

find it much more useful to combine in the Indian Federation of their own accord than to keep apart,—ever a prey to British exploitation, ever in dread of British intrigue. But the Constitution, as contained in the Act of 1935, has no device by which such adjoining units might be assimilated in the Federation of India,—unless we press into service Section 290 of the Act, or use the analogy of the States' Instruments of Accession to facilitate this measure.

### CHAPTER III

## ACCESSION OF THE INDIAN STATES

As already stated, we have to consider, in this Chapter the accession,—as it is called in the Act,—of the Indian States to the Federation of India. The States, it must be repeated, are not, nor become, parts of the Federation,—constituent, or component,—merely by authority of the Act of Parliament. They elect to become such parts by an act of their Rulers', individually in each case, and subject to such terms and conditions, as, conformable to the general scheme of the new regime outlined in the Act of 1935, are laid down in the Instrument of Accession, and accepted by the King-Emperor.

### Place of States in Federation

The place and rôle of the States in the scheme of the Federation of India is, however, not wholly determined by the Act; or even by the Instrument of Accession; or by the two combined. A considerable field of public or constitutional dealings or activities relating to the States is still covered by their Treaties, Engagements, etc., which are not all necessarily abrogated, superseded, or rendered null and void, because of any state acceding to the Federation. What are known as the incidents of Paramountcy,—the rights and obligations, the powers and authority, the jurisdiction and control, appertaining to or derived from Suzerainty,—will continue to be exercised outside the terms and conditions of the Federal Constitution, not only with

regard to those States which, if any, do not accede to the Federation; but even as regards those States which join and form part of the Federal system.

Even within the Federal system, the question is by no means absolutely free from doubt as to the restrictions and obligations imposed upon the States forming part of the Federation,—even though voluntarily, so far, at least, as the Ruler is concerned. Much less is the nature of the bond created by acceding to the Federation free from doubt; i.e., whether, or not, the association thus formed, is revocable, dissoluble, terminable at will, or under operation of the law, by any one party, or by both acting together.

Some of these questions are impossible to answer at the present moment. We must have experience of the working of the new system; we must have the actual terms of the accession settled, at least as regards the first accessors to the new regime; we must even await the authoritative interpretation of certain clauses of the new Constitution by the appropriate Tribunals, before we can pronounce a dogmatic opinion on the bearings and consequences of the new scheme. No precedent derived from any existing Federal system,—within or outside the British Commonwealth of Nations,—will avail in this extraordinarily peculiar system created by the Act of 1935, and the Instrument of Accession executed thereunder.

For our present purpose, however, it will suffice to describe:—

- (i) the scheme of Federation as outlined in the Act; its nature, purpose, and binding force;

- (ii) the Instruments whereby the actual federating would take place; functions assigned to the Federation;
- (iii) the terms and conditions of those Instruments, and the extent to which limitations or reservations would be suffered to be included;
- (iv) the reservations, or safeguards, for the States, their peoples; and for British India, and its people, on account of the Federation having come into being;
- (v) the reaction of this union, or association, upon the future constitutional development and political progress of India.

## I—SCHEME OF FEDERATION

### Formation of the Federation

The Federation of India, as we know, is to be formed, under Section 5 of the Act of 1935,\* and the *modus operandi* for forming the Federation is prescribed by Section 6.

Several features of this unique provision have already been noted and commented upon; but for the clearness of argument in the present Chapter, it is necessary to repeat some of those comments.

### Initial Distinction between States and Provinces

(1) It will be noticed, in the first place, that the Federation is not formed merely because of the passing of an Act of Parliament. It will depend, for its being brought into being, upon the concurrence of a number of factors, not all of them being under one and the same control. The Provinces are “united” or “included”

\* Cp. ante p. 43.

in the Federation *ipso facto* the Act; but the States join, accede to, or become united with, the rest of India in a Federation, only after the Rulers have executed an Instrument of Accession.

### Its Consequences

This difference in *modus accendi* has important consequences on the status and function of the States in the Federation.

