for disunity in the Arab World, is necessary before we

1. Ibid, p. 161

2. Ibid, p. 164

3. Ibid, p. 170

4. Marriot, Mechanism of the Modern State, Vol. II, p. 392.

consider the possibility of forming a federation out of the League or federations inside the League.

It might be asked how can we talk of such plans when the Arab states are even unable of carrying on the loose relations prescribed by the League. My answer is that we are not only concerned in this study with what "could be" or "is likely to be in the near future", but with what "ought to be" and with the Arab unity as seen by one of the believers in Arab nationalism.

Economically speaking "the Middle East as a whole is self-sufficient as far as cereal production is concerned."¹ The Nile Valley produces cotton, as well as grain and vegetables, the plains of geographical Syria produce mainly grains, its coasts fruits.

As far as industry is concerned, the Arab countries are still very poor because of the lack of raw materials first and second because imperialism has followed the policy of keeping the Arab lands mainly agricultural in order to remain a market for its exports. Another reason is the lack of markets; the Arab countries impose customs duties upon goods imported from another Arab state and that fact stands in the way of establishing big industrial firms in the Arab countries. If these barriers were taken off, it would be possible for the industries - which are on a small scale now - to develop in each state according to specialization: instead of importing Indian cotton or Italian sugar, for instance, the Arab States would import these goods from Egypt where these industries would grow. A big firm to

1. The Middle East, op. cit., p. 65

supply the Arab World with soap would be established in Lebanon for instance, and so on. "If co-operation in the field of industry and trade is to develop successfully, the efforts of each of the states in the direction of industrialization will need to be co-ordinated so that the products of one country do not compete with those of the others."¹ It seems therefore necessary for the prosperity of all Arab States that co-operation in the economic field should replace hostility and competition. The actual figure of inter-Arab trade is far from being satisfactory. (Statistics have already been given.)

This economic factor, added to the military, and political ones that we mentioned before, are the main interests that invite the Arab countries to a kind of Union in which their potentialities find their expression, in which the public opinion will be reassured and where great plans in education, economy, health and social services may be carried on.

The obstacles to an Arab Union are of two categories: external and internal. The external obstacles result from the imperialistic anxiousness to keep the Arab States divided, and consequently weak, because it is easier to impose the foreign will on a diversity of regimes rather than on a large unified block. This policy is apparent in the declarations of the Western Powers to keep the status quo in the Near East. When a Western Power is a protagonist of an Arab Unity like Greater Syria, it is in the hope of putting this entity under the throne of a close friend to this Power.

1. Ibid, p. 77

The internal obstacles are diverse: local nationalisms, racial and religious minorities, differences in the scale of social and economic development, the Royal dynasties, diversity in the degree of independence of the states, the differences in size, wealth and population, the wideness of the area, and most dangerous of all: the inability of the peoples to impose their will.

A rapid study of these factors will throw light on the conclusions that we shall deduce as to the form of the Arab Union.

1. Local Nationalisms:

In several parts of the Arab lands, some sections of the population are protagonists of regional nationalism. In Lebanon the Al-Kataeb believe in Lebanese nationalism based on a so-called phoenician civilization. The Nationalist Syrian Party - active in Syria and outlawed in Lebanon - believes in a Syrian Nation and a Syrian culture (including geographical Syria, Iraq and Cyprus). Their main object is to fight Arab Nationalism which is still connected with Islam to a large extent. In Egypt, there are those who speak of Egyptian Nationalism and of Pharaonic civilization. These ideologies, however, do not include a large part of the population in any community.

2. Racial and Religious Minorities:

The population in the Arab Fatherland is racially and

religiously heterogeneous. All sects of Christianity are represented and, Sunnis, Alawis, Druzes, Koptis, Chias etc... all live side by side in the Arab World. Moslems, however, represent a heavy majority in all parts, except in Lebanon where Christians and Moslems are almost equally represented. Racially there are Circassians, Turkomans, and especially Kurds in Northern Iraq. Separatists tendencies have existed among these Kurds who have been promised an independent nationaldom by Soviet Russia.

Social and Economic Divergences:

Social conditions vary between tribal life and traditions in the Peninsula and between modernized societies on the European pattern in Cairo and Beirut. The same can be said of economic life: "in the Peninsula, "Western budgetary and fiscal practice are practically disbursements for the King's household and for governmental administration".¹ In Saudi Arabia the Koran and the Charīa are the law of the country.

Royal Dynasties:

Some of the Arab States are governed according to a republican form of government, others according to constitutional monarchy, to absolute monarchy, to Princedom etc... The study of German federation has shown us that the multitude of regimes in a federation is to a certain degree responsible for its failure. To this should be added the fact that ruling Kings or Princes

1. The Middle East, op. cit., p. 92

would not abdicate their thrones willingly to be merged into a union.

