CHAPTER XII

THE DOCTRINE OF THE SEPARATION OF POWERS

The need for separation of powers : The conditions of life in modern states have become very complex and for this purpose political thinkers have suggested certain devices by which Governmental work can be carried on in order to make the people happy and prosperious giving them the maximum amount of liberty without loss of efficiency of administration. For this purpose it has been found absolutely necessary that the powers of Government are distributed amongst the different departments in such a way that maximum efficiency is brought about. This theory of separation of powers is as old as Aristotle. Briefly stated the theory implies that each department should be limited to its own sphere of action without encroaching upon the others and that each should be independent within its own sphere. This theory is called the theory of Separation of Powers by political thinkers.

Originally the King was the Law—giver, the executor of law and the Judge. This process did not involve a division of sovereign power. It was only a convenient means of dealing with the business of the State. But the King's powers came to be checked and constitutional ideas came into prominence. This simple fact that power should be delegated to other departments become the basis of liberty. Montesquieu is considered the great promulgator of this doctrine that assurance of law was to be found in the separate embodiment of the various functions connected with the law. In his own words, "from the very nature of things, power should be a check to power, if liberty of law itself is to endure." The theory therefore, that the different Governmental functions should be performed by different departments which should be limited to their own spheres of action without encroaching upon the others and that they should be independent within their own spheres, is called the theory of separation of powers. The theory that each of these departments should share in the powers of the others or exercise a certain control over their act is known as the theory of checks and balances. By these devices Montesquieu thought that any single organ of Government would be prevented from becoming too strong and that liberty of citizens would be safeguarded.

The Theory of Separation of Powers : To the students of Constitutional law it is necessary to know how the machinery of Government works, to what extent the various powers are combined in the same person or body of persons, how far are they separate, to what extent there should be co-ordination between the various different departments and how far they are independent of one another. The general impression is that to be at once a legislator and a Judge is to mingle together office and the prerogative of mercy. If justice is not well administered the litigating

parties are not free enough, they are crushed by the authority of the sovereign. "When the legislative and executive powers and united in the same person, or in the same body of Magistrates, there can be no liberty: because apprehensions may arise, lest the same monarch should enact tyrannical laws to execute them in a tyrannical manner." (Montesquieu).

"Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would then be a legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the peoples, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals"—(Montesquieu: *The spirit of Laws*).

In 1765, Blacktone in his Commentaries expressed almost similar views on this subject, when he stated, "In all tyrannical Governments, the supreme magistracy or the right both of making and enforcing the laws is vested in one and the same man, or one and the same body of men, and wherever these two powers the united together, there can be no liberty." Medison has put forth the same view when he said, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The American Supreme Court in the leading case of *Kilbourne* v. *Thompson* has laid down "It is believed to be one of the chief merits of the American system of written constitutional law that all powers entrusted to the Government, whether State or national are divided into three grand departments-the executive, the legislative and the judicial, that the function appropriate to each of these branches of Government shall be vested in a separate body of public servants and that the perfection of the system requires that the times which separate and divide these departments shall be broadly and clearly defined." All constitutions modelled on the American pattern have included this theory, but in Europe less attention was given to this theory except in France, where the doctrine was used to uphold the freedom of the administrative authorities from control by the judiciary.

The application of the theory to modern governments : It is difficult to say to what extent the three functions of the State, *viz*., legislative, executive and judiciary should be combined or separated in modern governments. Our experience of the different Constitutions of the world, tells us that there cannot be rigid separation of powers but there is a tendency all over the world towards union or unity of purpose.

In Great Britain the executive is an integral part of the legislature. The Cabinet is considered as the first legislative chamber. The Cabinet is chosen from the legislature, the ministers take part in the proceedings and initiate laws, advise the House of Commons before its normal term of office is over, recommend the creation of Peers to the House of Lords. On the other hand, the legislature can by refusing to sanction supplies and by other methods like a vote of censure, terminate the term of office of the Cabinet. The legislature has a power of presenting an address to the Crown for the removal of Judges. A close study of the English Government in its practical working shows that the principle of separation of powers has been carried with a rigidity that is found in few or no other governments. The Crown is even today as superior as it was before because Parliament has never attempted to deprive the Crown of its executive powers and it has never taken upon itself the functions of administration. In the like manner the judiciary has been established as a distinct and an independent branch of the government. Judges hold the office during good behaviour and are not liable to be dismissed by the executive.

