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THE NEW CONSTITUTION OF INDIA

BY

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FOREWORD

BY

DR. SIR CHIMANLAL H. SETALVAD,
K.C.I.E., LL.D.

It is my pleasant duty to write a Foreword to Mr. Joshi's book *The New Constitution of India*. Mr. Joshi is eminently qualified to deal with the subject-matter by his past training and academic position. He was a Professor of History and Economics in one of the leading Colleges of Bombay and he is now a Professor of Law at the Government Law College. He is also in active practice in the High Court of Bombay and has the necessary critical and precise mind to deal with the subject upon which he has written this book.

Mr. Joshi's book is an impartial exposition of the New Constitution of India under the Government of India Act, 1935, without any political bias, and puts before the student and the general reader a complete picture of the whole system embodied in the Act. Though the book has been primarily intended as a guide for students of Law in comprehending the principles underlying the New Constitution and its provisions, it has in fact, in my opinion, grown into a publication which will be of great use not only to lawyers but to the general public wishing to understand and grasp the implications and effects of this piece of legislation which constitutes a landmark in the political evolution of India. The historic background, as delineated in the book, is very accurate

and enables one to appreciate in proper perspective the various stages through which both the theory and the practice of Indian administration have passed. The book is bound to be a great help to those on whom will fall the duty of administering the Act either in a ministerial capacity or as members of the Legislatures. It will also be a valuable addition to the library of every one, in any part of the British Empire, who is interested in Indian affairs.

The importance of the Government of India Act, 1935, in the political evolution of India cannot be exaggerated. When I first entered the Bombay Legislature (then called the Bombay Legislative Council) in the year 1893, that body was no more than a dignified debating society. The elected element formed only a small proportion of the total number, the rest being nominated by the Government. Barring actual legislation, the members of the Council had no control over the administration. They had only the right to put interpellations at the meetings of the Council and to discuss the annual budget but with no power to move any alterations therein. There was, of course, under the circumstances, no element of responsibility in the Legislature. The Viceroy's Legislative Council, then called the Imperial Legislative Council, had also the same restricted functions.

In 1909 came what are known as the Morley-Minto Reforms. These reforms did not introduce any radical change in the system, but only widened the membership and empowered the members to move resolutions and to vote on the budget. A similar change was brought about in the Central Legislature. One departure was then made so far as the administration was concerned by requiring that one Indian should be

appointed to the Executive Council in the Provinces as well as at the Centre. Any idea, however, of introducing Parliamentary government and clothing the Legislature with responsibility was not then in the picture. Lord Morley, the then Secretary of State for India, openly disclaimed in Parliament any intention of introducing a Parliamentary form of government in India. It was only in 1919, after the Declaration of August 20, 1917, that the broad vision of Mr. Montagu made the introduction of responsibility the main feature of the reforms then introduced. It is noteworthy that the scheme of reforms evolved and submitted to Mr. Montagu jointly by the Indian National Congress and the Muslim League did not contain any element of responsibility. It was Mr. Montagu who during his tour in India instilled in the minds of Indian public men the essential need of making the Executive responsible to the Legislature. The Act of 1919, however, introduced no responsibility in the Central Government and introduced only partial responsibility in the Provinces, thus creating what has been known as Dyarchy, whereby Ministers in charge of certain transferred subjects were made responsible to the Legislature, while the other half of the Government, in charge of what were called the reserved subjects, still remained irresponsible. Such a patchwork was bound to encounter obvious obstacles in its working. But even so, it would have served as a substantial step forward towards real responsible government but for certain unfortunate events that transpired. Although there were differences of opinion regarding the merits of these reforms, the Indian National Congress, at its sessions at Amritsar, welcomed them and at the instance of Mr. Gandhi

himself passed a vote of thanks to Mr. Montagu. Soon afterwards, however, came disorders in the Punjab and other places and the unfortunate happenings during the administration of martial law in the Punjab. I have a vivid recollection of those events and the feelings they created in the country, as I was one of the members of the Committee, presided over by Lord Hunter, that was appointed to investigate into those disorders. On the top of that, there were introduced in the Imperial Legislative Council the measures known as the Rowlatt Acts. The whole of the Indian public was against these measures, and it is significant to note that every Indian member of the Imperial Legislative Council, a good many of whom happened to be nominated by Government, voted against that piece of legislation. Even a reasonable request made for the postponement of the consideration of that Bill till the new Legislature came into existence was brushed aside. All this created widespread suspicion as to the good faith of Britain, and Mr. Gandhi started his Non-Co-operation Movement, with the result that the Congress people abstained from entering the Legislatures. The Legislatures in consequence were not fully representative of the people.

One defect of this scheme of reforms as regards the Central administration was that, whilst the Legislative Assembly had a standing majority of elected members, the Executive was irremovable. This naturally led to a want of proper appreciation of the duties of both the Executive and the Legislature. The elected majority had naturally every temptation to act in an irresponsible manner, because whatever they did, the responsibility of carrying on the government would not be put on their shoulders, and they

knew that it did not matter what attitude they took up, the King's government would still be carried on. Such an irresponsible feeling among the legislators correspondingly produced a disregard in the mind of the Executive of the views of the Legislature. In the Provinces, half of the Government being irremovable, the elected members, from among whom the Ministers for the transferred subjects were chosen, regarded the Ministers with the same suspicion that they displayed towards the irremovable part, with the result that both in the Provinces and at the Centre the objects which Mr. Montagu had in view in introducing the reforms were not fulfilled, at any rate to the extent he had contemplated.

At a very early stage in the operation of these reforms, it was realized that the system would have to be overhauled at an early date. Both in the Central Legislature and in the public Press there was a demand for the appointment at an earlier date of the Commission which, under the Government of India Act, 1919, was to be appointed after ten years to review the whole position. In pursuance to that general desire, what is known as the Simon Commission was appointed in November, 1927. Unfortunately again a great blunder was committed in deciding upon the composition of that Commission. Its members did not include an Indian, and this raised a great storm of indignation throughout the country. Lord Birkenhead, who was then the Secretary of State for India, tried to justify his act by contending that, inasmuch as the Royal Commission was to be appointed by Parliament, membership must be restricted to Members of Parliament. This contention was utterly untenable in law. I can testify to the

intensity of resentment in the country, for I myself took a leading part in a demonstration that took place in the city of Bombay to give expression to the public feeling in the matter. It is significant that all differences between the various parties were sunk for the moment, and the Congress, the Liberals, and all other political parties joined in protest against the exclusion of Indians from that Commission. The result naturally was that the Report of the Commission was stillborn. Mr. Gandhi then started his Civil Disobedience movement, and the country clamoured for complete responsible government. India would not be satisfied to attain that goal by easy stages. Lord Irwin, with his usual sagacity, saw that some steps should be taken and means devised to satisfy the public demand and expectations. It was mainly at his initiative that the Declaration of October 1929 was made, asserting that Dominion Status was implicit in the Declaration made by Parliament in August 1917, and steps were taken to call a Round Table Conference in London for Indian delegates to meet the representatives of the British Government and Parliament to discuss the form of the new Constitution for India.

There were three Round Table Conferences held successively in 1930, 1931, and 1932, and some Indian delegates were also summoned to London to act as assessors with the Joint Parliamentary Committee appointed to consider the Government of India Bill which the British Cabinet had produced.

During the various stages from 1930 to the passing of the Act, the viewpoint of the British Government and the British Parliament had undergone a great change. One may recall what Mr. Ramsay MacDonald,

who was Premier when the First Round Table Conference was called, said in Parliament after that Conference was over. He stated: "Having had that majority, the Government is charged with the duty of conducting negotiations, and these negotiations had to be carried on from Parliament to Parliament. . . . That is the method of Government, and here, regarding India, the Cabinet must carry on these negotiations, until a point is reached when a proposed agreement is initialed—a very well-known stage in the negotiation of treaties. When the parties to the negotiations initial it, then, at that point, the House of Commons is asked whether it agrees or whether it disagrees. If it agrees, that is all right. If it disagrees, I think most Governments would regard the disagreement as a vote of no confidence, and would take steps accordingly."[1]

This attitude was subsequently changed. It is common knowledge that not a single suggestion made by the British Indian Delegation, which was composed of the members of all the communities, was accepted by the Joint Parliamentary Committee, and the Bill that was introduced was in certain respects worse than the Report of the Joint Parliamentary Committee.

It is an obvious fact that the New Constitution has not satisfied any shade of political opinion in India. It has often been said very aptly that responsibility is buried in a pile of reservations, safeguards, and "discretions." At the same time, it must be admitted that with all its glaring defects the New Constitution is a substantial advance so far as the Provinces are concerned.

[1] *House of Commons Debates*, December 2, 1931 (vol. 260, p. 1,113).

As regards the Central Government, the idea of a Federation of the British Indian Provinces and the Indian States originated in a somewhat dramatic manner. The Simon Commission had hinted at such a federation to be brought about at some distant date. It was at the First Round Table Conference that the Indian Princes, who were also invited to take part in it, suddenly expressed their willingness to come into a Federation, and, as Lord Reading then remarked at the Conference, that declaration of the Princes altered the situation completely. The motives operating on the minds of the British representatives, the British Indian delegates, and the Indian Princes were of a varied character. The British representatives were very unwilling to agree to any responsibility at the Centre unless they were assured of a stable element in the Legislature, and they thought that the entry of the Indian States into the Federation would supply that element in the form of the representatives of the States in the Legislature. The British Indian delegates, anxious as they were to secure responsibility at the Centre, and seeing that their only chance of getting it was by such a Federation, welcomed the idea. It is difficult to gauge accurately the motives operating in the minds of the Princes. Some of them no doubt were desirous in the interests of India as a whole to enter the Federation, even though it involved a certain amount of loss of their sovereignty. Some others were actuated by the hope that by entering the Federation they would be able to escape the yoke of Paramountcy as exercised through the Political Department of the Government of India. But while they were anxious to be relieved from the strong arm of Paramountcy, they were not prepared

to trust the Federal Government, in which they were going to have a strong representation, with the powers which the present Government of India exercises as the representative of the Crown in matters of Paramountcy. Therefore, while expressing their willingness to enter the Federation, they insisted that their relations with the Crown should be outside the Federal Constitution. The result has been that while they have to surrender to the Federal Government part of their sovereignty, Paramountcy remains unaffected and will be exercised by the Representative of the Crown entirely uninfluenced in that respect by the Federal Government. There is a considerable body of opinion which now feels that, instead of having a federation of the character evolved at present, it would have been better if a federation of British Indian Provinces alone had been inaugurated, and the States might have been invited to join it at some later stage on conditions very different from those which are offered to them now.

The Federal Constitution embodied in the Act has no precedent in any other country where federal government exists. In the United States of America, different sovereign States agreed for the general benefit to surrender part of their sovereignty to a federal government which they brought into being. In India, on the other hand, so far as British India is concerned there has been a strong central, unitary Government. It is now the Centre that sheds some of its functions and powers and surrenders them to the Provinces. The Federation is also a curious combination of Provinces working under a Parliamentary system of government and autocratic Indian States. It is difficult to prophesy how such a novel

Federal Government will eventually work out. It is, however, clear that if India is ever to take her proper place among the nations of the world, one cannot have democratic government in two-thirds of India side by side with autocratic government in the remaining one-third. It is, under these circumstances, a desirable thing that the States should be brought under one central authority, so that by close contact with British Indian Provinces working on the Parliamentary system, the States will sooner or later, possibly much sooner than people imagine, have to reform and remodel their governments more or less on the same lines as the British Indian Provinces. From that point of view, one is inclined to welcome this novel form of Federation. Time alone will show whether India under this Federation will ultimately evolve a system of government suitable to her requirements.

The above are my personal views and should not be attributed to the author of this book.

CHIMANLAL H. SETALVAD.

PREFACE

"A professor whose duty it is to lecture on Constitutional Law must feel that he is called upon to perform the part neither of a critic nor of an apologist nor of an eulogist, but simply of an expounder; his duty is neither to attack nor to defend the Constitution but simply to explain its laws." In writing this work, I have kept in mind this dictum of Professor A. V. Dicey. The book seeks to expound the New Constitution of India in a historical setting with the object of enabling students of law and Indian citizens in general to understand and appreciate the legal and constitutional aspects and implications of the New Constitution.

The Indian Constitution; the Government of India Act, 1935, and the Orders in Council made thereunder, is prescribed as one of the subjects for Law and Arts Examinations in various Universities in India. This book is intended primarily to supply the need of a comprehensive textbook for the students of the Indian Universities. There is also an increasing demand on the part of citizens both in India and abroad for a handy volume dealing with all the aspects of the New Constitution. The purpose of this book is also to satisfy this growing demand.

The Constitution of a country is only comprehensible in terms of its history. In order to enable the reader to appreciate the nature of India's constitutional advance from stage to stage, and the significant constitutional changes introduced by the Act of

1935, the whole subject is treated on an historical background.

The Government of India Act, 1935, has 321 Sections and ten Schedules. Fourteen Orders in Council have already been issued under it. Further, there are Instruments of Instructions issued or to be issued to the Governors of the Provinces and the Governor-General, which are a part of the Constitution. The Instruments of Accession of the Rulers of the States, and the Agreement between His Majesty the King-Emperor of India and His Exalted Highness the Nizam of Hyderabad with respect to the administration of Berar, are also material documents for the study of the Constitution. The statutory material of the New Constitution is so large that it is very difficult to deal with it fully in one comprehensive and self-contained book. I have endeavoured to present the whole of the material precisely and concisely, embodying the substance of all the Sections of the Act, important Schedules to it, Orders in Council issued up to December 16, 1936, and the Berar Agreement. The important Schedules to the Act of 1935 are given in Appendices. The Letters Patent constituting the office of Governor-General of India, the Commission appointing the Marquess of Linlithgow to be Governor-General and Crown's Representative, the Instrument of Instructions to the Governor-General and the Instrument of Instructions issued to the Governors of the Provinces, are given *in extenso* in Appendix A. A copy of the revised draft Instrument of Accession is also given in Appendix F.

The Government of India Act, 1935 contains the longest and most complex Constitution in the world. Some of its provisions do not deal with the fundamental

law of the Constitution, but are only of an administrative character. The anxiety of the British Parliament to provide comprehensive and effective safeguards and reservations accounts for the complexity of the Constitution. But it is to be borne in mind that it is not easy to frame a Constitution for one-fifth of the human race, and especially when there are many conflicting interests, and the avowed object of the Constitution is to grant responsibility with reservations and safeguards. Moreover, the nature of the All-India Federation, which conforms to no accepted theory of federalism and which is at once a bold and unique constitutional experiment, is also responsible for the length and complexity of the Constitution. There is a further complication, as the All-India Federation consists of British Indian Provinces which are democratically governed, and of States which are under the personal rule of their Princes. Thus the authors of the Federation have incorporated in one political structure two different kinds of polities, forgetting that in their functioning within one structure these may prevent the growth of the vitality and organic unity of the new federal polity.

Ultimately, the real nature of the government in India, both Federal and Provincial, is to be Parliamentary. The present Constitution in its internal structure resembles Parliamentary Government, but it differs vitally from it in substance. Whilst Parliamentary Government is in the process of being discarded in some of the countries of Europe, India is given for the first time responsible government in the Provinces and a semblance of responsible government at the Centre.

For a proper study of the New Constitution of India, one must have some knowledge of English

Constitutional Law, Paramountcy, Federalism, and also the Constitutional Law of the Dominions. I have endeavoured to deal briefly with all these topics.

It is very difficult to anticipate the results of the working of the New Constitution. Admittedly, Dominion Status is the constitutional goal of India. But there is no provision in the Constitution for the realization of this goal. Indians look upon the New Constitution as an imposed Constitution which is incapable of growth from within. It is encompassed in a strait-jacket. Nevertheless, having regard to the nature of the New Constitution and the political conditions in India, we can easily assert that its working on proper lines will inevitably result in securing for India full responsible government. The ultimate amendment of the Constitution by the British Parliament to grant full responsible government to India is inevitable.

My sincere thanks are due to Dr. Sir Chimanlal Setalvad, K.C.I.E., LL.D., for his kindness in reading the manuscript, for his valuable suggestions, and for the Foreword with which he has been good enough to honour this book. I am grateful to my friend Mr. M. C. Chagla, B.A. (Oxon), Barrister-at-Law, for going through the manuscript and making useful suggestions. I have to thank Mr. T. C. Srinivasan, B.A., who so carefully and expeditiously typed the manuscript as to enable me to finish the work by the end of January.

My thanks are also due to the authors of the various books I have consulted.

G. N. JOSHI.

Government Law College,
Bombay. February, 1937

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Ragunath Prasad Singh *v.* Pratapgar Deputy-Commissioner 54 Ind. App. 323

Salaman *v.* Secretary of State for India (1906) 1 K.B. 104

Secretary of State in Council *v.* Kamachee Boyee Sahaba (1859) 7 Moo. Ind. App. . . . 5

Secretary of State *v.* Cockcraft 34 All. . . 302

Statham *v.* Statham (1912) P. 56

Transfer of Natural Resources to Provinces of Saskatchewan (1932) A.C. 103

Young *v.* s.s. Scotia (1903) A.C. . . . 103

"And if the constitutional changes now impending predicate the remarkable growth of Indian political consciousness in terms both of the desire for self-government and of a growing realisation of the essential unity of India, so also those changes connote a profound modification of British policy towards India as a member of the Commonwealth. For indeed, by their very nature, they involve nothing less than the discarding of the old ideas of imperialism for new ideas of partnership and co-operation."

H. E. THE VICEROY OF INDIA, IN A SPEECH ON SEPTEMBER 21, 1936.

"Government with us (Englishmen) is government by opinion; and that is the only kind of 'self-government' that is possible. So there arise 'two familiar British conceptions; that good government is not an acceptable substitute for self-government, and that the only form of self-government worthy of the name is government through ministers responsible to an elected legislature.' There is, indeed, a third British conception, that good government cannot endure unless it is self-government."

W. IVOR JENNINGS,
Cabinet Government (1937).

CHAPTER I

THE NEW CONSTITUTION OF INDIA

The Historical Background

The conquest or acquisition of India by the British is an outstanding event of modern history. The British came to India to trade, and in the process of trading, by the inexorable force of circumstances, became the rulers of India. The East India Company, which commenced trading with India under a Charter granted by Queen Elizabeth in 1600, conquered or acquired India with its own resources under the authority and with the help and guidance of the British Parliament for and on behalf of the British Crown.

1. Acquisition of Sovereignty and Suzerainty of India

The sovereignty of India was acquired by the British Crown by a process which was slow and uncertain and which took place both in England and in India.

As the East India Company was essentially a trading corporation, there was for it at first no question of sovereignty or territorial acquisition. The sovereignty of the Crown over India is based partly on the Charters and partly on the Acts of Parliament, and where these fail, on the constitutional maxim that all conquests made by the subjects must necessarily

belong to the Crown. The Company was at no time sovereign in the strict sense of the term. Its authority was derived from the Charters or Acts of Parliament.

Having regard to the history of the Company in the seventeenth and eighteenth centuries, it may be stated that sovereign power was delegated to it by the Crown in successive stages by the Charters which were renewed at regular intervals. The Charter of 1600, which incorporated the Company as a trading corporation, gave it power to make laws for the government of its officers. The Charter of King Charles I (1661) authorised the East India Company to export warlike stores and to make peace and war with Native Princes within the limits of their trade.[1]

The Charter Act of 1663 authorised the Company to use martial law for defence against foreign invasion or domestic rebellion, but there the Crown reserved to itself the sovereign right over the forts in India.

By the Charter of 1698, the powers of the East India Company were restricted to raising forces to defend the forts, but all sovereign rights were again reserved, and amongst those thus reserved was the power of establishing Courts of Justice. The Charter of 1758 delegated to the Company the power to make treaties and to cede territories acquired by conquest from Indian Princes or governments. The Regulating Act, 1773, which put the question of the undoubted sovereignty of the Crown beyond all doubt, was the first legislative enactment that made a definite provision for the sovereign administration of the dominions acquired by the Company in the East Indies. Such

[1] The Charter of 1661 was absolutely null and void, as the power of making war and peace is admitted by all jurists to be an incommunicable prerogative.

sovereign rights were vested in the Governor-General-in-Council, in whom all the civil and military power was vested. He, and not the East India Company, was really the only representative of the Crown in India. His powers were definite. The right of the Crown to establish a Supreme Court of Judicature at Fort William was exercised by the establishment of a Supreme Court of Judicature at Calcutta. By the Act of 1784 the Board of Control was given power to superintend all services relating to civil and military government and the revenue in the East Indies. The Act empowered the Governor-General-in-Council at Fort William to superintend the Presidencies of Madras and Bombay, if not repugnant to the orders from England. It prohibited the Governor-General-in-Council, except in case of emergency, from declaring war without the consent of the Court of Directors and the Board of Control. The Act also empowered the Crown to set up Courts of Judicature at Madras and Bombay.

It is to be noted that the early Charters were expressly stated to be "without prejudice to the claims of the public." It was in 1813 that we find for the first time the express reservation of the undoubted sovereignty of the Crown over the territorial acquisitions of the Company. The Charter Acts of 1813, 1833, and 1853 declared that the Company was only a trustee of the Crown as regards its possessions, rights, and powers. The Government of India Act of 1858 transferred the government from the Company to the Crown, and vested in the Crown all the territories and powers of the Company. Thus the powers and privileges granted to the Company by Charters were confirmed, supplemented, regulated,

and curtailed by various Acts of Parliament till they were finally resumed by the Crown in 1858. The change effected in 1858 was thus not a new acquisition of sovereignty, but only the resumption of a delegated authority by the Crown and the exercise thereof directly by the servants of the Crown thereafter. This fact was, however, further emphasized when the Queen under the Royal Titles Act, 1876, as "a recognition of the transfer of government" made by the Act of 1858, adopted the style of Empress of India.

Secondly, in India, the Company was dependent on the grants of the Moghul Emperor and other rulers for permission to trade and the right to settle disputes within the territorial units of their factories. In 1641, on payment of a tribute, a Hindu Prince granted the Company a piece of land on which Fort St. George (Madras) was built. In 1688–9 a royal grant placed the Island of Bombay under the Company's control. The King had full sovereignty over it, as it was part of his wife's dowry. In 1698 the Company obtained the zamindari right over a portion of land on which, subsequently, Calcutta was built. Territorial acquisitions and concessions granted by or wrested from native rulers gradually established the Company as a territorial sovereign in rivalry with other native powers, and finally, by 1858, left the Company exercising universal sovereignty throughout British India and paramount authority over the Native States.

Thus, strictly speaking, there is a twofold source of acquisition of the sovereignty of India. But it is very difficult to locate the point of time when the sovereignty of the British Crown became a fact in

relation to various territories which came under the Company's control either by conquest or under a treaty or grant from the titular Moghul Emperor, or by agreement or by extinction of Indian rulers, or by the assumption and assertion of sovereignty on the part of the Crown. The legal and constitutional position of the Company up to 1858 is fully defined in a series of judicial decisions.[1] The Company exercised delegated sovereignty over the territories under the Government with all the powers in connection with the external relations of those territories incidental to the exercise of that sovereignty, subject, of course, to such restrictions as are imposed by Charters or Statutes.[2]

To sum up, the title of the Crown as Sovereign of India is a paramount title, arising from the fundamental relations between sovereign and subject; it is in no sense derivative; it did not come from the East India Company, and has nothing to do with the Transfer Act of 1858, but rests on the broad principle that a subject who acquires territory acquires

[1] "Upon this legislative authority, subject, however, to such control of the Crown, as is provided by several statutes, does the right of the Company to the possession and government of the territories acquired in the East Indies depend, and from the same legislative authority . . . it is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other, namely, powers to carry on trade as merchants, and power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land and to make peace or war with the native powers of India."—Gibson *v.* The East India Company, 5 Beng. N.C. (1839), p. 262; The Secretary of State in Council *v.* Kamachee Boyee Sahaba (1859), 7 Moo. Ind. App., p. 476; Hemchand Devchand *v.* Agam Sakarlal Chhotamlal, 33 Ind. App., p. 1.

[2] The Government of India has always possessed two sets of powers—one set derived originally from the Crown, but exercised at one time by the East India Company and then in 1858 transferred to the Governor-General in Council; another set which grew in course of time, and was never parted with to the Company.

it for the Sovereign, and not for himself. This principle applies to all territorial acquisitions, whether made in time of peace or war. The East India Company acquired territory and ceased to be a purely commercial corporation, and all the rights of sovereignty thus acquired at once accrued to the Crown. The paramount title of the Crown was in no respect modified or affected by the puisne title of the East India Company at the time when the government of India was taken from the Company. Parliament might have attached restrictions to the prerogative. This was not done. The only effect of the Transfer Act of 1858 was simply to determine the trustee administration of the Company and not to create the title of the Crown.

In India, the Crown, in addition to its inherent authority, represents the authority of the Moghul Emperor of Delhi over all the Indian Princes. This authority was partly acquired and mostly assumed and asserted. The suzerainty of the Crown over the Native States is partly acquired by treaties, engagements, and Sannads, but mostly assumed and asserted with the growth of the British power.

2. Origin and Growth of the Indian Constitution

The constitution of a country is only comprehensible in terms of its history. The origin and the growth of the Indian Constitution is rooted in the history of British India. "The history of British India falls into three periods. From the beginning of the seventeenth century to the middle of the eighteenth century, the East India Company is a trading corporation existing on the sufferance of Native Powers and in

rivalry with the merchant companies of Holland and France. During the next century, the Company acquires and consolidates its dominion, shares its sovereignty in increasing proportion with the Crown, and gradually loses its mercantile privileges and functions. After the Mutiny of 1857, the remaining privileges of the Company are transferred to the Crown, and then follows an era of peace in which India awakens to new life and progress."[1] During the third period, Indians become politically conscious and demand a share in the administration of the country. The third period ends with the passing of the Government of India Act of 1919 based on the Declaration of August 20, 1917, which *inter alia* accepted the progressive realization of Responsible Government in India as an integral part of the British Empire, as India's political goal. The fourth period begins with the introduction of Dyarchy in the Provinces in 1921. During this period, India demands full Responsible Government. This period ends with the passing of the Government of India Act, 1935, which creates a polity for the whole of India, and inaugurates a new era in her constitutional development. The principal events of constitutional importance in each period may be briefly stated.

Period I. 1600–1765

The first period (1600–1765), which is entirely a trading period, begins with the Charter of Queen Elizabeth. Without going into the details of the fortunes of the East India Company, it is enough to state that during this period the Company is essentially

[1] *Imperial Gazetteer*, Vol. IV, p. 5.

a commercial corporation, enjoying mercantile privileges of trading with the East Indies.

Owing to the capture of Constantinople by the Turks, the nations of Western Europe were compelled to resort to the sea route to the East. Their spirit of adventure helped them. Vasco da Gama landed in Calcutta in 1499, and within a short time the Portuguese Empire was founded in the East. In course of time, Portugal was dominated by Spain. The monopoly of Portugal and Spain was soon challenged by England and Holland. In England, the spirit of adventure and colonisation was in the ascendant. Holland and Spain were at war for a number of years, and it became difficult for Portugal and Spain to retain their monopoly of the Eastern trade. As the position of the individual traders in this competition became precarious, the Chartered Companies came into existence. In 1600 Queen Elizabeth granted certain London merchants a Charter for trading purposes in the East. In return for these privileges of trade monopoly the East India Company paid to the Crown a share of its profits.

The Charter granted by Queen Elizabeth was renewed from time to time by the English kings and, after 1688, by Acts of Parliament. The Government of England had neither direct share in nor responsibility for the affairs of the Company. The qualification for a Proprietor of the Company was the possession of stock to the value of £500 and upwards, and for a Director £200 stock. Directors were elected annually by the Board of Proprietors. The Company's settlers were responsible only to the Directors. The Company had also under the Charter the right "to acquire territory, fortify their stations, defend their property

by armed forces, coin money and administer justice within their own settlements." In the exercise of this right, the Company acquired a few trading stations. The first of such stations was at Surat, where the Company obtained some concessions from the Emperor Jehangir. It built factories mostly on or near the coasts. In 1616 the Company opened a factory at Masulipatam, and in 1641, as already noted, Fort St. George was built at Madras on land acquired from a Hindu ruler. A factory was also built on the Hugli, which was subsequently moved to Calcutta in 1699. In 1662 the King of Portugal handed over the Island of Bombay as a dowry to Charles II, who granted it a few years later to the Company.

On the death of Aurangazeb, the mighty Empire of the Moghuls broke up, and by 1761 it survived only as a shadow without substance. Provincial governors set themselves up as independent rulers, and began fighting with one another. The Marathas were busy consolidating their power, but were at the same time fighting amongst themselves. The Rajputs were not powerful enough to establish a Rajput kingdom, and the Sikhs had not gathered sufficient strength. There was no strong central authority to take the place of the Moghul Emperors. A vacuum was created in the political life of India. The opportunity was missed by the Hindus, and the vacuum was filled by the British, who took advantage of the political conditions in India. The European situation helped them in defeating and ousting from India their European rivals, the French. At one time the French had almost established their power in India, but the victories of Clive turned the scale in favour of the British. Clive's tactics, the British control of

the sea, and the short-sighted policy of the French Government proved fatal to the original plans and ambitions of Dupleix.

The settlements at Calcutta, Bombay, and Madras were each governed by a Governor or a President and a Council. After the Battle of Plassey, the cession of Burdwan, Midnapore, and Chittagong to the Company by the Nawab of Bengal in 1760 made the Company masters of a large tract of territory. This period terminates with the grant of *Dewani* (the acquisition of powers of revenue collection and civil administration) to the Company by the Moghul Emperor in 1765, when the Company became virtually the rulers of Bengal, Bihar, and Orissa.

Period II. 1765–1858

The second period witnesses the transformation of the Company from a trading corporation into a political body, and finally its extinction. It is during this period that we see the beginnings and growth of administrative and legislative machinery for British India.

By 1772, the Company had already become, under the stress of circumstances, a territorial potentate. Strangely enough, when its agents were handling the revenues of a kingdom in the name of the Moghul Emperor, it found itself in financial difficulties. The opulence and arrogance of the servants of the Company returning to England from India drew the pointed attention of Englishmen to their responsibility for the governance of India. The provisions of the Charters were found inadequate to meet the new

situation. Hence, in 1773, Parliament "first undertook the responsibility of legislating for India," which was given effect in Lord North's Act. This Act, known as the "Regulating Act," recognised the authority of the Company to carry on hostilities and to make treaties with native powers in India. It reconstituted the Council of Bengal, changed the style of Governor to Governor-General, and subjected the other two Presidencies of Bombay and Madras to that of Bengal in matters of the declaration of war and the making of peace. The first Governor-General and his Council of four members were named in the Act. Thereafter they were to be appointed by the Court of Directors. The power of making Rules, Ordinances, and Regulations was conferred upon the Governor-General and his Council. A Supreme Court of Judicature, comprising the Chief Justice and four Puisne Judges nominated by the Crown, was established in Bengal. The Court of Directors was required to communicate to the Treasury all despatches from India relating to revenue, and those relating to public affairs to a Secretary of State. The three Presidencies of Bombay, Madras, and Bengal were independent of one another, but the Act brought Madras and Bombay under the supervision of the Governor-General and Council of Bengal. This Act has been criticized with some force as violating the first principle of administrative mechanics. It was based on the theory of checks and balances. Hence, in its actual working, it broke down. "It created a Governor-General who was powerless before his own Council, and an Executive that was powerless before the Supreme Court."[1]

REGULATING ACT

[1] *Montagu–Chelmsford Report*, para. 30.

When, by 1782, the Company emerged from the wars with Native and European Powers as the strongest power in India, Parliament resolved to strengthen its control over India. On the report of the Committee which was specially appointed to enquire into the affairs of the Company, Warren Hastings, the Governor-General, was recalled. The Directors of the Company defied Parliament and retained Warren Hastings. Hence, in 1783, Fox, on behalf of the British Ministry, introduced his India Bill, which in substance was meant to transfer the authority belonging to the Court of Directors to a new body named in the Bill for a term of four years, which was afterwards to be appointed by the Crown. This Bill passed through the House of Commons by a majority of two to one, but it was rejected by the House of Lords chiefly through the intervention of George III. For the first and the last time a British Ministry was wrecked on an Indian issue. Pitt, who became Prime Minister in 1783, introduced another Bill and carried it through Parliament. This was the measure famous as Pitt's India Act of 1784. It reformed the constitution of the Government of India. Its effect was twofold. First, it constituted a department of State in England under the official style of "Commissioners for the Affairs of India," generally known as the Board of Control, whose special function was to control the policy of the Court of Directors, thus introducing the dual system of government by the Company and by a Parliamentary Board which lasted till 1858. Secondly, it reduced the number of members of the Executive Council of Bengal to three, of whom the Commander-in-Chief was to be one. It also modified

FOX'S INDIA BILL

PITT'S INDIA ACT, 1784

the Councils of Madras and Bombay on the pattern of that of Bengal.

The Board, as modified by a subsequent Act, consisted of five Members of the Privy Council, of whom two were the Secretary of State and the Chancellor of the Exchequer. These high officials were not expected to take an active part in the work of the Board. Hence, the first Commissioner named was appointed President of the Board, and was given a casting vote. This made him practically supreme. The Act empowered the Board, if it considered that the subject-matter of its deliberations concerning war and peace or negotiations with any of the Native Princes in India required secrecy, to send orders and instructions to the Secret Committee of the Court of Directors. The Governor-General was prohibited "except in certain cases without the express consent of the Secret Committee of the Court of Directors either to declare war or to commence hostilities or to enter into any treaty for making war against any of the countries, provinces or States in India or signing of any treaty or guaranteeing position of any country, provinces or States." In short, it enjoined upon the Governor-General in Council a policy of non-intervention. When the Company's Charter expired in 1793, it was again renewed for twenty years. This time the monopoly of the Company for exclusive trade in the East was renewed for twenty years. This Act also introduced some changes in the constitution of the Government of India. The Board of Control was modified, the Court of Directors appointed a Secret Committee of their own members, through whom the Board of Control was to issue instructions to the Governor-

CHARTER ACTS OF 1793 AND 1813

General and the Governors in India regarding questions of peace and war. The Councils in Bengal, Madras, and Bombay were remodelled. The appointments of the Governors and the Commander-in-Chief were vested in the Court of Directors but subject to the approval of the Crown. The Directors retained their powers of dismissing any of these officials. The Governor-General was empowered to override the majority of his Council "in cases of high importance and essentially affecting the public interests and welfare or when any measure was proposed whereby the interests of the Company, or the safety or tranquillity of the British position in India, may in the judgment of the Governor-General be essentially concerned." A similar power was conferred upon the Governors of Madras and Bombay. The power of the Governor-General in Council to superintend the subordinate Presidencies was emphasized. All orders were to be expressed and made by the Governor-General in Council. The Governor in Council at Madras first received legislative powers in 1800 by an Act which also established a Supreme Court of Judicature at Madras with judges appointed by the Crown. Bombay obtained legislative powers in 1807, and a Supreme Court of Judicature in 1823. The Company survived and the Directors still retained great powers of patronage. Before the renewal of the Company's Charter, Parliament generally held an exhaustive enquiry, which was in the nature of an inquest, into the affairs of the Company. One of these enquiries resulted in the Fifth Report of 1812. The indefinite dominion derived from the Moghul Emperor in the form of *Dewani* was overlaid by the authority derived from Parliament. Hence the Charter Act of 1813,

while continuing the Company in actual possession of its territories, distinctly asserted the sovereignty of the Crown over those territories. The territorial authority of the Company and its monopoly of trade with China were again renewed for twenty years, but the right of trade in India, except in tea, was thrown open to all British subjects. This Act made provision for a Bishop for India and an Archdeacon for each of the Presidencies. It also, authorised the expenditure of a lakh of rupees on education and the encouragement of learning.

CHARTER ACT OF 1833

In 1833, when the Charter of the Company was renewed for a further period of twenty years, extensive changes were introduced. The Charter Act of 1833 declared that the territories in India were held by the Company in trust for His Majesty. Its monopoly of the trade with China was withdrawn, and the Company ceased altogether to be a mercantile corporation. It was enacted that no official communication should be sent to India by the Court of Directors until it had first been authorised by the Board of Control. The Governor-General of Bengal received the title of "Governor-General of India." His Council was enlarged by an addition of a fourth or extraordinary member who was not entitled to a seat or vote except in matters of making laws and regulations. He was to be appointed by the Directors, subject to the approval of the Crown, from amongst persons who were not servants of the Company. The first member was Thomas Babington Macaulay. The Governor-General was empowered to make "laws and regulation for the whole of India," and legislative functions were withdrawn from Bombay and Madras. A Law

Commission was appointed for drafting laws for India. The Act also directed that all Indian laws and also the Reports of the newly constituted Law Commission should be laid before Parliament. A new Presidency was created with its seat at Agra. (This clause was suspended two years later by an Act which authorised the appointment of a Lieutenant-Governor of the North-West Province.) At the same time, the Governor-General was authorized to appoint a member of his Council to be a Deputy-Governor of Bengal. Two new Bishoprics were constituted for Madras and Bombay. It was for the first time enacted that "no native of India shall by reason of his religion, place of birth, descent or colour, be disabled from holding any office under the Company."

