For to the people.”
the swiss constitution

For the United States this point is covered by the Tenth Amendment which provides that “ 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.

” The Swiss Constitution expressly declares that the Cantons “ are sovereign in so far as their sovereignty is not limited by the Federal Constitution, and, as such they exercise all rights which are not transferred to the Federal power.” The reasons for the adoption of this system are largely historical. The federal union was, in each case, formed by the union of previously independent sovereign States. At the time of the union, the latter desired to retain to themselves all governmental power except such as was plainly necessary to confer upon the central government in order that an effective union might be established. In Canada the method adopted was just the reverse of that in the United States and Switzerland.

Here, too, historical events determined the course. “ All Constitutions,” as Jennings remarks, “ are the heirs of the past as well as the testators of the future.” The persistent racial conflict between the British and the French and the failure of the unitary government, coupled with the cool relations with the United States, enforced the argument for unification and for a national authority. Federal government seemed the obvious solution. But the experience of the near-dissolution of the American Union in the Civil War led British and Canadian statesmen to the conclusion that the central government must possess more powers than those that belonged to its counterpart in the United States. The Canadian Constitution the British North America Act, 1867 accordingly divided the powers between the Provincial

and Dominion governments in such a way that the Provinces had exclusive control over a list of enumerated subjects, and the Dominion had exclusive control over the rest, which “ for greater clarity” were enumerated, though not exhaustively. The legislatures of Dominion and the Provinces are distinct from each other; neither has the power to alter the Constitution so far as the distribution of powers is concerned.

In Canada, therefore, enumerated powers are given to the Provinces and residuary powers are left to the Dominion government. The Constitution of India contains three lists of subjects, the Union List, the State List and the Concurrent List, and the residuary powers rest in Parliament. The total number of subjects exclusively given to the Central government is ninety-seven as compared with sixty-six which are under the actual exclusive control of the States.

The Concurrent List contains forty-seven subjects upon which both Union and State legislatures make laws. Here is an enumeration more than anything attempted in any other federation. The provisions which deal with a conflict between the Union and State laws are interesting. In general, they require that State laws on concurrent subjects must give way to the laws of the Union government to the extent of their repugnancy to such laws. The Union legislature has also been empowered to legislate on any matter in the State List, if the Council of States (Rajya Sabha) passes a resolution by a two-thirds majority, declaring a particular subject or subjects of national importance or interest.

When Emergency is in operation Parliament makes laws for the whole or any part of the territory of India with respect to any matter enumerated in the State List. Article 253 further empowers Parliament to pass legislation implementing any treaty, agreement or convention with any other country. The last phrase is remarkably vague, as Jennings maintains, because under this provision the Union Parliament can acquire jurisdiction on any subject, as for example, even over university education “ by the simple process of decision of the Inter-University Board of India which is an international body because it contains representatives of universities in Burma and Ceylon.” B. R. Ambedkar, Law Minister, in the Government of India and the principal architect of the Constitution, admitted in the Constituent Assembly that “ the constitution has not been set in a tight-mould of federalism.” The federal principle has, indeed, been so much modified by unitary elements in the form of control by the Central government over the State governments and the intervention in the conduct of affairs of the State governments has become so proverbial that the Indian Constitution, many critics maintain, cannot claim to establish a federal union. And the Constitution nowhere uses the word federation.

The omission is deliberate and shows the intentions of the authors of the Constitution. It is true that the federal principle has been introduced into the terms of the Constitution to some extent and Wheare deems it “ justifiable to describe it as a quasi-federal constitution,” but a system of government in which one partner can unmake another cannot claim to have even the semblance of a federation. The Indian Constitution may have the form of a federation, but to have federal form does not make it a federation. A

Federation is a partnership among equals; oneness of the State with the separateness of the units is its formula, although equality of status does not mean absolute equality of powers.