In the United State the hostility between the executive and the legislature was visible in the beginning as a result of which the doctrine of separation of powers and checks and balances became almost necessity. Some of the provisions, like the election of the executive official and of the Judges show that the theory has been rigidly applied. It is said that the Constitution of the United States is an essay in the theory of separation of powers. Both the Congress and the president are elected by the people for fixed terms. The President and the heads of the departments do not sit in the Congress; the President cannot dissolve the Congress before it has completed its term of office. The separation is also visible in the relation between the executive and the judiciary because the term of the judges is made independent of the executive. Hence the American Constitution goes further than any other in the application of this theory.

In France we find some union of powers and some separation. The President is elected by the legislature; the President has suspensive veto; the national assembly has the power to impeach the President and the Ministers before the High Court of Justice. The Cabinet system, the President's power of pardon, all these illustrate the fact that there is union of powers rather than separation. But there is enough of evidence to prove that the organs of Government perform their work of legislation, administration and judicial work independently without interference from other departments.

But, the theory has not been accepted in the Stalin Constitution of 1936. In the Stalin Constitution, the entire and complete authority is concentrated in the Supreme Soviet of the U.S.S.R. which is the sole legislative organ chosen by the people.

Criticism of the theory of separation of powers : Modern writers have criticised Montesquiu's theory on the ground that we cannot speak of distinct political powers, because we cannot think of mere aspects of manifestations of indivisible sovereignty and if we do, how can they be separate in their embodiment? Are the powers merely activities or functions connected with government which may be exercised through separate organs that remain nevertheless within the unity of political organism? Should we distinguish between powers and functions and maintain that powers are in the nature of things while functions may be combined in practice? This theory has been attacked on two grounds. Some writers argue that the functions of government do not fall into three classes, only, they may be two or five. Secondly, there is no possibility, much less the desirability of having distinct departments or of setting up elaborate checks and balances. According to these writers what is required is co-ordination of government functions into a harmonious and a united system. It is true that an elaborate system of checks and balances can secure the liberty of the citizen in a better way. The principle of vesting the exercise of the legislative, the executive, and the judiciary in three different organs may be called an Organic Separation of powers which is quite distinct personal separation of powers. By this we mean that more than one department may be in the hands of the same persons, *e.g.*, in Great Britain the legislative and the executive departments are directed by the Cabinet. It is obvious that the legislature cannot carry out the functions of the Judges nor can the judges carry out the executive functions. Further, no one department should have an absolute control over the other departments for that is contrary to the principles of democracy and liberty. But within certain limits, there must always be some co-ordination between the three departments so that maximum harmony and co-operation can be secured for the good Government of the country.

Secondly, it is not possible to define the area of each branch of government so that each may remain independent and supreme within its own allotted sphere of activities. No government has ever been organised on the basis of a complete separation of its three important departments of government. As a matter of fact, departments are most closely related and dependent and each exercise powers which on the strict application of the theory belong to the other, *e.g.*, the legislature and the Executive often exercise judicial function the Courts share in creating and administering law.

Thirdly, government is an organic unity. The 'different organs must therefore closely associate themselves in a harmonious unity in order that they may function efficiently. To divide governmental work into water-tight compartments is unnatural and would only result in constant deadlocks. The emphasis on the rigid separation of powers would result in the creation of narrow departmentalism, and departmental jealousy and frictions would only result in impairing the efficiency of the governmental organisations.

The most fundamental criticism levelled against this theory is the facile belief that political liberty is impossible without a rigid separation of powers. In a democratic set up concentration of powers may possibly secure greater liberty than otherwise. In actual practice, separation of powers and checks and balances tend to produce a considerable degree of minority influence and control in the government. Beyond a certain degree the application of the doctrine would merely lead to constant deadlocks, and frictions and unnecessary delays which would completely paralyse the Governmental machinery. "Governments are not machines but are dues of men. The functions performed by the various parts adjust themselves to one another by a gradual and constantly changing process. The influence of individual leader often reaches far beyond the confines of a single department and breaks down paper theory of strict separation or of legal balance"—(Gettell).