By this Act, the sole legislative power was vested in the Governor-General in Council to the supersession of the powers formerly also enjoyed by Bombay and Madras. This established legislative centralization. The former Acts had already brought the Presidencies of Bombay and Madras under the general superintendence and control of the Governor-General in Council, thus already creating a sort of administrative centralization. In the enlargement of the Council of the Governor-General for the purpose of legislation by the addition of a fourth member, we have the beginning of the Indian Legislature.

CHARTER ACT OF 1853

When the Company's Charter expired in 1853, the powers of the East India Company were again renewed by the Charter Act of 1853, but "only until Parliament shall otherwise provide." This Act effected other changes also. Six members of the Court of Directors out of eighteen were henceforth to be appointed by the Crown.

Appointments of the ordinary members of the Council in India, though still made by the Directors, were to be subject to the approval of the Crown. The Commander-in-Chief of the Queen's Army in India was declared Commander-in-Chief of the Company's forces. The Council of the Governor-General was again remodelled by the admission of the fourth member as an ordinary member for all purposes, whilst six members were added for the object of legislation only, namely, one member from each Presidency, the Chief Justice of Bengal, and a Puisne Judge of the Supreme Court of Bengal. A Law Commission was appointed in England to consider the reforms proposed by the Indian Law Commissioners. Finally, admission to the Civil Service was thrown open to public competition. This Act took away the right of patronage from the Directors. Patronage was henceforth to be exercised under the Rules made by the Board of Control. By 1853 the President of the Board of Control was the sole member of the Board. The supremacy of the President did not mean that the Directors had no real power. The right of initiative was still with them. They were still the repository of knowledge of India, and they still exercised substantial influence upon the details of administration.

The Mutiny of 1857 sealed the fate of the East India Company, after a career of 250 years. The Moghul Emperor, accused of complicity in the Mutiny, was deposed and his titular sovereignty either passed to or was assumed by the British Crown.

The Act of 1858 for the Better Government of India transferred the government of India from the Company to the Crown, vested in the Crown all the territories and powers of the Company, and declared that

India should henceforth be governed directly in the name of the Crown by its own servants. It created a new office of Secretary of State for India to transact the affairs of India in England, and to exercise all the powers formerly exercised either by the Directors or by the Board of Control. It also established a Council of India consisting of fifteen members, nine of whom were to be those who had had long and recent service in British India, with the object of providing the Secretary of State with information and advice on Indian questions. Thus the Crown became *de jure* as well as *de facto* sovereign of India. By the Act of 1858, the delegation of sovereign power to the Company was determined, and this power has since been exercised directly on behalf of the Crown, in India through the same authorities as before, in England through the Secretary of State.

Period III. 1859–1920

Home Government of India after 1858

Since 1858, the Crown (Parliament) has exercised its authority and control over the Government of India through the Secretary of State who is a member of the British Cabinet. Like other Ministers of the Crown, he is responsible to Parliament for his official acts. Till March 1937 he discharged his functions with the help of the India Council. He had generally the power of over-riding his Council except in certain matters in which a vote of the majority of the Council was necessary. The Governor-General in Council had to obey all orders received from the Secretary of State. Thus, in theory, Parliamentary control over India was complete, but, in fact, it was rarely exercised.

Indian affairs, ever since the fall of the Coalition Ministry in 1783, have been kept outside British party politics. During the whole period from 1858 to 1919 the interest of Parliament in Indian affairs was neither well-sustained nor well-informed. Parliament, which had become the direct guardian of Indian interests, proved anything but a vigilant guardian. The Government of India was controlled by the Secretary of State in the name of Parliament, but his policy and acts remained generally unscrutinized and uncontrolled by Parliament except in a few cases in which Great Britain was primarily interested. The structure of the Home Government of India introduced in 1858 continued without any important modification till 1919. The size of the India Council was altered from time to time, but its functions remained the same. At times its rôle was reactionary. The Government of India Act of 1919 effected certain changes in the Home Government of India with a view to carrying out the policy contained in the Declaration of August 20, 1917. These changes were merely consequential. The basic principle of Parliamentary responsibility for Indian affairs was not touched. With the idea of stimulating the interest of Parliament in Indian affairs, the salary of the Secretary of State and the cost of his political establishment at the India Office were transferred to the British Exchequer. Further, the Secretary of State was authorized to relax his powers over Indian administration by Rules in specified matters. A new post of High Commissioner for India was created for the purpose of agency work. The composition of the India Council was also modified. The responsibility of Parliament "for the welfare and advancement of the Indian peoples" was emphasised

in the Preamble to the Act of 1919. Provision was made for the appointment of a Statutory Commission to examine the working of the reforms at the end of ten years with a view either to restricting or extending them.

GOVERNMENT OF INDIA AFTER 1858

The administrative machinery in India after 1858 was not substantially modified, but the legislative machinery was improved and enlarged. Until 1858 the Legislatures were merely enlarged executives. The Indian Councils Act, 1861, enlarged the Governor-General's Council for the purpose of legislation by the nomination of a few Indians, but its activity was strictly confined to legislation. The Provincial Councils were also similarly enlarged. Up to 1870 the Government was mainly occupied with the consolidation of its power and the maintenance of law and order. The early years of British rule in India were marked by a willing submission to, and acceptance of, that rule on the part of the people. It was regarded as an efficient police state which maintained order and preserved peace. People were just settling down and had neither the equipment nor the time to apply their minds to the problems of government. From 1870 onwards, with the spread of higher education, some Indians began to question whether the blessings of British rule were not exaggerated. Educated Indians, steeped in Victorian literature, nourished on the teachings of Burke, Macaulay, and J. S Mill, applied the principles of the English constitution to the working of bureaucratic government in India. The Indian National Congress, founded in 1885, gave an impetus to the desire of educated Indians for a share in the administration of the country. To meet the growing ambitions of

educated Indians, the Indian Councils Act of 1893 enlarged the Central and Provincial Legislatures both in their composition and functions, thus providing more facilities for Indians to express their views on the whole field of adminstration. The strong administration of Lord Curzon intensified the political discontent among educated Indians. The partition of Bengal in 1905 led to terrorism and dacoities, and invoked an intensive wave of Swadeshism in the country. The desire for political advance was immensely intensified. The new temper that was awakened in the East by the victory of Japan over Russia heightened India's national self-consciousness. To meet the political demands, the Morley–Minto Reforms of 1909 further enlarged the Central and Provincial Legislatures. Their functions were also widened. But these reforms did not touch or affect the framework of the Government. The basic principle of the Morley–Minto Reforms was that the Governor-General's Council "in its legislative as well as executive character should continue to be so constituted as to exercise its constant and uninterrupted power to fulfil the constitutional obligations it owes, must always owe, to His Majesty's Government and to the Imperial Parliament."[1]

Thus, between 1861 and 1909, steps were taken to secure the co-operation and consultation of the nominated representatives of the people. All these

[1] Though the Morley–Minto Reforms are now looked upon as containing "the seeds of Parliamentary government," Lord Morley most emphatically publicly denied having had any intention of introducing Parliamentary government in India.

Lord Morley stated, "If it can be said that this Chapter of Reforms had led directly or indirectly to the establishment of Parliamentary system in India, I for one would have nothing at all to do with it."—*Montagu–Chelmsford Report*, para. 79.

steps were necessitated by the growing political consciousness of the Indian people. There was no definite intention of introducing Parliamentary government in India, though it is true that all these measures since 1861 facilitated the introduction of a representative system.[1]

India's demand for political advance was not satisfied by the Morley–Minto Reforms. The claim was renewed with emphasis and intensity during the War which was said to be fought for the establishment of self-determination for every nation and "to make the world safe for democracy." By way of satisfying India's demands and in recognition of her spontaneous services in men, money, and materials to the United Kingdom during the War, on August 20th, 1917, Mr. Montagu, the then Secretary of State for India, made an announcement in the House of Commons of the policy of His Majesty's Government towards India in the following terms:

"The policy of His Majesty's Government, with which the Government of India are in complete accord, is that of increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire. They have decided that substantial steps in this direction should be taken as soon as possible and that it is of the highest importance as a preliminary to considering what these steps should be that there should be a free and informal exchange of opinion between those in authority at home and in India. His Majesty's Government have accordingly decided, with His Majesty's approval, that I should

[1] "From the first, the principle of representative institutions began to be gradually introduced, and the time has come when that principle may be prudently extended."—Royal Proclamation, November 2, 1908. (This is not historically accurate.)

accept the Viceroy's invitation to proceed to India to discuss these matters with the Viceroy and the Government of India, to consider with the Viceroy the views of local Governments, and to receive with him the suggestions of representative bodies and others.

"I would add that progress in this policy can only be achieved by successive stages. The British Government of India, on whom the responsibility lies for the welfare and advancement of the Indian peoples, must be judges of the time and measure of each advance, and they must be guided by the co-operation received from those upon whom new opportunities of service will thus be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility."

Mr. Montagu came to India, and in the company of the Viceroy, Lord Chelmsford, toured the whole country and enquired into public opinion in India. Their joint Report was followed by the Government of India Act, 1919, which gave effect to the policy contained in the Declaration of August 20th, 1917. By this Act, Dyarchy was introduced in the Provinces. In the transferred departments in the Provinces the control of the Secretary of State for India was relaxed, and to the extent to which it was relaxed it was transferred to the Ministers who were appointed by the Governors from the elected members of the Legislature. No important changes were introduced in the Central Government.

Period IV. 1921–1936

These reforms met with some approval at first, though Indian opinion did not regard them as adequate. After the Amritsar tragedy, however, they were denounced by the Indian National Congress as unsatisfactory and unacceptable. The first elections

under the Act were boycotted by the Congress, and the unsatisfactory character and imperfect operation of the Reforms brought into existence a strong and well-organized political movement under the auspices of the Congress, guided by Mahatma Gandhi. An All-Parties Conference drew up a Constitution based on complete autonomy, not necessarily outside the Empire. The new status of the Dominions envisaged in the Resolutions of the Imperial Conference, 1926, strengthened India's craving for responsible government. India's political aspirations grew rapidly, and the National Congress demanded complete independence in 1927.

The insistent demand for political advance secured the appointment earlier than provided in the Act of 1919 of the Statutory Commission to report on the working of the Reforms, under the chairmanship of Sir John Simon. As no Indian was appointed on it, this Commission was boycotted by Indians. To allay doubts regarding India's contemplated political status, Lord Irwin made an announcement on October 31, 1929: "In view of the doubts which have been expressed both in Great Britain and in India regarding the interpretation to be placed on the intentions of the British Government in enacting the Statute of 1919, I am authorized on behalf of His Majesty's Government to state clearly that, in their judgment, it is implicit in the Declaration of 1917 that the natural issue of India's Constitutional progress as there contemplated is the attainment of Dominion Status."

SIMON COMMISSION, 1928–30

In 1930, Gandhiji launched his Civil Disobedience Movement, with the object, *inter alia*, of achieving political freedom. The

Simon Commission presented its report in 1930. It recommended complete Responsible Government in the Provinces, control of Police and Justice being transferred to the Ministers. Legislatures were to be based on a wider franchise, and the official bloc was to disappear. At the Centre, it recommended the continuance and preservation of full British authority and control. It also recommended the reorganization of British India on a federal basis with a view to facilitating the development of an All-India Federation, when India as a whole, and not merely British India, can take her place among the constituent States of the Commonwealth of Nations united under the Crown. The Commission emphasized the importance of establishing contact with the Native States, and envisaged a scheme of an All-India Federation, but considered its realization a distant possibility. Owing to the rapid progress of political events in India, the Report of the Simon Commission was not considered on its merits. It was felt that, without the grant of some responsibility at the Centre, there was no chance of India's accepting any Constitution. The British Government therefore summoned in London a Round Table Conference of the representatives of different parties in England and in India and of the Indian Princes, to consider the question of the Indian Constitution *de novo*.

The Princes had become nervous after the restatement of the implications of Paramountcy by Lord Reading in his letter to His Exalted Highness the Nizam of Hyderabad in 1926. They were dissatisfied with the findings of the Butler Committee. They were already resenting the encroachment of the

Political Department of the Government of India on their various rights and privileges, but they were not prepared to consider the scheme of an All-India Federation seriously.[1] While the First Round Table Conference was in session, the Princes suddenly declared their intention and eagerness to join the Federation. At that time the Civil Disobedience movement was at its height. The Gandhi-Irwin Pact was signed in the beginning of 1931, and Gandhiji attended the Second Round Table Conference in September 1931, the Congress accepting an All-India Federation on terms of the Sankey Report, Provincial Autonomy, Responsibility at the Centre, and safeguards in the interests of India as the basis of the new Constitution. The Conference held its third session in 1933. In March 1934 the British Government issued a White Paper containing proposals for a new Constitution for India. These proposals included an All-India Federation—a union between Governors' autonomous Provinces and Commissioners' Provinces and those Indian States whose rulers signified their desire to accede to the Federation by a formal Instrument of Accession. These proposals were fully examined by a Joint Committee of Parliament with the help of Indian assessors. The Committee approved of the scheme of the White Paper subject to certain alterations and presented its Report in October 1934. It was on the Report of this Committee that a Bill was prepared. On the basis of this Bill the Government of India Act, 1935, was passed on August 2, 1935. This Act, which creates a polity for the whole of India, contains the new Constitution of India.

[1] For a full discussion of this subject see Chapter II.

3. Conclusion

From this rapid historical survey it is clear that up to 1858 the administrative machinery, both in India and in England, was meant to govern British India from England, and there was no question of the consultation or co-operation of the people of India. After 1858, the Executive remained entirely responsible to Parliament, but in governing the country, it tried to ascertain and understand public feelings with a view to making its measures effective. In its nature, it was a benevolent despotism tempered by the public opinion and haphazard interest of a remote democracy, and at times influenced by public opinion in India. It is not untrue to say that till 1919 the Executive remained supreme and independent both of the Legislature and the people of India. It is nevertheless true that from 1861 onwards the Legislatures were progressively enlarged and representation of the people was sought on an increasing scale. To quote the Montagu-Chelmsford Report, "The announcement of August 20, 1917, marks the end of one epoch and the beginning of a new one. Hitherto we have ruled India by a system of absolute government, but have given her people an increasing share in the administration of the country and increasing opportunities of influencing and criticising the government." The growth of political institutions in India can be traced through various stages. These stages of growth have been succinctly summarised in the Royal Proclamation of December 3, 1909. "The Acts of 1773 and 1774 were designed to establish a regular system of administration and justice under the Hon'ble East India Company. The Act of 1833 opened the door for

Indians to public offices and employment. The Act of 1858 transferred the administration from the Company to the Crown, and laid the foundations of public life which exists in India to-day. The Act of 1861 sowed the seed of representative institutions, and the seed was quickened by the Act of 1909. The Act of 1919 entrusted representatives of the people with a definite share in government in the Provinces, and pointed the way to full Responsible Government." The Act of 1935 definitely places India on a way to full Responsible Government under the Crown. Thus the Federal Constitution of India is not a new creation substituted for the old one, but the natural evolution of the existing Government and the natural extension of its past tendencies.

India's constitutional progress is a measure of the political consciousness and desire of the people for a share in the government of the country growing into a demand for full Responsible Government. The process of introducing responsible government in the Provinces, which began under the Act of 1919, is completed under the Act of 1935 which has introduced full Provincial Autonomy and has made the Provinces autonomous federating units deriving their authority directly from the Crown. Partial responsibility is to be introduced at the Centre, and in the fullness of time complete responsibility will follow. It is true that, even in the Provinces, the responsible government is not a true Responsible Government in the strict sense of that term, and that the partial responsibility at the Centre is of a shadowy nature, but it is also true that the new Constitution, both in the Provinces and at the Centre, is only intended for the evolution and the final establishment of a true Responsible

Government both in the Provinces and at the Centre under the Crown.

The forces and the factors which are mainly directly incidental to British rule in India, and which have in their cumulative effect through historical process generated a demand for Responsible Government in India, are thus summed up by the Joint Parliamentary Select Committee: "By transforming British India into a single Unitary State, it (British rule) has engendered among Indians a sense of political unity. By giving that State a government disinterested enough to play the part of an impartial arbiter and powerful enough to control the disruptive forces generated by religious, racial and linguistic divisions, it has fostered the first beginnings, at least, of a sense of nationality transcending those divisions. By establishing conditions in which the performance of the fundamental functions of government, the enforcement of law and order and the maintenance of an upright administration, has come to be easily accepted as a matter of course, it has set Indians free to turn their minds to other things, and in particular to the broader political and economic interests of their country. Finally, by directing their attention towards the object-lessons of British Constitutional history and by accustoming the Indian student of government to express his political ideas in the English language, it has favoured the growth of a body of opinion inspired by two familiar British conceptions; that good government is not an acceptable substitute for self-government, and that the only form of government worthy of the name is government through Ministers responsible to the elected legislature."[1] The

[1] Para. 10.

outcome of these trends is thus indicated by the Marquess of Linlithgow: "The unitary system of government, for so long the supreme authority in India, is disappearing. In its place, great autonomous Provinces made their appearance; and finally comes the Federation crowning the entire structure and impressing and unifying within its bold and ample scope the common life and aspirations of one-fifth of the human race, dispersed over a sub-continent as large as Western Europe. Such will be the structure of government in India which when the task is completed will meet the gaze of a watching world . . . a spectacle whose dignity and grandeur will not be unworthy of this great and famous country."[1]

[1] The Legislative Assembly Proceedings, September 25, 1936.

CHAPTER II

THE EVOLUTION OF THE ALL-INDIA FEDERATION

1. India

The Government of India Act, 1935, creates a new policy in which both the British Indian Provinces and the Indian States are federally united. It is therefore necessary to trace briefly the evolution of the legal and constitutional status of these federating units.

India is in fact, as well as by legal definition, one geographical whole. It comprises an area of 1,570,000 square miles with a population of 350 millions. Under the Act of 1935, India means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Federal Government and Federal Legislature, declare to be part of India.[1]

In its political structure, India is divided between British India and the Indian States. Thus politically there are two Indias.

[1] Section 311.

2. British India

British India means all territories comprised within the Governors' Provinces and the Chief Commissioners' Provinces.[1] British India covers about 820,000 square miles or 55 per cent of the total area. Its population is 27 millions or 74 per cent of the total population. It is under the sovereignty of the British Crown, and has been subject to British rule and has pursued its constitutional development as a part of the British Empire.

Status of the Provinces

The cardinal point which emerges from the examination of the constitutional structure of British India before 1919 is the concentration of authority at the Centre. This centralization dates back to the Charter Act of 1833. Up to that date, the control exercised by the Governor-General in Council of Bengal over the two Presidencies of Madras and Bombay was limited to transactions with Indian potentates and questions affecting war and peace. For the ordinary internal administration of these areas and for the making of laws to be applied to them, the Government of Bengal had, previous to 1833, no responsibility. By the Act of 1833, the Governor-General of Bengal became the Governor-General of India, and the Government for the first time became the Government of India. Its authority became co-extensive with the area of British possessions in India. The independent legislative powers formerly exercised by the Governments of Madras and Bombay were taken away. Down to 1921, the Governor-General was, inside British India, the supreme authority in which was concentrated

[1] Section 311.

responsibility for every act of civil as well as military government throughout the whole country. Provincial Governments had, of course, important work to do, for in their hands lay the day-to-day task of administration in the Provinces. But the Provincial Governments were virtually in the position of agents to the Government of India. The entire governmental system was in theory one and indivisible. The rigour of the logical application of that conception to administrative practice had gradually been mitigated by the wide delegation of powers and by customary abstention from interference with the agents of administration. Nothing illustrated more clearly the over-riding authority at the Centre and the subordination of Provinces to it than the arrangement between them as to finance. In short, up to 1919, from the administrative, financial, or legislative point of view, the concentration of authority at the Centre was a cardinal feature of the Constitution of India. This was one of the features which Parliament in 1919 set itself to modify, as it blocked effectively any substantial advance towards the development of self-governing institutions. The authors of the Montagu-Chelmsford Report stated: "Provinces are the domains in which the earlier steps towards progressive realization of Responsible Government should be taken. Some measure of responsibility should be given at once, and our aim is to give complete responsibility as soon as conditions permit." This object was achieved by the introduction of Dyarchy, by which partial responsibility was introduced in the Provinces. The intention of the authors of the Reforms of 1919 was to give an independent life to provincial organisms which would in future form the members or

constituent units of a British-India Federation. Considerable progress towards full Provincial Autonomy was made under the Act of 1919. The Act made two changes: (1) It gave the Provinces authority of their own as distinguished from authority derived as agents of the Government of India. (2) It relieved them of their former obligation to obey the Government of India in regard to those subjects which were transferred to the control of Ministers, but retained its powers of supervision. Though the Provincial subjects had been marked off from the Central subjects, the Provincial Legislatures were not given freedom of action or finality of action in legislation upon a number of subjects. The gradual course of devolution had tended to remove Provincial administration from the immediate purview of His Majesty's Government, and by thus weakening the direct accountability of the Indian administration to Parliament, it had rendered perhaps inevitable the introduction, in some degree, of local responsible government. At the same time, it had tended to make the Provinces centres of the development of social reforms; it had also tended to transfer to the Provincial executives the prime responsibility for the preservation of law and order. These three changes made Provincial Autonomy inevitable.

The Government of India Act, 1935, has created an All-India Federation and has made the Provinces autonomous constituent units independent within their own sphere and free of central control, deriving their authority directly from the Crown. Thus the Provinces are, henceforth, in the eyes of the law, independent units deriving their authority directly from the Crown. This has been achieved by the

PROVINCIAL AUTONOMY

introduction of Provincial Autonomy, whereby each of the Governors' Provinces possesses an Executive and a Legislature having exclusive authority within the Province in a precise and defined sphere, and in that exclusively Provincial sphere, practically broadly free from control by the Central Government and the Legislature. This represents a fundamental departure from the scheme under the Act of 1919. Under that Act, the Provincial Governments exercised devolved authority from the Government of India and not independent authority. Under the Act of 1935, the Provinces are to exercise independent authority derived directly from the Crown.

A Federation means a union of independent units. It starts with a number of clearly defined States each already possessed of individuality and consciousness. In British India, however, these units did not exist. The Provinces were only a number of administrative areas which had grown up almost haphazard as the result of conquest, supersession of former rulers, or administrative convenience. None of them had been deliberately formed with a view to its suitability as a self-governing unit within a federated whole. They were not autonomous, and hence could not federate unless enabled to do so by an Act of Parliament. The Provinces had not the legal power to federate without acquiring independent legal status. This status, which is the culmination of the historical process of progressive devolution begun in 1870, and which is necessary for the formation of a Federation, is conferred by the Act. Under the Act, two new Provinces—Orissa and Sind—were created on a linguistic basis by an Order in Council made on March

3, 1936. Under the Act of 1935, British India consists of: (1) Eleven Governors' Provinces, namely, Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, and the two newly created Provinces of Orissa and Sind; (2) Six Commissioners' Provinces, namely, Delhi, British Baluchistan, Ajmere-Merwara, Coorg, the Andaman and Nicobar Islands, and the area known as Panth-Piploda. The Government of India has also jurisdiction over certain tribal areas. The eleven Governors' Provinces and the six Commissioners' Provinces are the British Indian federating units of the new polity.

3. The Native States and their Constitutional Status

The other India—Indian India, comprising the Indian States—covers about 70,000 square miles, or 45 per cent of the total area. It has a population of 80 millions, or 26 per cent of the total population, and consists of about 600 units which are not British territories and whose subjects are not British subjects. They are ruled by hereditary Princes or Chiefs. These 600 Native States include 109 States, among them great States like Hyderabad, Mysore, Baroda, Kashmir, Gwalior, and Travancore, the Rulers of which are entitled to a seat in the Chamber of Princes; 126 which are represented in the Chamber by twelve of their own order elected by themselves; some 320 Estates, Jagirs, and others which are only States in the sense that their territory, sometimes consisting of only a few acres, does not form part of British

India. The important States enjoy within their own territories all the principal attributes of sovereignty, but their external relations are in the hands of the Paramount Power. The sovereignty of others is of a more restricted kind. Over some, the Paramount Power exercises in varying degree administrative control.[1]

The structure and the government of the States present a large variety. The Butler Committee divides the States into three classes, of which 109 are in the first class, the Rulers of these States being members of the Chamber of Princes in their own right; 127 are in the second class, the Rulers of which are represented in the Chamber of Princes by twelve members of their order elected by themselves, and 327 are Estates or Jagirs which are not represented in the Chamber of Princes. As regards their constitutional developments, the Committee states: "Of all the 108 Princes in Class 1, thirty have established Legislative Councils, most of which are at present of a consulting nature only. Forty have constituted High Courts, more or less on British Indian models; thirty-four have separated Executive from Judicial functions; fifty-six have a fixed Privy Purse; forty-six have started a regular Civil List; fifty-four have bonus or provident fund schemes. Some of these reforms are still no doubt inchoate or are on paper, and some States are still backward, but a sense of responsibility to their people is spreading among all the States and growing year by year."[2]

In the new polity, for the first time, constitutional relationship is established between the British India

[1] *J.P.C. Report*, para. 3.
[2] *Report of the Butler Committee*, 1929.

Provinces and the Indian States. The whole scheme of the Constitution relating to the accession of the States to the Federation is based on a definite legal and constitutional theory. The Constitution recognises and legalises what is considered the existing constitutional and legal status of the States in relation to the British Crown and to British India. As the whole basis of the accession of the States to the Federation is the present constitutional status of the States, it is essential to set out succinctly the evolution and the meaning of this status in relation to the British Crown and British India.

(*a*) PARAMOUNTCY

The sovereignty of the British Crown is supreme in India. In British India this sovereignty is a fact. In the States it means Paramountcy. Paramountcy denotes the relationship which exists between the Crown and the States. Its nature, scope, and implications have not been accurately defined. The Butler Committee, finding it difficult to define Paramountcy in a formula, states "Paramountcy must remain paramount." This shows the difficulty of defining it precisely and fully. It cannot be otherwise, as the whole conception of Paramountcy has evolved under changing political conditions. Just as Dominion Status is the legalisation of the *de facto* status achieved by the Dominions in relation to the mother country by their growing strength and position, and not a status based on any *a priori* legal or constitutional theory, so also Paramountcy is the *de facto* position or supremacy achieved or assumed and asserted by the British Crown in India under changing political conditions by its growing strength, culminating in a dominant position. It is neither derived from nor

based on any legal or constitutional theory.[1] Its exact implications varied directly with the political position and strength of the British in India from time to time.

The law which governs the relationship of the Paramount Power with the Indian States has no parallel or counterpart in the constitutional history or law of any other country. This relationship and the law which governs it have been gradually developed and shaped during the whole period of British rule in India. It had changed rapidly and significantly from that of equality to that of alliance, from that of alliance to that of suzerainty, and then to that of union and co-operation, and ultimately to that of Paramountcy.[2] It is the outcome of historical facts.

[1] According to the Butler Committee, the relationship between the Paramount Power and the States is "a living growing relationship, shaped by circumstances and policy, which is a mixture of history, theory and modern fact." To quote the pronouncement of the Government of India in 1877, "Paramountcy is a thing of gradual growth . . . established partly by conquest, partly by treaty and partly by usage." In the opinion of Professor W. H. Holdsworth, "Paramountcy is only a part of the Prerogative." *The Law Quarterly Review*, No. clxxxiv, p. 425.

[2] "The policy of the British Government towards the States has changed from time to time, passing from the original plan of non-intervention in all matters beyond its own ring fence to the policy of 'subordinate isolation,' initiated by Lord Hastings—which in its turn gave way before the existing conception of the relation between the States and the Government of India which may be described as one of union and co-operation on their part with the Paramount Power. In spite of the varieties and complexities of treaties, engagements and sanads, the general position as regards the rights and obligations of Native States can be summed up in a few words. The States are guaranteed security from without. Paramount power acts for them in relation to foreign powers and other States, and it intervenes when the internal peace of their territories is seriously threatened. On the other hand, the States' relations to foreign powers are those of the Paramount Power. They share the obligations for common defence, and they are under a general responsibility for the good government and welfare of their territories." *Montagu-Chelmsford Report*, para 297.

The truth is that a theory has been evolved to rest it on a legal basis, and this theory which recognises and legalises the existing relationship is characterized as Paramountcy.

(*b*) SOURCES OF PARAMOUNTCY

The question of the sources of Paramountcy has been much debated. It is held that the series of treaties, engagements, and sanads between the States and the East India Company, and the usage and the practice of the Political Department of the Government of India, have worked together to produce a relationship between the Paramount Power and the States which is now known as Paramountcy. That usage and political practice have played a dominant part in the evolution and creation of this relationship is admitted. The importance of these elements is due partly to the growth of the *de facto* paramountcy of the Crown and partly to the working of the machinery employed by the Crown to give effect to its paramountcy. Briefly stated, the legal position now held by the Paramount Power has been gradually built up on the basis of treaties, engagements, sanads, usages, and sufferances, and by the practice of the Political Department, which is designed to promote a harmonious relationship between the Paramount Power and the States. The usage and sufferance and practice of the Political Department are only legal terms applied to legalise what was assumed and asserted or demanded by the Government of India, taking advantage of its superior position in which it found itself in the process of history.[1]

[1] *See* Aitchison: *A Collection of Treaties, Engagements and Sanads* (1931); *The Indian States Committee Report* (*Butler Committee*

(c) HISTORICAL EVOLUTION OF PARAMOUNTCY

The Butler Committee has given a detailed account of how Paramountcy has evolved. Its Report sets out a series of pronouncements on behalf of the Crown on Paramountcy, which contain the views expressed on behalf of the Paramount Power, from time to time, as to the nature and exercise of its authority.

Historically, it may be considered under two periods.

PERIOD I 1765–1858

The first period is from the beginning of the career of the East India Company up to 1858. The Honourable East India Company began its career as a feudatory of a Mogul Emperor. In its early days, it concluded treaties with Indian States on a basis of equality.[1] Hence, at first, this relationship was based solely upon treaties. Their relations were guided by international law in a restricted sense. By the beginning of the nineteenth century, the superior attitude of the British Crown in relation to the States is obvious. It is reflected in the terms of the various treaties, which were no longer terms of equality. We find treaties of submission or obedience or protection or subordinate co-operation. Lord Wellesley's treaties and alliances are very significant. In course of time, the general control by the Paramount Power necessitated intervention in the internal affairs of the States, not only to secure the performance of treaty obligations, but

Report) (1928); *The Indian States and India*. Prof. William Holdsworth; *L.Q.R.*, vol. xlvi, p. 470.
Julian Palmer: *Sovereignty and Paramountcy in India.*
C. L. Tupper: *Our Indian Protectorate.*
Macpherson: *British Enactments in force in Indian States.*
Barton: *The Princes of India.*
K. M. Panikkar: *Indian States.*
Lee-Warner: *The Native States of India.*

[1] Nabob of the Carnatic *v.* East India Company (1792), 2 Ves. 60.

also to secure the peace of India as a whole. Treaties of protection and subordinate co-operation were signed with various Rajput princes between 1799 and 1818. In the result, the Paramount Power had of necessity to make decisions and at times to exercise functions beyond the terms of the treaties. In 1823, Sir John Malcolm stated clearly that the Crown was the Paramount Power in relation to the States. The necessity for intervention in the internal affairs of various States was increasingly felt between 1813 and 1853, but the East India Company, adhering to a policy of non-intervention, did not in the exercise of this paramount power intervene in the internal affairs of the States as it could have done. It is to be noted that till 1854 the Governor-General did homage to the Mogul Emperor, and the legal position of the Company in India was not free from doubt. The Company was acquiring territories and consolidating its dominions. It already occupied a dominant position in India, but its claim to suzerainty was not recognized. The language used in the treaties was distinctly in conformity with international law. It is historically untrue to assert that the Company assumed paramount power as early as 1813, but it is true that this relationship had a basis of international law before 1858. But the whole position was changed after 1858.

PERIOD II 1858–1936

After the Mutiny, the abandonment of the policy of non-intervention and annexation, the substitution of the policy of co-operation and partnership, and the re-organisation of the Political Department, which made the policy effective, brought the paramount power of the Crown into great prominence. The disappearance of the Mogul Emperor was an event of great significance in India's constitutional

history. It rendered the direct sovereignty of the Crown natural as well as inevitable, and it made the Crown entitled to the Mogul prerogatives of suzerainty over the whole of India. In the Royal Proclamation, 1858, it was stated:

"We hereby announce to the Native Princes of India that all treaties and engagements made with them by or under the authority of the Hon'ble East India Company are by us accepted and will be scrupulously maintained, and we look for the like observance on their part. We desire no extension of our present territorial possessions; and while we permit no aggression upon our dominions or our rights to be attacked with impunity, we shall sanction no encroachment on those of others. We shall respect the rights, dignity and honour of Native Princes as our own; and we desire that they as well as our own subjects, should enjoy that prosperity and that social advancement which can only be secured by internal peace and good government."

Thus the policy of annexation was brought to an end. The Native States were guaranteed their existence and integrity subject to the fulfilment of certain conditions. Lord Canning, when the Crown took over the government of India from the Company, emphatically stated that "the Crown stands forth as unquestioned Ruler, the paramount power over all India." The assumption of Paramountcy after 1858 is a fact, which was further confirmed by the assumption in 1876 by Queen Victoria of the title of Empress of India. There is a marked change in the tone of the British claim from 1859 onward. Nothing more is heard of international law as regulating the relations of the Company and the States, as under Bentinck and Dalhousie.

The Company had long held a dominant position in India, but the Moghul Emperor had never renounced his nominal sovereignty. With his deposition, a new situation emerged. The Crown was now in India what the Emperor had once been, a completely sovereign power predominant over all others and claiming allegiance. This rôle was assumed and not acquired. Its assumption was effective, as there was unmistakable sanction behind it in the form of political and military power. The tone adopted by Canning is explicable only by the realization that the Crown had succeeded to or had assumed and asserted the whole authority of the Moghul Emperor, and by the consciousness that the Crown had sufficient strength and power to make good any such claim.

In the years which followed, the treaties with various States were taken over as interpreted, the only assurance that was given being against the extension of British territory. This policy was implemented by sanads or instruments of grants given to some 140 States in 1860. Later on, the Hindu Princes were assured that adoptions would be recognized, and the Muhammadan Princes were assured that any succession legitimate by Muslim Law would be upheld. Under the new policy, the Rulers were persuaded to prohibit in their States the practice of infanticide and the burning of widows, and to adopt measures for the promotion of the welfare of their people. They were expected to afford facilities for through railway communication, for posts and telegraphs and telephones, for the control of opium and salt production and the construction of military roads. In course of time, the strict terms of these treaties were not always observed. The Political Department adopted the plan

of applying such general principles as seemed just and necessary in the interests of India. This process, known as usage or sufferance, was initiated in the re-establishment of Indian rule in Mysore in 1881. The treaty transferring power to the Maharaja contained elaborate stipulations representing the idea of Paramountcy and has served as a model for regulating the relationship of the Crown with other States.

The subordination of the States to the Paramount Power is exhibited in various historical incidents after 1865.[1]

Though the *de facto* position of the Crown in relation to the States was made clear by Lord Canning, the Princes still advanced their claim as sovereign States, and attempts have been made on their part for the application of international law to their relation with the Crown. Their legal position, which has been a subject of long controversy, was aptly stated by Sir Henry Maine as early as 1864 in the following words:

"Sovereignty is a term which in international law indicates a well-ascertained assemblage of separate powers and privileges. The rights which form part of the aggregate are specifically named by the publicists, who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to

[1] It is enough to mention some of them in order to illustrate the point. They are: the deposition of the Nawab of Tonk in 1867, the suppression of the Ruler of Alwar in 1870, the deposition of the Ruler of Baroda in 1875, the enforced resignation of the Maharaja of Kashmir in 1889, the execution of the Senapathi of Manipur in 1891 on charges of treason, compelling the Maharaja of Udaipur in 1921 to rectify the causes of complaint against him and to delegate power to his son, the enforced abdication of the Ruler of Indore when he declined to face investigation by a Commission. In 1923 the Ruler of Nabha was forced to abdicate and was arrested in 1928 under Bengal Regulations, 1818, and is kept as a State prisoner on Kodaikanal; and the Ruler of Alwar was ordered in 1934 to leave his State within twenty-four hours.

legislate, and so forth. A sovereign who possesses the whole of this aggregate of rights is called an *independent* sovereign, but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible. . . . It may perhaps be worth observing that according to the more precise language of modern publicists 'Sovereignty' is divisible but 'independence' is not. Although the expression 'partial independence' may be popularly used, it is technically incorrect. Accordingly, while there may be found in India every shade and variety of sovereignty, there is only one independent sovereign, the British Government. My reason for offering a remark which may perhaps appear pedantic is that the Indian Government seems to me to have occasionally exposed itself to misconstruction by admitting or denying the independence of particular States, when in fact it meant to speak of their sovereignty." [1]

The whole position was emphatically reiterated by Lord Reading in his letter dated March 27, 1926, to His Exalted Highness the Nizam of Hyderabad:

"Sovereignty of the British Crown is supreme in India, and no Ruler of any Indian State can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only upon treaties and engagements, but exists independently of them, and quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government whilst scrupulously respecting all treaties and engagements with Indian States to *preserve peace and good order throughout India.*" [2]

It is definitely settled that the rights and privileges conferred by the treaties, engagements and sanads are subject to the Paramountcy. On this constitutional

[1] Minute on the Kathiawar States dated March 22, 1864.
[2] The italics are those of the author of this book.

basis, the treaty rights cannot exempt the States from their subordination to the Paramount Power. The Crown has acquired by usage independently of treaties the right to take what measures it thinks fit for the safety of the British Empire, the interests of India as a whole, or the interests of the States. This is Paramountcy.

