

Economic motives, however, will probably drive them to it sooner or later. The whole world is so closely bound by economic ties that economic nationalism must be disastrous; the great development of productive capacity demands wide markets; and the appalling conditions under which many millions are now forced to live necessitate the proper exploitation of world resources. The first steps toward an economic union have already been taken, under stress of war, by England and France, just as they were taken in the last war. It is of the utmost importance that there should be no retreat at the time of peacemaking from this economic alliance, which we may hope is but a beginning.

4. Constitutions, Institutions and Powers

29. Kenneth Wheare: 'What Federal Government is' 1941

From *What Federal Government is*, Federal Tracts No. 4, London (Macmillan) 1941, pp. 1-2, 9-24; reprinted in Ransome, P. (ed.), *Studies in Federal Planning*, London (Macmillan) 1943, pp. 17-18, 23-38.

Kenneth Clinton Wheare (1907-79, subsequently Sir Kenneth Wheare) was an Australian who became a Fellow of University College, Oxford (1939-44), Dean of University College (1942-45), Gladstone Professor of Government and Public Administration at the University of Oxford (1944-57) and Vice-Chancellor of the University of Oxford (1964-66). He wrote standard works on constitutional and legal matters, including Federal Government,¹ most of which he wrote when he was a Fellow of University College during the Second World War. He was at University College with Beveridge when he became a member of the Federal Union Research Institute's Constitutional Research Committee, together with Goodhart² prepared a Draft Constitution for its first Conference, and wrote What Federal Government is for the Institute. This excerpt comprises a large part of his Federal Tract, which was explicitly designed to explain federal government to British readers who had little understanding of its rationale and structure.

Federal Government is a thing of which most people in the United Kingdom of Great Britain and Northern Ireland have had no direct, personal experience, and they find it hard, therefore, to understand what it is. (. . .)

They are accustomed to a form of government one of the leading characteristics of which is that one single legislature, the King-in-Parliament at Westminster, has authority to make laws for the whole of the United Kingdom on all matters whatsoever; and these laws duly made prevail over rules made by any other body in the Kingdom and are accepted by the courts as valid law and supreme law. The result is that people in this country may doubt whether acts of parliament are good laws, but they cannot doubt that they are good law. In a federation it is otherwise. There, it is possible to doubt not only whether the acts of some legislature in the federation are good laws but also whether they are good law, and it is possible for a court to declare acts which are almost universally recognised as good laws to be bad law and no law at all. This intentional obstruction, in a federation, of the will of the elected representatives of the people as expressed in acts of the legislature, appears to us to be a strange device. Why do

¹ Wheare, K. C., *Federal Government*, London (Oxford University Press) 1946.

² See excerpt 26, n. 2.

people adopt such a form of government, and why do they continue to put up with it? (. . .)

What Federal Government is

What then is federalism? Its essence consists, I think, in this: that in a federal system, the functions of government are divided in such a way that the relationship between the legislature which has authority over the whole territory and those legislatures which have authority over parts of the territory is not the relationship of superior to subordinates as is the relation of the Parliament at Westminster to the Parliament at Stormont, but is the relationship of co-ordinate partners in the governmental process. In a federal government there is a division of governmental functions between one authority, usually called the federal government, which has power to regulate certain matters for the whole territory, and a collection of authorities, usually called state governments, which have power to regulate certain other matters for the component parts of the territory. (. . .)

What Federal Government is for

If this is what federal government is, what is it for? Why is it adopted? Why are people not satisfied with devolution? A short answer to these questions may be given in this way. If all that people want is the power to regulate local affairs locally as a general rule, and if they are prepared at the same time to leave to a national parliament not only the power to regulate national affairs but also a power to regulate local affairs too if it thinks fit, that is, a potential supremacy over all matters whatsoever in the territory, then a system of devolution will do. (. . .) It is only when a group of territorial communities are prepared to co-operate with each other for the regulation of certain matters but for those matters only, and when they are determined at the same time to remain separate and supreme, each in its own territory, for the regulation of other matters, that federal government is appropriate. Federalism provides for this desire for co-operation in some things coupled with a determination to be separate in others. It was because the American colonies had this attitude to each other that they formed the federation of the United States of America, enumerating in their constitution the matters which they handed over to the federal congress for regulation – foreign commerce, inter-state commerce, coinage, naturalisation, post office, copyright, defence, and so on. (. . .)

What Federal Government is like

I have attempted to explain what federal government is and what it is for. It may next be asked: What is it like? Is the governmental machinery in a federation arranged in any special way? Are there any essential, distinguishing marks in the institutions of a federal government? There are, and two or three of them may be mentioned.

First of all, since federal government involves a division of functions and since the states forming the federation are anxious that this division should be explicit and guaranteed and that they should not surrender more powers than they know,

it is essential for a federal government that there be a written constitution embodying the division of powers, and binding all governmental authorities throughout the federation. From it all state and federal authorities derive their powers and any actions they perform contrary to it are invalid. It must be the supreme law of the land. (. . .)

In the second place, if the division of powers is to be guaranteed and if the constitution embodying the division is to be binding upon federal and state governments alike, it follows that the power of amending that part of the constitution which embodies the division of powers must not be conferred either upon the federal government acting alone or upon the state governments acting alone. It is preferable, though not essential to federalism, that the power should be exercised by the federal and state authorities acting in co-operation, as is done in the United States, for example, where amendments may be carried by a two-thirds majority, in both houses of Congress, together with a simple majority in the legislatures of three-quarters of the States. In Australia and in Switzerland the people are associated in the amending process through a referendum. (. . .)