Our conclusion is, therefore, that absolute separation of powers as suggested by Montesquieu is practically impossible. Every legislature performs some executive functions. Further, the line between legislative enactments and executive and judicial decisions is very thin. Ministerial ordinances and decrees are formidable substitutes for legislation. In England, Parliament, as a matter of discussion, would introduce certain measures as 'Public Bills' or 'Private Bills.' The former being regarded as of a true legislative character while the latter are matters of local Government over which Parliament only exercises an administrative control. We know by experience that "All power tends to corrupt, and absolute power tends to corrupt absolutely." It follows therefore that there is some element of truth underlying this theory, *viz.*, that there should be some check on limit on the absolute concentration of political power in the hands of one department at the cost of others. We should watch vigilantly that there is no absolute concentration of power and every act of the executive or the legislature should be open to scrutiny. If is only then that liberty can be secured.

CHAPTER XIII

PROBLEMS OF FEDERALISM

While classifying modern constitutions we saw that one such classification is into unitary and federal. The rapid advance of science and the recent international relations between different States have brought about tremendous changes in the political outlook of the nations. The old cases of self-sufficiency and national independence are dead and gone and there is everywhere dependence of nations, as a result of which combinations are becoming quite common. Such unions may be either personal or they may be real unions. From the point of view of federal unions we have two distinct categories.

(1) Confederation or temporary Union : It is the result of a temporary alliance concluded for specific purposes—political or economic between two or more States. Common institution are established to carry out specified purposes, e.g. the American Confederation, 1781-89, the Swiss Confederation up to 1874 and the German Confederation up to 1784.

(2) Federation : In a federation the federating units which are the component parts lose their independence but retain a few powers as separate organs, transferring the remainder in the hands of some central authority. Federal unions are United States of America since 1789, Switzerland since 1874, Canada since 1867, Australia since 1900, Soviet Russia since 1918.

We thus find that creation of such unions is more or less dependent upon historic development of modern national states. As the national Spirit grew from one country to another following the Industrial revolution, such combinations were brought about as a result of sheer necessity. In some cases there was complete fusion while in others there were voluntary unions between different States.

Federal Principle : Federation is a device by which the force of the State is divided among "A number of co-ordinate bodies each originating in and controlled by the Constitutions." A Federal State is one in which there is central authority that represents the whole and acts on behalf of the whole in the external affairs and such other internal affairs as are held to be of common interest to all. "It is an association of states that forms a new one. It is a political contrivance intended to reconcile national unity with the maintenance of State right." (*Dicey*)

In a federation therefore there are two sets of Governmental machinery for the performance of its functions and each of these Governments is but an instrument through which the State acts. The question is why is this division necessary? This division is necessary because in everyday life a citizen is more concerned with the activities of his town, or district than with the activities of the nation or the country as a whole. He is parochial and interested in regional patriotism. Modern science has brought about the shrinkage of the earth, which has only resulted in the greater interdependence between the States who are forced to give up their shallow isolationism. Evidently therefore, in a Federation, there is division of powers between the national or Federal Government which presides over the whole territory of the nation and the Governments of the various component States. "Two requisites

Leading characteristics of Federal Government : Following are the leading characteristics of the Federal Government.

(1) The first distinctive feature of federation is the formal division of sovereign power between the constituent part States and the larger States which together, they compose. The citizen of each constituency within the federation owes a double but not a conflicting political allegiance to it as the case in the United States. For all practical purposes the division of powers is complete but in a Federal Government the centre has been given certain specific powers and the general principle is that the division of powers is based on the necessity of safeguarding all matters which are national, for example, Defence, Foreign Affairs, Customs, Post and Telegraphs , all these are allotted to the National Government, while matters like education, health, sanitation, etc. are entrusted to the Governments of the States composing the federation.

(2) In a federation the Government of the whole territory is called the Central Government, which is in juxtaposition with the Government of the component States or Provinces. Both these sets of Governments derive their authority from the Constitution and are to that extent independent of each other's control in the spheres assigned to each.