The repercussions of political reform in British India on the States, and the fiscal policy of the Government of India which indirectly affected the States, made the Princes aware of their vital connection with British India. The interpretation of Paramountcy by Lord Reading caused the Princes as an order some alarm as regards the fundamental rights contained in their treaties and engagements with the Crown. As the time for the appointment of the Statutory Commission for British India approached, the Princes expressed their desire that before a new Constitution for British India was submitted to Parliament "the opinions, wishes and aspirations of the States should be ascertained in regard to the effect upon them both of the proposals for British India and as to the constitutional machinery which will best ensure wise and harmonious co-operation between Governments of British India and the Governments of the States in the future." Hence, in July, 1927, the Butler Committee was appointed (1) to report upon the relationship between the Paramount Power and the States with particular reference to the rights and obligations arising from (*a*) treaties, engagements and sanads and (*b*) usage, sufferance and other causes; and (2) to enquire into the financial and economic relations between British India and the States; and to make any recommendations that they may consider desirable

or necessary for a more satisfactory adjustment. The Committee submitted its Report in 1929. To safeguard the interests of the Princes, it recommended that in future they should deal with the Viceroy as the Agent for the Crown, and not with the Governor-General in Council. The Princes asked for a definition of Paramountcy, but the Committee evaded it. It did not clearly define the sphere of Paramountcy in relation with the States, but stated that: "Paramountcy must remain paramount. . . . On Paramountcy alone can the States rely for their preservation in the generations that are to come. Through Paramountcy is pushed aside the danger of destruction or annexation."

The findings of the Committee were severely criticized by the Princes, who continued to entertain misgivings as regards their position in relation to the Crown. The Butler Committee regarded the Federation of British India and the Native States as a remote ideal, but suggested joint and concerted action on the part of the States with British India in matters of common interest. The Simon Commission considered an All-India Federation a remote possibility. The Princes were at first not prepared to consider seriously the question of an All-India Federation, but, strangely enough, during the session of the First Round Table Conference, they declared their eagerness to enter such a Federation. The British Government welcomed their declaration, as they looked upon their entry as introducing a steadying and stable element in the Indian polity.

The existing status of the Princes is recognized in the new Act. The Constitution Act itself does not include the States as members of the Federation, but each State has to accede to the Federation by a

separate Instrument of Accession. It is to be a voluntary act on the part of every State, and this is due to the recognition of the quasi-sovereign status of the States. The Princes were very anxious for a clear definition of Paramountcy, but the British Government has refused to state it definitely and clearly.

Sir Samuel Hoare has officially summed up succinctly what Paramountcy means and how it affects the constitutional matters in the Act of 1935, so far as it affects them at all. He says:

"Paramountcy is the term commonly used to describe the powers of the Crown in its relation to the States. The Crown is bound by engagements of great variety, only some thirty of them, however, being treaties with the Indian States. The nature of the undertaking has varied with the circumstances in which the relationship arose. A common feature of great significance is that the Crown accepted responsibility for the States' external relations and their internal and external defence. The contractual obligations embodied in the treaties have, with the growth of the Crown's authority, throughout India, been supplemented by usage and by the course of events. The Crown's suzerainty has been established for generations. When the Crown took over direct authority in India from the East India Company, Lord Canning made the following pronouncements:

> 'The Crown of England stands forth the unquestioned Ruler and Paramount Power in all India. . . . There is a reality in the suzerainty of the sovereign of England, which has never existed before and which is not only felt but eagerly acknowledged by the Chiefs.'

I quote a second pronouncement which has an important bearing on the question, and which illustrates some of the implications of paramountcy. I take Lord Minto's statement in 1909:

'Our policy is with rare exceptions one of non-interference in the internal affairs of Native States. But in guaranteeing their internal independence and in undertaking their protection against external aggression, it naturally follows that the Imperial Government has assumed a certain degree of responsibility for the general soundness of their administration and would not consent to incur the reproach of being an indirect instrument of misrule. There are also certain matters in which it is necessary for the Government of India to safeguard the interests of the community as a whole, as well as those of the Paramount Power, such as railways, telegraphs, and other services of an Imperial character. But the relationship of the Supreme Government to the States is one of suzerainty.'

These latter matters, railways, telegraphs, and so on, mentioned by Lord Minto will come within the Federal purview, and if a State accedes to the Federation, paramountcy will not be applicable to that extent; paramountcy will to that extent be limited. . . . In other respects, whether a State federates or not, paramountcy must remain a fact affecting its relationship to the Crown. . . . In the ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in dealing with the States. No successful attempts could be made to define exactly the right of the Crown's Representative to intervene."[1]

(*d*) Legal Implications of Paramountcy

The first and most striking characteristic of Paramountcy is the fact that the internal sovereignty is divided between the States and the Paramount Power in different proportions. The reasons which cause these proportions to differ are the varying sizes of the States, the stipulations of the treaties, engagements and sanads, and the operation of usage and sufferance.

[1] *House of Commons Debates*, March 20, 1935.

This characteristic was analysed, as we have already seen, by Sir Henry Maine in 1864. As the Princes enjoyed some attributes of sovereignty within their own territories, the relation between them and the Paramount Power is characterized as "quasi-international" in form. Some maintain that the relationship is based on international law. This ignores the appreciation of the true legal position of the States in relation to the Crown.[1] The plain fact is that the principle of international law has no application to the relations between the Crown and the States. It is significant to note that in the treaties between the States and the

[1] In the Despatch to the Secretary of State dated August 28, 1891, it is stated that "the principles of international law have no bearing upon the relations between the Government of India as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other."

Wheaton maintains that the Indian Princes have no international status in the true sense of the term (*Elements of International Law*, p. 69).

Oppenheim maintains that Rulers of these States cannot claim privileges which according to international law are due to the heads of States abroad. (*International law*, vol. I.)

Sir Leslie Scott and Mr. Wilfred Green are of opinion that "Indian Princes were originally independent, each possessed full sovereignty and the relationship *inter se* and to the British power in India was one which an international lawyer would regard as governed by rules of international law . . . and even when they came to transfer to the Crown these sovereign rights which in the hands of the Crown constitute paramountcy, international law still applied to the Act of Transfer. But from that moment onwards the relationship between the States and the Crown as Paramount Power ceased to be of the nature of which international law takes cognaisance." This view may not be accurate, but it is not and cannot be denied that the other view, that the present relationship is governed by international law, is untenable. It is useless to discuss this relationship in terms of international law, because only a sovereign State can claim the application of international law in its relation with other States. A sovereign State has two aspects, one positive and the other negative—the exercise of power and the absence of superior control. Admittedly, there is the presence of superior control—the Paramount Power. Externally, the States are not sovereign, and even no such claim is made by them. Internally, the right of the Paramount Power to intervene in the affairs

East India Company in the beginning of the nineteenth century and in the earlier Acts of Parliament the word "alliance" was generally used. But after 1858, that word is dropped from the Acts of Parliament. There is not the element of mutuality which is essential in an alliance based on international law. The States have no right to terminate the relationship.

The Paramount Power has all the power which enables it to act in the interests of the Empire, in the interests of India as a whole, and in the interests of the States. But its powers do not extend further. As Paramountcy gives the Paramount Power authority to act in the interests of the Empire, in the interests of India as a whole, and in the interests of the States, it can call upon the States to pursue courses of conduct which they are bound to follow if it falls within the

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of the States on specified grounds within the sphere of Paramountcy is also admitted. Thus it is futile to apply international law to this relationship.

Lee-Warner characterizes the bond which unites the Paramount Power to the States as constitutional rather than international.

C. L. Tupper, who takes a realistic view of this relationship, characterizes the States as feudatory States. He says "that the Paramountcy of the British Government is not derived from the law of nations or from the Moguls or indeed from any of the potentates who maintained a fluctuating and often nominal suzerainty over the different parts of the country in former times. It rests on conquest, agreement and usage and the necessity in the general interest of keeping peace (*Our Indian Protectorate*, p. 60).

Viscount Finlay's observations in Duff Development Co. *v.* Government of Kelantan (1924) A.C. 797 are useful in explaining the legal position of the States. He observes: "It is obvious that for sovereignty, there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power."

sphere of the Paramountcy to prescribe them. It is true that it cannot do so outside the sphere of Paramountcy, but the sphere is so vague and unlimited and undisputed that almost any interference may be justified as being in the larger interests of India, the Empire, and the States. In practice, apart from cases of gross misgovernment, native institutions are not interfered with. Acts of the Crown in the exercise of Paramountcy are Acts of State not cognisable in any British Court. This is particularly to be noted because in the new polity Paramountcy is kept intact, and is outside the sphere of Federation. This view of Paramountcy was the basis of the demand of the States that in the new Constitution of India the relationship between the Paramount Power and the States should cease to be entrusted to the Governor-General, and should be handed over to the Representative of the Crown.[1]

Since the transfer of the government to the Crown in 1858, the oath of loyalty and allegiance to the Crown by the Princes has been insisted upon. Successions are decided in cases of dispute by the Governor-General, who has the right to assume guardianship of a Ruler who is a minor. Decorations, titles, and salutes of the Princes are determined by the Crown, which controls the passports for travel abroad through the Governor-General. Rulers have been expected to grant, and have in fact granted, free access to land for railway construction, and to cede jurisdiction over it, to accept the monopoly of telegraphs and telegrams and part of the postal services, and to acquiesce in the control and manufacture and sale of arms. Most of them have been persuaded to restrict State coinage,

[1] Butler Committee Report, para. 58.

and almost all of them have given the Government complete control over the opium traffic and the salt monopoly.

Each State manages its own internal affairs by making and administering its own laws, and imposing, collecting, and spending its own taxes. There is, as a rule, a British Resident or other Agent whose duty it is to offer advice to the Ruler and to report to the British authorities, and there is the right of the Crown to intervene as the Paramount Power in the affairs of the States in cases of misgovernment, or in cases where such intervention is called for, having regard to the duty of the Crown as Paramount Power to preserve the dynasty, to be answerable for the integrity of the States, and to maintain the peace of India. A certain number of States pay tribute to the Crown, mostly in lieu of former obligations to supply or maintain troops. Most of the inland States in the exercise of their sovereignty impose their own import and export duties at the frontiers of their own territories. The external relations of the States are entirely in the hands of the Crown. For international purposes, the territories of an Indian State, though not British territory, are in the same position as the territory of British India, and its subjects are in the same position as the British subjects.[1]

An Indian State cannot hold diplomatic or other official intercourse with any other foreign Power or even with sister-States in India. India is a member of the League of Nations. At Geneva, she is represented as a unit by a delegation, which in practice includes a Ruler of an Indian State. The Government of India,

[1] Mr. C. L. Tupper says that for external purposes the whole map of India is red.

in connection with the responsibility for the strategic defence of India, encourages the major States to maintain bodies of efficient forces for co-operation with the Indian Army both in the external defence of India and the maintenance of internal order. As regards Posts and Telegraphs, the British telegraph system by agreement extends everywhere. Fifteen States have their own postal departments. There are only eight States which mint their own rupee currency. In the rest, the Mints are only worked for copper coinage or for striking silver or gold coinage on special ceremonial occasions. Jurisdiction in the States is exercised by the British authorities in certain cases.[1] The State tacitly or formally delegates or cedes to British cantonments, British civil stations, railways running through the States, and the Residency, jurisdiction over servants and dependants and over European subjects and other Europeans. In other cases, the jurisdiction of the States is limited and the residuary jurisdiction is exercised by the Agents of the Crown. Such jurisdiction is not subject to appeal to the Privy Council.[2] In other cases, that is to say, during the minority or the suspension of the Ruler, jurisdiction may be exercised by the Resident in substitution for the State Officers. The delegated jurisdiction is exercised under the India (Foreign Jurisdiction) Order in Council dated June 11, 1902, which, originally passed under the Foreign Jurisdiction Act, 1890, was validated by the Government of India Act, 1916. The States are required to extradite offenders to British India, and in return offenders from

[1] See Macpherson: *British Enactments in force in Native States.*

[2] Muhamad Yusuf-ud-din *v.* Queen-Empress 1897 L.R. 24 Indian Appeals 137.

the States are handed back to them. The Ruler of a State is exempt in British India from the jurisdiction of Courts except with the assent of the Governor-General.[1] In Great Britain he is treated as exempt from jurisdiction.[2] As a rule, the British Parliament does not legislate for the States or their subjects. As the Crown is responsible for the external relations of the States, Parliament has legislated to control such subjects as the slave trade, and generally these subjects fall under the foreign jurisdiction of the Crown exercised under the Act of 1890.

[1] *Civil Procedure Code*, Section 86.
[2] Statham *v.* Statham (112), p. 92.

CHAPTER III

THE GENESIS OF THE INDIAN FEDERATION

British India and Indian India or the Native States are respectively under the sovereignty and paramountcy of the British Crown. But they have remained separate politically owing to historical accidents. The States have maintained political isolation *inter se* and also from British India, and have no direct constitutional relationship with British India except that the Governor-General in Council deals with them as the Representative of His Majesty, at the same time exercising his executive authority over British India. With all the differences in their status, character, size, and conditions, there are vital and essential racial and cultural affinities, common historical background and common interests among the States and among the British Indian Provinces. A mere glance at the map of India shows that the States dovetail into various Provinces of British India. Historically, the whole of India was under one authority under Asoka, Samudra Gupta, and Harshavardan, and during the Moghul period the whole of India except the southernmost part was under the authority of the Moghul Emperors. But apart from this geographical and historical unity there are some vital factors to be noted. Firstly, the composition of the population of the States and British India, which are closely interwoven, is not different. Their religions are the same.

Thus there is an essential unity in diversity in India regarded as a whole. Secondly, there is political unity in the sense that both the States and British India owe common allegiance to the Crown. Thirdly, there is a sound basis for economic unity. The economic interests of all parts of India depend upon free trade within the country. Fourthly, various matters common to British India Provinces are also common to a great extent with those in which the Native States are interested, for example, defence, tariffs, exchange, opium, salt, railways and posts and telegraphs. Fifthly, the unity imposed upon India by the external force of Great Britain is reinforced by an increasing sense of Indian nationality. Again there is a growing sentiment of national unity. Moreover, both Indias have a common religious and cultural heritage. Thus, the desirability of establishing an All-India polity cannot be doubted. The conception of such a polity was already present to the minds of Mr. Montagu and Lord Chelmsford. In their joint Report, they stated: "Our conception of the eventual future of India is a sisterhood of States self-governing in all matters of purely local or provincial interests, in some cases, extending to existing provinces, in others, perhaps modified in area according to the character and economic interests of their people. Over these congeries of States would preside a Central Government increasingly representative of and responsible to the people of all of them; dealing with matters both internal and external of common interest to the whole of India; acting as arbitrator in inter-State relations and representing the interests of all India on equal terms with the self-governing units of the British Empire. In this picture there is a place also for the Native

States. It is possible that they too will wish to be associated for certain purposes with the organisation of British India in such a way as to dedicate their peculiar qualities to the common service without loss of individuality."[1]

During recent years, the States have been making claims for a share in the Customs revenue, which amounts to about four-fifths of the revenues of India, and demanding a voice in the formulation of the fiscal policy of British India as it also affects them indirectly. The whole question, as already noted, was considered by the Butler Committee, which emphasized the need for common action on matters which equally affect both British India and the States, but considered the formation of an All-India Federation a remote ideal. The Simon Commission recognized that the ultimate constitution of India must be federal, for it is only in a federal constitution that units differing so widely in constitution as the Provinces and the States can be brought together, while retaining their internal autonomy. The Commission, however, considered the formation of an All-India Federation a remote possibility and recommended the reconstruction of the British India Constitution on a Federal basis. It stated: "It might be possible to visualize the future of Federation in India as bringing about a relationship of two separate Federations, one composed of the elements which make up British India, the other of the Indian States. . . . We are inclined ourselves to think that the easier and more speedy approach to the desired end can be obtained by reorganizing the Constitution of India on a federal basis in such a way that the individual States or groups of States

[1] *Montagu-Chelmsford Report*, para. 349.

may have the opportunity of entering as soon as they wish to do so."[1] The Commission expressed its belief "that the essential unity of Greater India will one day be expressed in some form of federal association, but that the evolution will be slow and cannot be rashly pressed." The States also were not prepared to consider the question of an All-India Federation seriously. The recommendations of the Simon Commission, which excluded the grant of responsibility at the Centre even in a restricted form, were not acceptable to India. The British Government felt that any Constitution without some form of responsibility at the Centre would not be accepted. The Princes felt that in the long run the future of their States would be materially influenced by the introduction and working of Responsible Government in British India. They realized that their interest in British India's constitutional progress was not to be that of mere detached spectators but of fellow-Indians living in a world which for all its history, deep divisions, and bitter rivalry, preserved some remarkable cultural affinities, and is slowly working out a common destiny. Apprehensive of the possible reactions and repercussions in their States of the political developments in British India,[1] and also of the new interpretation of Paramountcy by Lord Reading, smarting under the treatment meted out to them by the Political Department of the Government of India during recent years, and expectant of achieving their double objective of due recognition of their treaty rights and fair adjustment of conflicting interests between the States and

[1] The Government of India had to pass the Princes' Protection Act in 1934 with a view to protecting the Princes from attacks in the public Press by British subjects.

British India and Great Britain, the Princes suddenly decided to enter the Federation and to play their part in India's constitutional progress and to make their position in relation to the Crown definite and certain. Their declaration was at once dramatic and surprising.

It is a matter of speculation as to why the Princes suddenly decided to enter the Federation. It is alleged that they were prevailed upon by British statesmen who knew some form of responsibility must be granted at the Centre, and who wanted to be sure of a stable and conservative element there.[1]

[1] It is stated that the idea of an All-India Federation was put forward by an eminent Indian Liberal either *suo moto* or at the instance of a British statesman with a view to securing some measure of responsibility at the Centre. He was also partly responsible for the declaration of the Princes. Once the idea was mooted and the declaration was made, they were readily taken up by British statesmen. The Lord Chancellor, Viscount Sankey, welcomed the Princes' declaration and looked upon it as an escape from the difficulty. During Parliamentary debates on the India Bill, he observed "It is almost possible to see some Providence in the timely declaration of the Princes in favour of an All-India Federation." A further clue is given by the Marquess of Reading, who was opposed to responsibility at the Centre. During the debate he said: "After that statement made by the Princes, I changed the view I had held and decided that, if there was Federation and the Princes would come in, so that there would be union of All India, then I would be prepared to give responsible government subject to certain safeguards. . . . I know nothing about the genesis of the Princes' declaration. Nothing surprised me more than that declaration of the Princes. No more dramatic announcement was ever made at any conference or at any political meeting at which I have been present. I believe that it surprised everybody else." But the surprise loses its freshness when he gives the real reason for leaping at the idea of an All-India Federation. Says he: "All I would say to you with regard to Federation is that when that door was once opened it gave us the prospect for which we had always been hoping, of stability in India. That is the only word to express compendiously what it meant. The reason why Federation is of such importance is that the Princes, in their own interests, are involved in the matters that concern us most. If the Princes come into a Federation of All India and you have therefore one Government of All India . . . at least you can say that in the

The Joint Parliamentary Committee states that "the Ruling Princes as members of a Federation may be expected to give steadfast support for a strong and stable Government and to become helpful collaborators in policies which they have sometimes in the past been inclined to criticise or even obstruct." The First

future . . . there will always be a steadying influence . . . I ask myself the question, what will be the result if the Princes are with us. It must follow that in both the Lower Chamber of the Federal Legislature and in the Upper Chamber of the Federal Legislature you will have a large proportion of representatives of the Princes. That will be a steadying, a stabilising influence more valuable to us than appears perhaps at first sight. What is it we have most to fear? There are those who agitate for independence for India, for the right to secede from the Empire altogether. I believe myself that it is really an insignificant minority that is in favour, but it is an articulate minority and it has behind it the organization of Congress. It becomes important, therefore, that we should get what steadying influence we can against this view. The Princes are as interested in the preservation of the connection of India with the British Empire as we are ourselves. They want their treaties preserved. Their treaties are treaties with the King. They want to have direct relations with the Viceroy as representing the King, so that in any questions that arise they may go to the Viceroy direct and not have anything to do with Ministers who are to be responsible to the Legislature under the new scheme. That shows the importance of having their co-operation. In my view the maintenance of internal order and resistance of anything approaching anarchy or communism is as much in the interests of the Princes as it is in our interest, and it is also in the interest of the vast majority of Indians. There again you will have a tremendous great stabilising influence . . . there will be approximately 33 per cent of the Princes who will be members of the Legislature with 40 per cent in the Upper Chamber. There are of course large bodies of Indians who do not take the view of Congress or anything approaching to it. So that with that influence in the federated Legislature I am not afraid in the slightest degree of anything that may happen, even if Congress managed to get the largest proportion of votes. Then, too, the Princes are as interested as we are in the security of India against external aggression. It is just as important to them as it is to us. If invaders gain the upper hand, the Princes go just as we should have to disappear. Therefore they are with us on those three main questions. They cannot be disputed. . . . There you will see the value of the Federation to the stability of the connection between India and ourselves."

Round Table Conference in 1930, in which the Princes made their declaration, laid down four fundamental mutually interdependent principles of the new Constitution. They were: (1) All-India Federation; (2) Responsibility at the Centre; (3) Full Provincial Autonomy; and (4) Safeguards in the interests of India.

All-India Federation was made a condition precedent to the grant of responsibility at the Centre. This condition is sufficiently eloquent as regards the object of creating an All-India Federation.

The States demanded that the rights and obligations of the Paramount Power should not be assigned to persons who are not under the direct control of the Crown, as is at all events partially the case with the Federal Government in British India responsible to Indian Legislature. Accordingly, the Government of India Act, 1935, separates the offices of the Governor-General and the Representative of the Crown (Viceroy), though it is intended that the same person shall continue to hold both offices. The Crown's relation of Paramountcy with the Princes will be conducted by the Viceroy as such Representative of the Crown alone. The States in entering the Federation surrender a portion of their sovereignty to the Federation voluntarily. The portion of sovereignty surrendered to the Federation is excluded from the sphere of Paramountcy.

The States have a threefold status. Firstly, they are sovereign for internal purposes subject to the rights of the Paramountcy of the Crown. Secondly, they are subject to the Federal Government to the extent to which they have surrendered their powers to the Federal Government and Legislature and other federal authorities by their Instruments of Accession;

and thirdly, they are subject to the paramountcy rights of the Crown. With this threefold status, the States are to be members of the Federation. Their accession to the Federation has a double result. It restricts their existing (internal) sovereignty within the accepted federal sphere. It excludes Paramountcy from the sphere accepted by them as federal.

CHAPTER IV

FEDERALISM IN INDIA

1. Theory of Federalism

Federalism is of extreme modernity. Its theory and practice in modern times are not older than the American Federation which came into existence in 1787. The federal idea—the plan of government of a number of contiguous territories in association and neither separated nor combined in one—is very old and had been practised in Greece, but its use on a large scale has been made only during the last two centuries. Federalism is a historical product. It has been the result of historical evolution. It springs from the necessity for the union of a number of independent States which are not strong enough individually to protect themselves from outside danger, and whose union is requisite for the promotion of their economic interests, but which are not prepared to surrender their complete independence. The impulses which lead to the formation of federations are usually the spiritual ideal of national unity, the desire to promote common economic interests and the amicable resolution of common problems, and considerations of defence and international prestige. The federal form of government is not deduced from a theory or from *a priori* reasoning, but is, as we have said, a historical product, or a necessity arising under certain political conditions. The fundamental principles of federalism

have been fully worked out in the most highly developed Federation in the world, namely, that of the United States of America. As the authors of the Indian Federation are mostly influenced by the provisions of the Canadian and Australian Federations, which were formed under the influence of the American Federation, it is desirable to state briefly the theory of Federalism as revealed in their Constitutions.[1]

According to Prof. A. V. Dicey,[2] there are two requisite conditions for the formation of a Federation. (1) There must be a body of States 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. (2) There must be the existence of a very peculiar state of sentiment among the inhabitants of the States which propose to unite. They must desire union but must not desire unity. If there is no desire to unite, then there is clearly no basis for federalism. . . . The sentiment therefore which creates a federal State is the prevalence throughout the citizens of more or less allied States of two feelings which are to a certain extent inconsistent—the desire for national unity and the determination of each individual State to maintain its identity and independence. The aim of federalism is to give effect as far as possible to both these sentiments. A federal State is thus a political contrivance intended to reconcile national unity and power with the maintenance of "States' rights." It is a union of a number or body of independent States whose territories are contiguous and whose citizens have certain

[1] The chief Federal Constitutions in the World are those of the United States of America, Canada, Australia, Germany and Switzerland.

[2] *The Law of the Constitution*, Part I, chap. iii.

affinities, either racial or ethnological or traditional, who have a common historical background or heritage, a community of economic interests, and feel a craving for spiritual and national unity, but at the same time are keen to maintain the identity and independence of their States, which are not strong enough in modern times to face external industrial competition or military menace. It is an organic union. A federal State is a distinct fact. The federating States also remain distinct facts. By the association of the States, a new organic State is created for the discharge of certain national functions. The federal State is the embodiment of the nation as a whole, and it has a direct and organic contact with the citizens of all the States who are citizens of the Federation and who owe a double allegiance—to their own States and to the Federal State. The federal form of government came into existence where a unitary form of government was not possible owing to strong sentiments of local patriotism. The States are, first of all, sovereign States. They then enter into an agreement to part with a portion of their sovereignty and thus to create a national State which discharges certain functions in relation to all the States—functions which are common to them all. Such a Federation is essentially created for national purposes. It is based upon a compact which contains the terms and conditions on which the federating States have agreed to enter into a union. It follows that the relation between this new National Government and the federating units must be governed by the terms and conditions embodied in the pact. This requires a written Constitution.

As the federating units are jealous of their independence, except that portion which they have

surrendered to the National Government, the Constitution is always rigid, and it cannot be amended without the consent of the federating units. Thus the Constitution becomes the supreme law of the land. The authority of the States is necessarily divided between the National Government and the federating units, their respective rights and powers are clearly defined and delimited, and each has to function strictly and rigidly within the delimited sphere.

As the whole basis of this pact of federation is the distribution of limited executive, legislative, or judicial authority among bodies each co-ordinate with and independent of the other, there is every likelihood of encroachment by one on the sphere of the other, and also of disputes between the National Government and the federating units, or between the federating units *inter se*. From this it necessarily follows that there must be some institution to keep the National Government and its legislature, and the State Governments and their legislatures, within their respective demarcated and defined spheres and to settle disputes between them. Thus, a Federal Court or judicial tribunal is an indispensable necessity in a federal system. Such a Court is at once the custodian and interpreter of the Constitution and the highest tribunal for the settlement of disputes.

2. Salient Features of a Federal Constitution.

A study of modern federal systems reveals three leading characteristics of a Federal Constitution. They are: (1) Supremacy of the Constitution; (2) Distribution of powers among bodies with limited and co-ordinate

authority; and (3) the authority of the Courts to act as interpreters of the Constitution.

(I) Supremacy of the Constitution

A federal State derives its existence from its Constitution. The Constitution contains the terms and conditions of the pact between the federating States on the one hand and the newly established Federal Government on the other. Each Government, whether State or Federal, exercises all its executive, legislative, or judicial powers in accordance with the provisions of the Constitution. The supremacy of the Constitution involves three consequences: (*a*) The Constitution must necessarily be a written Constitution; (*b*) It must be a rigid Constitution; (*c*) Every legislature under a Federal Constitution is a subordinate law-making body. It is difficult in the Austinian sense to locate legal sovereignty in a Federal State, and this is inevitable having regard to the nature and object of a federal polity.

(II) Distribution of Powers

From its very nature, Federalism necessitates the distribution of the authority of the State among a number of co-ordinate bodies originating in and conditioned by the Constitution. The very essence of Federalism is the distribution of powers, as contrasted with the concentration of power at a single Centre in a unitary form of government. The details of this distribution differ in different Federations according to the peculiar conditions and requirements of the federating units, and the circumstances and motives which brought about their federation, but the basic principle is the same in all of them, namely, matters which concern the nation as a whole are delegated to the National Government, while those which do not are reserved to the States.

(III) The Authority of the Courts to Interpret the Constitution

This characteristic is a natural consequence of the first two. The maintenance of the line as fixed by the federating agreement is of the essence of modern Federalism. The Federal Constitution being the supreme law of the land embodying the definite terms of the pact between the National Government and the federating Governments, it is necessary that there should be some agency to uphold the Constitution and to keep the different Governments within their proper limits. Thus the Judiciary occupies a very important position in a Federal Constitution, and it is the duty of the judges to give effect to the clauses of the Constitution, and to pronounce judgment on the validity or otherwise of both Federal and State legislation. In a Federal Constitution, the political sovereign and the legal sovereign are generally in the background, and it is very difficult to arouse them. Hence the duty of safeguarding the Constitution and the rights of the citizens lies upon the Judiciary. This is the reason why the Judiciary occupies such a significant position in a Federal Constitution.

To sum up, Federation postulates the existence of a body of independent States and presupposes a desire for some form of union among the inhabitants of those States. Though they desire union for certain purposes, they nevertheless wish to preserve their identity and some measure of their independence. It follows that a Federal Constitution must be to a large extent a rigid Constitution. There must be distribution of powers between the Federal Government and the Governments of the several States forming the Federation. If amendment of the Constitution

could be made without the consent of the federating units, there would be no safeguard for the preservation of States' rights. Thus the Federal Legislature cannot be and is not supreme. There must be a special machinery for constitutional changes, and there must be some authority, namely, courts of law, which can prevent the Federal and State Governments from encroaching upon each other's powers and can declare legislation void on the ground of being *ultra vires*.

As the essence of Federation is the distribution of powers, a federal government is weak in comparison with a unitary government in which there is concentration of powers in a single body. A strong government postulates concentration of power, and provision for prompt decision and prompt action. With the distribution of powers and divided authority, it is not possible to secure these conditions. Disputes are apt to arise between the National Government and the States (which are jealous of their rights), and this necessarily means weakness. Secondly, a federal government is a weak one because progressive legislation is likely to be opposed by vested interests with definite representation in the Constitution, which recognises and legalises the *status quo*. A federal government is more or less a static government. It is necessarily intended to legalise and perpetuate the *status quo* without adequately taking into consideration the growing requirements of a growing community. In the words of Dicey, a system meant to maintain the *status quo* in politics is incompatible with schemes for wide social innovation. The recent decision of the Supreme Court regarding the "New Deal" in the U.S.A. is at once illustrative and instructive. There is a good deal of force in this inference of Dicey's.

However, if we keep in mind the nature and object of a federal polity, its character cannot be other than it is. The difficulties felt by Roosevelt in the U.S.A. and Bennett in Canada in introducing radical measures of economic and social reform are the direct consequence of the distribution of powers between the Federal Government and the States—a distribution based on the sentiments of the citizens forming the Federation, and the then prevalent conception of the proper sphere and functions of the Federal Government. Both the sentiments of the citizens and their conception of the proper functions of the Federal Government have altered under the stress of dynamic forces and modern economic developments. The American Constitution has been in existence for 150 years, the Canadian Constitution for seventy years, and the Australian Constitution for thirty-six years. The world has changed more rapidly in the last few decades than in almost the whole of its previous history. It is now subject to a depression of unexampled intensity, and naturally the distribution of powers between the local legislatures and the federal legislature requires reconsideration. This is a question to which the federations of the world are giving anxious thought. Because this matter is being considered, it does not follow that Federation as a polity is discredited. The experience is that once the dynamic forces are brought into operation, the tendency in all federations is towards unitarism. The Federal Government overshadows the States' Governments. This is both natural and inevitable. The affinities which constitute the original basis of a federal polity are strengthened and intensified under the operation of dynamic federal forces and the new environment

created by the federal agencies. The provincial jealousies that operate to preserve local independence grow weaker, and in course of time the benefits of a strong National Government are realized and a desire for a government resembling a unitary government is created.

It is asserted that Federalism produces conservatism. It is only natural that it should do so. The Constitution being the supreme law of the land, the citizens look upon it as sacrosanct and unalterable. Once this idea gets hold of the minds of the people, it dominates their thinking. Innovations and changes are dreaded, and even when they are desired, they are not easily possible. The conservatism inherent in the Constitution is accentuated by the conservatism of the people themselves, who generally dislike innovations. It is a common experience that the conservatism and the rigid nature of a federal polity prevent the adjustment of the Constitution to the growing needs of society. But though a conservative spirit permeates the working of a federal polity, it has not been wholly detrimental to the interests of the State, and whenever the necessity for growth or change was deeply felt, human ingenuity found indirect methods to achieve its ends. The successful working of a Federal Constitution presupposes the prevalence of legality among the people. In a federal polity, the spirit of legality permeates the minds of the citizens. This is inevitable, because the relations of the Federal Government and the federating units, and the relations of the citizens with the States or with the Federal Government, are strictly and rigidly governed by the terms and conditions of the compact, which are interpreted and enforced, whenever occasion arises,

by the Judiciary. The very foundation of federalism is legalism. Wherever the spirit of legalism was absent, federation has not been an unqualified success. It is true that pushing the spirit of legalism to its logical conclusion may at times prevent desirable changes, but, on the whole, that spirit has had a good effect in all federations.

3. Conditions in India.

It is pertinent to ask how far the conditions favourable to the formation of a federal polity exist in India. Applying the criterion of Dicey, one can say that some of the conditions are present in India. There are affinities, cultural, racial, religious and historical, among the inhabitants of British India and the States. There is a common historical background and heritage. There is geographical contiguity. There is community of economic and political interests. The defence system of British India and Indian India is common to both. The composition of the population of British India and the States, their religion and culture, are similar. All their peoples are capable of bearing in the eyes of Indians an impress of common nationality. There is only one factor that does not exist—a body of independent States. So far as British India is concerned, there is already one central unitary form of government. As regards the Native States, it is true that they are quasi-sovereign, but even they are under the suzerainty or Paramountcy of the Crown. For external purposes, India is already one State. The historical motives for bringing into existence a Federation, namely, the necessity for common defence, tariffs, uniform communications, currency, etc., are absent

in India, because all these subjects are already under the control of the Government of India, whether they affect British India or the States. The Government of India is responsible for the defence of British India as well as that of all the States. Externally and internationally, India is already one State. It is true that British India is under the direct sovereignty of the Crown, while the States are under the Paramountcy of the Crown, but strictly and legally the difference is of degree and not of kind.

Historically, everywhere Federalism has been a process of uniting, but in India it is a process of breaking up British India into eleven autonomous Provinces.[1]

[1] "Granted the announcement of August 20, we cannot at the present time envisage its complete fulfilment in any form other than that of a congeries of self-governing Indian Provinces associated for certain purposes under a responsible Government of India, with possibly what are now the Native States of India finally embodied in the same whole in some Relation which we will not now attempt to define. For such an organization, the English language has no word but "federal". But we are bound to point out that whatever may be the case with the Native States of the future, into the relation of the Provincial and Central governments the federal element does not, and cannot, enter. There is no element of pact. The government of the country is at present one; and from this point of view the local governments are literally "agents" of the Government of India. Great powers have been delegated to them, because no single administration could support the Atlantean load. But the process before us now is not one of federalising. Setting aside the obstacles presented by the supremacy of Parliament, the last chance of making a federation of British India was in 1774, when Bombay and Madras had rights to surrender. The Provinces have now no innate powers of their own, and therefore they have nothing to surrender in a Foedus. Our task is not like that of the fathers of the Union of the United States and Canada. We have to demolish the existing structure at least in part before we can build the new. Our business is one of devolution and drawing lines of demarcation and cutting long-standing ties. The Government of India must give, and the Provinces must receive; for only so can the growing organism of self-government draw air into the lungs and live. It requires no great effort of the imagination to draw a future map of India

Secondly, the question of the sentiment for union does not arise in the case of British India because the inhabitants of British India are already united, and they have something much more than union, namely, unity. It is true that the inhabitants of the Native States have a potential desire for union with British India in order to share common citizenship and nationality. But in this Federation it is not the citizens of the States who have desired union or who are to unite, but the Rulers of the States who are to unite. The subjects of the States are not to share the common citizenship of the Federation.

In all federations the initiative for union came from the constituent units who were moved thereto by their citizens. In India, the impulse to federation, from whatever source it may have come, has been translated into action by Parliament. The Indian Federation has been created by Parliament to secure steadying and stabilising elements in the Central Government. Thus some of the conditions for the formation of a Federation are present in India while some are absent. It is true that the dream of an All-India Federation was cherished by Mr. Montagu and Lord Chelmsford, and that dream was endorsed by the Simon Commission, which realized the essential difficulties in the formation of an All-India Federation, and advisedly recommended the immediate reorganization of the Indian Constitution on a federal basis by a permissive Act which might enable the States to enter the

which shall preserve the external semblance of a great new confederation within the Empire. But we must sedulously beware of the ready application of federal arguments or federal examples to a task which is the very reverse of that which confronted Alexander Hamilton and Sir John MacDonald."—*Montagu-Chelmsford Report*, para. 120.