Again, if there must be a division of powers and if this division must be inscribed in a constitution and if this inscribed division must be guaranteed, it follows that in any case of dispute between federal and state governments as to the extent of the powers allocated to them under the constitution, some body other than the federal and state governments must be authorised to adjudicate upon those disputes. It is not accidental, therefore, that there exists in the United States, Australia and Canada a body of this kind. The United States has its Supreme Court; Australia has a High Court together with, for some cases, the Judicial Committee of the Privy Council; and Canada has the Judicial Committee of the Privy Council. Switzerland has no institution performing this function completely and is to this extent imperfectly federal. (. . .)

Finally, if the governmental authorities in a federation are to be really co-ordinate with each other in actual practice as well as in law, it is essential that there should be available to each of them, under its own unfettered control, financial resources sufficient for the performance of the functions assigned to it under the constitution. It is no good allotting functions to the federal or to state authorities and devising legal safeguards so that each should be limited strictly to the performance of its respective functions, unless at the same time adequate provision has been made so that each authority can afford to do its job without appealing to the other for financial assistance. (. . .)

Financial subordination makes an end of federalism in fact, no matter how carefully the legal forms may be preserved. . . .

Some modifications upon the completely delimited and co-ordinate division of functions characteristic of federalism may be essential if good government or efficient, decisive government shall be achieved in a given community. It may be wisest for a group of states in devising a system of government for themselves to adopt strict federalism in some matters and a modified federalism or no federalism at all in other matters. Federalism is not an end in itself. (. . .)

It has usually been hard to establish a federal government. The forces of separatism and individualism which make federalism necessary make any super-

state government at all almost impossible. And when a federation has with difficulty come to exist, it is only with difficulty that it continues to exist. Its operation requires great skill and tact. Its success depends upon an enormous patience and an enormous capacity for compromise among the statesmen who work it. Swift and decisive government is impossible. Deep dividing issues must be avoided. Changes can come about only at the pace of the slowest. Federal government is conservative government. Federal government is above all legalistic. It is created and regulated by a legal document; it is safeguarded by a court of law.

Compromise, conservatism, and legalism – these are at once the virtues and the vices of federal government. It is wise to recall them when one proposes to set up a new federal government in the world. Those who do propose such a federal government, however, may feel inclined to say to me at this point: The difficulties you have been talking about seem to us to be much less urgent and more remote. Our greatest difficulties come not from those who prefer a unitary government for Europe to a federal government for Europe, but from those who do not believe that any form of *government*, strictly so called, for Europe is possible or desirable. The real obstacle for us is the supporter of the sovereign, independent state and not the supporter of the unitary state.

That is true. It is also true that they must expect, when they overcome the objections of those who believe in the sovereign, independent state, to meet thereafter the objections of those who, used to the simple certainties of unitary government, declare that they do not believe in federalism. It has seemed wise therefore to recall that federalism is a form of government which is not always appropriate or always easy to work. It is fair to recall at the same time that federal government is at least government; it is order, not anarchy, it is peace, not war.

30. William Beveridge: Form of Federal Authority 1 May 1940

From *Peace by Federation?*, Federal Tracts No. 1, London, Federal Union, 1940, pp. 18–20; reprinted in *World Order Papers*, First Series, London, Royal Institute of International Affairs, September 1940, pp. 80–82.

In this excerpt, Beveridge¹ expounds in simple terms the form of federal institutions which Wheare analyses in more detail in his Federal Tract.² Beveridge firmly insists on the need for "constitutional guarantees for the maintenance of effective democracy in the member States".

1 See introduction to excerpt 21, p. 72.

2 See excerpt 29.

In regard to the form of the federal authority, the framing of this is governed by two general considerations – that the individualities of the member states, large and small, must be adequately protected, and that the federal authority must be strong, with unquestioned power in its own sphere.

The first of these general considerations is important both for acceptance of federation at the outset, and for keeping it together in contentment. The purpose of federation is not the power of large nations but security for citizens of all nations and for their different cultures.

The second of these general considerations tells strongly against any plan of constituting a federal authority by nomination from national governments. Whatever provision were made for giving federal representatives a tenure independent of their nominators or securing that they should represent not simply the national party in power but all parties in fair proportion, it is difficult to believe that nominated federal representatives would ever have the authority that they will need. They cannot get this authority otherwise than directly from the people whom in common affairs they will govern. Whatever the difficulties of direct election, it seems essential that they should be overcome. Nor is there reason to suppose that they cannot be overcome, if the States for inclusion are chosen with this in mind.

This means, not only that the area of the federation must be manageable, but that every member State must be a democracy, with effective provision for peaceful change of governments and policies and for free discussion and association in parties. Requirement of democracy as a condition of federal membership results, not from abstract preference of democracy to dictatorship as a means of government, but from practical reasons. The working of a federal legislature as a super-national authority would become impossible if all the representatives of a particular nation were the nominees of one man in it: very rapidly it would become a cock-pit for national interests. Again, if it becomes impossible in any member State for the national government to be changed except by violence, the federal authority controlling the armed forces may be driven to an insoluble dilemma, between allowing disorder within the federation and supporting a dictator against a probable majority of his nationals. Effective democracy is a condition of federation.

These arguments point to a federal constitution on the following lines:

(a) A Federal Legislature of two Houses, one with membership based on population or electorate and chosen directly by the citizens, and one with equal or nearly equal representation of the separate States, whose members might be either elected or nominated by the national governments.

(b) A Federal Executive responsible to the Federal Legislature.

(c) A Federal Judicature interpreting a written constitution.

(d) Constitutional guarantees for the maintenance of effective democracy in each of the member States, i.e. for peaceful change of governments and policies in them by free discussion and association and secret voting.

These are the main lines only. To discuss all the constitutional problems of federation and the alternatives available for their solution would occupy many books, not part of a single pamphlet. The relations of the two Houses and