(3) In a Federal State the power or functions of the Government cannot be distributed so easily and hence every Federal Government has got three distinct powers, viz. residuary, concurrent and implied power. With regard to concurrent power, which relates to the functions not assigned to any of the Governments or which is specifically mentioned as being of local as well as of national importance, both Government are allowed to have powers of legislation and administration, subject to this important condition that whenever there is a conflict between National and State Governments in the exercise of the concurrent power, the voice of the national Government shall be final. In short federal law overrides the State law in matters where the Governments have concurrent powers.

(4) Every citizen in a Federal State owes allegiance to the Government of the State of those matters which are within the jurisdiction of that Government and owes a direct allegiance to the national Government for other matters which are the concern of the national

Government. In a unitary State, a citizen owes undivided allegiance to one Central Government.

(5) A Federal Constitution is written and rigid in character. This is necessary in order to avoid any clash. Further, a Federal Constitution is rigid because the claims and counter-claims of the States must be carefully considered.

(6) All Federal Constitutions are in the nature of a contract and for the purposes of enforcing the terms of the contract it is necessary to have an independent and impartial judiciary. A Federal Constitution provides for the setting up of an independent judiciary generally called the Supreme Court which in its original jurisdiction tries to settle disputes between several Governments.

FEDERAL PRINCIPLE AS APPLIED TO THE DIFFERENT CONSTITUTIONS

First Constitution of the U. S. A. : Under this constitution it was provided that the Congress shall have the sole executive power of determining certain matters which are of national importance, for example, war and peace treaties and alliances, armed forces and etc. But the Central Government was not independent of the State Governments because the Congress had representatives from the State legislatures. Each delegate voted according to the mandate from the respective legislature. It also provided for separation of powers and a system of checks and balances.

Swiss Constitution : It follows the pattern of the American Constitution in many ways but with two important modifications. *First,* the Council of States is composed of two representatives from each canton and they are paid by the cantons themselves. The method of their election and the tenure of their office is determined by the cantons themselves. *Secondly,* the Swiss Courts have no right to declare any law passed by the general legislature as *ultra vires* the Constitution. It means that the general legislature can trespass upon the sphere of the regional legislatures without any fear of the Courts. There is no rigid separation of powers incorporated and in this respect, the Swiss Constitution is in contrast to the Constitution of U. S. A. No provision is made for the admission of new States, for if this is to be done the Constitution must be amended. The Swiss Constitution established a truly Federal Government of the 22 cantons as enumerated in the preamble.

Stalin Constitution of 1936 : An important feature of the new Constitution is the declaration of Fundamental Rights. There is division of powers between the general Government and the Governments of the Constituent republics. There, components parts possess powers not conferred on the union Government by Art. 14, and have even a right to secede from the Union and also have direct foreign relations with other countries. But in actual practice the Presidium of the Supreme Council can annual all decisions of the council of ministers of the Union Republics. The Constitution sets up a federal citizenship of the whole union. We may therefore, conclude that the 1936 Constitution of Russia is partly federal and Prof. Wheare describes it as *quasi*-federal in theory but almost unitary in practice.

The study of the above Constitutions provides us with ample material to formulate and lay down the federal principle. In all Federal Constitutions there is a

method of dividing powers between general and regional Governments so that each is within its own sphere co-ordinate and independent. A Federal Government exists where in a political community the powers of the Government are distributed between two classes of organizations—Central Government affecting the whole territory and population and a number of local Governments affecting particular areas and persons and things therein—which are so far independent of each other than one cannot destroy the other or limit the powers of the other or encroach upon the sphere of the other as determined by the sovereign in the constitution." It follows therefore, that the federal principle consists of a division of powers in such a way that the powers of the Federal Government are specified and the residuary powers are left to the regional Government. It is no doubt true that this division is to be found in the Constitutions of U.S.A. and Australia and to a certain extent affects the balance of power but they are likely to hand over certain specified and limited powers to the new general Government. Hence, this division of powers may be characteristic of some Federal Constitutions. It is not the essence of federalism. According to Lord haldane, in a federation, the associated states while agreeing on delegation of certain powers to a common Government must substantially continue to preserve their original constitution. According to this definition therefore, if a federal compact secures new constitutions from the associating states, then such an association would not be federation. Applying this test he held that Canada was not a true federation because the Act of 1867, created not only a new general Government but also new Provincial Governments. From this point of view U.S.A. and Australia may be called true federations. But this is too narrow an interpretation as it merely emphasizes a mode of the formation of federal associations but completely misses the essence of the federal principle.