Federation in future, thus facilitating the growth of an organic Constitution for India.

4. Salient Features of the Indian Federation.

The Indian Federation exhibits all the normal characteristics of a federation. There is a written and rigid Constitution. There is distribution of powers between the Federal Government and the Provincial Governments and the States, and there is also a Federal Court with power to keep the Federal Government and Legislature and the Provincial Governments and Legislatures within their respective spheres as defined by the Constitution. But there are many peculiar features of the Indian Federation resulting from the special political conditions of India. These peculiar features are: (*i*) In all federations independent units are united for certain common purposes. Thus, a number of independent political units are transformed into a single State for national purposes. Federalizing has normally been a process of uniting. In India, federalizing has been a process of breaking up British India into eleven Provinces and of bringing in Native States which are in substance surrendering very few powers to the Federal sphere. It is to be noted that the most important subjects within the Federal sphere—customs, defence, external affairs, indirect taxation, etc.—are already within the sphere of the Government of India indirectly[1] or are

[1] The list of subjects in respect of which the States are to federate consists of three categories: (1) Matters which hardly affect the States, e.g., Ecclesiastical affairs, Fisheries, etc. (2) Matters of no consequence to the States, such as botanical and zoological surveys, admiralty jurisdiction, European mental hospitals, etc. (3) Important matters in which the Government of India have always taken

within the competence of the Central Legislature and the Government of India which is responsible for the peace and good government of India as a whole. There has already been one central Government with other subordinate Governments. Even the States have been under the suzerainty of the Crown. We see, therefore, that the federalising units which are all under the Crown have already been for external purposes one State. Thus, the historical process of formation of Federation for India has been just the reverse of what it has been in other countries, and the aims which brought other federations into existence have also not been operating in India. The formation of Federation in India is not the manifestation of the urge of the people towards a creative union embodying national unity. This fact is recognized by the Joint Parliamentary Committee, which states: "Of course, in thus converting a Unitary State into a Federation, we should be taking a step for which there is no historical precedent. Federations have commonly resulted from an agreement between independent or at least autonomous governments surrendering a definite part of their sovereignty or autonomy to a new Central organism. At the present moment, the British India Provinces are not even autonomous, for they are subject to both the administrative and legislative control of the Government of India, and such authority as they exercise has in the main been devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced, therefore, with the necessity of creating

decisions without any legal obligation to consult the Princes—such decisions having applied to the States as much as to British India—e.g., customs, defence, external affairs, exchange, currency.

autonomous units and combining them into a Federation by one and the same Act. But it is obvious that we have no alternative." (*ii*) In a Federation the status and character of the constituent units are usually similar. The Indian States are wholly different in status and character from the British India Provinces. The States are under the personal rule of the Princes, and the Provinces have more or less responsible government. The representatives of the States in the Federal Legislature are the nominees of the Rulers, and those of British India Provinces are elected by the people. In a Federation, there is a double citizenship, Federal and State or Provincial. The Federal Government acts not only upon the associated States, but also directly upon their citizens. In the Indian Federation, the subjects of the Native States are not citizens of the Federation and are not in the enjoyment of the same civic rights as those enjoyed by the citizens of the British India Provinces. Thus the Indian Federation is a union between autocratic rulers and more or less democratic governments.[1]

(*iii*) The range of the federal powers in other Federations is the same in all the federating units. In the Indian Federation, it is identical in British

[1] "I am satisfied that the system of construction of the Federation under which the nominees of autocratic rulers are to have a powerful voice in both Houses of the Federation, in order to counteract Indian democracy, is quite indefensible. Whether in practice it works out as the Government and the Princes hope may be doubted, but the whole of the project seems to be indefensible. I should have proposed Federation only for units which were themselves under responsible government, and have admitted the Princes only on condition that they gave their States Constitutions leading up to responsible government, and that their representatives in both Houses of the Central Legislature were elected by the people of the States."—A. Berriedale Keith. This view is shared by many Indians. It is significant that the Legislative Assembly by its Resolution passed on February 7, 1935, disapproved of the establishment of the All-India Federation.

India Provinces, but in the States it depends upon the terms of the Instrument of Accession of each State. Thus there is an obvious anomaly—a Federation composed of disparate constituent units in which the powers and authority of the Central Government differ as between one constituent unit and another.

(iv) The Indian Federation is brought into existence by the Crown. The contracting parties are not the federating units. According to the preamble to the Act of 1919, Parliament is the sole judge of the future constitutional development of India. Hence Parliament decided the question and made the British India provinces legal entities, and included them in the Federation by one and the same Act. It is obvious that there can be no question of consent on the part of the British India Provinces to the Federal compact. The States, on the other hand, are quasi-sovereign States who have acceded to the Federation by separate Instruments of Accession which are separately accepted by His Majesty. Thus the contracting party as regards the States is the Crown and not the federating units. It is clear that the whole Federal structure is brought into existence by the Crown, and the fundamental and vital impulse towards the formation of a normal Federation is absent.

(v) The power of amending the Constitution is vested in the British Parliament. This is very significant. It has already been observed that a federal Constitution is rigid and conservative. As the States are the members of the Federation, the Constitution cannot be amended without their consent to the extent to which such amendment may affect their accession. British India is directly under the sovereignty of the Crown, and the authority of the Central Government

as well as of the Provincial Governments is derived directly from the Crown. The States are sovereign internally, but they have a certain relationship with the Crown, which, as we have already seen, is known as Paramountcy. In other Federations, as the political structure of the federating units does not vary in nature, the amendment of the Constitution in the larger interests of the Federation as a whole, though it may be difficult, is not as difficult as in the Indian Federation, where the Princes are guaranteed their personal rule provided there is no gross misrule. The States as units of the Federation, but with Paramountcy—their special relation with the Crown—outside the Act, introduce a further element of rigidity and complexity unknown to any other Federations.

(vi) In other Federations, the Upper Chamber generally secures the equality of status of the federating units by allowing equal representation in it of all units, irrespective of their size and population. The Lower Chamber secures the oneness of the Federal State. Its representatives are elected by the citizens of the federating units as a whole. Thus one Chamber is intended to secure the equality and autonomy of the units, and the other to secure national unity. In the Indian Federation, neither of these principles is observed. There is no equality of representation of the units in the Upper Chamber. Even among the States there is no equality of representation. Again, strangely enough, its election is direct, whereas in other Federations it is indirect. In the Lower Chamber the election instead of being direct is indirect. There is no direct and organic contact between the citizens and the Federation. Moreover, the direct and indirect

modes of election are based on communal considerations. Under this system the very object of creating a Federation—the manifestation of nationality, and the crystallisation of the essential unity of India—is negatived by the machinery which is intended to secure the representation. In other Federations, dynamic federal forces produced a desire among their citizens towards closer unity among themselves. In the Indian Federation the forces generated by the Federation are likely to strengthen provincialism and lead to the disruption of the national unity which is in the making.

(vii) In the relation between the Central Government and the units there is an impress of the fact that government in India has been strongly centralized, and the superintendence and control of the Central Government over all the Provinces is still in the background, not only for Federal but also for Provincial purposes. The Governor of a Province is under the general superintendence and control of the Governor-General in cases where the Governor has to act "in his discretion" and in the exercise of "his individual judgment". As regards the States, Federal authority is to be strictly confined within the sphere stipulated in the Instruments of Accession. In normal Federations, the federating units not only are autonomous but also have responsible government. The Government of British India Provinces is not strictly responsible to the Provincial Legislature, and the final power and effective authority is still vested in the Governors, who are responsible to the Crown. The Princes are autocratic and are not responsible to their people, and they are under Paramountcy subject to the final control of the Crown.

(viii) In most Federations, either the Provinces or the Federal Government have certain powers assigned to them, and the residue is given to the Provinces or the Federal Government as the case may be. In the Australian and American Constitutions, broadly speaking, the powers which are not given to the Centre fall to the Provinces or States. In other words, the Province or the State has the residuary legislative powers, and the Centre has only specific powers. In the Canadian Constitution, both the Federal Government and the Provinces have specific powers, and the residuary power rests with the Federal Government. In the Indian Federation, the powers of both the Federal Government and the Provincial Governments are specifically defined, and the executive head of the Federation, the Governor-General, is given the power to decide in his discretion whether the power of residual legislation in respect of a particular item is to be assigned to the Centre or to the Province. There is no precedent for this.

(ix) The Representatives of the States have the power to vote for laws which affect British India only, and which they or their States will not have to obey, whilst the representatives of British India have no power to vote on subjects which affect the States or their subjects only. In case the Federation requires more revenue, it can only be raised by an increase in indirect taxes, as the States have contracted out of direct taxes, except Corporation tax after ten years. This will lead to the imposition of a disproportionate burden on the consumer, thus leading the development of Indian finance in a direction to which there are deep objections.

(x) The executive head of the American Federation

is elected by the people; the executive head of Canada or Australia is nominated by the Crown on the advice of the Dominion Ministry; whereas the executive head of the Indian Federation, the Governor-General, is appointed on the advice, not of the Indian Ministry, but of the British Ministry. The executive head of none of the other Federations has distinct legislative powers even under extraordinary circumstances, while the executive head of the Indian Federation has such powers. Action in his discretion or individual judgment by the executive head is unknown in any Federation except the Indian Federation.

Thus the Indian Federation is a political contrivance to create for India an All-India polity recognizing the essential unity of British India and Indian India under the British Crown. It is unique, and it has no parallel in the world. "The idea of an All-India Federation is in many ways one of the most striking events in the history of the world, considering the area to be covered and the differences of language, of religion, of race and of historical background of the people and the territories which the realization of the ideal of federation will combine in a single body."[1]

These are some of the special features of the Indian Federation. It resembles and differs from other Federations. It is doubtful whether one can correctly and strictly call this All-India polity a Federation in the sense in which the term is understood by political theorists and constitutional lawyers. Some Indians have doubted the wisdom of creating such a polity for India.[2] India is already under a strong

[1] The Marquess of Linlithgow in a speech at Benares on July 31, 1936.

[2] The following view of Professor J. H. Morgan, K.C., who is an authority on Constitutional Law, is also refreshing:

centralized government. This government has generated forces which have brought into existence a feeling of nationality. They have unified and united

"The outstanding feature of the Government proposals for constitutional 'Reform' in India is the imposition of Federalism on a country which has hitherto been a stranger to it. It is a bold, some may say a rash, departure. For 'Federalism,' even under the most favourable conditions, is notorious among constitutional lawyers as being the most complex, the most litigious, the most disconcerting (I use the word advisedly), and in the execution of the law, the weakest of all forms of government. The very fact that it involves a division of 'internal' sovereignty alike in the legislative sphere and the executive between the Federation and its constituent 'States' or Provinces, results in the citizen who lives under it owing a double 'allegiance,' and the truth of the Scriptural aphorism that no man can serve two masters is writ large in the political history of all federal communities. An astute Australian lawyer, Mr. Cannaway, K.C., who considers, not without reason, that the adoption of Federalism in Australia has proved a disastrous failure, has remarked, with much truth, that 'under a federal form of polity the sense of duty towards the national government is not likely to be strongly felt.' Indeed he goes so far as to suggest, not without warrant, that the lawlessness so apparent of late years in the United States is due to the 'demoralising' effect of this dual allegiance. . . .

"In all other federal systems the division of legislative powers is, at its worst, no more than dual—Federal law on the one hand and the law of the constituent States on the other. Divided authority is, of course, always weak, but the more divided it is, the weaker it will be. The division recommended by the White Paper attains the dimensions of disruption. It is not merely dual, it is sextuple. I find that under these proposals . . . our Indian fellow-subjects, each and every one of them, will owe obedience to six, in fact seven, different and often conflicting legislative authorities, three of them centred, but hardly united, in the multiple personality of the Governor-General, who may find considerable difficulty in agreeing not merely with his ministers, but with himself.

"British subjects in India, whether 'native' or 'European' will owe obedience to Federal Statutes, to Provincial Statutes, to 'Governor-General's Acts,' to 'Governor-General's Ordinances,' to the Federal Ministry's Ordinances, to the Provincial Governor's 'Ordinances' to say nothing of Acts of the Imperial Parliament. Such a choice collection of antinomies is not unfamiliar in theology and metaphysics, but it is the first time anything of the kind has been proposed for the government of men."—"The Dangers of Federation": *Daily Mail*, July 9, 1933. Having regard to the political conditions in India, the method of indirect election for the Federal Lower House and the incoherent nature of the Indian Federation one can easily realize the seriousness of these dangers.

India. It is true that for a vast country like India adequate devolution of power is indispensable and essential. The whole historical development was in the right direction. What was necessary was adequate and effective devolution with a strong Central Government. India had been a victim for centuries to disintegrating forces. That lesson is writ large on the pages of Indian history. This process had been reversed during the last 150 years, and it ought to have been completed by a Constitution deliberately designed to avoid those disastrous tendencies. Feralizing India in the manner in which it is done under the Act, is likely to mean a check to this unifying process, if not a movement in the other direction. Having regard to the political problems of India, the composition of her population, her economic requirements, and the danger of provincial patriotism intensified by communal feeling running amok, effective solutions of her vital problems are only possible if they are attempted on an All-India scale. But with the existence of Provincial autonomy, and the method of indirect election for the Central Legislature, such solutions will be difficult if not impossible.

It has been stated that "disruptive forces have been very strong in the past history of India. It is only an administration by a strong Central Government that has succeeded in bringing about uniformity of laws and standards of administration and a feeling of common nationality. The separatist tendencies likely to be produced by differences of race, religion, language and custom have been largely overcome or kept in check by the influence of a strong Central Government."[1]

[1] *Indian Constitutional Problems*, by Sir P. S. Sivaswamy Iyer.

Against this argument it is urged that the necessity for guarding against centrifugal tendencies is recognized in the new polity, and the powers and functions of the Central Government are so distributed in the light of experience of the working of other Federations, and the Governor-General is so empowered to take measures, as to avoid the difficulties from this direction, as well as those difficulties which are now felt by the United States, Canada and Australia. It is asserted that the new polity will prevent India's progress. It is also maintained that the British India representatives who accepted the scheme of an All-India Federation did not comprehend its implications.[1] It is urged that in view of the position of the States in the new Constitution, and their relation with the Paramount Power, and the rigidity of the Constitution, the powers and the special responsibilities of the Governor-General, the establishment of a true responsible government at the Centre will be difficult if not impossible. It is further pointed out that the whole polity is based on the theory of

[1] The British India representatives, in their eagerness to secure a measure of responsibility at the Centre, agreed to the scheme which was acceptable to the Conservatives in England. Sir Tej Bahadur Sapru has succinctly stated their position in these words: "If the representatives of British India accepted it (the idea of Federation) as a feasible basis of advance in 1930 at the Conference, it was because they realized that (*a*) it would lay the foundations of Indian unity; (*b*) it would provide an effective machinery for protecting common interests and minimising the chances of friction between the two sections of India; (*c*) it would, by supplying a stable element in the Indian Constitution, allay the apprehensions in the minds of British statesmen in respect of changes to be brought about in the character and composition of the Central Government in India; and (*d*) it would promote the cause of progress and constitutional advance in the Indian States themselves." One has only to compare these impulses to the formation of the Indian Federation with those which operated in other Federations to realize the difference.

checks and balances and will prevent India's constitutional progress, and is meant to counteract democracy at the Centre.[1] One would have preferred, to start with, the Federation of British India alone, allowing the States to enter it not entirely on their own terms. One may object to the exact nature and to some of the provisions of the new Constitution, to the disproportionate power and influence given to the States, to the elaborate reservations and safeguards, and to the "discretions" and "individual judgments" of the Governor-General and the Governors, but one cannot envisage a Constitution for the whole of India in any form other than a Federation. It is also to be remembered that once the political isolation of the States *inter se* and from British India is gone, and the representatives of the States take part and become instrumental in deciding questions affecting British India, the States are bound to be affected by British India decisions, and the spirit of democracy is bound to filter into the States. It

[1] "My Lords, are liberty and Federation really indissoluble elements of one whole? Can you not have liberty without Federation? The Secretary of State for India told us that 'to those who have directed their gaze forward it has been obvious that the eventual Government of India at the Centre must be of the Federal type.' What exactly are the reasons why the Government are so anxious to force the development of the Indian Constitution into this particularly rigid channel? Is it possibly just because they fear that they cannot ride the whirlwind if Indian political development is allowed to follow its natural bent? If so, do they think that this Bill, monument of industry though it may be, will enable them to trammel the spontaneous expressions of Indian progress? Do they find a tendency to Federation in the long history of India? Do they think that this hotch-potch of intricately elected Assemblies and the Governor-General's discretions will stand for five years after it has been set up? For my part, I am persuaded that the late Secretary of State for India was dangerously addicted to cross-word puzzles, and that this Bill has strayed from a back sheet of *The Times* to lie across the path of Indian progress."—Lord Phillimore (*House of Lords Debates*, June 19, 1935).

cannot be checked. It has to overcome many difficulties at first, but once it begins it gathers momentum. Moreover, under the dynamic forces of a federal State or National State, the States and their subjects are bound to be affected in the same manner as happened in Australia.[1] Further, it should not be forgotten that a federal contract has always and everywhere under the process of judicial interpretation turned out to be somewhat different from what it was intended to be by the original parties to the contract. Moreover, the consequences of the application of the doctrines of "implied or ancillary powers" of the Federal Legislature by the Privy Council to the Constitutions of Canada and Australia are also to be kept in mind.

It is true that since the whole legislative field in the Indian Federation is mapped out, as regards British India, between the Federation and the Provinces, and since, as regards the States, the Federal sphere is only that which is accepted by the States, the scope of the application of the doctrine of "implied or ancillary powers" under the Indian Constitution is narrow and limited. But the fact cannot be ignored that in the judicial interpretation of the Indian Constitution the rules of construction laid down and followed by the Privy Council will be applied to it in so far as they are relevant to the Indian Federation, and the consequences of such an application may be in the same direction.

[1] "I am strongly of the opinion, however, that one result among others of the association of British India and Indian States in the field of common activity in the Federal Legislature, will be to facilitate the passage of the Indian States from their present form of autocratic government (I use the expression in no offensive sense), to a constitutional form with the rights of their subjects defined, ascertained and safeguarded."—Sir Tej Bahadur Sapru, Memorandum on the White Paper. *Records of J.C.*, vol. iii, p. 239.

5. How is the Federation of India Formed?

We have already seen that a Federation is a union of a number of political communities for certain common purposes. These political communities or units agree to commit themselves to the control of one common Government, in relation to such matters as are agreed upon as of common concern, leaving each unit independent and autonomous in all other matters. Hence, every such union necessarily involves an arrangement that some of the powers of each federating community shall with its assent thereafter be exercised by a Central authority or authorities on behalf of all. It is this organic connection between the federal units themselves and between each of them and the Central authority which distinguishes a Federation from a mere alliance or confederation. The Federation of India, which is an association of British India on the one hand and the States on the other, is formed to do more than to act in concert on matters of common concern. It creates an organic union between the two, with the Federal Government and the Legislature exercising, on behalf of both, the powers vested in them for the purpose. In ordinary circumstances, where the communities desire to federate, they determine by mutual negotiations the form of Federal Constitution which they desire to establish, and if they are independent States, they themselves bring the Federation into existence as soon as agreement is reached. This procedure was followed in the United States of America. In Canada and Australia, the procedure was different. Both Canada and Australia, at the time of forming the Federation, were autonomous communities subject to the British

Crown. They drew up their own Constitutions[1] and sought the sanction of the British Parliament, which alone at that time could make the Federal Constitution a legal reality throughout the whole area of the Federation.

Political conditions and circumstances of and in India demanded a still different procedure.[2] The Federation in India is a result partly of the political evolution of British India, partly of the desire of the States to play a part in the constitutional progress of the country and to get their rights in relation to the Paramount Power definitely clarified and defined, and mostly of the anxiety of the British Government to secure steadying, stabilising, and conservative elements before granting some responsibility at the Centre. Thus, the Federal Constitution is the outcome of at once granting India responsibility in the Provinces, and some responsibility at the Centre, and securing and safeguarding various rights and interests.[3]

Thus the vital impulse and motives of the Federation in India are peculiar and have no precedents. The conditions in India were peculiar to that country. Some of the communities included in the Federation —the British India Provinces—were not autonomous and therefore could not federate unless enabled to do so by an Act of Parliament. Others—the States—

[1] *Constitutional Law of the British Dominions*, A. Berriedale Keith (1933).

[2] Memorandum attached to the Despatch of the Secretary of State to the Government of India, dated March 14, 1935.

[3] In the debate on the Government of India Bill Sir Samuel Hoare stated: "Parliament . . . is passing the best Bill it can, taking of account as fully as it can of the various interests, British Indian interests, the interests of the Indian States, the interests of Great Britain, and the interests of the Empire."

are neither British territories nor subject to the authority of Parliament. Nor could the Provinces of British India and the Indian States meet together and agree upon a Federal Constitution. The Provinces had not the legal power to do so, and the variety and number of the Indian States precluded such a step for practical reasons, apart from other considerations. Accordingly His Majesty's Government ascertained as far as they were able the opinion both of British India and of the Indian States, formed their own judgment of the problems involved, and framed a Constitution which is embodied in the Act of 1935. This is the Federal Constitution of India which, unlike the Constitutions of Canada and Australia, is framed by the British Parliament to give effect to its policy towards India—a policy deemed to be proper and liberal having regard to the political conditions in India and the political consciousness of the people.

The Princes did not definitely agree to accede to the Federation, but only declared their desire to do so if the conditions of their accession were acceptable to them. Thus the Constitution is not a natural Constitution—the embodiment of the genius of the race and the expression of the national conception of the organization of the fundamental institutions of the country, meant to secure order and promote the well-being of the nation as a whole. It is looked upon as an imposed Constitution. The birth of the Federation has been sudden. The demand of India was for responsible government at the Centre. This was not acceptable to the British Parliament, but in order to meet that demand without running any risk, the idea of Federation was mooted and accepted, and the grant of even restricted responsibility at the

Centre was made dependent on the establishment of the Federation, which is made dependent on the accession of the requisite number of States. The States are considered essential and indispensable elements in the Central structure. Thus the Constitution was framed in order to realize certain objects which are not fundamental to the constitution of any normal Federation.

The underlying principles of the new Constitution appear to be that India for the present cannot be trusted with full responsible government either in the Provinces or at the Centre; and that the sole responsibility for drawing up and amending the Constitution is and must remain entirely with the British Parliament.[1]

The Government of India Act, 1935, is binding upon British India because British India is subject to the authority of Parliament. The Act as such is not binding upon the Indian States. As regards these, the Act provides machinery whereby they severally accept the Constitution, thus becoming part of the Federation, not because the Act is an Act of Parliament, but because it embodies a Constitution to

[1] "Lastly, there must be an authority in India armed with adequate powers able to hold the scales evenly between conflicting interests and to protect themselves. Such an authority will be as necessary in future as experience has proved it to be in the past, under the new system of Provincial Autonomy, to hold as it were in reserve; but those upon whom it is conferred must at all times be able to intervene promptly and effectively if the responsible ministers and the legislatures should fail in their duty. This power of intervention must, generally speaking, be vested primarily in the Provincial Governors, but their authority must be closely linked and must be focussed in a similar authority vested in the Governor-General as responsible to the Crown and Parliament for the peace and tranquillity of India as a whole, and for the protection of all the weak and helpless among her people."—*J.P.C. Report*, page 25.

which they have of their own volition acceded. The Princes have acceded to the Federation subject to the specified reservations and limitations of the Federal legislative and executive authority mentioned in their respective Instruments of Accession. The nexus between the Federation and the States is provided by the Instruments of Accession, which constitute the legal basis of the Federation as regards the States.

The Princes, taking advantage of the fact that the establishment of Federation was dependent on their accession, demanded, as a condition precedent to their accession, the clarification and definition of Paramountcy, but their demand was emphatically negatived. The Princes insisted on the Instruments being treated as bilateral agreements, but this claim also was negatived. The Instruments are bilateral in so far as they have no binding force until His Majesty has signified his acceptance of them, but they are not in the nature of treaties. Such rights and obligations as flow from the execution of an Instrument of Accession are found in the terms of the Act, subject only to those conditions and limitations set out in the Instrument for which the Act itself makes provision. The Crown assumes no obligations by virtue of its acceptance of the Instrument other than those which are defined in the Act. While it is true that a Ruler by an Instrument of Accession recognizes certain specified matters as federal, the Crown has by accepting the Accession impliedly assented to a modification in respect of those matters of its former relations with the States, and has renounced in favour of the Federation any right, authority, or jurisdiction which might hitherto have

been exercised in connection with them. Thus, to the extent to which the rights of Paramountcy are within the sphere of the Federation, they are removed from the rights of the Crown in relation to the States. Subject to this, the rights and obligations of the Crown in relation to the States remain unaffected. The question of Paramountcy and the relations between the States and the suzerain power is entirely outside the Act. The States insisted on the rights of Paramountcy being exercised by the Representative of the King, as a distinct individual, because they apprehended that the Governor-General might under the influence of the British India representatives in the Legislature require the Princes to do certain acts in their States. The Princes realized the force of the working of a Responsible Government at the Centre and its reactions and repercussions on their methods of government in their States. The eagerness on the part of the Princes for a clear definition of the Federal legislative and executive spheres in relation to the States is based on their apprehension of indirect interference in their internal sovereignty by the Federal Legislature and the Executive.

CHAPTER V

THE FEDERATION AND THE CROWN

The establishment of the Federation has involved two distinct operations: (1) a necessary consequence of the grant of Provincial Autonomy to British India and (2) the establishment of a new relationship between British India and the Indian States.

1. Legal Basis of the Federal Constitution

(*a*) British India

The dominion and authority of the Crown extends over the whole of British India, and was exercised till March 31, 1937, subject to the conditions prescribed by the Government of India Act, 1915. It is derived, as already explained, from many sources, in part statutory and in part prerogative. Till March 31, 1937, the Secretary of State was the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India, and for the exercise also of certain authority which was derived directly from powers formerly vested in the Court of Directors and the Board of Proprietors, whether with or without the sanction of the Board of Control. The superintendence, direction, and control of the civil and military government of India was declared by the Government of India Acts, 1858 and 1915, to be vested in the Governor-General in Council and the governments or administrations of the Governors' or Chief Commissioners'

Provinces respectively in the local governments; but the powers of superintendence, direction and control over "all acts, operations and concerns which relate to the government or revenues of India" were subject to substantial relaxation after 1919 in the transferred Provincial field expressly reserved to the Secretary of State. This distribution of the authority of Parliament in British India is altered under the Act of 1935. In the new Constitution, as already explained, before the Provinces are federally united, they are made legally autonomous, deriving their authority directly from the Crown. The Central Government is no longer the agent of the Secretary of State. Both the Provinces and the Central Government derive their powers and authority from a direct grant by the Crown. The legal basis of the government of India under the Act of 1935 is first the resumption into the hands of the Crown of all rights, authority and jurisdiction in and over the territories of British India whether they were vested in the Secretary of State, the Governor-General in Council or in the Provincial governments and administrations; and second, their redistribution between the Central Government on the one hand and the Provinces on the other as prescribed by the Act.

(*b*) NATIVE STATES

Over the Indian States, the authority of the Crown or Paramountcy is exercised by the Governor-General in Council as Viceroy under the general control of the Secretary of State. There is no clear distinction in the exercise of his rights by the Governor-General in Council either in relation to British India or in relation to the States. The general control of the Secretary of State extends over both spheres. The Act of 1935 differentiates the functions

of the Governor-General and those of the Viceroy or Representative of the Crown. To the extent to which the States have surrendered their powers to the Federation, they are under the authority of the Governor-General. For the rest, they are under the authority or Paramountcy of the Representative of the Crown. Paramountcy is not included in the Act. It is outside the Act. It is to be exercised by the Representative of the Crown. Hence, as regards the States, the legal basis of the Federation is the Instruments of Accession of the States implemented by Paramountcy which is to be exercised by the Representative of the Crown. Thus, the Government of India, either in relation to British India or the States, is to be conducted by the Crown through its representatives—the Governor-General and the Representative of the Crown. This legal basis is given effect in the Act.

2. Government of India by the Crown

The authority of the Crown over India, which was after 1858 declared directly exercisable by the Government of India, is now declared exercisable by His Majesty except in so far as may otherwise be provided by or under the Act or as otherwise directed by His Majesty. This declaration[1] extends to all rights,

[1] This declaration requires explanation. Under the Act of 1915, the government of India was also government by the Crown, and the territories vested in His Majesty in India were governed by and in the name of His Majesty the King-Emperor of India. But this authority was exercised by the Secretary of State, who had superintendence, direction and control over all acts, operations and concerns which related to the government, etc. Under the control of the Secretary of State, the authority was distributed. The Crown was in the background and the Secretary of State was in the foreground. This made the government of India, though

authority and jurisdiction of the King-Emperor of India over the territories in India, and includes all rights, authority and jurisdiction hitherto exercised by the Secretary of State with or without his Council, the Governor-General himself or with his Council, any Governor or local government. This authority does not cover Paramountcy, which, if not exercised by His Majesty, is to be exercised by His Majesty's Representative for the exercise of the functions of the Crown or by persons acting under the authority of the Representative.[1] The question of Paramountcy and the relation between the States and the suzerain power is entirely outside the Act except in so far as it is affected by the Instruments of Accession of the States acceding to the Federation. Paramountcy is restricted only to the extent to which the matters under Paramountcy are surrendered by the States to the Federation. Except for this, the rights and obligations of the Crown in relation to the States remain entirely unaffected.[2]

The Executive authority of the Federation is vested in the Governor-General as the Representative of the King. He also exercises such prerogative rights of the Crown as His Majesty has delegated to him. The Executive authority includes the supreme command of the military, naval and air forces in India,

nominally by the Crown, really by the King in Parliament. The Princes were reluctant to federate with British India except under the Crown, hence they insisted that the Governor-General and the Governors should derive their authority directly from the Crown. It is with a view to meet this point and also to follow the Dominion precedent that this declaration is embodied in the Section. Under the declaration, all authority which the King-Emperor has hitherto exercised in India is vested in him and remains in him. The Federation has received its powers from the King-Emperor as provided in the Act.

[1] S.2. [2] S.285.

but His Majesty has also appointed a Commander-in-Chief in India to exercise in relation to these forces certain powers which are assigned to him. The Governor-General is appointed by a Commission under the Sign Manual and has powers and duties conferred or imposed on him by or under the Act,[1] and such other powers, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleased to assign to him. He is not to exercise the rights of Paramountcy or the functions of the Crown. For the exercise of the functions of the Crown in relation with the Indian States (Paramountcy) His Majesty appoints his Representative with such powers and duties in connection with the exercise of those functions (not being the functions of the Governor-General) and such other functions as he may be pleased to assign to him.[2] It is lawful for His Majesty to appoint one person to fill both these offices. Under the Act, the Governor-General is to hold both the offices, but in practice, if it is found difficult for the Governor-General to exercise both sets of functions, His Majesty may appoint a separate Representative of the Crown. When he acts as the Representative of the Crown in relation to the States, his capacity is different and distinct from that of the Governor-General.[3] Thus the government of India is by the Crown.

The Commander-in-Chief of His Majesty's forces in India is also appointed by a Warrant under the Royal Sign Manual. (S.4.)

[1] The Federation is given only such powers as are transferred to it by the Act. All the powers not transferred are retained by His Majesty.

[2] S.3.

[3] This legal differentiation of the functions which were under the Act of 1919 exercised by the Governor-General in Council is

3. The Prerogative of the Crown

The prerogative of the Crown is defined by Dicey as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." In other words the Royal Prerogative is what is left of the original sovereign power of the Crown to legislate without the authority of the Houses of Parliament. The Royal prerogative is not confined to the British Isles, but extends to the Dominions and Colonies as fully in all respects as in England, unless

made and given effect on the demand of the States, which are very jealous of their rights and particular to maintain their dignity by insisting that Paramountcy should be exercised only by the Representative of the Crown. The Princes insisted on this differentiation, as they apprehended that the Governor-General exercising both functions in one capacity might be influenced by the British India representatives under responsible government, to the detriment of the States.

The insistence by the States on the differentiation of the functions of the Governor-General and the Representative of the Crown is unintelligible from a constitutional point of view. From the beginning, in actual practice, whatever may be the legal theory, the Indian Princes and States have dealt with the Government of India and submitted to its rulings and decisions and interventions, and have never dealt with the Crown. The dealings of the East India Company with the Princes, as well as the government of the Company in India before 1858, stood in law on the same footing. With the transfer of the government of India to the Crown in 1858, the legal position was not altered. The transfer was formally to the Crown, but in reality it was to the British Parliament. It is well established that "Crown" means "King in Parliament." This legal theory was acted upon both by the Crown and the Princes after 1858. At no time before 1876 had the Princes any personal relationship with the Crown. From 1858 to 1876 all acts in the name of the Crown were acts of the Secretary of State for India. It was only after the Queen assumed the title of "Empress of India" that the personal element between the Princes and the Crown may be said to have arisen. But in practice the Crown meant the Secretary of State. The prerogative rights of the British Crown are exercised with the consent of Ministers. The Government of India under the Act of 1919 is carried on by the Crown, and the relations of the Princes are also with the Crown; the Crown in both these senses means one and the same thing, namely, the King in Parliament, acting through the Secretary of

otherwise prescribed by Imperial or Dominion enactments. The Government of India Act, 1935, delegates some prerogative powers to the Governor-General and to the Representative of the Crown, but it does not exhaust all the prerogative rights of the Crown. These prerogative powers exercisable by the King may be briefly mentioned.

The Crown enjoys exemption from criminal or civil liability. Provision is made for bringing of suits against the Federation or Provincial Government in the name

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State and the Governor-General in Council. Even the Butler Committee clearly states: . . . "We agree that the relationship of the States to the Paramount Power is a relationship to the Crown."

Having regard to the responsibility of the Governor-General to the Secretary of State and to Parliament in vital matters, and also to the fact that the Crown even in relation to the Princes can only act through the responsible minister, namely, the Secretary of State, the insistence on the differentiation of the functions has no legal significance. In substance, the King, apart from the Ministry, does not act. If this is so, there is no room for the personal element of the Crown in relation to the Princes. If it is intended that the Crown has some special interest in relation to the States, it is only a misapprehension because, under the theory of the English Constitution, the Crown means the King in Parliament. If the insistence was meant to prevent the Governor-General acting as such from bringing pressure on the Princes at the instance of British India representatives, it is intelligible, but it has no practical value. Parliament is responsible for the government of India both in relation to British India and to the States. Hence the distinction in the capacities of the Governor-General is a distinction without difference.

The fact that there may be personal relationships between His Majesty and an Indian Prince does not alter the fact that there is also personal allegiance of British Indian subjects to His Majesty. From the early days of the Company, it has been the Government of India and the Government of India alone which has dealt with the Indian Princes and Indian States. The Government of India has regularly acted, when its interest has conflicted with its duties, without any public protest on the part of the Indian States. The theory of personal relationship and personal confidence, and the consequent duty of the Paramount Power remaining in India to discharge its obligations in relation to the States, is a novel theory and introduces an element which may effectively hamper the growth of responsible government in India.

of the Federation of India or of the Provinces,[1] but the Act in no way derogates from the Common Law rule that the King himself is above the law. The prerogative of the control of foreign affairs, including the right to cede territories, and of making war or peace or declaring neutrality, is untouched by the Act. The Act recognizes and saves the right of the Crown, or by delegation the Governor-General, to grant pardons, reprieves, respites or revisions of punishments.[2]

All the land in British India is vested in the Crown, as the ultimate owner. All waste land is its absolute property.[3] The Crown enjoys escheats of land and treasure trove and separate property of persons dying intestate without kin.[4] It is provided, however, that any property in India accruing to the Crown by escheat or by lapse or *bona vacantia* shall, if the property is situated in the Provinces, vest in the Crown for the purposes of the Provincial Government. In other cases, such property is to vest in the Crown for the purposes of the Federation.[5] Gold and silver mines belong to the Crown.[6] Ships of the Crown are exempt from seizure in respect of salvage claims or claims for damage done by collisions.[7] The Crown is free from statutory control. The Crown has the right to grant honours of all kinds whether in British India or to Rulers or subjects of the States. For British India,

[1] Ss. 176 and 179.
[2] S.295.
[3] In re: Transfer of Natural resources to the Provinces of Saskatchewan, 1932, A.C., p. 28.
[4] Attorney-General of Ontario *v.* Mercer, 1883. 8 App. Cases 767. Collector of Masulipatam *v.* Cavily Vencata Narraiyanapah, 1868 Moo. Ind. App., p. 500.
[5] S.174.
[6] Hudson's Bay Co. *v.* Attorney-General for Canada, 1929, A.C. 285.
[7] Young *v.* s.s. Scotia, 1903, A.C. 501.

these prerogative rights are ordinary; for the Native States, they are based on the paramountcy of the Crown. The prerogative of annexation of territory is untouched by the Act. The addition of territory to British India requires its inclusion in a Province, and such inclusion must take place in a specified manner in consultation with the Governors and the Legislatures of the Provinces of India.[1]

In addition to these prerogative rights the Crown enjoys in British India all the privileges it has under the prerogatives in England save in so far as these are limited by Statute. Thus in British India the Crown is entitled to the benefit of the rule that in general the Crown is not bound by a statute unless expressly mentioned or referred to by implication.[2] The Crown similarly enjoys priority in respect of debts due to the Crown unless precluded by statute. In addition to these rights, the Crown has also all the rights of the Moghul Emperors to which it succeeded.[3] Under the Act, the extent of the Executive authority of the Crown appointed under Letters Patent is restricted by the Act which prescribes the limits of Federal and Provincial executive authority. It is now well established that where the operation of a statute overlaps the exercise of the prerogative, the prerogative is superseded to the extent of the overlapping.[4] The prerogative rights of the Crown in relation to the States are untouched and unaffected by the Act of 1935.