(a) While the Provinces are there ready and waiting for the Federation to be born; and, when born, automatically part and parcel of the new organism, the States join deliberately by a specific act of the Ruler in each case.\* The Provinces, accordingly, cannot claim, in law at least, to be equal partners *inter se*, or with the States. Though the Instrument of Accession of a State is neither a deed of partnership, nor an act of association, the States can claim each to be a partner with British India as a whole—not with individual Provinces—as also *inter se*, in the Federation. Sections 138-140 clearly imply the benefits as well as the burdens of this partnership.†

(b) While the States are free to join, or not to join the Federation, the Provinces have no such freedom of choice.‡ They are for ever united in a Federation of India, or included in it, by an act of Parliament which they have no right to amend or alter. The States, too, are not free to leave the Federation once

\*Cp. Section 311 (3).

†Cp. Chapter on Federal Finance.

‡Cp. Section 5.

they have joined it; but they have a limited right to vary their Instrument of Accession once they have executed it.

(c) The form of Provincial Government is prescribed by this Act. But, notwithstanding their being united in a Federation with autonomous units having popular Legislatures and Responsible Government, the States' form of government is left absolutely unaffected by their accession to the Federation, however, incompatible the basis and methods of their government may be with that of the Federation, or of other members in the Federation.\* Even the seats assigned to them in the Federal Legislature may be filled by their Rulers as they like, irrespective of the laws in that behalf governing the rest of the Federated units. They are, moreover, free to make any changes in their internal constitution, which the Provinces are not.

(d) The functions assigned to the Provinces are fixed by the Act; those assumed by the States, as units in the Federation, are determined by their Instrument of Accession; and are subject to such conditions or reservation as may be laid down in that document.

The nature and condition of this Instrument of Accession will be discussed more fully hereafter in a later section of this Chapter. Here we must note the important consequences to the future of the Federation, due to the difference in the original position in the Federation of the States and the Provinces, though all of them cannot be accurately envisaged to-day. It may be that the supposed deliberate act of the Rulers, in joining the Federation, may be a farce. It will be so

\*Cp. Sections 9 and 18.

in most cases, inasmuch as many of the Indian States Rulers are notoriously under the domination of the British Government. By character or attainments, many of them are not in a position to demur to the advice of their mentors from the Indian Foreign and Political Department, even if they had an inclination against federating. It must be admitted, also, that the decisive considerations, which would, generally speaking, influence the Indian State Rulers in making this fateful choice, are not likely to be such as would command public sympathy and popular support in this age. Unless, therefore, they could, in any particular case, convince the British Indian Foreign and Political Department, that a concession to sentiment or tradition, or a confirmation of a vested interest, is necessary in the larger interests of British Imperialism in India, they will plead to deaf ears, should they incline against federating, or demand impossible terms. They would be told, and not without some show of reason, that even their interests, as States or as Rulers, would be better safeguarded by acceding to the Federation. And, of course, in so far as the mere act of acceding would make them the avowed or implied allies of British Imperialism in India, they may count upon the solid support of the British bayonets in all their well-known tendencies to be extravagant and oppressive, reactionary and parasitical.

But, when every allowance is made for these well-known factors, the formal act would be a deliberate choice by each Ruler himself. That alone is enough to mark out the States, so far as their entrance into the Federation is concerned, from the British Provinces of every class. Neither the peoples, nor the govern-

ments, of those areas, would have any choice in the matter. They are part and parcel of the Federation from the moment Part III of the new Act was put into operation. Even if the Federation itself should not come into being, the new Constitution, in so far as it is applicable to the Provinces as autonomous units (within limits), of a future Federation, will continue until modified by the same authority that enacted it.\*

#### Lawful—not obligatory—to Proclaim the Federation

(2) The Act makes it "lawful" for the King to proclaim a Federation of India as from a given date. It does not make it *obligatory* for the King to do so, even if the condition laid down is fulfilled. This is inherent in the peculiar circumstances under which the scheme was conceived, and has come to be executed. It was unknown, at the time the Act was passed, whether or not the States would join; and if they did, how many of them, and under what conditions. It is made a condition precedent to the establishment of the Federation that States aggregating one-half the total population in those areas,—or the Rulers whereof are entitled to choose not less than 52 members of the Council of State,—should have executed their Instruments of Accession, accepted by the King-Emperor, and acceded to the Federation, before the King can issue the Proclamation required in Section 5 to establish the Federation.†

\*cp. Part XIII of the Act of 1935, Sections 312-319.