A confederation like a federation is a union of States with a common recognized authority in certain matters affecting the whole body especially in respect of external relations. In a confederation the member states retain their full sovereignty and legal independence and a confederation cannot be a State at international law because the individual members maintain their international status. In a confederation, "there is a Central Government but no central sovereignty."

The differences between the two forms of Governmental organizations are quite clear. In a confederation the Central Government is a mere branch of the Governments of the associated States and obtains its authority by a delegation of powers from these member States, which is not the case in a Federal Government. A confederal Government does not operate upon the people of the territory directly but only on the member Governments. It is the instrument which creates the confederation that defines the powers of the Central Government in the form of a Constitution. This instrument is merely a compact which derives its validity from the consent of the member States. Therefore, the members of confederation have a legal right to secede from the union but such secession of a member of a federation is illegal and a revolutionary act. the Central Government in a confederation is created by the member States who have the authority of laying down or limiting or even destroying the powers of the Central Government, while in a federation the Central Government has definite powers as given to it under the Constitution and those can only be altered by the legal method of constitutional amendment. A confederation, therefore, lacks central administrative or judicial organs and therefore, its resolutions

and decisions have validity only if the member Governments individually enforce these resolutions. We have examples of many such confederations ; the Achaen, League of the Greek City States, the Hole Roman Empire, the German Confederation (1815-1866), the Swiss Confederation 1815-40 and the American Confederation 1781-89.

Facts that promote Federal Unions: Federal Government is difficult to be formed because there should be present many factors before such a union can be formed. Certain characteristics must coexist, so as to enable the people to form a Federal Government. Some of these factors are as follows:-

Physical contiguity: No successful and lasting federation can be formed unless the states lie in close proximity to each other. Newzealand could not be brought in the union with Australia because the sea intervened although the people had the full desire of linking up the island in the Australian federation. For the same reasons, New foundland could not be connected with Canada.

Economic incentive: Economic advantages are tangible utilities of the Union which have proved a vital impulse to federation. Uniformity of laws regulating commerce, contracts, navigation, railways, and the like, led the people to form central federations, *e.g.*, Canada, Australia and South Africa.

Political motives: There are obvious advantages of a political union between two or more states. There are common problems of defence, foreign affairs, and a great economy is secured in administration. A strong sense of the value of blessings of the union induced the American people at a very early period to institute a Federal Government which they preserved and perpetuated till today. On the other hand the same motive in Country only resulted in the partition of the country.

Racial and cultural factors: Where there are different religions, a federal form of Government is most suited for the economic progress and constitutional settlors of the country as a whole. In Canada, the British and the French solution of the political problems could come together by reconciling the racial and cultural diversities in the form of a government which was essentially federal. Similarly, the Swiss Cantons, speaking three different languages, following different religions could not form a unitary State.

Desire for a Union: A federation can never be found unless political units existing in a country desire to unite. But such a desire will not be there if the States are opposing any foreign encroachment. The thirteen American States which jointed to form the U. S. A. were eager not only to establish their hard won independence from England but also to adopt a uniform commercial policy and generally to make the maximum use of the opportunities afforded by union in order to advance their general prosperity.

There have been certain other factors which have helped in creating a desire for union. These factors are: (a) a sense of military insecurity; (b) the desire to be independent of foreign control; (c) economic advantages that could be secured in a union; (d) a political association among the member States prior to the coming into existence of the federal union; (e) geographical neighbourhood; (f) similarity of political institutions; (g) community of language, of races or religion; (h) community of common nationality and common sentiments, (i) similarity of social institutions and many other factors.