[1] S.290.
[2] 1889, ch. 469.
[3] Salaman *v.* Secretary of State for India, 1906, 1 K.B. 613.
[4] Attorney-General *v.* De Keyser's Royal Hotel Ltd., 1920, A.C. 508. The British Coal Corporation *v.* the King, 1935, 51 *Law Times*, p. 508. Moore *v* Attorney-General for Irish Free State 51 *Law Times*, p. 504.

CHAPTER VI

THE FEDERATION OF INDIA

1. Establishment of Federation and Accession of Indian States

The Act of 1935 itself does not establish the Federation. It provides that the Federation under the Crown by the name of the Federation of India is to be constituted by Proclamation made by His Majesty from the day mentioned therein.

Two conditions are to be fulfilled before the Proclamation is made: (1) An address in that behalf must have been presented to the King by each House of Parliament; (2) Rulers of States who are entitled to not less than half the seats (52) to be allotted to the States in the Council of State or Upper Federal Chamber and also representing at least one half of the total population of the States shall have acceded to the Federation.[1]

Thus the establishment of the Federation is made dependent upon the accession of the requisite number of States representing the requisite strength of the population. If these conditions are not fulfilled, the Federation does not come into existence at all. The Act simply provides the structure which may be brought into operation on the fulfilment of certain conditions which are made conditions precedent. The reason is obvious. The grant of some responsibility at the

[1] S.5.

Centre is made dependent on the establishment of an All-India Federation which would bring in stable and conservative elements as a bulwark against radical, violent, and subversive forces which might operate at the Centre under the influence of British India representatives.

2. Units of Federation

The Federation is made up of Governors' Provinces, Chief Commissioners' Provinces, and the Federating States.[1]

(*a*) Provinces

The Governors' Provinces are increased by the addition of Orissa, which is extended in area by adding to it areas in Madras and the Central Provinces occupied by Oriya people, and of Sind separated from Bombay.[2] There are thus eleven Governors' Provinces—Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa, Sind, and such other Provinces as may be created under the Act which authorizes such creation by Order-in-Council after consultation with the Federal Executive and Legislature and the authorities of any Province affected.[3] The Act provides also for the alteration of the boundaries in a like manner. Berar,[4] though still under the sovereignty of the Nizam, is, under the agreement dated October 24, 1936, to be administered with the Central Provinces as one Province,[5] but in case the agreement or administration terminates, the Crown in Council may make any necessary adjustments affecting the provisions of the

[1] S.311(2).
[2] S.289.
[3] S. 290.
[4] S.47.
[5] See footnote on p. 190.

Act dealing with the Central Provinces. For the purposes of the new Constitution, British India includes Berar, and except as regards any oath of allegiance to the Nizam, Berari subjects rank as British subjects.[1]

The Chief Commissioners' Provinces[2] are British Baluchistan, Delhi, Ajmere-Merwara, Coorg and the Andaman and Nicobar Islands, the area known as Panth Piploda, and such other Provinces as may be created under the Act.[3]

(*b*) States: Accession of Indian States[4]

As the States are, in relation to British India, sovereign units, their accession to the Federation can be and is only a voluntary act on the part of their Rulers. The Act, as already stated, does not itself make any Indian State a member of the Federation, but only prescribes a method whereby a State may accede, and the legal consequences which flow from the accession.

The Ruler of a State has to signify to the Crown his willingness to accede to the Federation by executing an Instrument of Accession. Accession is effected by the King's acceptance of such an Instrument executed by the Ruler personally whereby he for himself, his heirs and successors, declares that he accedes to the Federation with the intent that the King, the Governor-General, the Federal Legislature, the Federal Court

[1] Burma is separated from British India.

[2] S.94.

[3] Aden ceases to be part of British India and by Order in Council it is transferred from April 1, 1937, to the British Colonial Office. It is to be administered as a Crown Colony. Indian public opinion was against the transfer of Aden to the Colonial Office. Aden has been developed by India, and the Government of Bombay has spent large sums on its development. In 1792 Ceylon was removed from the administrative control of Madras.

[4] S.6.

or any other Federal authority[1] shall by virtue of his Instrument of Accession, but subject to its terms for the purposes only of the Federation, exercise in relation to its State such functions as may be vested in them by or under the Act. Outside those limits, the autonomy of the States and their relations to the Crown are not affected in any way by the Act.[2] The Ruler also assumes under the Instrument of Accession the obligation to give effect to the provisions of the Act within his State.[3] Thus, by the terms of the Instrument, he permanently and irrevocably limits his sovereignty. Instruments of Accession may be executed conditionally on the establishment of the Federation on or before a specified date. The Instrument must specify the matters on which the Federation is to have powers to legislate for the State, and any limitations of that power and of the Federal executive power in relation to the States. The extent of the Federal power may be enlarged, but not diminished, by a subsequent Instrument duly executed. The King is not obliged to accept any Instrument and his discretion is made absolute in this matter. He may not accept any accession whose terms are inconsistent with the scheme of Federation embodied in the Act. This discretion is extended to the rejection of an Instrument of any State which is unwilling to accept the greater portion of the subjects in the Federal List. It is the scheme of the Act, with the object of making the Federation effective and the States' membership of the Federation a reality, that the list

[1] The other Federal Authorities are the Federal Railway Authority and the Railway Tribunal.

[2] S.285.

[3] The Provinces assume no such obligation; it is imposed upon them by the Act.

of Federal subjects should be as far as possible the same for all the States, subject only to the reservation or exceptions incidental to the treaty rights or usages in relation to particular States. Once the Instrument is accepted by the King, its validity or the validity of any of its provisions cannot be called in question. Every Instrument of Accession must provide that a number of provisions of the Act in Schedule 2 may be amended by, or by the authority of, Parliament without affecting the accession of the State. If such amendment affects the accession of the State, it must be accepted by the Ruler by a supplementary Instrument extending the functions exercisable by any authority in respect of the State. The provisions of the Act mentioned in the Second Schedule mostly relate to British India and do not affect the States or their accession.[1]

[1] The Secretary of State for India explained this provision in these words: "Since Princes enter the Federation, as set out in the Act, of their own volition and according to their Instruments of Accession, it would of course have been quite unfair to them, and indeed their adherence could never be obtained, if there was an unlimited power for subsequent Parliamentary legislation to alter the Federal Constitution, leaving the States completely bound to a totally different type to that which the Princes had agreed to accede to. On the other hand there are, of course, provisions in the Bill, and in particular nearly all those relating to the purely British Indian side, to the subsequent amendment of which the States cannot possibly offer any objection. The solution of this difficulty which has been adopted is the following: Those provisions of the Act which it was proposed should be amendable without the States being able to object are set out in Schedule 2, and under clause 6 (5). Amendment may be made of these provisions 'without affecting the accession of the State' with the addition that no such amendment (unless agreed to by the States) should extend the powers of the Federal authority in relation to the State itself. These provisions are set out in Schedule 2. They may be amended without affecting the accession of the States, and may be conveniently referred to as 'protected' provisions of the Act. These are, of course, the provisions which deal with the fundamental parts of the Federal Constitution and with other parts which directly affect the States. It will be noticed that clause 6(5) does

A federal union is a compact between the Crown and the Princes, and its terms and conditions cannot be altered without the consent of all parties. With a view to avoiding the necessity of securing the consent

not say positively what is to happen if a 'protected' section is amended by Parliament, but by implication such an amendment would be one which 'affects the accession of the States'; that is to say, if the 'protected' provisions are amended by Parliament, the State has the right to reconsider its position, or in more technical language it may be said that if 'protected' provisions are amended, the State's Instrument of Accession is voidable, though not void" (*Parliamentary Reports*).

It may be urged, however, that if amendment is made by Parliament without the consent of the States, they have a right to consider their accession abrogated. This view was expressed by the Attorney-General during the debates in Parliament. Said he: "Any amendment of a protected provision will give a State a right to reconsider its position because the Instrument of Accession was made upon a certain basis and an amendment or alteration of a protected provision has changed that basis." (House of Commons Debates, May 23, 1935.) He further stated: "Any amendment of a provision (not comprised in Schedule 2) will give a State the right to reconsider its position because the Instrument of Accession was made upon a certain basis and the amendment . . . has changed that basis." (House of Commons Debates, May 26, 1935). A similar view was also expressed by the Solicitor-General. He said: "This amendment (new sub-section to clause 45) would safeguard the rights of the States in exactly the same way as they are safeguarded in Schedule 2, namely, if in the amendment which Parliament makes it alters the protective clauses which affect the States, then their Instruments of Accession are voided. They need not go out automatically, but they have a right to say 'This is a different Federation.' Negotiations will take place, but in the last resort, they have the right to say 'In spite of your negotiations this is not the Federation which we joined and therefore our Accession is no longer a valid Instrument.'" (*House of Commons Debates*, May 27, 1935.)

It is submitted that the explanation of the legal effect of the amendment of the "protected" provisions by Parliament set forth by the Marquess of Zetland, the Attorney-General, and the Solicitor-General has no legal significance. What is the meaning of stating that the Instrument of Accession becomes voidable? How is it to be voided? The statement that the State is entitled to reconsider its position is inconsequential. The Instrument of Accession is an irrevocable Instrument. As regards the remedy, the Act is silent on the point. There is no right of secession. *Ubi jus ibi remedium*. There is no legal remedy, and any remedy which is open can only be extra-legal or political.

of the States in matters which do not affect their accession, Schedule 2 is provided to facilitate necessary amendments in relation to British India. The matters in Schedule 2 which can be amended do not touch the fundamentals of the compact, namely the structure and nature of the Federal Government. Provisions relating to defence or external affairs or the establishment of full responsibility at the Centre cannot be altered without the consent of all the federating States. Thus, the Constitution is very rigid, and the possibility of introducing responsible government at the Centre for British India is entirely dependent upon the willing consent of the States. There is no seed of growth in the Constitution. It is cast-iron. If it is amended in such a manner as to affect the accession of the States without their consent, the States may point out that in so doing there is a breach of the terms and conditions on which they acceded to the Federation. In such a case, the Act provides no remedy for the States. The union once formed and accepted is perpetual and indissoluble. There is no distinct power of secession under any circumstances. Such a contingency is unlikely, but if it occurs, it may be stated that Paramountcy may be invoked in the interests of India as a whole to keep the Union intact. Having regard to the legal supremacy of Parliament, the declaration that the provisions in Schedule 2 can be amended by, or by the authority of, Parliament, seems to be superfluous. Does this provision by implication restrict the power of Parliament to amend other provisions? The competency of Parliament to amend the whole Act is not doubted. Yet if the amendment of those provisions in Schedule 2 affects the accession of the States, it has no binding force

on the States unless it is accepted by them by a supplementary Instrument of Accession. Can Parliament amend provisions outside Schedule 2 and affecting the accession of the States without the consent of the States?[1] In terms the Act is silent on the point, but in law the answer is in the affirmative. This means that Parliament may alter the very basis or terms of the Federal compact with the States without their consent. The Act does not restrict the authority of Parliament to do so. All that it provides is that if the amendment of the provisions in Schedule 2 involves the extension of Federal authority over the States, that extended authority is not binding on the States unless accepted by them. But as regards the amendment of other provisions relating to the Federal sphere and its effect on the States, the Act is silent. In general, Parliament will not amend those provisions without the consent of the Rulers, but if it does, its action is legal, and the matter as regards the States would have to be regularised by supplementary Instruments. If that course is not acceptable to the States, the States may point out that the terms on which they acceded have been altered without their consent, therefore they are at liberty not to remain within the Federation, or are released from their obligations.[2] This is logical and strictly legal, but having regard to the fact that the States are under the Paramountcy of the Crown, the situation is not likely to arise.

No Instrument of Accession or supplementary Instrument is valid unless it is executed by the Ruler

[1] SS. 6(5), 45(4).

[2] If the Constitution breaks down for more than three years and cannot be restored without fundamental modification, the States are released from their obligations.

himself or any person for the time being exercising the powers of the Ruler of the State whether by reason of the Ruler's minority or for any other reason. The Federal Legislature has been given no power over the accession of the States for twenty years after the Federation is established. Thereafter, not only must any request for acceptance of accession be sent to the Governor-General, but no request may be transmitted unless both Chambers of the Legislature have addressed the King asking that the State may be admitted to the Federation. Any Instrument or supplementary Instrument as soon as it is accepted must be laid before Parliament, and all Courts shall take judicial notice of every such Instrument and its acceptance.

The Instrument of Accession is intended to be a formal expression of a Ruler's desire to enter the Federation, and its acceptance by His Majesty makes the State a constituent member of the Federation, as soon as the latter comes into being. By thus acceding, a Ruler necessarily accepts as binding upon him the Federation as a whole. The Constitution is in the form of an Act of Parliament, because in no other way can it be binding upon British India, but it owes its authority in federated States to the Instruments of Accession of the Rulers.

As the Crown's Representative will not control any forces if he needs the aid of such forces for the due discharge of the Crown in relation with States (federated or unfederated) he is entitled to the requisition of the forces from the Governor-General, and it is the duty of the Governor-General acting in his discretion to cause the necessary forces to be employed accordingly, any extra expenses involved being accounted as

expenses of the Crown in relation to the States, payable by the Federation.[1] There is nothing to prevent the Representative of the Crown from recovering the extra expenses from the State concerned and recouping the Federation with the amount. As the offices of the Governor-General and the Representative of the Crown are both to be held by one individual, there will be no difficulty in this matter. Again, it is to be remembered that the Commander-in-Chief is the Commander-in-Chief in India and not in British India only. The Representative of the King is authorized to make arrangements with the Governors of the Provinces for the discharge by the latter of their offices and functions appertaining to the Representative of the Crown in relation to the States.[2] Provision is made for the jurisdiction already enjoyed by the Crown in certain areas in the States such as Bangalore, etc. It is provided that the Crown in accepting an Instrument of Accession may declare that a specified area in the State heretobefore administered by the Crown shall remain outside the jurisdiction conferred upon the Federation by the Instrument of Accession. In other words, these areas will continue to be administered as at present, and the Federal executive and legislative authority shall not apply to such an area. Before making any such declaration, due notice will be given by the King to the Ruler that his acceptance shall contain such a declaration, but no notice can be given in respect of any area which is under the Crown's jurisdiction solely in connection with a railway. Thus the Ruler's wishes as to the continuance of these areas will be taken into account. The Federal authority may by agreement between the Crown and the Ruler

[1] S.286; S.33(3); S.145. [2] S.287.

be extended on such terms as may be specified in the supplementary Instrument of Accession, at a later date. Provision is also made for the possible relinquishment of the Crown's rights in these areas, but only with the Ruler's assent. The extent to which Paramountcy powers and foreign jurisdiction powers are abrogated by a State's accession is clearly defined. The Crown's Paramountcy powers or foreign jurisdiction powers are not exercisable in the States within the field which by virtue of the States' Instruments of Accession become the subject of Federal powers. Outside this field, both these powers as they are at present remain unimpaired. Subject to this rule, on the establishment of the Federation, any authority of the Crown, under the Foreign Jurisdiction Act 1890 or otherwise, shall become exercisable by the Federal authorities including the Railway Authority except in so far as any agreement may be made for the administration of Federal legislation by the Ruler. The law under foreign jurisdiction powers in force in the States is to be deemed a Federal law in so far as the Federation under the Instrument of Accession could re-enact it, but shall cease to have any effect after five years, if not so enacted or amended by a Bill. In all other matters, the powers of the Crown in a State remain unaffected. Without prejudice to its power to relinquish such authority, the Order-in-Council of 1890 is reaffirmed as valid. It is provided that an Order under the Foreign Jurisdiction Act of 1890 may validly authorize judicial or administrative authority to act in respect of a State though constituted outside the States, and that the appellate jurisdiction from British Courts in Indian States may validly be conferred on the Federal Court. The Act does not limit the right of His Majesty to determine by what

Courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian States. All these provisions do not affect the provisions with respect to Berar.[1]

[1] S.294.

CHAPTER VII

THE FEDERAL EXECUTIVE

I

1. Historical.

Each of the three Presidency Settlements of the East India Company at Calcutta, Bombay, and Madras, was from the very beginning administered by a President or Governor and a Council. The three Presidencies were independent of one another, and each Government was absolute within its own limits, subject to the distant and intermittent control of the Court of Directors. As the need for a common policy for all settlements was soon felt, it was decided to create one supreme Government in the country. The grant of the *Dewani* by the Moghul Emperor to the East India Company in 1765 had made Bengal the predominant Presidency, and the Regulating Act had converted its Governor-in-Council into Governor-General in Council. The Charter Act of 1833 made the Governor-General of Bengal the Governor-General of India. A fourth Member, the Law Member, was added to the Executive Council, only for purposes of legislation. The control of the Governor-General over other Presidencies was made complete and effective. The Charter Act of 1853 made the Law Member an ordinary Member of the Executive Council. In 1861, a fifth Member, the Finance Member, was added to the Council. A Member for Public Works was added

in 1874 and converted in 1904 into a Member for Commerce and Industry. A new Member for Education was added in 1911. Accordingly, the Central Executive consisted of the Governor-General in Council.

2. Pre-Federation Central Executive.

The Central Executive authority in British India, both in civil and military matters, is the Governor-General in Council.

(a) Governor-General

The Governor-General is appointed from amongst the most prominent public men in Great Britain for a period of five years, during which he may be granted leave of absence once only and for not more than four months. He draws a salary of Rs. 2,56,000 a year. "He occupies the most responsible as it is the most picturesque and distinguished office in the overseas services of the British Crown." He has a direct, personal share in the main burden of the government.

His Powers and Responsibilities

In general he carries out his functions with the guidance and concurrence of the Executive Council, but he can over-ride it in certain circumstances. He can dissolve either Chamber of the Legislature, and in certain circumstances, if he thinks fit, he can extend the life of either or both the Chambers. He can secure the passing of legislation rejected by either or both Chambers by certifying that such passage is "essential for the safety, tranquillity or interests of British India." With the assent of his Council, he can restore grants refused by the Assembly, and he can on his own initiative authorize such emergency expenditure as he thinks

necessary for the safety or tranquillity of British India. He may withhold his assent to any Bill or reserve such a Bill for His Majesty's pleasure. Further, he has power in an emergency, without consulting the Legislature, to legislate by Ordinance having effect for not more than six months. His previous sanction is required for the introduction of certain classes of Bills in the Central Legislature. He decides what items of the Central expenditure fall within the non-votable category. He nominates a number of officials and non-official members to the Central Legislature. He is in constant communication with the Governors of the Provinces, and no new policy of any vital importance is embarked upon by them without consultation with, and the general concurrence of, the Governor-General.

He is also the Viceroy[1] and is the direct representative of His Majesty in India. He exercises the delegated prerogative rights of the Crown. He has direct personal charge of the relations of India with foreign countries and of British India with the Indian States. All decisions of importance in connection with the Indian States, though taken by and issued in the name of the Government of India, are generally the special concern of the Viceroy. The Viceroy is the link between British India and the Indian States.

HIS RESPONSIBILITIES TO THE SECRETARY OF STATE

The Governor-General is, at all times, in intimate communication and consultation with the Secretary of State for India. He keeps the Secretary of

[1] Viceroy is a term which has never been used in a statute or in the warrant of appointment; it is a term of courtesy and not of law. It was used for the first time in the Queen's Proclamation of 1858. The term Viceroy is used officially for the first time in the Commission appointing Lord Linlithgow to hold both the offices of Governor-General and Crown's Representative. (*See* Appendix A)

State fully informed of Indian events through regular correspondence by letters, cables, and radiograms. The superintendence, direction, and control of the civil and military government of India is vested in the Governor-General in Council, who is required to pay due obedience to such orders as may be received from the Secretary of State. The Secretary of State has the powers of control over Indian finance, legislation, and administration. Constitutionally and legally, the Governor-General is subordinate to the Secretary of State, who is responsible to the British Parliament. The British Parliament secures its control and exercises its supervision over India through the Secretary of State.

There is no other political functionary in the world who has such powers and privileges as the Governor-General of India. "The constitutional monarch of the United Kingdom reigns, but does not rule; the President of the United States of America rules, but does not reign; the President of the French Republic neither reigns nor rules"; whilst the Governor-General of India both reigns and rules.

(*b*) THE GOVERNOR-GENERAL'S EXECUTIVE COUNCIL

There is no limit to the number of members of the Governor-General's Executive Council. It consists of seven members in addition to the Governor-General. The seven members are the Army Member (Commander-in-Chief), Home Member, Finance Member, Law Member, Commerce Member, Member in charge of Education, Health and Lands, and Member in charge of Industry and Labour. The executive work of the Government is divided into various departments of which these Members are in charge. The Commander-in-Chief controls the Army headquarters, and is in

charge of a civil department called the Army Department. The Home Member is in charge of the Home Department, which deals with the Indian Civil Service and with such subjects as Police, Prisons, and judicial matters to the extent to which they are within the sphere of and affect the Central Government. The Finance Member deals with all matters relating to Central Finance, Currency, Exchange and Banking. The Law Member is the head of the Legislative Department, and is responsible for the drafting of Government Bills. He advises the Government on legal questions. The Commerce Member is in charge of the Commerce Department and also the Railway Department, which functions through the Railway Board. The Education Member is concerned with Higher Education, Local Government, Agriculture, Forests, etc., in so far as they touch the Central Administration. He also deals with questions concerning the position of Indians in other parts of the British Empire. The Member in charge of Industries and Labour deals with these matters, and also with the Posts and Telegraphs, Irrigation, Factories and Civil Aviation. The Governor-General himself holds the portfolio of the Foreign and Political Department.

THE MEMBERS OF THE EXECUTIVE COUNCIL

The Members of the Council are appointed by His Majesty by warrant under the royal Sign Manual. Three of them must be persons who have been for at least ten years in the service of the Crown in India. These are invariably senior members of the Indian Civil Service. The Law Member must be a barrister of England or Ireland or a member of the Faculty of Advocates of Scotland or Pleader of the High Court of not less than ten years' standing. In practice, out of the

six Members, three are Indians. There is a Vice-President who is appointed by the Governor-General. The Commander-in-Chief has rank and precedence next after the Governor-General. Every Member of the Executive Council is a member of one or other Chamber and has the right of attending in and addressing the Chamber to which he does not belong, though he cannot be a member of both. Members are appointed for a term of five years. Their salaries are fixed and are not subject to the vote of the Legislature.

THE MEETINGS OF THE COUNCIL

The Governor-General presides at the meetings of the Council, and in his absence the Member whom he has appointed as its Vice-President presides. All orders are signed by the Secretary to the Government of India. In the event of a difference of opinion, the decision of the majority is binding, and in the event of equality of votes, the Governor-General or other person presiding has a second or casting vote. But if the proposed measure is in conflict with the view of the Governor-General as to what is essential for the safety, tranquillity or interest of British India, he may on his own authority and responsibility overrule the decision of the Council. In such a case, any two members of the dissentient majority may ask that the matter be reported to the Secretary of State, and that the report may be accompanied by copies of any minutes made by the members of the Council. Ordinary matters are disposed of by the different departments, but all important decisions of the Government of India are made by the Council, which meets at short intervals.

The Governor-General in Council may not without the express order of the Secretary of State in Council in any case (except in cases of emergency) either

declare war or commence hostilities or enter into any treaty or war against any Prince or State in India or enter into any treaty for guaranteeing the possessions of any such Prince or State. In cases in which the Governor-General in Council commences any hostilities or makes any treaties, he is forthwith to communicate the same with the reasons therefor to the Secretary of State. The naval forces and vessels raised and provided by the Governor-General in Council are to be employed only for the purposes of the Government of India. In the case of an emergency so declared by the Governor-General, the Governor-General in Council may place any of such forces and vessels at the disposal of the British Admiralty, and thereupon it is lawful for the Admiralty to accept such an offer.

The Central Executive is neither removable by nor responsible to the Legislature. It is responsible to the Secretary of State and to the British Parliament. This legal position was established in 1858 when the Government of India was transferred from the Company to the Crown, and no substantial change was introduced in the nature and framework of the Central Executive. Even the Act of 1919 which introduced an element of responsibility in the Provinces left the Central Executive untouched. Having regard to the powers of the Governor-General in Council, it is not too much to say that the Central Executive is practically independent of the Legislature. This independence is secured by the various provisions already noted. The Legislature, however, can and does exercise an influence upon the policies of the Government to a marked and increasing degree. It may be noted that the Central Executive did become at times

responsive to the Legislature and to the public opinion of the country. Constitutionally, under the Act of 1919, it is the government of India by the British Parliament through the Secretary of State and the Governor-General in Council. The Act of 1919 introduced an elected majority in the Legislature with an irremovable Executive, which made the Legislature irresponsible and the Executive irresponsive.

II

3. The Federal Executive

No element of responsibility was introduced in the Central Government under the Act of 1919. The Statutory Commission did not recommend the introduction of even restricted responsibility at the Centre. But public opinion in India was bent upon securing some responsibility at the Centre. The demand was so urgent and unmistakable that the British Parliament thought it expedient to grant a measure of responsibility at the Centre, and has now granted it.

The Governor-General

Under the new Constitution, the Governor-General is given the executive power and authority of the Federation as the Representative of the King. He will exercise this authority on behalf of His Majesty. This power and authority is derived from the Constitution Act itself. He also exercises such prerogative powers of the Crown, not being inconsistent with the Act, as His Majesty is pleased to delegate to him.[1] The office of the Governor-General is constituted by Letters Patent.[2] The Governor-General receives an annual

[1] These powers are the conferment of decorations and honours, the grant of commissions in the Indian Army, etc. S.7.

[2] For the contents of the Letters Patent see Appendix A (i).

salary of Rs. 250,800. He is also paid such allowances as are fixed by the King-in-Council to enable him to discharge conveniently and with dignity the duties of his office. Provision is also made for his allowances when he is on leave. An acting Governor-General receives the same salary and allowances as the Governor-General. All these sums are charged on the revenues of the Federation and are exempt from the vote of the Legislature.[1]

EXTENT OF THE FEDERAL EXECUTIVE AUTHORITY

The executive authority of the Federation extends to all matters in respect of which the Federal Legislature can make laws, the raising of defence forces for the Crown in British India, and the governance of the forces of the Crown borne on the Indian establishment, and the exercise of rights possessed by treaty, grant, usage, sufferance or other lawful means in respect of tribal areas. But this authority does not extend in any Province to matters with respect to which the Provincial Legislature has power to make laws. In the federated States, it extends only to matters over which the Federation has legislative power in so far as it is not reserved in whole or in part to the State, and the State authority remains unless expressly excluded by the Instrument of Accession of the State. But this authority does not extend to the enlistment or enrolment in any forces raised in India of any person unless he is either a subject of His Majesty or a native of India or of territories adjacent to India. Commissions in any such forces are to be granted by His Majesty.[2] Thus the executive authority of the Federation does not extend over European forces which are enlisted and enrolled outside India. By

[1] Schedule 3. [2] S.8.

including the forces raised in territories adjacent to India, the Gurkha and the Nepalese regiments are brought under the executive authority of the Federation. It is to be noted that the executive authority of the Federation is co-extensive with its legislative competence. This observation requires qualification. In the Provincial field which is covered by the Provincial List, the executive authority of the Federation is limited, but it is not true to say that the Federal authority is entirely absent in the Provincial field, having regard to the special responsibilities of the Governor-General for the prevention of menace to the peace and tranquillity of British India. There is ample provision in the Constitution for enforcing the executive authority either directly through Federal agencies, in which case there is no difficulty, or indirectly through the Provinces. Governors can be compelled by the Governor-General to enforce the executive authority.[1] The executive authority of the Federation in the States even within the Federal sphere—the subjects accepted by the States as Federal under their respective Instruments of Accession—is to be exercised in the States mostly by the respective States. It is not direct, but it is delegated. But the provision for the enforcement of the executive authority in the States is left to the Princes of the States, either under an arrangement or an agreement or by a Federal Act,[2] who have undertaken the obligation of enforcing it in their respective States under their Instruments of Accession. In case the Princes either fail or neglect to enforce the Federal authority in their States, there is a provision in the Act enabling the Governor-General to give directions to the Princes

[1] S.126. [2] S.125.

to execute the orders of the Federal Executive.[1] But the Princes may refuse to execute the Federal authority or may defy it, thus violating the obligation undertaken by them under the Instruments of Accession. The Act neither makes provision nor provides machinery for dealing with the recalcitrant or defaulting State. It is silent on the point. However, it may be assumed that in such a contingency Paramountcy may be invoked, and the Representative of the Crown in the exercise of his rights of Paramountcy in the larger interests of India may compel the recalcitrant Ruler to execute the Federal authority in his State. But this authority is outside the Constitution, and to the extent to which the Constitution is silent on the point it is a constitutional omission.

ADMINISTRATION OF FEDERAL AFFAIRS. THE SCHEME OF THE FEDERAL EXECUTIVE

The Governor-General is to exercise this authority in a twofold manner. The Federal subjects are divided into those reserved to the Governor-General himself and those which are committed to the charge of the Ministers. Defence, External Affairs, Ecclesiastical Affairs, and the administration of Tribal areas, are reserved exclusively to the Governor-General, who is to administer them in his own discretion. The remaining Federal subjects are committed to the Council of Ministers. Even within these subjects which constitute the ministerial field in certain matters, the Governor-General has special responsibilities in due discharge of which he is authorised to act in his individual judgment.

COUNCIL OF MINISTERS

Except for Defence, Foreign Affairs, Ecclesiastical Affairs, and the Tribal areas and any other functions to be exercised under the Act

[1] See p. 264.

in his discretion, for the exercise of his authority and the administration of Federal affairs, there is a Council of Ministers[1] not exceeding ten in number to aid and advise the Governor-General. In other words, all these subjects constitute the ministerial field in which the Governor-General has to consult his Ministers. The legal obligation to consult his Ministers in these subjects does not preclude his power to act in his individual judgment even with respect to these subjects, when he is authorized to do so under the Act.[2] The Ministers are chosen and sworn by the Governor-General, and they hold office during his pleasure, and may be dismissed by him acting in his discretion. If any question arises whether any matter is or is not a matter as regards which he is required to act in his discretion or to exercise his individual judgment, the decision of the Governor-General is final, and the validity of anything done by him cannot be called in question on the ground that he ought or ought not to have acted in his discretion or to have exercised his individual judgment. Thus the determination of the question whether a particular subject is within the ministerial field or the reserved field rests with the Governor-General, and his decision is final. But the Governor-

[1] S. 9.

[2] The distinction between the Governor-General "acting in his individual judgment" and "acting in his discretion" must be carefully noted. The words "individual judgment" are used in relation to actions by the Governor-General on his individual judgment in the ordinary sense of the word within the ambit in which normally he would be acting on the advice of his Ministers. The words "in his discretion" are used where the Governor-General is acting on his own judgment outside the ministerial field. Putting it differently, the words "individual judgment" are used in respect of powers within the area in which normally in ordinary times the Governor-General would be acting on the advice of his Ministers. The words "in his discretion" are used in respect of powers and functions outside the ministerial field.

General may take the advisory opinion of the Federal Court.[1] Moreover, His Majesty may refer any question to the Judicial Committee of the Privy Council under Section 4 of the Privy Council Act. These are matters for which the Governor-General and the Secretary of State are answerable, and therefore are matters which may be discussed in Parliament. This provision cannot be amended in accordance with the provisions of the Second Schedule, as it affects the Instrument of Accession.

The Ministers are chosen and sworn by the Governor-General. They hold office during his pleasure and may be dismissed by him acting in his discretion. Ministers cease to hold office if for any period of six consecutive months they are not members of one of the Chambers of the Legislature. The Governor-General fixes their salaries until determined by the Legislature; these may not be varied during the term of their office. The question of the nature and the content of the advice given by the Ministers to the Governor-General cannot be enquired into in any Court. It rests with the Governor-General in every case whether or not to act or to exercise his individual judgment. The functions of the Governor-General with respect to the choosing and summoning and the dismissal of Ministers and to the determination of their salaries are exercised by him in his discretion.[2] These provisions, except the one relating to the salaries, are in conformity with the constitutional principle of Parliamentary Government.

The functions of the Governor-General with respect to Defence[3] and Ecclesiastical Affairs and External

[1] S. 213.
[2] S. 10.
[3] Indian public opinion demanded the Indianisation of the Army

Affairs, except the relation between the Federation and any part of His Majesty's Dominions, are to be exercised by him in his discretion. His functions in relation to the Tribal areas are also to be exercised by him in his discretion. These subjects are outside the ministerial field and absolutely reserved to the Governor-General, who is responsible with respect to them to the Secretary of State, thus ultimately to the British Parliament. As he cannot undertake in person so great an administrative burden, he is assisted in the exercise of these functions by three Counsellors appointed by himself and whose salaries and conditions of service are prescribed by His Majesty in Council. Each Counsellor is an ex-officio member of both the Chambers of the Legislature to represent his department for all purposes, though without a right to vote, but with full freedom to take part in debates in both Chambers. In the administration of the department of Defence, consultation of the Ministers by the Governor-General[1] is recommended under the Instrument of Instructions. The views of Ministers in matters affecting the appointment of Indian officers to Indian forces and the employment of Indian forces outside India are to be obtained before decisions are taken. The draft Instrument of Instructions state: "Seeing that the defence of India must be to an increasing extent the concern of the Indian people, it is our will and intention that our Governor-General should have regard to this Instruction, in his administration of the department of Defence, notably that he shall bear in mind the

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[1] within a definite period of twenty years, and also if not the complete transfer of the Defence Department to an Indian Minister, at least his association with its administration during the transitional period.

desirability of ascertaining the views of his Ministers when he has occasion to consider matters relating to the general policy of appointing Indian Officers to our Indian forces or the employment of our Indian forces on service outside India."[1] The Minister of Finance is to be consulted before Defence estimates are settled and laid before the Legislature. Control of Defence inevitably involves control in matters ancillary thereto of other departments under Ministers and in the Provinces. To achieve this, the Governor-General may require the Ministers charged with communications and the Railway Board to afford facilities in the movement of troops, and may order the Governors of the Provinces to give necessary directions in regard to the control of lands, buildings, and other requirements of the forces and the safeguarding of their rights and the guarding of roads, bridges and canals. In these matters, the Governor-General is subject to the Secretary of State, whose orders he must obey.

SPECIAL RESPONSIBILITIES OF GOVERNOR-GENERAL

In the exercise of his functions covering the ministerial field, the Governor-General has special responsibilities in specified matters in respect of which he is required to exercise his individual judgment as to the action to be taken. In other words, in those matters which involve his special responsibilities he will have to consult his Ministers, but the action to be taken will be entirely according to his judgment irrespective of the advice tendered by the Ministers. These matters are (*a*) the prevention of any grave menace to the peace or tranquillity of India or any part thereof; (*b*) the safeguarding of the financial

[1] Para. XVIII.

stability and credit of the Federal Government; (*c*) the safeguarding of the legitimate interests of Minorities;[1] (*d*) the securing to, and to the dependants of, persons who are or who have been members of the Public Services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests; (*e*) the securing in the sphere of executive action of the purposes which the provisions of Chapter III, Part V of the Act (dealing with the prevention of commercial discrimination) are designed to secure in relation to legislation; (*f*) the prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment; (*g*) the protection of the rights of any Indian States and the rights and dignity of the Ruler thereof; and (*h*) the securing that the due discharge of his functions with respect to matters in which he is required to act in his discretion or to exercise his individual judgment is not prejudiced or impeded by any course of action taken with respect to any other matter.[2]

The Governor-General is charged with special

[1] Legitimate interests mean general interests. The word "legitimate" would not be interpreted by the Law Courts but by the Governor-General. The Instruments of Instructions explain how the Governor-General and the Governors are to interpret them. The Governor-General is definitely given instructions not to put a kind of legalistic interpretation upon them but to treat them in a broad and reasonable manner. Minorities do not mean political minorities. "In this case, when dealing with minorities we mean, first of all, the six minorities which have always been regarded as minorities in the phraseology we use, and in the second place, we mean the backward races and backward communities which for one reason or another cannot pull their weight under representative institutions. Those are the minorities we have in mind."—Sir Samuel Hoare (*Parliamentary Debates*).