There are some students of federalism who hold that the federal principle consists in the division of powers in such a way that the powers to be exercised by the central government are enumerated in the Constitution and the residue is left to the regional governments. It is not enough for federalism, they assert, that the central and regional governments should each be independent in its own sphere. That sphere must be marked in a particular way, that is, the residuary powers must lie with the regional governments. Applying this criterion, a government is not federal if the powers of the regional governments are specified and the residue is left to the central government. The Constitutions of the United States, Switzerland and Australia embody the federal principle, because they distinctly enumerate subjects over which their central legislatures exercise control and they further provide that powers not so given to the central governments remain with their states and Cantons. But such a test of federalism, in the opinion of Wheare, concentrates on a relatively superficial characteristic. “ The essential point,” he says, “ is not that the division of powers is made in such a way that the regional governments are the residuary legatees under the constitution, but that the division is made in such a way that, whoever has the residue, neither general nor regional government is subordinate to the other.” It is, no doubt, true that the question of residuary power is important as it affects the balance of power in a federation, but this factor itself does not make a government federal.

The fundamental point in a federal principle is whether the powers of government are divided between coordinate, independent authorities or not. It is immaterial what the system of distribution of powers is and where the residuary power rests. The circumstances of each country decide which method is adopted. Carl Friedrich points out, “ The existence of residuary powers has ever been held to constitute the decisive test of ‘ statehood’ for the component units. In reality, such residuary powers are an illusion, if the powers and functions delegated to the central government are practically all-embracing, as they were in Weimar Germany, broad delegated powers would mean more ‘ local government’ in actual practice than such a residue of ‘ genuine’ self-determination’. In either case, the only guaranty (guarantee) for whatever distribution of functions there is, delegated or residuary, is the constitution which determines the governmental structure as a whole.” What distinguishes a federal from a unitary government is that the regional governments are not subordinate to the central government; the one is not simply the creation of the other. Both enjoy a juridical and corporate personality, no matter whether division of powers is made by enumerating the powers of the central government and leaving the rest for the regional governments, or the division is made by enumerating the powers of both the central and regional governments and leaving the residue to the former.

What made the Canadian Constitution “ quasi-federal” were the matters in which the Provincial Governments were subordinate to the Central Government, and not coordinate, with it. These matters were: the power of the Dominion executive to disallow any Act passed by a Provincial legislature even if it fell within its sphere of jurisdiction, the Dominion executive

appointed the Lieutenant-Governor of a Province, and it could instruct a Lieutenant-Governor to withhold his assent form Provincial bills and to reserve them for consideration by the Dominion executive, and it might refuse assent to such reserved bills if it deemed fit. These are all unitary elements in an otherwise strictly federal form of constitution. But the law of the constitution is one thing; the practice is another, thus, signifying the difference between a federal constitution and a federal government. Wheare places particular emphasis on this difference and says, “ A country may have a federal constitution, but in practice it may work that constitution in such a way that its government is not federal. Or a country with a non-federal constitution may work it, in such a way that it provides the example of federal government.” In actual practice the unitary elements in Canada had either become obsolete or were being so worked as not to compromise with the federal principle.

“ If Canada, therefore,” as Wheare says, “ has not a federal constitution, it has a federal government.” The United States, Switzerland and Australia have federal Constitutions as well as federal governments, though the process of centralisation in all these countries is assuming alarming proportions. A concurrent jurisdiction is found in all modern federal governments and with it a provision that when the laws of the central government upon matters in the concurrent field conflict with the laws of the regional governments in that field, then, the regional laws must give way to the central laws to the extent of their repugnancy. The extent of the concurrent jurisdiction varies greatly. In Canada it consists of only two subjects whereas in the United States and Australia the concurrent field is

extensive. In Switzerland it is smaller than in the United States and Australia, though wider than in Canada. In India, the concurrent list covers forty-seven subjects.

Concurrent jurisdiction is not incompatible with the federal principle. There are, indeed, many good reasons for providing concurrent jurisdiction. Wheare is of the opinion that “ it is better always, if possible, to admit concurrent jurisdiction, if only perhaps, as a transitional measure. In most cases it will be unavoidable. But what are likely to work best are a short exclusive list and a rather longer concurrent list.”