All the above factors are dependent to a very great extent on the ability of people to operate a federal union, which is a very complicated machinery with very sensitive balancing of powers and hence unless the people possess the necessary qualifications, it would be difficult to maintain a Federal Government. Fear of a common enemy or the need for common defence may help to overcome internal differences and may act as a uniting force compelling the communities to live together. Community of race, language, religion and nationality are also helpful in the formation of successful federations but the most important factor in this connection is a similarity of political and social institutions. That is the reason why when drafting the Federal Constitution, statement always exist that all the units should have the same form of Government. Fundamentally political institutions in all federations are similar and have the same democratic principles of free elections criticisms and representative democracy. But it would be impossible to combine all such states into federal union in which the institutions having democratic set up are oligarchic. Further, there must be a certain amount of similarity of social institutions among the communities desiring to work together. Take the problem of slavery in the U. S. A. which would have wrecked the Union had it not been for the wisdom of Abraham Lincoln.

Merits and Demerits of Federal Government: Federal Government is a political contrivance designed to reconcile national power with State rights. It achieves this object by establishing a dual polity and dividing power between co-ordinate Governments on the national and regional levels. Some writers have unduly emphasized a particular aspect of federal structure by insisting on a true federation having certain specific powers given to the Federal Government and the residuary powers given to the local Governments. The idea is that by this method the Federal Government would not become very strong. In a Federal State the State authority is of exactly the same nature as the unitary State but the difference lies only in the peculiar form of the institutions possessing the authority of the State which is not a single collective person but a number of persons ordered together in a specific way. Federal union therefore is a union in which the federating units definitely lose their independent character and retain some authority in their hands which is subject to the Central Government.

Political writers, therefore, very strongly differ in their opinions, regarding the merits and the demerits of federalism. Some critics say that it creates a weak Government and divided allegiance. According to Prof. Dicey a federation makes the State dominant which is likely to exercise an authority which is inconsistent with the federal equality, or many States may equally combine to increase unduly the burden of taxation which is then imposed on the most powerful. but in actual practice, these two dangers do not generally appear if the Constitution has been properly drawn up. Prof. Dicey also points out another defect in federalism which, he says, creates divided allegiance and constant frictions which would often lead to expensive litigation. But much depends on the drawing up of the Constitution. There are others who believe that federalism is a concession to human weakness; it must be accepted only when nothing better is got but its disadvantages are quite patent. It means a division and weakness in the organs of Government and it tends to stereotype and limit the development of a new country.

But there are certain obvious advantages which a country can secure under federalism. They are:-

(1) When diversities are pronounced and located with reasonable compactness, the geographical deconcentration of power secures greater correspondence between public policies and local and majority sentiment on matters entrusted to the constituent Government.

(2) There is large scope for experimentation and hence opportunities for political participation.

(3) It is more suitable for Government over large and scattered areas. Unitary Government would in such cases be undesirable because the seat of authority would be far removed from the activities of the people, as a result of which there would be little contract and understanding between the governor and the governed. Hence it is claimed that the Federal Government is more consistent with democracy.

(4) Federalism lessens the risk of monopoly of political power by providing number of independent points where a party nationally in minority can maintain itself while it formulates and partly demonstrates its policies and capabilities and develops new leadership.

(5) The multiplication of the bodies of elected officials who bear considerable responsibility in their own right broadens the opportunity for political participation.

As opposed to this, there are many disadvantages which one finds in a federal union.

(1) Federalism is a method to reconcile national unity with regional aspirations which is sought to be achieved by adopting a constitution under which sovereign powers are divided between different Governments. This would lead lead to quarrels and frictions between the Central and the State Governments.

(2) Federalism involves a limitation on the powers of Government and to that extent this aspect is quite unfavourable to governmental activities leading towards the social welfare state. "The constitution of a Federal State must generally be not only a written but a rigid Constitution which cannot be changed by any ordinary process of legislation..... Now this essential rigidity of federal institutions is almost certain to impress on the minds of the citizens the idea that any provision included in the Constitution is immutable and so to speak sacred..... The difficulty of altering the Constitution produces conservative sentiments, and national conservatism doubles the difficulty of altering the Constitution.....To this one must add that a Federal Constitution lays down general principles which, force being placed in the Constitution, gradually come to command a superstitious reverence and thus are in fact, though not in theory, protected from changed or criticism". (*Dicey*)

(3) Federalism leads to legalism, in which case the judiciary plays a dominant role in the Government of a country and requires the prevalence of a spirit of legality among the people. The legislatures in a Federal State being subordinate