[2] S. 12.

responsibilities in these matters because these subjects are vital for the safety and security of India, and it is apprehended that the Legislature may attempt to deal with them in a manner which may be detrimental to India. Each of these special responsibilities is justified. As the Governor-General has the exclusive responsibility for the defence of India, it is necessary that he should have the power to act in his individual judgment for the preservation of the peace or tranquillity of India or any part thereof, and to do this it is necessary to empower him to act even against the advice tendered to him by his Ministers within their own sphere. The financial stability and credit of the Federation is so vital for the existence and functioning of the Federal Government that it should be secured beyond all doubt from any irresponsible or unwise action, endangering Indian credit or the stability of Indian finance, being taken by the Legislature. It was apprehended that the Indian Legislature might attempt to alter the monetary system of the country, thus affecting the financial credit of India. It was to safeguard against this danger that the Reserve Bank of India was made a condition precedent to the inauguration of the Federation. The safeguarding of the financial stability and credit of the Federal Government being special responsibilities of the Governor-General, he can act against ministerial advice in his individual judgment with a view to securing that no budgetary or borrowing policy is adopted which would prejudice Indian credit in the world money markets or affect the capacity of the Federation duly to perform its special obligations. The underlying principle of the Federal Constitution is that it is necessary for the British Parliament to

safeguard the legitimate interests of the Minorities. It was feared that, without such safeguards, Minorities might be tyrannised by the majority Communities. India cannot be trusted with full Responsible Government in the strict sense of the term, as the conditions precedent for its successful working are absent in India. The conception of the responsibility of the British Parliament for the government of India, and the idea that India cannot be trusted with Responsible Government because she may abuse it, is at the very basis of these special responsibilities of the Governor-General. The rights of public servants are also safeguarded and are included in the special responsibilities of the Governor-General. Provision against discrimination against British and Burmese goods and the protection of the rights of Indian States and the rights and dignity of the Ruler are all included in the special responsibilities of the Governor-General on the same principle. These special responsibilities eat away a substantial portion of the ministerial field. It is true that the Governor-General is under the legal obligation to consult his Ministers, but he is at liberty to act in his own judgment, thus ignoring the advice given by the Ministers, and thereby the opinion of the Legislature.

INSTRUMENT OF INSTRUCTIONS: ITS CONSTITUTIONAL SIGNIFICANCE

On the appointment of the Governor-General, His Majesty issues to him an Instrument of Instructions[1] which contains instructions and directions as to how he should act in matters for which he has special responsibilities, and any other matters which are in his discretion or in which he is

[1] Sec. 13. For the exact nature and scope of the Instrument of Instructions see Chapter IX on the Provincial Executive.

required to exercise his individual judgment. The Instrument containing the Instructions supplements the Act.[1] The Secretary of State is required to lay before the British Parliament the draft of any Instrument of Instructions which His Majesty is to issue to the Governor-General, and no action on it can be taken except in pursuance of an address presented to His Majesty by both the Houses of Parliament asking that the Instrument may be issued.[2] The issue of Instruments of Instructions to the Dominion Governors-General or Governors is the prerogative right of the Crown, and they are issued by the Crown in the exercise of its prerogative, and need not be sanctioned directly by Parliament. This has been the practice even in relation to India under the Act of 1919. But this practice is now altered. The Instrument of Instructions, though issued in the name of the Crown as if in the exercise of the prerogative rights, is required to be sanctioned and approved by both Houses of Parliament. Not only the original Instrument of Instructions but also its amendment or revocation or any supplementary Instrument is also required to be sanctioned by both Houses. It is to be noted that the Instrument of Instructions issued to the Dominion Governors-General was utilised to evolve Responsible Government in the Dominions without the direct intervention of the British Parliament, and it served as an elastic appliance for adjusting the Dominion Constitutions to the growing needs of the Dominions and facilitating the evolution of true Responsible Government. In the case of India, the

[1] See Appendix A. (i).

[2] For the Representative of the Crown there will be a separate and entirely distinct Instrument of Instructions, which will not be laid before Parliament.

departure is significant.[1] No devolution of power or grant of responsibility to the Federal Executive by the alteration or enlargement of the Instrument of Instructions, or, as in the case of the Dominions, by the delegation of prerogative rights to the Governor-General by the Crown in the exercise of its prerogative without the direct statutory sanction of Parliament, is possible. Parliamentary sanction is insisted on, as Parliament desires to control the functioning and the growth of the Indian Constitution. The Instrument of Instructions, even though it may be in a final form, is described as a draft because it is a prerogative document issued by the Crown. This Instrument is so vital to the functioning of the Constitution and the gradual development of Responsible Government that it must have the sanction of Parliament. It is stated that there is no other way in which Parliament can effectively exercise an influence upon Indian Constitutional development.[2] But it is feared that

[1] It is to be noted that Sir Tej Bahadur Sapru favoured the statutory or Parliamentary sanction of the Instrument of Instructions.

[2] "But when we come to the Instrument of Instructions . . . I think I am right in saying that we are introducing in this Bill an unprecedented concession to the control of Parliament. So far as I know, the Instrument of Instructions which has always existed with regard to all the Dominions in the old days and the colonies and with regard to India to-day, is essentially a prerogative matter which has been decided by the Executive of the day, and which has never been submitted to Parliament at all. Having regard to the importance of the Instrument of Instructions under this Constitution, and to the novelty of some of the points which will arise and to the part which it plays in the proposed new Constitution, the Government have thought it right in this case to ask Parliament to undertake a responsibility which it has never imagined it would be called upon to discharge. Parliament has been asked to come into consultation with regard to the Instrument of Instructions, but the Instrument of Instructions still remains a document which has to be sent under the prerogative on the advice of the Executive and is essentially an executive matter." (The Lord Chancellor. *House of Commons Debates.* July 2, 1935.) As the Instrument

the necessity for Parliamentary sanction may hamper the organic growth of the Constitution.

The validity of any Act done by the Governor-General cannot be questioned on the ground that it was not done by him in accordance with the Instrument of Instructions issued to him. The Governor-General is directed under the Instrument of Instructions to include so far as possible in his Ministry not only members of important minority communities but also representatives of the States which have acceded to the Federation. He is also directed to encourage collective responsibility as far as possible. The Governor-General is to select the Council of Ministers in a manner usual in choosing a Cabinet, that is, in consultation with the person most likely to secure a stable majority in the Legislature. Whilst keeping in mind the necessity of including the representatives of the States and the minority communities, he is to remember the need of collective confidence in the Legislature fostering a sense of joint responsibility. In the ministerial field, the advice of Ministers is to be valid unless, in his opinion, some special responsibility or some function in which his individual judgment is prescribed compels him to act otherwise. It is to be noted that in matters which are within the ministerial field and for which the Governor-General has special responsibility, the Governor-General need not accept the advice of the Ministers, and in that case the

of Instructions requires Parliamentary sanction, it must be agreed to by both Houses. It is possible that either House may not agree to the terms of the Instrument presented by the Government. In that case, no amendments are competent as there is no machinery to resolve the differences. Each House is asked to approve the Instrument, and if there is any serious matter raised in the debate, the Government makes the necessary modification, it being essentially an executive document, and then brings the modified Instrument to Parliament for its approval.

Ministers are not expected to resign, as they know from the beginning that their advice may not be accepted in those matters. Under these circumstances, a delicate constitutional question arises. The Governor-General who does not accept the advice of his Ministers does not act unconstitutionally or illegally. In taking such action, he is responsible to the Secretary of State, who may interfere to rectify his mistake in not accepting the advice of his Ministers. The over-riding authority of the Secretary of State is the only constitutional check. When the Governor-General exercises the executive authority of the Federation vested in him either entirely in his discretion or in his individual judgment, he is under the general control of the Secretary of State, and has to comply with such particular directions as may from time to time be given to him by the latter. His actions in relation to these subjects cannot be called into question on the ground that he did not act in accordance with the directions of the Secretary of State. The Secretary of State has to satisfy himself that his directions are not such as to require the Governor-General to act in a manner inconsistent with any Instrument of Instructions issued to him by His Majesty.[1] Thus, in all vital matters at the Centre, the Governor-General is responsible to the Secretary of State, and finally to the British Parliament. Only in matters which are within the ministerial sphere and not included in his special responsibilities is the Governor-General not under the general control of the Secretary of State.

FINANCIAL ADVISER

The Governor-General has a special responsibility for the safeguarding of the financial

[1] S. 14.

stability and credit of the Federal Government. To enable him to discharge this responsibility, he has to appoint a Financial Adviser whose duty is to advise him upon such matters and also to give advice to the Federal Government upon any matter relating to finance with respect to which he may be consulted. He is essentially the adviser of the Governor-General, but his functions are not necessarily confined to this. He is available for consultation by the Federal Government whenever a Minister wishes to avail himself of his advice. The Adviser is to hold office during the pleasure of the Governor-General, who fixes his salary and allowances and the number of his staff and their conditions of service. The Governor-General exercises all his powers with respect to the appointment and dismissal of the Financial Adviser, and with respect to the determination of his salary and allowances and the number of staff and their conditions of service, in his discretion. But the Governor-General has to consult his Ministers as to the person to be selected as Financial Adviser except the first person to hold that appointment.[1]

ADVOCATE-GENERAL

The Governor-General has also to appoint an Advocate-General for the Federation, being a person qualified to be appointed a Judge of the Federal Court. It is the duty of the Advocate-General to give advice to the Federal Government upon such legal matters and to perform such other duties of a legal character as may be referred to or assigned to him by the Governor-General. He performs the functions performed in Great Britain by the Law Officers, but he has no political affiliation with the Ministry. He is the adviser to the Federal Govern-

[1] S. 15.

ment; hence, as such, he will advise the Governor-General and his Counsellors even on those reserved departments with which the Ministry is not concerned. In the performance of his duties, the Advocate-General has the right of audience in all Courts in British India and, in cases in which Federal interests are concerned, in all Courts in any federating States. He holds office during the pleasure of the Governor-General and receives such remuneration as the Governor-General may determine. In exercising his powers with respect to the appointment or dismissal of the Advocate-General and the determination of his remuneration, the Governor-General has to exercise his individual judgment. In other words he has to consult his Ministers, but the final decision rests with him. The Advocate-General has a right to address both Houses of the Legislature.[1]

CONDUCT OF BUSINESS OF FEDERAL GOVERNMENT

All executive action of the Federal Government is taken in the name of the Governor-General, and orders authenticated under rules made by him may not be questioned on the ground that they are not his acts. The Governor-General is required to make rules for the transaction of the business of the Government and for the allocation among Ministers of such business except business with respect to which the Governor-General is required to act in his discretion. To ensure that none of his special responsibilities is overlooked, he may, after consultation with the Ministers, make in his discretion rules requiring Ministers and Secretaries of Government to transmit to him all such information with respect to the business of the Federal Government as may be specified in the rules, and in particular

[1] S. 16.

requiring a Minister to bring to his notice, and the appropriate Secretary to bring to the notice of the Minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any responsibility of the Governor-General. It is to be noted that there is a statutory obligation imposed on the Secretaries and the Ministers to draw the attention of the Governor-General to any matter in which he has a special responsibility.[1] The Governor-General has his own secretarial staff appointed by him in his discretion. The salaries and allowances are fixed by him and charged on the revenues of the Federation.[2]

NATURE OF THE FEDERAL EXECUTIVE

The Federal Government is dyarchical in character. The Governor-General's Ministers have the constitutional right to tender advice to him on the administration of a part only of the affairs of the Federation, while he has the exclusive responsibility for the administration of the other part. Even within the ministerial field, the Governor-General has special responsibilities, with respect to which he has to act in his own individual judgment.

It is noteworthy that Dyarchy, which was found unworkable in the Provinces and was rejected by the Simon Commission, is now introduced at the Centre under a different name. It is true that the Ministers have a constitutional right to advise the Governor-General as regards the administration of all departments except those reserved to him, but the existence of these reserved departments limits the sphere of Responsible Government at the Centre. As the Ministers are to be chosen with regard to the interests

[1] S. 17. [2] S. 305.

of the minority communities and the States, the Ministry is likely to be of a heterogeneous character. This is likely to retard the growth of the political parties in the Federal Legislature, which is largely based on communal representation. This method of composing the Ministry strikes at the very root of responsible government. The Federal Ministry is likely to be a heterogeneous group without unity of purpose or common policy. Again, the special responsibilities are of such a nature that, if narrowly interpreted, they might destroy the possibility of responsibility in the substantial portion of the ministerial field. Moreover, the Ministers' salaries once fixed are not to be varied and are not subject to the vote of the Legislature. Thus the most effective weapon for making the Ministers responsible to the Legislature is made ineffective. Further, as the Legislature is composed on a communal basis, the formation of an effective Ministry will be rendered difficult. Again, large powers remain with the Governor-General under his special responsibility for the maintenance of the financial stability of India, covering the budgetary position, Currency and Exchange, and the Reserve Bank, subjects which cannot be touched by the Legislature without his previous consent. There is a statutory Railway Board, and there is the special responsibility of the Governor-General for preventing commercial discrimination. With the whole problem of Defence entirely under his control, with the Defence budget not open to voting and with the non-votable items of expenditure comprising nearly 80 per cent of the total Central expenditure, the scope of ministerial activities is greatly restricted.

It is further to be remembered that the representa-

tion of the States in the Legislature is very substantial, and this is secured by the nominees of the Princes who are under the Crown. It is apprehended that the right of Paramountcy—the right which is not accurately defined—may be canvassed to secure safe nominees of the Princes in the Ministry. This fear may be unfounded, but one has to remember that the grant of responsibility at the Centre was discussed only on the basis of an All-India Federation. . .

The vital principles of Parliamentary government as it is in operation in the Dominions are: (1) The King, or his Representative the Governor-General, in the exercise of his powers, statutory or prerogative, is bound in political matters to follow the advice of his Ministers; (2) The Ministers must be members of one or other House of the Legislature; (3) The Ministers must command the support of the majority of the Lower House; (4) A Ministry is formed by the Prime Minister, who is selected by the Crown or his Representative as commanding the support of the majority of the Lower House, and who recommends his colleagues for office. Ministerial responsibility is collective and there is solidarity of action under the Prime Minister; (5) The salaries of the Ministers are subject to the vote of the Legislature.

Tested by these principles, the nature of the Federal Executive is anything but responsible. It is a composite government—a mixture of heterogeneous elements. The difficulties of Dyarchy are well-known, and they were present to the minds of the authors of this Constitution, but it is argued that, considering the political conditions in India—the absence of well-organized and disciplined parties, the presence of political parties divided not by broad issues of policy

but by sectional and communal interests, and the absence of a mobile body of political opinion, owing permanent allegiance to communal parties—the nature of the Federal Executive cannot be different from what it is under the New Constitution. It is admitted that there is a measure of self-government at the Centre, but it must also be recognized that it is granted upon the saving condition that over all the powers thus conceded there is an effective British veto; that the essential financial control remains with the Governor-General; that the Army remains essentially a British preserve; and that the conservative influence of the Princes is enlisted to safeguard the Constitution. Another criticism is that if India should want a revision of the present Constitution, she will have to depend once more on persuading the British Parliament that she is fit for a further instalment of responsibility. It is further pointed out that the Constitution is based on the existence and continuation of conflicts of interests amongst the people, thus negativing the possibility of national solidarity and the establishment of Responsible Government.[1] The objection is also made that the Governor-General has more powers under this Constitution than he has under the Act of 1919. Moreover, one feels that the very complexity of the Constitution and the onus it imposes under it on the Governor-General for its working and for keeping the machine on the rails may prove fatal.

[1] "In the Federal Government also, the semblance of Responsible Government is presented, but the reality is lacking, for the powers in Defence and External Affairs necessarily, as matters stand, go to the Governor-General, limiting vitally the scope of ministerial activity, and the measure of representation given to the Rulers of the Indian States negatives any possibility of even the beginnings of democratic control."—*Constitutional History of India* (1600 to 1935), Preface, p. viii.

The force of this criticism is not denied, but the reply is that the political conditions in India and the state of her political education do not justify the British Parliament in granting a Constitution different in nature and character from that which it has actually granted. It is conceded that full responsibility is not given at the Centre. Only a measure of responsibility is introduced with a view to enabling India to achieve full responsibility in future. This is true. But the possibility of evolving full responsibility without the intervention of Parliament, as happened in the case of the Dominions, is negatived. There is no provision either for the automatic revision of the Constitution or for the growth of Responsible Government. The whole Constitution has a look of finality.

CHAPTER VIII

THE FEDERAL LEGISLATURE

I

1. Historical

The germ of the legislative power of the East India Company lay embedded in Elizabeth's Charter which authorized the Company to make reasonable laws, orders and ordinances not repugnant to English law for the good government of the Company and its affairs. The Charter Act of 1726 invested the Governors and the Councils of the three Presidencies with power to make ordinary bye-laws and rules for the good government of the Company's factories. From 1726 onwards the three Presidency Councils proceeded to make laws independently of one another within their own jurisdiction. The Regulating Act of 1773 subordinated the Presidencies and Councils of Madras and Bombay to the Governor-General and Council of Bengal, who constituted the Supreme Government, and required the Madras and Bombay Councils to send to Bengal copies of their Acts and orders. Thus, by 1833, such legislative powers as were exercisable in India were vested in the Executive Governments. It was the period of Bengal, Madras, and Bombay "Regulations."

The Charter Act, 1833

The germ from which the special Legislative Council may be said to trace its descent is to be found in the Charter Act of 1833, which aimed deliberately at simplifying the

legislative machinery. Under that Act, Macaulay was appointed to be the first Legislative Councillor of the Governor-General's Council. All legislative power in India was vested in the Governor-General in Council. The Council was thus increased by the addition of a fourth ordinary Member who had no power to sit or vote except at meetings for the purpose of making laws and regulations. Laws made by this body were, subject to their not being disallowed by the Court of Directors, to have effect as Acts of Parliament. Henceforward, laws passed by the Indian Legislature were known as Acts. Further changes were made by the Charter Act of 1853. The Council was doubled in size for legislative purposes by the addition of six members —the Chief Justice of Bengal, another judge, and four servants of the Company appointed by the Governors of Bengal, Madras, Bombay and the North-West Province. The Legislative Council thus constituted was intended for purely legislative work.

THE CHARTER ACT, 1853

The Indian Councils Act of 1861 remodelled the Legislative Council and provided that the Governor-General, in addition to the members above-mentioned, might further nominate not less than six and not more than twelve persons as members of the Council for the purpose of making laws and regulations only, one half of them being non-official persons. The functions of the Legislative Council were limited strictly to the consideration and enactment of legislative measures.

THE INDIAN COUNCILS ACT, 1861

The Indian Councils Act of 1892 increased the size of the Legislative Council. It introduced changes in the method

THE INDIAN COUNCILS ACT, 1892

of nomination and relaxed to some extent the restrictions on its proceedings. The number of the members to be nominated for legislative purposes was fixed at ten to fifteen. An official majority was maintained. The powers of the Legislative Councils were also enlarged by rules under which the members were allowed to take part in the annual discussion of the financial statement and to draw attention to any financial matter they pleased. They were also allowed to ask questions. The activities of the Council were, however, strictly limited to legislative business and the asking of questions.

MORLEY-MINTO REFORMS, 1909

By the Morley-Minto Reforms of 1909 the Legislative Council was again enlarged. The number of additional members was fixed at sixty, of whom not more than twenty-four were to be non-officials. The Governor-General nominated three non-officials to represent certain specified communities and filled two other seats by nomination. Representation was given to interests rather than to territories. The twenty-seven elected seats were distributed among certain special constituencies, such as the land-owners, Muhammadans, and two Chambers of Commerce, and the residue of open seats was filled by election by non-official members of the nine Provincial Legislative Councils. Thus the principle of election was introduced in an indirect manner. Communal representation was definitely recognized for the first time. Lord Morley maintained that the Governor-General's Council in its legislative as well as executive character should continue to be so constituted as to ensure its constant and uninterrupted power to fulfil the constitutional obligations that it owes to His Majesty's Government

and to the Imperial Parliament. Changes were also introduced in the functions of the Council. For thirty years, between 1861 and 1892, the Councils had no other function than that of legislation. The Act of 1892 gave members power to discuss the Budget, but not to move resolutions about it or to divide the Council, while Lord Morley's Act empowered the Councils to discuss the Budget at length before it was finally settled, to propose resolutions on it, and to divide the House upon them. Resolutions could be proposed and divisions could be taken not only on the Budget but on all matters of general public importance. The resolutions were, however, only recommendations of the Executive. On certain matters, such as those affecting the Native States, no resolutions could be moved. Any resolution might be disallowed by the Governor-General if it was inconsistent with the public interest. Members were also allowed to ask supplementary questions.

The Morley-Minto Reforms frankly abandoned the old conception of the Council as a mere legislative committee of the Government. They did much to make it serve the purpose of an inquest into the doings of Government by conceding the very important right of discussing administrative matters and cross-examining Government on its replies to the questions. Lord Morley publicly disclaimed that it was directly or indirectly intended to introduce the Parliamentary system into India. The Morley-Minto Reforms failed owing to various reasons. Some of the antecedent conditions of success were absent. The defects of the electoral system prevented a healthy growth of parties. The official *bloc* often rendered the opinion of the non-officials ineffective. Lastly, the reforms did not

satisfy the political aspirations of the people. In the words of the Montagu-Chelmsford Report: "The Morley-Minto Reforms, in our view, are the final outcome of the old conception which made the Government of India a benevolent despotism, tempered by a remote and occasionally vigilant democracy which might as it thought fit for purposes of enlightenment consult the wishes of its subjects."

PRE-FEDERATION CENTRAL LEGISLATURE

The Act of 1919 introduced a bicameral system of legislature at the Centre. As the Legislature was enlarged both in its composition and in the sphere of its functions, it was apprehended that it might use its powers rashly and hastily, so a Second Chamber was established. The original proposal of the Montagu-Chelmsford Report was to establish a Second Chamber containing a majority of nominated members with a view to enabling the Government to pass legislation. But the Joint Select Committee rejected that proposal and recommended the establishment of a true Second Chamber. That recommendation was adopted. The Central Legislature consists of the Governor-General and two Chambers, namely, the Council of State and the Legislative Assembly. In each of these Chambers the majority of members are elected.

THE COUNCIL OF STATE: ITS COMPOSITION

The Council of State consists of sixty members of whom thirty-four are elected and twenty-six nominated. Of the nominated, not more than twenty are officials. The electorate of the Council of State is so framed as to give it a character distinct from that of the Legislative Assembly. Its franchise is extremely restricted. Voters have to possess high property qualifications. Previous experience in a Central or Provincial Legislature,

service in the chair of a Municipal Council, membership of the University Senate, and similar tests of personal standing qualify persons for a vote at its election. The electors are grouped into communal constituencies. Women are not entitled to vote at its election or to offer themselves for election. This disability may be removed by a resolution of the Council. Its President is appointed by the Governor-General from amongst its members. It continues for five years unless previously dissolved.

THE LEGISLATIVE ASSEMBLY: ITS COMPOSITION

The Legislative Assembly consists of 145 members, 105 of whom are elected, whilst twenty-six are official members and fourteen are nominated non-officials. Amongst the nominated non-officials are included the sole representative of the depressed classes, the sole representative of the Indian Christians, and the sole representative of the Anglo-Indian Community. The twenty-six officials include most of the members of the Governor-General's Council and the members of the Central and Provincial Secretariats. For the first four years of its existence, the President was appointed by the Governor-General, but thereafter he has been elected by the members from amongst them and approved by the Governor-General. The elected members are distributed amongst the Provinces having regard to their importance. The franchise is on the same lines as for the Provincial Councils, but with somewhat higher electoral qualifications. Muslims have secured separate representation by the formation of Muhammadan constituencies. Apart from the general constituencies, Muhammadan, non-Muhammadan, and European seats, there are certain special constituencies for landowners and for Indian commerce.

PRIVILEGES OF MEMBERS

Subject to the rules and standing orders, freedom of speech is assured to the members in both Chambers. No person is liable to any proceedings in any Court by reason of his speech or vote in either Chamber, or by reason of anything contained in any official report of proceedings of either Chamber.

LEGISLATIVE POWERS

The Indian Legislature has power to make laws for the whole of India. No Bill becomes law unless it is passed by both Houses and receives the assent of the Governor-General. A Bill may, except in the case of a Finance Bill, originate in either Chamber. The Indian Legislature is a non-sovereign law-making body. It is not a constituent Assembly. The power of amendment of the Constitution is with the British Parliament, and this fact is stated clearly in the Preamble to the Act of 1919. The Legislature has to obey the provisions of the Government of India Act, which it cannot alter. There is also a clear distinction between the laws which the Indian Legislature can make and the laws which it cannot make. Not only this, but there are definite restrictions or limitations on the legislative competence of the Indian Legislature. It is provided that the Indian Legislature has no power, unless expressly authorized by Parliament, to make any law repealing or affecting any Act of Parliament, any Act of Parliament enabling the Secretary of State to raise moneys in the United Kingdom for the Government of India, or any law affecting the authority of Parliament, or any part of the unwritten laws of the Constitution of Great Britain and Ireland whereon may depend the allegiance of any person to the Crown. It has no power without the previous approval of the

Secretary of State to make any laws empowering any Court other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe or the children of such subjects, or abolishing any High Court. It is further provided that no Bill on the following matters can be introduced in the Indian Legislature without the previous sanction of the Governor-General: (1) the public debt or public revenues of India or the imposition of any charge on the revenues of India; (2) the religion or religious rites and usages of any class of British subjects in India; (3) the discipline or maintenance of any part of His Majesty's military, naval or air forces; (4) the relations of the Government with foreign Princes; or any measure regulating any Provincial subject or repealing or amending any Act of the local Legislature or repealing or amending any Act or Ordinance made by the Governor-General. These are specific restrictions, either absolute or conditional, on the legislative competence of the Indian Legislature. In addition to these, the Governor-General has the right of veto, reservation, and disallowance. The High Courts in British India and the Privy Council can pronounce upon the validity and propriety or otherwise of the laws passed by the Indian Legislature and may declare them to be *ultra vires* or void. Thus all the traits of a non-sovereign law-making body or subordinate legislature are present in the Indian Legislature.

The members of the Legislature have the right of asking questions and also supplementary questions on matters of public importance. They may also move resolutions on all matters which are within the sphere of the Legislature, subject to their being disallowed by the Governor-General. They may also

move motions for adjournment whenever they want to discuss a definite matter of urgent public importance, or to draw the attention of the Government to any event of recent occurrence, or to express their feelings on an issue which may have recently arisen. Special procedure is laid down for the exercise of this right.

FINANCIAL POWERS

The Annual Statement of the estimated Revenue and Expenditure of the Government of India is presented simultaneously in both Chambers, and discussion of the main principles is allowed in both of them.

The expenditure of the Government of India is divided into votable and non-votable items. The non-votable items are not to be voted by the Legislature. They comprise interest and sinking fund charges on loans, expenditure prescribed by law, salaries and pensions of the officials appointed by the Secretary of State in Council, Chief Commissioners and Judicial Commissioners, members of the superior services, and expenditure classified as Ecclesiastical, Political and Defence. Thus the whole of this expenditure, which absorbs more than 75 per cent of the total expenditure, is excluded from the vote of the Legislative Assembly. It has become usual for the Governor-General to give directions which enable Army expenditure as a whole to be discussed by the Legislative Assembly, though no vote on it can be taken.

As regards the votable expenditure, the demands for grants are submitted to the Assembly alone. The Council of State has no power to vote the demands for grants. The Government alone can propose an item of expenditure or its increase, or any addition to or increase in taxation. The Finance Bill, which deals with taxation, comes before both Houses, which

have equal powers in dealing with it. Only the Assembly, however, as already stated, can grant or withhold supply. If the Legislative Assembly declines to vote the demand put before it, the Governor-General in Council is empowered to declare that he is satisfied that the demand which has been refused is essential to the discharge of his responsibilities, and in that case he is empowered to restore the rejected demand for grants in the exercise of this power of restoration.

To ensure general supervision over the finances of the Government of India, a Committee of the Members of the Legislative Assembly, called the Standing Finance Committee, is appointed every year. The Finance Member is its Chairman, with a casting vote. It examines all the estimates of the proposed new votable expenditure and offers criticism, suggests retrenchment and economy, and finally settles the items of expenditure.

Another committee, called the Public Accounts Committee, is also appointed at the commencement of each financial year to deal with audit and appropriation of accounts of the Governor-General in Council. It consists of not more than twelve members, of whom not less than two-thirds are elected members of the Assembly. The Finance Member is the Chairman and he has a casting vote. It examines the expenditure actually incurred by the Government during the closing year and has to scrutinize it and satisfy itself that the expenditure granted by the Legislature was spent for the purposes and on the heads for which it was granted. It brings to the notice of the Legislature all irregularities in the procedure of expenditure. Its work is in the nature of a post-mortem examination of the expenditure.

The Auditor-General is appointed by the Secretary of State in Council and holds office during His Majesty's pleasure. He is an independent person. His salary and tenure are fixed by the Secretary of State in Council. He audits the expenditure of the Government of India, and submits his report every year.

POWER OF CERTIFICATION

In the event of the failure of either Chamber of the Legislature to pass a Bill whose passage is essential, the Governor-General may secure its enactment by certifying that the Bill is essential for the safety, tranquillity or interest of British India or any part thereof. He can do this in the exercise of his powers of certification. When he certifies it, the Act has to be placed before both Houses of Parliament, and it has no effect until it has subsequently received His Majesty's assent. But where, in the opinion of the Governor-General, a state of emergency exists which justifies such action, the Governor-General may direct that the Act which he has certified shall come into operation forthwith.[1] It may be disallowed by His Majesty in Council.

POWER OF ISSUING ORDINANCES

In cases of emergency, the Governor-General may, without consulting the Legislature, issue Ordinances which have the force of law for six months.

RELATION BETWEEN THE TWO HOUSES

Three methods are provided for avoiding or composing differences between the two Chambers. They are Joint Committees, Joint Conferences, and Joint Sittings. The first method requires a formal resolution in each Chamber, and each nominates an equal number of members. The second means is to be used when a difference of opinion has arisen. A Joint Conference, consisting of an equal number of members of each

Chamber, is held, but no decision is taken. Its result would be looked for in the subsequent proceedings of the Chamber. Thirdly, where the originating and the revising Chamber has failed to reach an agreement within six months of the passing of the Bill, the Governor-General in his discretion may convene a joint sitting of both Houses, at which those present deliberate and vote upon a Bill in the shape given to it by the originating House. The decision that is taken is deemed to be the decision of both Chambers.

The Legislature does not control the Executive. For all practical purposes, the function of the Legislature is confined to law-making and to the elucidation of information on public questions. The Executive is not responsible to the Legislature, and more often than not is non-responsive. It is true that at times the Legislature has exercised an influence on the actions and policies of the Executive.

II

2. The Federal Legislature

General

The Federal Legislature is bicameral. This is not an innovation, but merely a continuation of the system established under the Act of 1919. The necessity of a bicameral system of legislature in a Federation is admitted both on historical and on theoretical grounds.

The Federal Legislature consists of the King, represented by the Governor-General, and two Chambers styled the Council of State and the House of Assembly or the Federal Assembly.

The Council of State is a permanent body, not subject to dissolution. Its members are elected for nine years,

one third of them retiring every third year. The Assembly, unless sooner dissolved, has a maximum duration of five years.[1]

Both Chambers must meet at least once every year. The Governor-General may, in his discretion, summon either Chamber or both to meet at such times and places as he thinks fit, prorogue the Chambers, and dissolve the Federal Assembly.[2] He may in his discretion address either Chamber or both, and for that purpose require the attendance of members; and send messages to either Chamber on Bills pending in the Legislature or other matters. A Chamber to whom any message is so sent shall with all convenient despatch consider any matter which it is required by the message to take into consideration.[3]

Every Minister, every Counsellor, and the Advocate-General has the right to speak in, and otherwise to take part in the proceedings of, either Chamber, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member, but is not entitled to vote. He enjoys all the rights and privileges of the members of the Legislature except the right of voting.[4] He may raise a point of order.

The Council of State chooses a President and Deputy President from its members. The President or Deputy President vacates his office if he ceases to be a member of the Council, and may at any time resign his office by writing under his hand addresssd to the Governor-General. He may be removed from his office only by a vote of the majority of all members passed on fourteen days' notice. While the office of the President is vacant, the Deputy President will perform his duties. If the office of the Deputy President is also

[1] S. 18 [2] S. 19 [3] S. 20 [4] S.21

vacant, such member of the Council as the Governor-General may in his discretion appoint will perform his duties. If the President and also the Deputy President are absent from any sitting of the Council, such person as may be determined by the rules of procedure of the Council shall act as President. The approval of the Governor-General is not necessary to the choice of the President or Deputy President. The six nominated members of the Council of State may not be excluded from the choice of the President. The salaries of the President and the Deputy President are fixed by Act of the Federal Legislature, and until they are so fixed, they are to be determined by the Governor-General aided and advised by his Ministers.

The Federal Assembly chooses the Speaker and the Deputy Speaker from its own members, and all the provisions already considered with regard to the President and Deputy President of the Council of State are applicable to them. As regards the Council of State, which is a permanent body, the President holds office during the tenure of his membership of the Council, whereas when the Assembly is dissolved the Speaker does not vacate his office until immediately before the first meeting of the new Assembly after the dissolution.[1]

All questions at the sittings or joint sittings of the Chambers are determined by a majority of votes of members present and voting, other than the President or Speaker or person acting as such. The President or the Presiding Officer shall not vote in the first instance, and has only a casting vote in the case of an equality of votes. Either Chamber has power to act, notwithstanding any vacancy in its membership.

[1] S. 22.

Proceedings in the Legislature are valid even if it is discovered later on that some unqualified person has sat and voted, or has otherwise taken part in the proceedings. No quorum is fixed for either Chamber, but it is made the duty of the President or Speaker or the presiding officer to adjourn or suspend a sitting of the Chamber if less than one-sixth of the members are present.[1] This indirectly prescribes the quorum, namely, one-sixth of the total number of members of the Chamber. This is to secure the minimum representation of various interests. Surprisingly enough, no provision is made as to the legal consequences in the event of the presiding officers not acting according to this direction.

3. Constitution of the Federal Legislature

The Council of State

The Council of State consists of 156 representatives of British India and not more than 104 representatives of the Indian States. The number of the representatives of the States depends upon the number of States acceding to the Federation. So long as one-tenth of the possible seats are vacant, the members appointed to fill the seats may appoint persons up to half the number of seats unfilled, but this power shall not last for more than twenty years from the establishment of the Federation.[2] It is hoped that within twenty years all the States would accede to the Federation.

In most Federations, the Upper House secures the representation of the federating units mostly on a footing of equality, irrespective of their size and their population. Lest the smaller States should be swamped

[1] S. 23. [2] S. 18 and Sch. 1.

by the larger States, one of the objects of a Federal union is to preserve the identify of the federating units, and this is achieved by preserving their equality as regards status, and by securing their representation in the Upper Chamber on a footing of equality. The election for the Upper Chamber is by the State Legislatures, and not directly by the people. In other words, the Upper Chamber represents the Legislatures of the federating units. This precedent is not followed in the Indian Federation. The representatives of British India are to be directly elected by the people on a communal basis, with the exception of six to be nominated by the Governor-General so as to secure the due representation of the scheduled castes, women, and minority communities. The number of seats is divided amongst the various communities and interests. There are seventy-five general seats,[1] including six for the scheduled castes, four in the Punjab for Sikhs, forty-nine for Muhammadans, and six for women. There are seven seats for Europeans, two for Indian Christians, and one for Anglo-Indians. Representatives for these seats are to be elected directly by the respective communities to which they are allotted. The seats for Europeans, Indian Christians, and Anglo-Indians are to be filled indirectly by members of Electoral Colleges composed of persons belonging to these communities who are members of the Chamber or Chambers of the Provincial Legislatures. This distribution is on a communal basis. Territorially, the seats are allotted to the Governors' Provinces at the rate of twenty each for Madras, Bengal and the United Provinces, sixteen each for Bombay, the

[1] General seats are seats which are allotted to the Hindus, including the seats reserved for the scheduled castes and also including the representation of small communities like Parsis and Jains.

Punjab, and Bihar, eight for the Central Provinces and Berar, five each for the four smaller Provinces, and one each for Delhi, Ajmere-Merwara, Coorg, and British Baluchistan. The qualifications for the electors are very high and are on the same lines as those prescribed for the electors of the old Council of State. It is true that the franchise is widened to some extent so as to secure 1,000,000 voters. The representatives of British India in the Upper House are thus the representatives of vested interests elected on a communal basis.

The seats allotted to the States are distributed amongst them, having regard to their dynastic status, salutes, importance, population, etc. There are 600 States in India, and it was very difficult to allocate 104 seats amongst them. On various considerations, they are allocated in the manner set forth in Schedule I, (Appendix B). Hyderabad is given five seats; Mysore, Kashmir, Gwalior, and Baroda three each. The smaller States are given fewer seats, while the very small States are grouped and their Rulers are to choose jointly in rotation a representative for the Upper House. The rules of their election are very complicated. The State representatives are appointed by the Rulers, and though they are appointed for definite periods of time, the power of resignation could no doubt be insisted on by any Ruler who desired to change his nominee. They may resign before their period is over.