†See Appendix I to this chapter. Broadly speaking, this distribution of seats does not reveal any general principle governing the allotment in each case. Sometimes, it seems to be population, sometimes geographic position, (e.g., Kalat), sometimes Treaty importance of the State concerned; but nowhere a uniform principle.

It is evident from this distribution of seats that the most important of the States can prevent the Federation becoming an accomplished fact,

## No Time Limit

(3) The States need not all join at once, or within a given time,—at least, so far as the express terms of the Act are concerned. No time limit is, in fact, laid down in the Section, or anywhere else in the Act, within which the Federation must be proclaimed, *i.e.*, within which the statutory condition must be fulfilled. Nor is any alternative provided in case the condition is not fulfilled, and the Federation does not come into being. A Federation of all British Indian Provinces,—including

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if they all choose to keep apart. Less than twenty States, with an aggregate population between them of 50,377,402, command 41 seats in the Council of State as shown in the subjoined Table. 13 States, with a population of a million or more each, command only 33 seats in the Council between them, though their aggregate population is over 46 3/4 million out of a total States' population of just under 79 millions, as given in this Schedule. Four States with population each from 3/4th of a million to nearly a million command 8 more seats between them; but even so, the required total of 52 seats out of an aggregate of 104 seats in the Council is not made up, though, between them, they have a population aggregating over 5/8ths of the total States population.

State	Seats	Population
Hyderabad .. .. .	5	14,436,148
Mysore .. .. .	3	6,557,302
Travancore .. .. .	2	5,095,973
Kashmir .. .. .	3	3,646,243
Gwalior .. .. .	3	3,523,070
Jaipur .. .. .	2	2,631,775
Baroda .. .. .	3	2,443,007
Jodhpur .. .. .	2	2,125,982
Patiala .. .. .	2	1,625,520
Rewa .. .. .	2	1,587,445
Udaipur .. .. .	2	1,566,910
Indore .. .. .	2	1,325,089
Cochin .. .. .	2	1,205,016
Total .. 13	33	46,769,480
Bhawalpur .. .. .	2	984,612
Kolhapur .. .. .	2	957,137
Bikaner .. .. .	2	936,218
Bhopal .. .. .	2	729,955
Total .. 4	8	3,607,922
Grand Total ..	41	50,377,402

It is, however, unlikely that the important States would all apprehend the consequences of Federating in such a prejudicial light as to

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the Chief Commissioners' provinces, and the areas wholly or partially excluded from the scheme of provincial autonomy laid out in other parts of this Act,—is clearly not contemplated by the Act, even during the period,—whatever that may be,—required by the necessary number of States to make up their mind for joining the Federation. That is why Part XIII of the Act continues, *mutatis mutandis*, the existing Constitutional arrangement for British India as a whole during the period of transition. A confederation of States among themselves, prior to joining the Federation, is, of course, utterly outside,—if not even incompatible with,—the scheme and purpose of this Act.

It is, indeed, reasonable to assume that the States would not be allowed an unlimited period to make up their minds: to join, or not to join, the Federation. But whatever time limit is imposed by the authorities in India or in London will be only an executive firman; and not under a provision of the Act. The situation is, accordingly, extremely intriguing, in this regard,

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refuse to Federate, even on the lines provided for in this Act, and the Instrument of Accession to be executed thereunder. Defection of a single State like Hyderabad from such a non-federating group,—assuming, for the sake of argument, that there is such a group,—would sabotage the entire plan of anti-federationists; as also a similar action on the part of the leading South Indian States; or the important Central Indian and Rajputana States. To any one, familiar with the actual position of the Rulers of Indian States *vis-a-vis* the Political Department of the Government of India, it cannot but seem utterly unlikely that the required number of them can resist the influence of the British Government of India, if once the latter have made up their mind that the States shall join the Federation in the required proportion at least. The smaller States have, indeed, neither the magnitude of interests to protect which would justify them in offering a stiff resistance; nor weight enough of their own to succeed in doing so, if they should be advised to demur to Federating. And, in general, the States afford too good a foil to their own pretensions of Liberal Government; are likely to serve as too efficient checks or brakes upon the popular elements coming from the British Indian Provinces; and are expected to prove too rich preserves, for the British Imperialists not to strain every nerve to bribe, induce or stampede the necessary number of States to accede to the Federation,—on the former's own terms.

especially if the States do not accept the Federation; or if the requisite number of them do not do so, within a reasonable time; or if they insist upon impossible or unreasonable conditions.