Sovereignty of the States:

Only Syria and Lebanon are apparently and theoretically free from foreign interference. Actually, however, they are economically interdependent on the West and have many concessionary companies on their territories. The other countries are either bound by political or military treaties with Western Imperialism. Egypt is the first country to renounce its Treaty with Great Britain.

Size, Wealth and Population:

Oil is the primary income in Saudi Arabia and this factor cannot be taken as permanent for the future. Transjordan is not self-sufficient and has to live on periodical loans from Great Britain. The Yemen is poor. Egypt is a rich country, so is Syria, but neither is fully exploited. Lebanon lives on trade mostly. Besides the huge territories of Arabia, we find tiny Lebanon and while the population of Egypt is about twenty millions, that of Syria is about three.¹

Wideness of the Area:

It is not possible to imagine this area, intersected by big deserts and long distances, to be ever united in a unitary democratic state and administered from one center. Nor would it

1. Statistics are found in Ibid, p. 475

be possible to apply a federation to the whole area because of the dislocation of its parts and the diversity of its conditions. It is true that the United States of America is a huge country and federal all the same, but comparison is out of place because the Arab lands are geographically dispersed and they lack the compactness of the American continent and its shape.¹

The Arab Will:

Due to ignorance, there is no general Arab conscience, and consequently, no general Arab Will. But if we take certain parts of the Arab countries we find that there is a will, and that this will is not free to express itself. I can assume that if a free referendum is held among the inhabitants of Syria, the Hachemite Kingdom and Iraq, the peoples of these three political unities would vote for the unity of these three bodies into a form of a common political organization which is a federated state. But the people are not allowed to choose for themselves as long as the ruling regimes are not ready to give up their seats and their thrones. The same is true about Egypt and the Sudan where the British - and not the ruling dynasties - are against a free referendum.

A Plan for Union

"The Arab States are not bound to follow the example of any existing federations. They can find in constitutional law enough malleability so as to adapt a new form of federation,

1. Only Brazil is an exception. Its democratic history was, however, broken by a dictatorship between 1930-45.

a form in conformity with their national history and with the psychology of the people."¹

This is true, but it is also true that ^{they} may profit from the lesson learnt by other nations in history. It appears from what has preceded that an Arab federal state is not practical. What I deduce is the necessity of forming several Arab Federations and to join them in an organization similar to the Arab League. Those countries with common denominators should be grouped into federations, and these latter into a Confederation.

The logical procedure would be to include Syria, Lebanon, Jordan and Iraq into one federation, Egypt and the Sudan into another, Saudi Arabia, Yemen and the other states of the Peninsula - as soon as they become independent - into a third federation, and Libya together with the other Western Arab territories - when liberated - into a fourth one.

The pre-requisite to the formation of all these federations is that the impulse to federation should come from a popular movement and not as a result of governmental manoeuvres. This presupposes the existence of true parliamentary democracy all over the countries concerned and of similar regimes. The Arab League failed because it was a League of governments not a League of peoples. Until, therefore, the people become politically aware of their needs and conscious of their good and able to impose their will, i.e. until the form of government becomes really popular, no federation should take place. The hereditary

1. Haykal, op. cit., p. 77

Arab rulers are not concerned with the interests of the people.

Except for the foreign obstacles, the Egyptian-Sudaneese federation is the one nearer in sight. The Western Arab Federation cannot be discussed before imperialism is abolished and federalism in the Peninsula has to wait for the awakening of people and their civilization. The only federation with certain probability in the near future is that of the Fertile Crescent. The particular ties between these countries, their contiguity, their similarity in social conditions, their security and a dozen of other factors make for federalism in this area.

The only obstacle seems to be the opposition of the governments. But these regimes are not ever-lasting, and no artificial force can stand in the way of the cycle of history. This federation should be the first stage in the Arab Commonwealth. Not only language history and interests are the same in these countries, but the same family reigns in Jordan and Iraq, and we often find relatives in the governments of Syria and Lebanon. The benefits that would be gained in such a federation are beyond limits: in military, industrial, financial and foreign affairs. Two objections may be given against this federation: A. the difference of level between certain parts of the region, and B. the particular status of Lebanon.