Thus the members of the Council of State are of two kinds: members who represent limited electorates and members who represent the views of the Princes. The maximum period for which a person may be a member has been limited to nine years. In order to

secure the automatic renewal of at least a portion of the House periodically, it is provided that a third of the House shall retire at the end of the first three years, another third at the end of six years, and the last third at the end of nine years, such determination to be made in the case of British India representatives by the casting of lots immediately the House begins to function. Thus at the end of the first three years a third of the House, as predetermined, will retire and make way for an equal number of new members who will remain members for nine years unless disqualified during that period. The effect of this arrangement, as already noted, is to replace triennially at least a third of the House.

COMPOSITION OF THE FEDERAL ASSEMBLY

The Federal Assembly consists of 250 representatives of British India, and not more than 125 representatives of the Indian States.[1] The number of State representatives depends upon the number of States which have acceded to the Federation, as in the case of the Council of State.

In all other Federations, the Lower House secures the representation of the Federal State, which is the embodiment of national unity. It is directly elected by the citizens of the Federal State—the citizens of the federating units acting as citizens of the Federation. Thus the citizens take a direct part in the Federal Government. There is a direct and organic contact between the citizens and the Federal Government. If the Upper House is meant to secure the equal status of the federating units, the Lower House is meant to secure the oneness or unity of the Federal State. The Upper House preserves the sentiment

[1] S. 18 and Sch. 1.

prevalent at the time of the formation of the Federation, while the Lower House secures the operation of the centripetal forces for cementing the union. The election is direct. This precedent is not followed in the Indian Federation. The White Paper proposed direct election for the Federal Assembly. The Government of India and public opinion in India also favoured it, but the Joint Select Committee negatived the proposal and recommended indirect election for the Legislative Assembly. The question was greatly debated. There were cogent reasons for continuing the system of direct election for the Lower House. India has been familiar with it for the last fifteen years, and it had worked on the whole reasonably well. It is universally prevalent in all Federations, and it is essential to achieve the object for which a Federation is formed. Direct election is the only device to establish direct and organic contact between citizens of the federating States and the Federal Government. The reasons given in favour of indirect election are that the constituencies in India, with the widening of the franchise, are so unwieldy and unmanageable as to prevent that close and intimate contact of the representative and his constituency which is the very essence of representative government. It was also urged that if direct election were introduced and found unsuccessful, it would be difficult to give it up and to introduce indirect election, whereas it would be easier to go from indirect election to direct election. It was also argued that ordinary citizens would not be interested in Federal subjects, which are far removed from their immediate consideration, and that indirect election will secure effective representation from those who are concerned

with Federal matters. All these arguments led Parliament to adopt the method of indirect election for the Lower House. Hence the Hindu, Muhammadan, and Sikh seats are to be filled by the representatives of those communities in the Provincial Assemblies, voting separately for the prescribed number of communal seats. Within the Hindu group—general seats —special arrangements are made for the scheduled castes with the object of maintaining the solidarity of the Hindu community and at the same time securing adequate representation for these castes. For scheduled castes, the persons selected as eligible candidates at the primary election for the Provincial Assemblies choose four times the number of vacant seats then voted on by the general electorate. The election is on the principle of proportional representation by means of the single transferable vote. The European, Anglo-Indian, and Indian-Christian members are to be chosen by similar voting in electoral colleges made up of the members of each of these communities in the Assembly. The seats reserved for women are to be filled by the women members of the Provincial Assemblies. The persons to fill the seats for commerce and industry are to be chosen by Chambers of Commerce and like bodies, those for landholders by landholders, and representatives of labour by labour organizations. There are four non-Provincial seats to be filled in accordance with the votes of Federated Chambers of Commerce, Associated Chambers of Commerce, commercial bodies in Northern India, and labour organizations respectively. The actual distribution of the seats is given in the Table in Appendix D.

The State seats are distributed amongst States according to their population and other considerations.

Hyderabad with a population of 14,436,148 has sixteen seats, Mysore with a population of 6,557,302 has seven seats, and the other States have fewer seats according to their population.

Thus the constitution of the Federal Legislature differs from the constitution of other Federal Legislatures. In all other Federations, the basis and principle has been that the Lower House, being the more important House, should represent the nation by territorial constituencies, and that the other House should represent the Union in order that both national feeling and provincial feeling may be adequately represented and linked together at the Centre. There is no exception to that principle except in the case of Canada, where the Upper House is wholly nominated. But in no case does any of these Federations employ the method of indirect election to the Lower House. Its adoption for the Lower House is the weakest point of the Indian Federal polity. There is some danger that it may facilitate corruption, and that under this system the Central Legislature—both Houses—will be the creature of the Provinces. It will be elected by Provincial cliques which will send their delegates to the Centre with a predominantly Provincial outlook, and possibly with an insufficient sense of responsibility for Central subjects. The Provincial outlook will tend to impair the political and constitutional unity of India by making the Central Legislature in a great degree subordinate to Provincial tendencies. It renders the power of dissolution useless. Another criticism is that if the Constitution is going to succeed, it can succeed only to the extent to which it is able to create a healthy and vigorous national sentiment. Admittedly that

sentiment does not exist to any great degree. It is still necessary to unite the States and the Provinces and to lessen communal difficulties. Moreover, the Constitution can only succeed if more and more people in India think of Indian problems in terms of India and not only in terms of Provinces. The only way in which this can be brought about is by forcing the electors to consider Indian problems and cast their votes on them. Instead of this, under indirect election, the electors will be asked to cast their votes on Provincial matters and will not be called upon to exercise direct responsibility, and therefore will not feel a direct and personal tie with the Central Government. This is a very serious impediment in the way of promoting national patriotism and unity. The States and the Provinces, Muhammadans and Hindus, must develop a national outlook if India is to make progress, but the system of indirect election will prevent any such development. There is substantial force in this criticism.[1]

[1] The case against indirect election is aptly stated by Sir Herbert Samuel: "Of course, every system of election, in India or elsewhere has its disadvantages, whether it is direct or indirect, and systems of no election at all have their disadvantages as well. When you are dealing with a country in which 350,000,000 people have to be represented in one Parliament, the difficulties, of course, must be very great, but the question is, what is the alternative? Admitted that there are these difficulties, ought we to endeavour to overcome them or ought we to adopt an alternative such as that suggested in the Bill? Does the Committee realise that each of these members of the Central Assembly is going to be chosen by a group of from five to eight individuals? Five to eight individuals meeting in a room are to choose the Members of Parliament for All-India! . . . Such a system as this has been unheard-of in the whole history of the world. Talk again about contact between the member and his constituents being close? The contact in this case will be far too intimate, and no member of the Indian Legislature will be able to move a step without his consulting his five or six patrons who are grouped in one of the Provincial Legislatures to whom he owes his seat. . . . The Governor-General may

FEDERAL FRANCHISE

Election to the Federal Assembly is indirect, through the Provincial Legislatures, hence no question of franchise for it can arise.

Election to the Council of State is direct, and a special franchise is provided for it. It is to be based on the franchise for the existing Council of State, broadening it so as to give the vote to about 100,000

at times find himself faced with a difficult Assembly. There may be divisions of opinion, and crucial questions may arise. Here in this country, a Parliament can be dissolved and that is a great safeguard. It gives a certain amount of control—necessary control—in regard to those who are popularly elected. That is the great difference between our Constitution and that of France, and in our view it is the superiority of the British Constitution that there is the power of dissolution in time of crisis. That power will still exist in the Governor-General of India, but what use will a dissolution be to him? Each member goes back to the five or six people who elected him, and, of course, there will be no change and they will send him back. Dissolution will be perfectly futile, and members will not have to go back to great constituencies and face the troubles and perils of a new election. They will go back to the room where they were elected, and they will be sent back again, and the power of dissolution will be a useless weapon in the hands of the Governor-General of the day. . . . Sir Tej Bahadur Sapru wrote: 'this system will tend to make the Central Legislature a pale reflection of the majority of the Provincial Legislatures.' I feel deeply that in making this decision we shall be committing a grave error, not only for all the practical reasons I have given, but also because it affects most closely the whole psychology of the question. The imponderables are the most important elements in this great issue. The Indians want their country to be one unit. They want their country to be visibly one great nation. The main achievement of British rule during the last two centuries has been that for the first time it has created a united India in some degree. That is an unchallengeable achievement of the British connection, which is welcomed by Indians of all shades of opinion . . . they want an Assembly which will represent India as such. This is not a measure which will secure the representation as such, a united, a single India, a great Nation standing visibly one and indivisible in the face of the whole world. It will be merely a collection of representatives of ten or twelve different Provinces. That is what the Indians do not desire, and that is the chief and underlying reason why the Central Legislature should be directly created by an All-India electorate and should be chosen on All-India issues. . . . Should we endure such a Parliament in this country? Would any European country endure it?" (*Parliamentary Debates*, March 6, 1935.)

persons. This franchise is, among other things, based on very high property qualifications or very high assessment for income tax.

PROVISION AS TO MEMBERS OF THE LEGISLATURE

Every member of either Chamber has to take an oath or affirmation in lieu thereof, in the prescribed form, before taking his seat. A British subject swears to be faithful and to bear true allegiance to His Majesty the King-Emperor of India, and to discharge faithfully his duty as a member. A Ruler of a State does so in his capacity as a member of the Chamber. A subject of the Ruler of an Indian State swears similarly, except for the oath of his allegiance, which he owes to his Ruler.[1] No person can be a member of both Chambers. Rules made by the Governor-General in his individual judgment provide for the vacation by a person who is chosen a member of both Chambers of his seat in one Chamber or the other. The seat of a member of either Chamber who becomes subject to any of the disqualifications mentioned in the Act, or who by writing under his hand addressed to the Governor-General resigns his seat, becomes vacant. Either Chamber may declare vacant the seat of any member who absents himself from all meetings for sixty days without the permission of the Chamber. In computing the period of sixty days, no account shall be taken of any period during which the Chamber is prorogued, or is adjourned for more than four consecutive days.[2]

A person is disqualified for being chosen as, and for being, a member of either Chamber: (*a*) if he holds any office of profit under the Crown, not being ministerial office or membership of service of the

[1] S. 24. [2] S. 25.

Crown retained while serving in a State; (*b*) if he is of unsound mind and stands so declared by a competent court; (*c*) if he is an undischarged insolvent; (*d*) if he has been convicted of offences in connection with elections declared by Order in Council or by a Federal Act to disqualify for membership of the Legislature, unless such period has elapsed as may be specified in that behalf by the provisions of that Order or Act; (*e*) if he has been convicted of any other offence by a Court in British India or a Federated State and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Governor-General, acting in his discretion, may allow in any particular case, has elapsed since his release; (*f*) if he as a candidate for the Federal or Provincial Legislature, or as an election agent of any candidate, has failed to lodge a return of election expenses within the time and in the manner required by Order in Council made under this Act or any Act of the Federal or Provincial Legislature, unless five years have elapsed from the date by which the return ought to have been lodged or the Governor-General, acting in his discretion, has removed the disqualification. This disqualification does not take effect until the expiration of one month from the date by which the return ought to have been lodged, or any longer period allowed by the Governor-General in his discretion. No person is capable of being chosen a member of either Chamber while he is serving a sentence of transportation or imprisonment for a criminal offence. Where a person by virtue of a conviction or a conviction and a sentence becomes disqualified under (*d*) or (*e*) and is at the date of the disqualification a member of the Legislature, his seat

does not become vacant by reason of the disqualification until three months have elapsed from the date thereof, or if within those three months an appeal or petition for revision is filed, until that appeal or petition is disposed of, but during that period he shall not vote.[1]

If a person sits or votes in either Chamber when he is not qualified or is disqualified for membership thereof, or when he is prohibited from doing so, under subsection 3 of Section 26, he is liable in respect of each day on which he so sits or votes to a penalty of five-hundred rupees to be recovered as a debt due to the Federation.[2]

PRIVILEGES OF MEMBERS

The members of the Legislature are given certain privileges. They are not absolute privileges, but limited. The members are assured freedom of speech in the Legislature, subject to the provisions of the Act and to the rules and standing orders regulating the procedure of the Legislature. No member of the Legislature is liable to any proceedings in any Court in respect of any thing said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by, or under the authority of, either Chamber of the Legislature of any report, paper, votes or proceedings. Freedom of speech, of course, does not include the right to publish a speech which is libellous, apart from publication ordered by either Chamber. Other privileges of members will be such as may be defined by Act of the Legislature, and until so defined shall be the same as were enjoyed by the pre-Federation Legislature. No Act may confer, or empower the legislature to confer, on either Chamber

[1] S. 26. [2] S. 27.

or both Chambers sitting together, or on any committee or officer of the Legislature, the status of a Court, or any disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner. The Legislature, unlike the British Parliament, has no power to punish or convict a person for an offence committed within the four corners of the Legislature. However, provision may be made by an Act of the Federal Legislature to inflict penalties, on conviction by a Court, on persons refusing to give evidence or produce papers, and the Governor-General in his individual judgment is to make rules regulating the attendance of persons who are or have been Civil Servants, and safeguarding confidential matters from disclosure. All these provisions apply to those persons who have the right to speak in, or otherwise take part in the proceedings of, the Legislature.[1] Members of either Chamber are to receive such salaries and allowances as may be determined from time to time by Act of the Federal Legislature. Pending action, they are to be paid on the same scale as the members of the former Legislature.[2]

LEGISLATIVE PROCEDURE

According to legislative procedure, a Bill, other than a Finance Bill, may originate in either Chamber. A Bill shall not be deemed to have been passed by both Chambers unless it has been agreed to by both, without amendment or with such amendments only as are agreed to by both Chambers. Prorogation of the Chambers does not involve the lapse of a Bill pending in the Legislature. The dissolution of the Assembly causes the lapse of any Bill passed by it which is pending in the Council

[1] S. 28. [2] S. 29.

of State,[1] but does not affect a Bill which is pending in the Council of State, but has not been passed by the Assembly. If the Bill is passed by one Chamber and rejected by the other, or if the Chambers have finally disagreed as to the amendments, and if it is not presented for assent within six months after its reception by the other Chamber (excluding any period of prorogation or adjournment over four days), the Governor-General may notify his intention to call a joint sitting for the purpose of deliberating and voting on the Bill. Generally such action will be taken on ministerial advice. If the Bill relates to finance or to any matter which affects the discharge of the functions for which he is required to act in his discretion or his individual judgment, the Governor-General, if he is satisfied that there is no reasonable prospect of the Bill being presented to him for his assent without undue delay, may notify his intention to summon a joint sitting even if there has been no rejection or final disagreement as to the Bill, and even if the period of six months has not elapsed. This power is given to the Governor-General to enable him to expedite legislation on vital matters. Normally, the joint session takes place in the next session of the Legislature after the expiration of six months from the date of the notification of the intention of the Governor-General, but when the Governor-General acts in his discretion or in his individual judgment, the joint sitting may take place in the same session. In these matters, the Governor-General will act in his discretion. After notification of the intention of the Governor-General to summon it, a joint sitting is competent notwithstanding that a dissolution of

[1] S. 31

the Assembly has intervened since the notification. At the joint sitting, questions are determined by a majority of the members of both Chambers present and voting. A Bill agreed and passed in the joint sitting shall be deemed to have been passed by both Chambers. At the joint sitting such amendments only may be made as are necessary by lapse of time or arise out of amendments, if any, proposed by one House but rejected by the other. The decision of the person presiding as to the amendments which are admissible shall be final. The President of the Council of State presides at the joint sitting.[1]

When a Bill has been passed by the Chambers, it must be presented to the Governor-General for his assent. The Governor-General may in his discretion assent to it in His Majesty's name, or withhold his assent therefrom, or may reserve it for the signification of His Majesty's pleasure. It is necessary for the Governor-General to take action on the presentation of the Bill. The Governor-General may in his discretion return the Bill to the Chambers with a message for reconsideration in whole or in part, or may suggest amendments, and the Chambers have to reconsider his suggestions without delay. A Bill reserved for the signification of His Majesty's pleasure shall not become an Act unless, within twelve months from the day on which it was presented to the Governor-General, the Governor-General makes known by public notification that His Majesty has assented thereto. If no assent is notified, the Bill drops. Any Act assented to by the Governor-General, and which has come into force, may be disallowed by His Majesty within twelve months from the day of the assent, whereupon the

[1] S. 31.

Governor-General must forthwith notify the disallowance, the Act becoming void from the date of such notification. The legal effect of such a disallowance is not stated in the Act, but there is no doubt that such disallowance does not invalidate acts done or actions taken while the Act was in force. The assent to, or disallowance of, a Bill by His Majesty is expressed by Order in Council.[1] Having regard to modern facilities of communication and consultation, it is obvious that the period of twelve months for the disallowance of an Act by the Crown is unreasonably long, but it was defended by Sir Samuel Hoare as a "piece of constructive conservatism."

PROCEDURE IN FINANCIAL MATTERS

The financial procedure is based upon the principle which is the foundation of a sound system of public finance, that no proposal for the imposition of taxation or for the appropriation of public revenues, nor any proposal affecting or imposing any charge upon those revenues, can be made except on the recommendation of the Executive. It can only be made by the Executive. The legislative procedure in matters of finance differs in India from that which exists in the United Kingdom. There is in India no Annual Appropriation Act, the proposal for the appropriation of revenues which require the vote of the Legislature being submitted to the Legislature in the form only of demands for grants, and a resolution of the Legislature approving a demand is a sufficient legal warrant for appropriation.

In every financial year the Governor-General shall cause to be laid before both Chambers a statement of the estimated receipts and expenditure of the Federation, called the "Annual Financial Statement,"

[1] S. 32

showing the estimates of the sums required to meet expenditure charged by the Act on the revenues of the Federation, and those required to meet other expenditure proposed to be made from the Federal revenues separately, distinguishing expenditure on revenue account from other expenditure, and indicating the sums, if any, which are included in it solely because he has directed their inclusion as necessary for the due discharge of any of his special responsibilities.[1]

The expenditure charged on the revenues of the Federation is not submitted to the vote of the Legislature, while the other expenditure is.[2]

The expenditure charged on the revenues of the Federation, and therefore exempt from the vote of the Legislature, comprises: (*a*) the salary and allowances of the Governor-General and other expenditure relating to his office for which provision is made by Order in Council; (*b*) the Federal debt charges, including interest, sinking fund charges and redemption charges, and the cost of raising loans and the service and redemption of debt; (*c*) the salaries and allowances of ministers, counsellors, the Financial Adviser, the Advocate-General, Chief Commissioners, and of the staff of the Financial Adviser; (*d*) the salaries, allowances, and pensions payable to or in respect of judges of the Federal Court, and the pensions of High Court Judges; (*e*) the expenditure on defence, ecclesiastical affairs (up to forty-two lacs of rupees exclusive of pensions), external affairs in so far as the Governor-General is required to act in his discretion, on tribal areas, and on the administration of any other territory in the direction and control of which he is required to act in his discretion; (*f*) the sums payable to His

[1] S. 33. [2] S. 34 (1).

Majesty out of Federal revenues in respect of the functions of the Crown in its relations with Indian States; (*g*) grants for the administration of any excluded areas in the Provinces; (*h*) any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal; and (*i*) any other expenditure charged by this Act on Federal revenues.[1] Whether any proposed expenditure falls within the category of expenditure "charged on the revenues" of the Federation is to be decided by the Governor-General in his discretion, and his decision is final.[2] All these items of expenditure charged on the revenues of the Federation and not subject to the vote of the Legislature, constitute nearly eighty per cent of the Federal expenditure. But either Chamber is at liberty to discuss,[3] though not to vote on, any of these "charged" or reserved items except those affecting the Governor-General and the expenditure in respect of the States.[4]

All other expenditure must be submitted in the form of demands for grants, first to the Federal Assembly and thereafter to the Council of State. The demands for grants can be recommended, as already stated, by the Governor-General only.[5] Private members have no power to propose any expenditure or an increase in expenditure. Either Chamber has power to assent to or to reduce any demand, the Assembly being first consulted. If the Assembly has refused any demand, it shall not be submitted to the Council of State unless the Governor-General so directs. If the Assembly has reduced the grant, only the reduced amount shall be submitted to the Council of State, unless the Governor-General otherwise

[1] S. 33 (3). [2] S. 33 (4). [3] S. 34 (1). [4] S. 33 (3) (*a* and *f*). [5] S. 34 (2).

directs. In the case of disagreement on grants,[1] the Governor-General summons a joint sitting of both Chambers, and the matter is settled by the decision of the majority of members present and voting. After the voting, the Governor-General authenticates by his signature a schedule specifying the grants made by the Chambers, the sums charged on the Federal revenues by the Act, not exceeding the sums shown in the original statement, to which he may add sums not exceeding the amount originally demanded when the Chambers have refused or reduced a grant which he considers necessary to enable him to discharge his special responsibilities. The authenticated schedule must be laid before both Chambers, but shall not be open to discussion or vote therein. This authenticated schedule constitutes the legal authority for expenditure for the year.[2] If in any financial year additional expenditure becomes necessary, it is to be provided only by a supplementary statement of expenditure laid before both Chambers and subject to the same procedure as the original statement.[3]

The Legislature thus has no control over 80 per cent of the Federal expenditure. It has control over 20 per cent of it, but even here, if any grant is refused by the Legislature, and if in the opinion of the Governor-General it affects his special responsibility, he can restore it and include it in the schedule. The heads of expenditure charged on the revenues of the Federation, and thereby exempt from the vote of the Legislature, are not identical with or analogous to payments which would in the United Kingdom be described as Consolidated Fund Charges, and as such would not be voted annually by Parliament. Any

[1] S. 34 (3). [2] S. 35 (1, 2 and 3). [3] S. 36.

comparison with them is both misleading and incorrect. These heads in India are much more comprehensive and absorb a substantial portion of the expenditure, and unlike the Consolidated Fund Charges, they are not voted by the Legislature at all either under an annual Act or permanent Acts. These items constitute permanent appropriations which the Legislature cannot touch. Apart from the items of the expenditure charged, and the power of the Governor-General to restore the items not charged, but which he considers essential to his special responsibility, even the salaries of the Ministers are not subject to the vote of the Legislature and are not to be varied during their tenure, once they are fixed. Thus, within the restricted field of responsibility, the most effective weapon under the British Constitution for making the Ministers responsible to the Legislature is rendered ineffective.

The Legislature cannot take the initiative in the case of a Bill imposing or increasing any tax, for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law regarding any financial obligations undertaken or to be undertaken by the Federal Government, or charging expenditure on Federal revenues, or increasing the amount of any such expenditure.[1] Such a Bill must be recommended by the Governor-General, and it shall not be introduced in the Council of State. However, a Bill or amendment shall not be deemed to impose expenditure if it simply imposes fines or other pecuniary penalties, or authorizes the demand or payment of fees for licences or fees for services rendered. No Bill may be passed by either Chamber which, if enacted, would involve expenditure

[1] S. 37.

from the Federal revenues without the Governor-General's recommendations. Thus the initiative in financial matters rests with the Executive. This is in conformity with the constitutional practice in Britain and the Dominions. In financial matters, both the Chambers are given co-ordinate and co-equal powers,[1] except that financial Bills cannot first be introduced in the Council of State. Apart from other objections, and solely on the ground of the nature of the composition of the Council of State, it is felt that its financial powers ought not to have been either co-ordinate or co-equal with those of the Assembly.

PROCEDURE GENERALLY

As in the Legislatures of other countries each Chamber of the Federal Legislature has the right to make rules for regulating its procedure and the conduct of its business. It is, however, provided that the Governor-General, after consultation with the President or the Speaker, as the case may be, shall in his discretion make rules regulating the procedure in matters affecting his functions when acting in his discretion or in his individual judgment; for securing the timely completion of financial business; prohibiting the discussion of, or the asking of questions on, any matter connected with an Indian State outside the Federal sphere, unless he considers that the matter affects Federal interests or a British subject, and has consented to its discussion or to a question being asked thereon; prohibiting, save with his permission, discussion or questions on (*i*) the relations of the Crown or the Governor-General and any foreign State or Prince; (*ii*) matters (except in relation to estimates of expenditure) connected with the tribal areas or any excluded area; (*iii*) action

[1] S. 34.

taken by him in his discretion in relation to provincial affairs; and (*iv*) the personal conduct of the Ruler of any Indian State or a member of the ruling family thereof. In the case of inconsistency between the rules made by the Legislature and those made by the Governor-General, the latter shall prevail. The Governor-General, after consulting the President of the Council and the Speaker of the Assembly, also makes similar rules as to the procedure in joint sittings and communications between the two Chambers containing therein provisions for the purpose stated above as he in his discretion may think fit. The President of the Council of State presides at the joint sitting of the two Chambers, and in his absence any person entitled under the rules to do so. Until these rules are made, the rules of procedure and the standing orders of the pre-Federation Indian Legislature shall be in force, with such modifications and adaptations as may be made by the Governor-General in his discretion. All proceedings in the Federal Legislature shall be conducted in the English language, but the rules of procedure of each Chamber and those with respect to joint sittings must permit persons unacquainted, or not sufficiently acquainted, with the English language to use another language.[1]

Apart from these powers of making rules for specified purposes, the Governor-General is also empowered to prevent discussion in the Legislature in some cases. If he, in his discretion, certifies that discussion of any Bill or any clauses or amendment thereof would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of India or any part thereof, he may in

[1] S. 39.

his discretion direct that no proceedings, or no further proceedings, relating to the Bill, clause, or amendment be taken, and effect shall be given to this direction. Any such direction is mandatory,[1] but it shall not be given, unless, in the judgment of the Governor-General, the public discussion of the Bill or amendment would itself endanger peace and tranquillity.[2]

Thus the freedom given to the Legislature to regulate its procedure by its own rules is in practice curtailed by the power given to the Governor-General to make rules in respect of matters for which he has special responsibility. Not only this, but in the case of any inconsistency, rules made by him over-ride rules made by the Legislature. Such provisions are absent in the British and Dominion Constitutions. Moreover, the power of the Governor-General to prohibit discussion in the Legislature, a power unknown to the British and the Dominion Constitutions, is a serious curtailment of the freedom of the Legislature.

No discussion is allowed with respect to the conduct of any judge of the Federal Court or a High Court in the discharge of his duties.[3] This provision is made to secure the independence and impartiality of the Judiciary. The Courts have no jurisdiction to question the validity of any proceedings in the Legislature on the ground of any alleged irregularity of procedure. Similarly, no officer, or member of the Legislature in whom powers are vested for regulating procedure or the conduct of business, or the maintainance of order, in the Legislature is subject to the jurisdiction of any Court in respect of his exercise of those powers.

The other rights of the members of the Legislature are the same as under the existing Legislature. They

[1] S. 40. [2] Draft Instrument of Instructions, XXIX. [3] S. 40.

have the right of asking questions and supplementary questions, and also of moving resolutions on matters which are within the sphere of the Federal Legislature, or on matters of public interest. They have also the right of moving motions for adjournment to discuss any matter of urgent public interest. All these rights have already been discussed.[1]

LEGISLATIVE POWERS OF THE GOVERNOR-GENERAL

Situations may arise in which executive action by the Governor-General may not suffice for the due discharge of his special responsibility. He is therefore entrusted with legislative powers in case of emergency and in the event of the failure of the Constitutional machinery.

ORDINANCES DURING RECESS OF THE LEGISLATURE

If the Legislature is not in session, and the Governor-General is advised by his Ministers that circumstances have arisen which require immediate action, he may promulgate an ordinance.[2] But if the ordinance is one which, as a Bill, would have required his previous sanction for its introduction, he is to exercise his individual judgment; and he must promulgate any such ordinance except under instructions from His Majesty, if had it been a Bill he would have been bound to reserve for the King.[3] Any such ordinance is void to the extent to which it makes any provision which would be beyond the competence of the Federal Legislature. Such an ordinance has the same force and effect as an Act of the Legislature, but it must be laid before the

[1] See pp. 152-4.

[2] S. 42.

[3] This rule applies to measures inconsistent with Acts of Parliament derogating from the powers of High Courts in a substantial degree or likely to violate the rules against discrimination.

Legislature when it meets, and it ceases to operate at the end of six weeks from the reassembly of the Legislature unless solutions disapproving it are passed by both Chambers before then. It may be disallowed by His Majesty like a Federal Act, and may be withdrawn by the Governor-General at any time.

ORDINANCES AT ANY TIME WITH RESPECT TO CERTAIN SUBJECTS

In matters where the exercise of his discretion or individual judgment is involved, the Governor-General may in his discretion promulgate the requisite ordinances,[1] which shall be in operation up to six months, but may by a subsequent ordinance be extended for another six months. Such an ordinance has the same force and effect as an Act of the Legislature. It may be disallowed by the King or may be withdrawn by the Governor-General at any time. If it is an ordinance extending a previous ordinance it shall be communicated forthwith to the Secretary of State and shall be laid by him before both Houses of Parliament. If the ordinance is beyond the legislative competence of the Federal Legislature, it is void to that extent.

GOVERNOR-GENERAL'S ACTS IN CERTAIN CIRCUMSTANCES

In addition to his emergency powers of legislation, if the Governor-General considers that, in matters where the exercise of his discretion or individual judgment is concerned, special legislation is essential for the purpose of enabling him satisfactorily to discharge his functions, he may explain the circumstances to the Chambers by message, and enact forthwith permanent legislation as a Governor-General's Act; or he may send to the Chambers a draft Bill and enact it as a Governor-General's Act

[1] S. 43. Draft Instrument of Instructions, XXVII.

a month later, after considering any address presented to him by either Chamber with reference to it or suggesting amendments. A Governor-General's Act has the same force and effect as an ordinary Act, is subject to disallowance by the King, and is void to the extent to which it is beyond the legislative competence of the Legislature. Every Governor-General's Act must be communicated forthwith to the Secretary of State and laid by him before both Houses of Parliament. The functions of the Governor-General in the above circumstances are to be exercised by him in his discretion.

PROVISIONS IN CASE OF FAILURE OF CONSTITUTIONAL MACHINERY

The legislative powers of the Governor-General by way of promulgating ordinances and enacting Governor-General's Acts are not considered adequate to cope with every kind of political situation in India. The possibility of the failure of constitutional machinery is recognized, and the Governor-General is empowered to take action in that event. The failure of constitutional machinery means and involves the impossibility or difficulty of carrying on the government in accordance with the provisions of the Act. If at any time the Governor-General is satisfied that the government of the Federation cannot thus be carried on, he may issue a proclamation declaring that his functions to such extent as is specified in the proclamation shall be exercised by him in his discretion, and may assume to himself all or any of the powers vested in or exercisable by any Federal body or authority other than the Federal Court. He may also by the same proclamation modify the provisions of this Act and

POWER OF GOVERNOR-GENERAL TO ISSUE PROCLAMATIONS

suspend in whole or in part the operation of any provision relating to any Federal body or authority other than the Federal Court.[1] Any such proclamation may be revoked or modified by a subsequent proclamation. It must be communicated forthwith to the Secretary of State and laid by him before both Houses of Parliament. It ceases to operate at the expiration of six months unless both Houses of Parliament approve its continuance, in which case it remains in force for a further twelve months. But if the government of the Federation has been carried on for three years continuously under one proclamation after another, the proclamation ceases to have effect at the end of that period, and the government shall thenceforth be carried on in accordance with the terms of the Act, subject to any amendment made by Parliament, and also subject to the restrictions of Schedule 2 as regards the changes which may be made without affecting the accession of the States. Any law made by the Governor-General in the exercise of his power under a proclamation shall continue to have effect for two years after the date of the expiry of that proclamation, unless sooner repealed or re-enacted by Act of the appropriate Legislature, Federal or Provincial as the case may be. In the exercise of his power to issue proclamations, the Governor-General shall act in his discretion. He is thus given absolute power in this matter. The only check is that of Parliament, which is to be acquainted with his action and with the terms of the proclamation, which it may revoke. The onus is also on the British Parliament to determine how far it will permit the operation of the suspension of the Constitution. Moreover, the

[1] S. 45.

Government of the Federation cannot be carried on beyond three years under proclamation. Government under proclamation is only government under emergency or abnormal conditions, which do not last for a long time, generally not for three years. If they do, they cease to be emergency or abnormal conditions, and acquire the nature of normality and should accordingly be recognized by the amendment of the Constitution in a manner consistent with the scheme of the Act. It may be noted that the time-limit of three years has been fixed at the instance of the States.

These powers—extraordinary powers—of the Governor-General are unknown to the British and Dominion Constitutions. It is true that the Executive in Great Britain as well as in the Dominions has extraordinary powers in case of emergency, but those powers are necessarily exercised by the Crown on the advice of the Ministry. Such powers are indispensable for the safety and security of the State, but they are to be exercised by a Ministry which is responsible to the Legislature. Under the Indian Constitution, all these powers, except that of issuing ordinances when the Legislature is not in session, are to be exercised by the Governor-General in his discretion, and not on the advice of Ministers. Government by ordinance is now obsolete in Great Britain, but under the Indian Constitution, there is elaborate provision for the promulgation of different ordinances under different circumstances. The Governor-General is sufficiently equipped with extraordinary emergency powers, not only executive but also legislative. In addition he is also given power to enact permanent legislation, the most unusual provision in the world.

As if these provisions are not sufficient and effective, he is further empowered to act in case of the failure of Constitutional machinery. In a Responsible Government, the right of the executive head is to secure government in conformity with the wishes of the people. In other words, his duty is to bring about harmony between the legal sovereign and the political sovereign, and for this purpose he is armed with the power of dismissing his Ministers, and in the last resort dissolving the Legislature with a view to obtaining the verdict of the electorate. Once the verdict of the electorate is conclusively expressed, the executive head has to accept it even if it is against his opinion. There is no provision for the suspension of the Constitution. Under the Indian Constitution, all the emergency powers are provided, not with a view to eliminating the disharmony between the legal sovereign and the political sovereign, but to prevent the Legislature from coercing the Government into a course of conduct which the Governor-General may think unjustifiable according to the provisions and the policy of the Act, and to enable the Governor-General to keep the constitutional machine on the rails. Thus the extraordinary powers given to the executive head originate and find their justification in grounds which are not the same as those in other Constitutions.

CHAPTER IX

PROVINCIAL AUTONOMY OR RESPONSIBLE GOVERNMENT IN THE PROVINCES

1. The Governors' Provinces

The Provinces of British India are made the federating units under the Act. The boundaries of these Provinces have not been decided by any physical, geographical, linguistic, or ethnological considerations, but were fixed in the process of the conquest and consolidation of British India, in accordance with administrative convenience. It is admitted that some of the Provinces require redistribution, and provision for that purpose is made in the Act, under which two new Provinces—Orissa and Sind—have come into existence. The Province of Orissa is formed from part of the territory of the old Province of Bihar and Orissa, part of the Central Provinces, and part of the Madras Presidency inhabited by the Oriya people. Sind is separated from Bombay Presidency. Burma ceases to be part of India. The term "Province" in this Chapter means a Governor's Province.[1] There are eleven Governors' Provinces, namely, Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa, Sind, and other Governors' Provinces may be created under the Act, which authorises such creation by Order-in-Council after consultation of the Federal Executive and the Legislature and the authorities of any Province affected.[2]

[1] S. 46. [2] S. 290.

Berar[1], though under the sovereignty of His Exalted Highness the Nizam of Hyderabad, is to be administered together with the Central Provinces as one Province,[2] under an agreement between the King-Emperor and the Nizam.

For the purposes of the Act, therefore, British India includes Berar, and save as regards any oath of allegiance, Berari subjects are to be treated as British

[1] S. 47.

[2] The territory of Berar is over 17,000 square miles, with a population of about 32 lakhs. Its administration as part of British India dates back to 1853 when the then Nizam mortgaged it to the East India Company in payment of the cost of the Hyderabad military contingent. When Lord Curzon visited Hyderabad in 1902, he persuaded the Nizam to enter into a new agreement which reaffirmed the Nizam's right over Berar, but leased it in perpetuity at an annual rental of 25 lakhs instead of the indefinite assignment to the Government of India, then in existence. Berar, which up to 1902 had been administered separately, was added to the Central Provinces, and the Hyderabad contingent became part of the Indian Army.

A new agreement between His Majesty and the Nizam in substitution for the agreement of November 5, 1902, was signed on October 24, 1936. This agreement reaffirms the sovereignty of the Nizam over Berar. Henceforth the Nizam and his successors will be known as "His Exalted Highness the Nizam of Hyderabad and Berar." The Heir-Apparent is granted the title of "His Highness the Prince of Berar." The Nizam has the right to be consulted in connection with the appointment of the Governor of the Central Provinces and Berar, to fly his flag alongside the British flag in Berar, to confer Hyderabad titles on Beraris, to hold Durbar in Berar, and to maintain an Agent at the seat of the Central Provinces Government. No objection will be raised by His Majesty to the *Khutba* being read in any mosque in Berar in the name of the Nizam. His Majesty continues to pay the Nizam the sum of Rs. 25 lakhs per annum as under the agreement of 1902. The Governor of the Central Provinces and Berar, in declaring his assent in His Majesty's name to any Bill of the Legislature of the Central Provinces and Berar, applying to Berar, and in notifying His Majesty's assent to any such Bill reserved for the Crown, shall state that the assent to the Bill in its application to Berar has been given by virtue of the assent by H.E.H. the Nizam. The provisions of Section 6 of the Government of India Act, 1935, do not apply to the agreement, nor shall the jurisdiction of the Federal Court extend to any dispute arising thereunder. This agreement is to have effect whether the Nizam accedes to the Federation or not.

subjects, and the provisions with respect to the qualifications of the voters for the Provincial Legislature of the Central Provinces and Berar, or of the voters for the Federal Legislature, are the same, subject to the agreement, as those in the Central Provinces. If the agreement for the administration of Berar ceases, His Majesty in Council may make any necessary adjustments and consequential modifications in the provisions of the Act relating to the Central Provinces.