#### Provision on the Transition Period

(4) Part XIII of the Act of 1935, Sections 312-319, both inclusive, contains what are described as transitional provisions, intended, not for the emergency mentioned above, but for the period\* which must necessarily elapse between the coming into operation of the portions of the Act relating to Provincial Autonomy, and the establishment of the Federation, under Section 5. These 8 sections keep in tact, *mutatis mutandis*, the constitution under the Act of 1919, in so far as the Central authority is concerned. We shall notice these provisions more fully in their appropriate place, later on in this volume; but here it is important to point out:

(i) that, by Section 313 (3):—

"References to the provisions of this Act for the time being in force to the Governor-General and the Federal Government shall, except as respects matters with respect to which the Governor-General is required by the said provisions to act in his discretion, be construed as references to the Governor-General in Council, and any reference to the Federation, except where the reference is to the establishment of the Federation, shall be construed as a reference to British India, the Governor-General-in-Council, or the Governor-General, as the circumstances and the context may require."

#### Dualism in Governmental Machinery during the Transition

(5) With very little modification in essential particulars, the authority and powers of the Indian Le-

\*Section 312:—"The Provisions of this Part of this Act shall apply with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation."

gisature, as established by the Act of 1919; of the Governor-General-in-Council, and of the Governor-General, of the Secretary of State,—in Council, or by himself,—have been maintained for use during the transitional period, which may extend to any length. If, by this kind of dualism in constitutional machinery,—the one designed for an essentially unitary State, the other for a Federal system,—there grows up lack of harmony in the administrative mechanism, the Act does very little to smooth away that very possible contingency. The provisions applicable in the transitional period are intended only to mark time; they are not designed specifically to promote one type of constitution for the whole of India, or the other. If Federation does not eventuate for any reason the present form of the Government of India will presumably continue indefinitely. If Federation is rendered abortive because of the unworkability of the system of Provincial Autonomy over the larger part of British India; or because the Constitution in the Provinces has to be suspended even before the Federation is brought into being, the situation then created is provided for even less satisfactorily than the former contingency.

The States are acceding to a Federation, which, consists, on the one hand, of a number of autonomous units; and on the other of themselves. They are not federating with the whole of British India, no matter under what form of government the territories spoken of in Section 2 of the Act may be for the time being.\*

\*The language of Section 5 read together with Part III of the Act, is not very helpful on this point. The States can perfectly reasonably refuse to execute their Instruments of Accession, so long as any of the Governors' Provinces is without the Constitution laid down for it in this Act. It is doubtful, if, having executed an Instrument which is accepted by the King-Emperor, they can resile from the Association thus formed.

If, however, the autonomous units are without any autonomy; if the Constitution assuring them a degree of autonomy, however illusory, is abrogated or suspended, would the States have any right to urge that they cannot be called upon to join such a system? Would they be entitled to urge that the first requisite of a Federation, as contemplated in the Act of 1935, is lacking, under the contingency mentioned above? As one reads Sections 5 and 6, and the Instrument of Accession to be executed thereunder, one finds it difficult to hold that the States have any say in the matter. They are entitled to consider their own position; and free to execute the Instrument of Accession, with such conditions or reservations as they deem to be necessary for safeguarding their own interests. But they are not entitled, under the provisions of the Act, to scrutinise the constitution of their fellow members in the future Federation of all India. Hence, the States, by executing the Instruments of Accession in a hurry,—and before any experience has been gained of the actual working of Autonomy and Responsible Government in the Provinces,—may be committing themselves to a position, from which there would be no easy withdrawal once the commitment has been made. However much British Imperialism may, for its own reasons, be anxious to secure the necessary accession of the States, need the latter allow themselves to be hurried into such a union, even while the fate of the Constitution in some of the most important of their future associates in the Federation hangs perilously in the balance?