A. As to the difference of level between parts of the region (for instance between Lebanon and Northern Iraq) the best answer may be found in a statement given by de Tocqueville about certain Swiss cantons which became federated immediately after the book of Tocqueville. "In Switzerland," he says, "the difference"

between the civilization of the Canon of Uri and that of the canton of Vaud is like the difference between the fifteenth and the nineteenth centuries; therefore, properly speaking, Switzerland had never had a federal government. The union between these two cantons exists only on the map; and this would soon be perceived if an attempt were made by a central authority to prescribe the same laws to the whole territory."¹ This shows that the course of events may sometimes take a direction completely unpredicted. It should also be observed that such differences exist only between the extremes of this territory, because the average is very much similar in all parts.

B. The best argument that could be given in answer to the second objection is a quotation from the King-Crane Commission:² "Lebanon ought to enjoy a large measure of local autonomy. It has achieved a considerable degree of prosperity and autonomy within the Turkish Empire. She certainly should not find her legitimate aspirations less possible within a Syrian national state. On the contrary it may be confidently expected that both her economic and political relations with the rest of Syria would be better if she were a constituent member of the State rather than entirely independent of it... As a predominantly Christian country, it is also to be noted that Lebanon would be in a position to exert a stronger and more helpful influence if she were within the Syrian State, feeling its problems and needs, and sharing all its life, instead of outside it,

1. De Tocqueville, op. cit., Vol. I, p. 170.

2. G. Antonius, op. cit., p. 445 & 446.

absorbed simply in her own narrow concerns."

The logical corollary of this argument is to adapt federalism between these countries in order to keep diversities and share in a common good.

The first step in this federation should be the union of Syria and Lebanon as a nucleus and the drafting of an elastic constitution so that Transjordan and Iraq could join in due time without a need for a constitutional amendment. The pre-requisites to the admittance of these two countries are * as I already mentioned - parliamentary democracy and a republican form of government. These conditions seem unlikely to-day, but they are, nevertheless, conditions for the successful working of the federation. This federation - let us call it the Fertile Crescent federation - would then be represented as a unit in the proposed confederation for all Arab land. It would have a system of government on the model of the American or the Swiss system: a bicameral legislature, a strong executive and a High court of justice. It is preferable that the Executive should not depend upon the legislature for its tenure of office. It should either be elected for a definite period, or should be given confidence upon its program for a limited time. The Central government would be invested with powers over education, defence, foreign relations, economy, currency, posts and telegraphs, communications, interstate trade, tariffs, etc... Some of these functions should be concurrent like education, social legislation and taxation. The residuary powers would be left to the member states. A central bank is also a necessity to unify and stabilize currency and the

rate of exchange in the federal state.

It is not possible to go into the details of this proposed federation in this work.¹ My purpose here is to stress the necessity of the federation. As to the Arab Confederation or Arab League, it will not be different from the actual Arab League. Its aims would be to unify the foreign policies of the Arab Federations in the International sphere, to unify their defence systems, to encourage the economic, commercial and cultural cooperation among them, and to settle their conflicts peacefully by arbitration.

But before we reach this goal many difficulties stand in the way of the Arab renaissance. It is a long path, twisted and full of dangers. The soil of freedom is bloody and the ideal of unity requires bitter sacrifices. The Arabs have to pay the price of their freedom and unity, as other nations did, and not believe in the error of the Federalist that: "The history of Great Britain ... gives us many useful lessons. We may profit by their experience without paying the price which it cost them."²

The Arab Irredenta:

A constant aim of the Fertile Crescent federation should be the restoration of Alexandretta and of the part of Palestine under Jewish occupation to the motherland. The Sanjak of Alexandretta which has always belonged to the Arab domain inside the Ottoman Empire, was delivered by French imperialism to Turkey after the pretext of a plebiscite. The plot was arranged by the French

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1. For a full and detailed study, refer to Mr. Heneidi's Thesis Problems of Arab Unity, p. 60-90.
 2. The Federalist, No. V, Jay, p. 18.

and English to please Turkey in 1939.

Palestine also has been divided by the United Nations and a part of it was given accordingly to the Jews to form a national state.

It is evident, that neither England and France, nor the United Nations, have the right to take away a land from its owners and appropriate it to foreign and hostile groups. Alexandretta is a part of geographical Syria and its affiliation is Syrian rather than Turkish. Israel stands awkwardly in the heart of the Arab lands and affects land communications between Egypt and the other Arab states. The natural economic and political life of the Arabs will remain seriously endangered unless Palestine is taken back and the Arab refugees settled again in their homes. Palestine, then, would form a member state in the Fertile Crescent federation where the Jewish community may find a channel for the expression of its local interests, like the Maronites of Lebanon. Alexandretta would become a part of political Syria and would enjoy a large autonomy in municipal matters.

The claim to the Arab Irredenta is a righteous and justified one.

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