#### **Proclamation not without Address from Parliament**

(6) The Royal Proclamation establishing the Federation may, it must further be observed, be issued

only upon an address to that effect from either House of the British Parliament. The intervention of Parliament may prove to be a mere formality; or it may be fraught with serious complications, either because of the difficulties discovered in the actual working of autonomous government in the Provinces; or because of vicissitudes of Party politics in Britain herself. India is conventionally regarded as being outside Party politics in Britain. That may not be quite a very accurate description of the state of affairs; but it is certainly true that among British politicians such an abysmal ignorance prevails regarding the Indian problem, that, one might well say, there are no Parties regarding India. A few vocal elements alone form the British public opinion regarding India, and the average politician simply joins in the refrain. Unforeseen development in the European situation may quite possibly affect the balance of Parties in the British Parliament; and, in that event, the advent of Federation, as planned in the Act of 1935, may be seriously affected.

#### **Union Federation—an indissoluble Union**

(7) It has been already pointed out that the word “united” used in Section 5 (1) has a significance, which is apt to be underestimated by those whose interest it may be to regard the union thus created as a loose bond to be adjusted or abandoned at will. The union formed, or created, by or under this section is organic, permanent, and indissoluble. If the parties to the Union wished to dissolve it; and even though the expression “Indissoluble Union” is not used anywhere in this Act, as it has been used in the Preamble to the

Commonwealth of Australia Act,\* they have no power to do so. So far as the British Indian Provinces are concerned, the question can, of course, never arise, since they have been "united in a Federation under the Crown" by this Act, and without any exercise of volition in the matter by themselves. In the case of the Federating States, there is seemingly a deliberate choice on their part. But once they have chosen solemnly to be "united" in the Federation of India; and their choice has been accepted and acted upon by the King-Emperor, there is no possibility even for the States to dissolve the Union, or withdraw from it. In other words there is no right of secession even for the States, as the Act stands to-day. All the provisions regarding unforeseen emergencies or deadlocks, which might lead to the suspension of the entire Constitution in British India, would not afford ground to the Federated units to terminate their union, once it has been duly effected.† In the absence of an express right of secession reserved to any of the component units of the Federation, the Union will be considered and interpreted by the appropriate tribunals or authorities as **permanent, organic, indissoluble**. The rejection by Parliament of the petition of Western Australia for withdrawing from the Commonwealth of Australia but too clearly shows this.‡ Even the British Commonwealth of Nations, which is not united *inter se* by the same close, formal, constitutional

\*Says, Sir T. B. Saprú:—

"I am definitely of the opinion that the Accession of the Indian States to the Federation is to be perpetual so long as the Federation created by the Act is in existence.....Shortly put, under the Act, the Indian States do not appear to me to possess the right of secession." Opinion, para. 3.

†cp. Section 45 particularly, and the remarks below on Section 6.

‡The Joint Parliamentary Committee, which examined the Petition not only rejected it, but even expressed the opinion that the established Constitutional conventions of the Empire put it "outside the competence" of Parliament to give effect to such a Petition. Cp. Report, J.P.C., p. x.

bonds, as the component parts of the Federations within the Empire have been held to be,—is held to be a sufficiently close Union to preclude any single, autonomous member of it from severing the ties of the Empire by unilateral action. Says Prof. A. B. Keith, after citing the Preamble to the Statute of Westminster regarding the unity of the Crown in all parts of the British Commonwealth of Nations:

"The declaration solemnly asserts that any change in the succession must be made by common action, and it is inevitable that the conclusion should thence be derived that the union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action. This was the sense given to the proposed clause when it was accepted by the Conference of 1929 by General Smuts, who naturally insisted that the intention of the Preamble was to negative the idea of the right of any part of the Commonwealth to sever itself from the rest, save as the result of common assent."

True, both in the Union of South Africa and in the Irish Free State, this interpretation of the situation created by the Statute of Westminster has been questioned; and the Imperial Conference of 1930 took note of the assertion regarding a right of unilateral secession, urged by General Smuts. But it has done no more; and the law stands as it was passed in 1931. Under that law, and under the respective Constitutions of the several Dominions, eminent jurists have held, that it would be competent for the King to disallow an Act of secession passed by a Dominion Legislature, as being *ultra vires*.† If the admittedly autonomous and even

\*cp. Keith, Constitutional Law of the British Dominions, p. 59.

†cp., Keith, *Op. cit.*, p. 69. The same authority observes, indeed "what is obvious and is never denied is that, if any Dominion should really decide to sever itself from the Empire, it would not be held proper by the other parts of the Empire to seek to prevent it from doing so by the application of armed force." (p. 60).