2. THE PROVINCIAL EXECUTIVE: HISTORICAL

Of the fifteen administrative units in existence before 1919, each of the three Presidencies of Bengal, Bombay, and Madras was administered by a Governor and a Council of three members, who were mostly members of the Civil Service. In case of emergency, the Governor overruled his colleagues, but otherwise the decisions were those of the majority. These Governorships were held by men whose experience had been in the field of British politics. In four Provinces, there were Lieutenant-Governorships, which were held by the senior members of the Indian Civil Service. They governed these Provinces either with or without the help of a Council. There were three Provinces, which were governed by civilians called Commissioners, as mere agents of the Government of India. The remaining units were under the direct control of the Government of India. The Government of India Act of 1919 converted six more of the fifteen units into Governors' Provinces, and left the others in the same position as before. The executive system introduced in the Governors' Provinces under the Act of 1919 was known as Dyarchy. Under this the Provincial subjects (the sphere of the Provincial Government) were divided

into transferred subjects and reserved subjects. The first group was administered by the Governor acting with his Ministers, the second by the Governor in Council. The members of the Governor's Council, who did not exceed four, and of whom at least half were Indians, were appointed by His Majesty. One at least of these members was a person who had been for not less than twelve years in the service of the Crown in India. The Governor presided at meetings of the Executive Council, where ordinarily the decisions of the majority prevailed, though the Governor had, in the event of equality of votes and in certain circumstances, the right to over-ride his Councillors. The Ministers were chosen by the Governor from the elected members of the Provincial Legislative Council. They were not members of the Executive Council, but for the purpose of convenience the Executive Council members and the Ministers met regularly under the presidency of the Governor to discuss matters of common interest. The responsibility for decisions rested upon the Governor-in-Council or the Governor advised by his Ministers, according to the subject. There was a joint purse for both classes of subjects, but the requirements of the reserved subjects had priority over those of the transferred subjects. The Governor was required to be guided by the advice of his Ministers in relation to transferred subjects unless he saw sufficient cause to dissent, in which case he might require action to be taken otherwise than in accordance with that advice. Ministers held office at the Governor's pleasure, but the financial power of the Legislature gave the latter the means of influencing ministerial policy. The Executive members, though ex-officio members of the Legislature, were independent

of it, and in practice were appointed for a fixed period of five years. The Provincial Governments were under the general control and superintendence of the Central Government, and in certain matters under its direct control.

This dual or dyarchical system was not successful. Apart from giving opportunities to some Indians for training in the system of Parliamentary Government, its working for sixteen years did not result in any substantial achievements.

Under the Government of India Act of 1935, the Provinces, as we have already seen, are transformed into autonomous political units legally deriving their authority directly from the Crown. The whole basis of the Provincial Executive under the Act of 1935 is a fundamental departure from that under the Act of 1919. Dyarchy is abolished and full Provincial Autonomy is introduced. The Provincial Executive is made responsible to the Legislature. The Act vests the whole power and authority of the Provinces in the Governor himself, as the representative of the King. It provides him with a Council of Ministers to aid and advise him in the exercise of any powers conferred on him by the Act in the whole sphere of Provincial government, except in relation to such matters as are left by the Act to his sole discretion, and those matters in which he has special responsibilities. In matters which are in his sole discretion, he need not consult his Ministers, and in matters in which he has special responsibilities he need not necessarily act according to the advice of his Ministers. To this extent, Responsible Government is restricted. Legally, the Governor's "special responsi-

THE PROVINCIAL EXECUTIVE UNDER THE ACT OF 1935

bilities" indicate a sphere of action in which it is constitutionally proper for the Governor, after receiving ministerial advice, to signify his dissent from it, and even to act in opposition to it if, in his own unfettered judgment, he is of opinion that the circumstances of the case so require. This is the scheme of the Provincial Executive. The Province being a legal entity and a federating unit, its head, the Governor, derives his authority directly from the Crown, and he occupies the position of a constitutional head representing the Crown in the Province with full responsibility for the Government of the Province.

GOVERNOR. The executive authority and government of the Province is vested in the King and is exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him.[1] The Governor of a Province is appointed by the King by a Commission under the Royal Sign Manual. His office is constituted by Letters Patent.[2] His salary is fixed by the Act. Allowances for expenses of equipment,[3] travelling allowances, and other

[1] S. 49.

[2] For the contents of the Letters Patent see Appendix A (ii).

[3] At present the Governors of the Provinces, except those of Madras, Bombay and Bengal, who are appointed from amongst public men in England, are appointed from the senior members of the Indian Civil Service. Having regard to the powers and position of the Governor under the new Constitution, it is essential that he should be a person with vision and imagination. The suggestion has been made that a Civilian, however efficient for administrative purposes, is nevertheless, from his very training and experience, not the proper person to hold the post of Governor. Moreover, before April 1, 1937, the Provincial Governors were appointed from the members of the Central or Provincial Executive Councils. These Executive Councils are now abolished, and the highest administrative post which a Civilian will occupy is that of Secretary to the Government. It is inexpedient to appoint a Secretary to the Government as Governor of a Province. Many people feel that the Provincial Governors should be appointed from public men in India.

allowances enabling him to discharge conveniently and with dignity the duties of his office, including leave allowances, are fixed by the King in Council.[1] Customs privileges for him are fixed by Order in Council. An Acting-Governor is entitled to the same salary, the same allowances and immunities and privileges as the Governor.[2] All these sums, salaries and allowances are charged on the revenues of the Province.[3]

The executive authority of the Province extends to all matters on which the Provincial Legislature has power to make laws. These powers are clearly laid down and defined.[4]

ADMINISTRATION OF PROVINCIAL AFFAIRS

In the exercise of his functions relating to the executive authority, the Governor has a Council of Ministers to aid and advise him except in so far as he is required by the Act to exercise his functions or any of them in his discretion. In other words, except for the functions in his discretion, he is to be aided and advised by his Ministers. But this obligation does not prevent the Governor from exercising his individual judgment in any case where he is required to do so, even in the ministerial sphere where he is not to act in his discretion. Unlike the Governors in the Dominions, the

[1] An Order in Council issued on December 16, 1936, fixes the allowances and privileges of the Governors. It is enough to state the provisions as regards the Governor of Bombay. He is entitled, without payment of rent or hire, to the use of his official residences and official railway saloons and river craft and aircraft, and of the motor-cars provided for his use, and no charge is to fall on him personally in respect of the maintenance thereof. His leave allowance is Rs. 4,000 per month, which may be increased by the Secretary of State to Rs. 5,500 per month for special reasons. If he is resident in Europe when appointed he is to receive £2,000 as equipment allowance and up to £400 as travelling allowance on appointment. He is also to receive Rs. 23,000 as maximum allowance for the renewal or furnishing of official residences.

[2] S. 304. [3] Sch. 3. [4] S. 49(2).

Governor in his discretion may preside at meetings of the Council of Ministers. In the Dominions, the Governors as representatives of the King are in law above party politics, and as such have no right to preside at the meetings of the Ministry. If a question arises whether any matter is or is not a matter on which the Governor is to act in his discretion or to exercise his individual judgment, his decision in his discretion is final. The validity of anything done by the Governor cannot be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment.[1] Thus the sphere of his authority in the Provincial field is determined by himself.

The Governor chooses his Ministers and summons them. The Ministers are sworn as members of his Council, and they hold office during his pleasure. The Governor has the right to summon any member of the Legislature to form a Ministry, but, under the Instrument of Instructions, he is directed to summon a person who is likely to command the confidence of the Legislature. He is to select as Ministers, "in consultation with the person who, in his judgment, is most likely to command a stable majority in the Legislature, those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. In so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers."[2] There is no statutory provision for the collective or joint responsibility of the Ministers. Even under the English Constitution, it is only a convention, and

[1] Sec. 50. [2] Instrument of Instructions, VIII.

it is difficult to give effect to conventions by a provision of the Act. However, the Governor is directed under the Instrument of Instructions to keep in mind this convention.

A Minister who for any period of six consecutive months is not a member of the Legislature ceases to be a Minister. The salaries of Ministers are fixed by the Legislature, and until so fixed shall be determined by the Governor. The salary of a Minister shall not be varied during his term of office. The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court. In choosing, summoning and dismissing Ministers, and in determining their salaries, the Governor acts in his discretion.[1]

It is clear from these provisions that some of the features of Parliamentary Government are given effect in the Constitution. Ministers must be members of the Legislature. The advice tendered by them cannot be inquired into. Their choice, summoning, and dismissal are in the discretion of the Governor. The only significant provision which is a departure from Parliamentary Government is that the salaries of Ministers are not to be varied during their term of office. This provision negatives the very idea of responsibility. Secondly, the direction to the Governor to have due regard to the interests of minorities in the formation of his Ministry is also inconsistent with ministerial responsibility.

SPECIAL RESPONSIBILITIES OF GOVERNOR

In the exercise of his functions, the Governor has the following special responsibilities: (*a*) the prevention of menace to the peace or tranquillity of his Province

[1] S. 51.

or any part thereof; (*b*) the safeguarding of the legitimate interests of minorities; (*c*) the securing and safeguarding of the rights of civil servants past and present and their dependants; (*d*) the securing in the executive sphere of protection against discrimination; (*e*) the securing of the peace and good government of areas declared to be partially excluded areas; (*f*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof; and (*g*) the securing of the execution of orders or directions lawfully issued to him under Part VI of the Act (Administrative Relations) by the Governor-General in his discretion. The Governor of the Central Provinces and Berar has the further special responsibility of securing that a reasonable share of the revenues of the Province is expended in or for the benefit of Berar. The Governor of a Province in which there is an excluded area is to secure that no action of his in respect of such an area is prejudiced by other actions. Any Governor acting as Agent for the Governor-General has the special responsibility of securing that no action is taken inconsistent with his agency functions. The Governor of Sind has the further special responsibility of securing the proper administration of the Lloyd Barrage and Canals Scheme. In the exercise of his special responsibility, the Governor will act in his individual judgment as to the action to be taken.[1]

INSTRUMENT OF INSTRUCTIONS

Under responsible government, in theory, all executive power is vested in the head of the State, the King; but by constitutional usage and practice, the powers possessed in legal theory by the Sovereign have come to be exercised almost entirely on the advice of Ministers possessing

[1] S. 52.

for the time being the confidence of Parliament. The ingenious and convenient adjustment of the legal framework, through successive stages of its political evolution, has given flexibility to the English Constitution. To imprison constitutional usage and practice within the four corners of a written Constitution is to run the risk of making it barren for the future. This was realized by the framers of the Dominion Constitutions, and they recognized the inapplicability of the whole body of English doctrine in its most highly developed form to their new States. Recourse was therefore had to another device, no less flexible, for the purpose of indicating to the Governor-General or Governor how far in the exercise of the executive power he was to regard himself as bound by English precedent and analogy. This is the Instrument of Instructions. The Dominion Constitutions necessarily embody much that is still regulated by usage and custom in the United Kingdom, but the Instrument of Instructions was preserved in order that evolution might continue without involving any change in the legal framework of the Constitution itself. This facilitated development in the Constitutions based upon the English model, without doing violence to existing forms of government, in harmony with the political circumstances of the time. The Instrument of Instructions enabled the Dominions to evolve and realize Responsible Government without altering the legal structure of their Constitutions.[1]

The general scheme of the Indian Act is that the Governor is to act on the advice of his Ministers. In certain circumstances, however, the Governor, in whom the executive power of the Province is really

[1] *J.P.C. Report*, para. 70.

vested, has to exercise on his own responsibility powers which elsewhere and under other conditions are exercised on the advice of Ministers. To this extent there is a modification of English constitutional practice. In the absence of these special circumstances, the Governor might have been given a wide discretion to act upon his own responsibility when the circumstances seemed so to require. In accordance with Dominion precedents, the Instrument of Instructions might have specified certain particular matters with regard to which the Governor was to exercise his own discretion whatever the advice of his Ministers might be. But the Act introduces a new method for which there is no precedent. It provides that the Governor is to have special responsibilities for certain specified purposes, and the Instrument directs him, where in his opinion one of them is involved, to take such action as he thinks that the circumstances require, even if this means dissenting from the advice tendered to him by his Ministers, while in other matters he will be guided by their advice. The Instrument of Instructions is generally a prerogative document, but the Instrument of Instructions issued to the Governors of the Provinces is issued with the approval and sanction of Parliament. The Instrument contains instructions and directions to the Governor as to how he is to exercise his discretion and how he is to act where his special responsibility is concerned. It embodies the conventions or understandings of Responsible Government as regards the relation of the constitutional head with his Ministers.

The Secretary of State is required to lay before Parliament the draft of any Instructions (including Instructions amending or revoking Instructions

previously issued) to be issued by His Majesty to the Governor of a Province, and no action on it can be taken except in pursuance of an address presented to His Majesty by both Houses of Parliament asking for the Instrument to be issued. The validity of anything done by the Governor cannot be questioned on the ground that it was not done in accordance with the Instrument of Instructions issued to him.[1]

Expressed in the simplest terms, Instruments of Instructions are letters issued by His Majesty to the Governors of the Provinces on their appointment. These documents are intended to be the very breath and spirit of the Constitution embodied in legislation. They interpret the spirit in which the Constitution should be worked; they are intended to breathe life into the dry bones of a legislative enactment. The Instruments, in other words, furnish lubrication for the constitutional machinery. They provide flexibility where legal rigidity might lead to difficulties and possibly to deadlocks. They indicate the way in which the Governors should discharge their duties. As they are vital to the development of responsible government, they must have Parliamentary sanction.

All the Instruments to the various Governors are in identical terms. They do not direct or advise Governors to take any action outside that permitted by the Act. The Instrument could not counsel a Governor to adopt a course if the Act forbade it, and it is not a legal document which can be interpreted in Courts. It is only a method of placing on record the duties of the Crown's Representative, which could not properly be enjoined upon him by statute. The combination of the rigidity of the sections of the Act

[1] S. 53.

introducing Provincial Autonomy, and the flexibility of the Instructions, which can be amended by an address presented to the King by both Houses, is expected to produce the system of checks and balances, and above all the blessed spirit of continuity from one administration and generation to another, which are features of the British Constitution.[1]

The procedure in issuing the Instrument of Instructions to the Governors is unusual, as it requires Parliamentary approval and sanction. Generally, its framing is a matter of high prerogative and within the executive sphere, but in the case of India Parliament is asked to share with the Executive the responsibility of advising the Crown.[2]

Under the Instrument of Instructions, the Governor is to do all he can to fit all classes of the population to take their proper place in the public life and government of the Province, to secure minorities a due share of appointments, to protect civil servants from inequitable treatment, to prevent measures which would discriminate though not in form discriminatory, and to avoid interference with the rights of the States. In case of doubt as to the existence of any particular State right, the Governor is to refer to the Governor-General, who, as the Representative of the Crown in relation to the States, will determine the extent of such alleged rights. The Governor of the Central Provinces and Berar is directed to see that a reasonable share of revenue is expended in or for the benefit of Berar. If the Governor is in doubt, "he shall, if he deems it expedient, fortify himself with advice from a body of experienced and unbiased persons whom he

[1] Mr. Butler's speech in the House of Commons.
[2] See also page 136.

may appoint for the purpose of recommending what changes in policy would be suitable and equitable." He is also directed to have due regard in the administration of Berar to the commercial and economic interests of Hyderabad. The Governor has also to keep the Governor-General informed of matters affecting irrigation, in view of the power of the Secretary of State to require the employment of officers appointed by himself. The Governors have the right to correspond with the Governor-General on all issues affecting Federation. The Act does not, as in Canada, prevent their direct relations with the Secretary of State.

When the Governor exercises the executive authority of the Province vested in him in his discretion or in his individual judgment, he is under the general control of, and has to comply with such particular directions, if any, as may from time to time be given to him by, the Governor-General in his discretion.[1] The validity of anything done by a Governor shall not be called in question on the ground that he did not act in accordance with these directions. The Governor-General has to satisfy himself that his directions do not require the Governor to act in a manner inconsistent with any Instrument of Instructions issued to the Governor by His Majesty.[2]

ADVOCATE-GENERAL FOR PROVINCE

The duties of the Governor include the appointment by him of an Advocate-General for the Province, being a person qualified to be appointed a judge of a High Court. It is the duty of the Advocate-General to give advice to the Provincial Government upon such legal matters, and to perform such other duties of a legal character,

[1] S. 54. [2] S. 54.

as may be referred or assigned to him by the Governor. He performs the functions performed in Great Britain by the Attorney-General, but he has no political affiliation with the Ministry. He holds office during the pleasure of the Governor, who fixes his remuneration. In exercising his powers with respect to the appointment, dismissal, and remuneration of the Advocate-General, the Governor is to exercise his individual judgment. In other words, in these matters he has to consult his Ministers, but the final decision rests with him. The Advocate-General has a right to address both the Chambers of the Provincial Legislature.[1]

In matters of law and order, the Governor has special powers. He has to exercise his individual judgment with respect to any proposal for the making or amendment of any rules affecting the Police, civil or military, unless such rules do not affect the organization or discipline of that force.[2]

He may also, if he thinks that the peace or tranquillity of the Province is endangered by the operations of any person committing, or conspiring, preparing or attempting to commit, crimes of violence intended to overthrow the government, direct that, for the purpose of combating such operations, his functions shall be exercised at his discretion. In such circumstances he may also authorise an official to speak in the Chamber or Chambers, or in joint sittings, or in any committee of the Legislature of which he may be named a member by the Governor; but he shall not be entitled to vote. All the functions of the Governor in this connection are to be exercised in his discretion. These powers are additional to the Governor's powers

[1] S. 55. [2] S. 56.

in relation to his special responsibility for the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof.[1]

The Governor has also in his discretion to make rules providing that no member of any police force may divulge to another member the sources from which information has been obtained regarding the criminal intentions mentioned above, except with the authority of the Inspector-General or Commissioner of Police, or to any other person except on the Governor's directions; nor must any other person in the service of the Crown disclose it to anyone except on his direction.[2] All these powers are given to the Governor to enable him to deal with terrorism and revolutionary or subversive activities. These are very unusual powers to give to the executive head, but they are justified by the existence of peculiar political conditions in India.

All executive action of the Government of a Province is expressed in the name of the Governor, and orders and instruments authenticated under rules made by him cannot be questioned on the ground that they are not his acts. The Governor, after consultation with his Ministers, makes rules for the transaction of business of the Provincial Government, and for the allocation amongst the Ministers of that business except any business with respect to which he is required to act in his discretion. To ensure that none of his special responsibilities is overlooked, these rules are to provide that Ministers and secretaries to Government shall transmit to him all such information with respect to the business of the Provincial Government as is specified in the rules, and in particular

[1] S. 57. [2] S. 58.

that Ministers shall bring to his notice, and the appropriate secretary shall bring to the notice of the Minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.[1] It is to be noted that there is thus a statutory obligation imposed on the secretaries and the Ministers to draw the attention of the Governor to any matter in which he has a special responsibility.

SECRETARIAL STAFF OF GOVERNOR

The Governor has his own secretarial staff, appointed by him in his discretion. The salaries and allowances of persons who are appointed on the staff and the office accommodation and other facilities to be provided to them shall be determined by the Governor in his discretion. All these items of expenditure are charged on the revenues of the Provinces and are exempt from the vote of the Legislature.[2]

NATURE OF THE PROVINCIAL EXECUTIVE

The Provincial Executive is theoretically a responsible Executive. The whole sphere of Provincial government, except that for which the Governor has to act in his discretion, is entrusted to Ministers appointed by the Governor from the elected members of the Legislature. Generally speaking, if parties in the Legislature are organized on broad issues of policy, it is possible to evolve a responsible government. But the sphere covered by the matters in respect to which the Governor has to act in his discretion and has special responsibility is so large as to restrict the scope of Responsible Government. Moreover, the instructions to the Governor to have due regard to the interests of minority communities in the selection of Ministers

[1] S. 59. [2] S. 305.

will hamper the growth of Responsible Government, which postulates the homogeneity and collective responsibility of the Ministry. Further, the existence of an electorate which recognizes communal representation, and which is rigidly divided into various groups, is inconsistent with the elementary principle of Responsible Government.

The Joint Select Committee observes: "Parliamentary Government, as it is understood in the United Kingdom, works by the interaction of four essential factors: the principles of majority rule; the willingness of the minority for the time being to accept the decisions of the majority; the existence of great political bodies divided by broad issues of policy rather than by sectional interests, and finally the existence of a mobile body of political opinion owing no permanent allegiance to any party, and therefore able by its instinctive reaction against extravagant movements on one side or the other to keep the vessel on an even keel." All these factors exist to-day in India, and they could be greatly developed and strengthened by suitable machinery. But the very scheme of representation in the Legislature, and of the selection of Ministers, is such as is likely to prevent the spread of these conditions and also to intensify forces which would make difficult, if not impossible, their further evolution. The Joint Committee states: "It must be recognized that if free play were given to the powerful forces which will be set in motion by an unqualified system of Parliamentary Government, the consequences would be disastrous to India and perhaps irreparable." Having regard to the extraordinary powers of the Governor, executive, legislative, and financial, it is hardly true to say that the Provinces

have true Responsible Government. Under Responsible Government, the constitutional head, after considering all other courses—dismissal of Ministry, dissolution of Legislature—has to accept the verdict of the electorate and to allow the Government to be conducted by those who have the confidence of the Lower House and the electorate. This very essence of Responsible Government is absent in the Provinces.

The Reforms of 1919 were designed as the first stage in the measured progress towards Responsible Government in the Provinces. The Government of India Act of 1935 is at best intended to set up a machinery which may facilitate its evolution. Its defenders assert that, having regard to the social conditions of the people and the need for the further growth of disciplined political parties and a mobile body of political opinion, the nature and form of Responsible Government in the Provinces cannot be different from what it is under this Constitution.

CHAPTER X

PROVINCIAL LEGISLATURES

1. Historical

The history of the Legislatures in the Provinces up to 1833 has already been given at the beginning of Chapter VIII.

The Charter Act of 1833 simplified the legislative machinery. The Governments of Bombay and Madras were drastically deprived of their powers of legislation and left only with the right of proposing to the Governor-General in Council projects of laws which they thought expedient. The Indian Councils Act of 1861 restored to Madras and Bombay the powers of legislation, but the previous sanction of the Governor-General was made requisite for legislation by local authorities in certain cases, and all Acts of the local Councils required the subsequent assent of the Governor-General in addition to that of the Governors. The Provincial Legislatures were merely enlargements of the Provincial Executive Councils, for the purposes of legislation.

By the Indian Councils Act of 1892, the Provincial Legislatures were enlarged but the official majority was maintained. Their extended functions were mostly advisory. By the Morley-Minto Reforms of 1909 the Provincial Legislatures were further enlarged up to a maximum limit of fifty additional members in the larger Provinces and up to thirty in the smaller,

and a non-official majority was introduced. The principle of election in an indirect manner was recognized. Communal representation was introduced for the first time. The Morley-Minto Councils, with powers to legislate and to advise, but with no effective administrative control, had been presided over by the head of the Provincial Executive himself, who exercised great influence over all deliberations. These Councils still embodied the idea that the Executive Government was responsible for the purpose of law-making. The Montagu-Chelmsford Report definitely stated that these Councils had exhausted their usefulness by 1918.

THE ACT OF 1919

By the Government of India Act, 1919, important changes were introduced in the composition and functions of the Provincial Legislatures. In the Governors' Provinces the Act set up a unicameral and triennial legislature called the Legislative Council. The President of the Council was elected after the first four years by its own members and approved by the Governor. At least 70 per cent of its members were elected, and not more than 20 per cent were official members. The franchise was broadened. Communal representation was not only recognized but further extended. The authors of the Montagu-Chelmsford Report expressed their opinion that communal electorates were opposed to the teachings of history, that they perpetuated class divisions, stereotyped existing relations, and constituted "a very serious hindrance to the development of the self-governing principle." Nevertheless, they admitted the necessity for its continuation and conceded it to the Sikhs in the Punjab. In all Provinces the constituencies were divided into Muhammadan and

Non-Muhammadan. The principle of communal representation was further supplemented by special arrangements for the reservation of seats for certain sections of population, such as non-Brahmins and Marathas. The depressed classes, apart from their right of voting in the non-Muhammadan constituencies, were given further representation by nomination. Nomination was resorted to in order to secure representation of the workers in organized industries. Separate electorates were provided for Indian Christians, Anglo-Indians and Europeans, and special seats were given to business interests, both Indian and European, to landlords and Universities. Thus the representation of the electorate for the introduction of Responsible Government was, strangely but truly, the representation of rival communities and different interests.

The powers of the Legislatures were enlarged. They were given powers to legislate "for the peace and good government of the Province subject to certain qualifications." But on a specified list of matters they could not legislate, even for their own territorial area, without the previous sanction of the Governor-General. Moreover, Bills passed by the Provincial Legislatures required the assent not only of the Governor but also of the Governor-General. Certain classes of Bills affecting religion, land revenue, etc., were to be reserved by the Governor for the consideration of the Governor-General. The Governor had the usual power of veto. He had also the power of "certification," which meant that if the Legislature refused to pass a Bill relating to a reserved subject the Governor could certify that its passage was "essential for the discharge of his responsibility for the subject." By so certifying

it the Bill was put in the same position as though it had actually been passed by the Legislature. An analogous power of overriding the unwillingness of the Provincial Legislature was placed in the Governor's hands in relation to finance. The Provincial expenditure was divided into non-votable and votable items. The former comprised nearly 75 per cent of the total Provincial expenditure. The Legislature had thus control over only 25 per cent of the expenditure, subject to the Governor's power of restoring an item of expenditure refused by the Legislature if that expenditure was essential to the discharge of his responsibility. Again the Governor had power in case of emergency to authorize expenditure necessary for the safety or tranquillity of the Province.

2. Constitution of the Provincial Legislatures under the Government of India Act, 1935

Under the Government of India Act, 1935, the Provincial Legislatures consist of the King, represented by the Governor, and one or two Chambers. Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, have each two Chambers known as the Legislative Council and the Legislative Assembly. The remaining Provinces: the Punjab, the Central Provinces and Berar, the North-West Frontier Province, Orissa and Sind, have each a single Chamber called the Legislative Assembly.[1]

For the first time a bicameral system of legislature is introduced in the Provinces. The question of introducing this system was carefully examined by Mr. Montagu and Lord Chelmsford and was rejected as both inexpedient and unnecessary in the Provinces.

[1] S.60.

The case for it is not convincing. Second Chambers have been established in six Provinces on the ground that there is enough material for their establishment. It is also stated that, in view of the enlarged powers of the Provincial Legislatures, it was necessary to create a Second Chamber to secure the representation of vested interests. The revising Chamber is said to be needed in case the Provincial Legislature, in the exercise of its newly acquired powers, should pass hasty and rash legislation. Indian public opinion was entirely opposed to the establishment of a Second Chamber in the Provinces on the ground that the special responsibilities and extraordinary powers of the Governor made ample provision for safeguarding against hasty and rash legislation. It is also asserted that Second Chambers will be impediments to progress, that they will act as citadels of conservatism and reaction and will prevent progressive social legislation, that they are intended to be not only a brake but an impediment to democracy in the Provinces. It is also stated that the Provinces do not possess enough men of the requisite qualifications to fill both Houses. The reply made to these arguments is that "In India, embarking upon a new career of responsible legislative power, there is everything to be said, where material for such Chambers exists, for establishing such Chambers for the purpose of revision and the encouragement of prudent legislation and to resist imprudent legislation at all events, giving the other Chamber the opportunity of second thought. It is not to entrench privilege or afford merely one more tiresome check upon the opportunities in India to adopt a progressive policy."[1]

[1] Viscount Halifax (*House of Lords Debates*).

It has been stated that the function of the Second Chamber in the Provinces is only revisory and delaying. It is only a ventilating Chamber. Its financial powers are neither co-ordinate nor co-equal with those of the Assembly. The original proposal was to establish a Second Chamber in three Provinces in which only the Zamindari system prevails, but three more were added subsequently. The Punjab is excluded from the bicameral system. The reason why the Punjab is excluded is that the majority opinion in that Province (Muslim) is against the establishment of a Second Chamber. It is contended that, having regard to the high property qualifications of the voters, the communal basis of election, and the small size of the Chamber, it is only an unwanted institution involving the already overburdened exchequer of the Provinces in unnecessary additional expenditure.

COMPOSITION OF THE LEGISLATIVE ASSEMBLIES

The Legislative Assemblies[1] of the Provinces are composed as follows: Madras 215 members, Bombay 175, Bengal 250, the United Provinces 228, the Punjab 175, Bihar 152, the Central Provinces 112, Assam 108, the North-West Frontier Province 50, Orissa 60, and Sind 60.

All members of the Assembly are elected. The electorate in every Province is divided into different communities and interests. It is formed in accordance with the terms of the Communal Award given by the British Government on August 4, 1932,[2] as modified

[1] S. 61 and Sch. 5, Appendix D.

[2] During the session of the Round Table Conference in London, the representatives of the various communities failed to reach an agreement as to the composition of the proposed Provincial Legislatures, principally because of a radical divergence of opinion on the vital question of separate electorates and the distribution of communal seats. As they failed to reach an agreement, they requested the Prime Minister to decide the question. Pursuant to

by the Poona Pact and by the creation of the new Province of Orissa. The Communal Award has in every Province assigned a definite number of seats to Muhammadans, Sikhs, and Indian Christians. The Poona Pact has secured the representation of the depressed classes, now officially known as scheduled castes,[1] in all Provinces. The scheduled castes vote in a specified manner which is intended to preserve the unity of the Hindu society and to secure adequate representation for them. The members of the scheduled castes in the registered electorate meet in primary elections and choose four candidates for each vacancy reserved for them, and the candidate who is given the first place in voting by the general electorate is elected for the seat. Thus in all Provinces there are seats assigned to Hindus (known as general seats and including those reserved for the scheduled castes), to small communities like the Parsis, to Muhammadans, to Sikhs in the Punjab and the North-West Frontier

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that request, His Majesty's Government issued the Communal Award on August 4, 1932, by which the seats in the Provincial Legislatures are distributed among the various communities with the object of securing adequate representation of the minority communities. It is not to be altered unless the alteration is desired by the communities themselves, but no such alteration can be made without the specific consent of Parliament. The provision in the Award for the representation of the depressed classes was not acceptable to the Hindu community, as it was likely to destroy the unity of the community. In response to a protest made by Gandhiji, the Poona Pact was signed and its terms were given effect by the modification of the Award to that extent. The modified terms are intended to preserve the unity of the Hindu community. The Communal Award has been subject to much criticism by the Hindu Mahasabha and Hindus of Bengal.

[1] The number of the scheduled castes in the nine Provinces is as follows:—

Madras 74, Bombay 35, Bengal 76, the United Provinces 60, the Punjab 27, Bihar 14, the Central Provinces 39, Assam 20, Orissa 43.

These castes are scheduled castes throughout the Provinces.

Province, to Europeans, Anglo-Indians, Indian Christians, and to representatives of commerce, industry, mining, and planting except in the North-West Frontier Province. Seats for women are provided in most Provinces. A seat is specially provided for an Anglo-Indian woman in Bengal, for a Sikh woman in the Punjab and for a Christian woman in Madras. The total number of seats in all the Provincial Legislatures is 1,535, of which the Hindus have 808, including 151 reserved for the scheduled castes, the Muhammadans have 482, and women have 41.

In Bengal where the Muhammadans have 117 seats and a few others under different heads, a Muhammadan majority is assured. In the Punjab the Muhammadans have 84 seats and the Sikhs 31 out of the 175. In the North-West Frontier Province, the Muhammadans have 36 seats out of 50, and in Sind they have 33 out of 60. In other Provinces, the Hindus have a majority.

COMPOSITION OF THE LEGISLATIVE COUNCILS

The composition of the Legislative Councils in the six Provinces is as follows: In Madras the minimum number is 54 and the maximum 56. In Bombay, the number is 29 to 30; in Bengal 63 to 65; in the United Provinces 58 to 60; in Berar 29 to 30; in Assam 21 to 22. Details are given in Appendix D.

PROVINCIAL FRANCHISE

The new Constitution is based on a broad franchise. Under the Act of 1919, there were initially 8,744,000 voters, of whom 398,000 were women, representing in all only 3 per cent of the total population. The Simon Commission recommended the enfranchisement of not less than 10 per cent of the total population. The First Round Table Conference favoured the enfranchisement of the people up to

25 per cent of the population. The Second Round Table Conference appointed a Franchise Committee, and it is on its findings that the arrangements for the franchise are based. The franchise is now a wide one, and the object is to give the vote to 14 per cent of the population—29,000,000 males and 6,000,000 females.

For the Provincial Assemblies provision for franchise is partly made in the Act, supplemented by an Order-in-Council issued on April 30, 1936. It is based on the findings of the Delimitation Committee.

There are territorial constituencies for the purpose of elections, with General (Hindu), Muhammadan, Women's, Anglo-Indian, European, and Indian Christian seats. On the findings of the Delimitation Committee an electoral roll is prepared for each constituency, and the persons belonging to the special classes are enrolled in these and are excluded from the general constituency. No person can vote at a general election in more than one territorial constituency. An exception is made in the case of some women.

In the Bombay Presidency, the distribution of seats is as follows: General 105, Muhammadan 29, Women 6, Anglo-Indian 2, European 3, Indian Christians 3, Commerce and Industry 7, Landholders 2, Labour 7 and University 1. Out of 175 seats, 92 are rural and 83 are urban. This distribution is meant to secure an adequate representation of the rural areas.

Territorial constituencies on similar lines are also provided for the Councils. Assignment to a territorial constituency is based on residence, but the nature and length of residence varies from Province to Province. (Bombay requires 180 days' residence.)

The qualification for the franchise in territorial constituencies is based on property, which may be measured by land revenue, or conditions of agricultural tenancy, by assessment to income tax, and in the case of towns by the amount of rent paid. These conditions vary in detail in each Province, but attempts are being made to secure the same types of voters in all Provinces. These conditions are supplemented by special qualifications to secure the adequate representation of women and depressed classes. Approximately 10 per cent of the depressed classes are enfranchised. Special qualifications are prescribed for the voters of the non-territorial constituencies: Commerce and Industry, Landholders, Labour, and Minorities. In additions, all officers, non-commissioned officers, and members of the Indian forces and police forces are given the vote if on pension or retired.

WOMEN

In general, women who have property qualifications are enfranchised in their own right. Wives or widows of men so qualified for voting, or wives of men with a service qualification, or pensioned widows or mothers of members of the military or police forces, or women possessing a literacy qualification, are all enfranchised. If a woman does not hold the qualification in her own right, she has to make an application for enrolment.

SESSIONS OF THE LEGISLATURE: PROROGATION AND DISSOLUTION

The Assembly, unless sooner dissolved, continues for five years. The Council is a permanent body, one third of its members retiring every third year. Both Chambers have to hold annual sessions. The interval between the two sessions of the Chamber should not extend beyond six months. The Governor may in his discretion summon either

Chamber or both, prorogue them, or dissolve the Assembly. He may address the Legislative Assembly or both Chambers, and may for that purpose require the attendance of the members. He may send to them a message on pending Bills or other matters. The Chamber has to consider the matter referred to in the message without delay. Ministers and the Advocate-General may speak in the Chamber or Chambers, or in the joint sittings, and take part in the proceedings, but may only vote if elected or nominated a member. Every Chamber selects its Speaker and Deputy Speaker from amongst its members. The Speaker or Deputy Speaker vacates his office if he ceases to be a member of the Chamber. He may resign his office, but may be removed only by a vote of the majority of all members on at least fourteen days' notice. On the dissolution of the Chamber the Speaker does not vacate his office until immediately before the first meeting of the new Assembly. The salaries of the Speaker and the Deputy Speaker are fixed by the Governor till they are fixed by the Legislature.[1]

OFFICERS OF CHAMBERS

VOTING IN CHAMBERS

All questions in the Chamber or in joint sittings of the two Chambers are determined by a majority of votes of the members present and voting, other than the Presiding Officer, who has only a casting vote. The Speaker or Presiding Officer has to adjourn or suspend a meeting if less than one-sixth of the members of the Assembly are present, or if during a meeting of the Council less than ten persons, who constitute a quorum, are present. In the joint sittings, the President of the Council presides.[2]

[1] Ss. 62 to 65. [2] S.66.

PROVISIONS AS TO MEMBERS OF THE LEGISLATURE

Members must be British subjects or Rulers of States or subjects of the Federated States. Every member has to take an oath of affirmation of loyalty or allegiance to the King before he takes his seat. A member may resign his seat. No person can be a member of both Chambers. If a person is chosen by both Chambers, he has to resign from one of them. No person may be a member of the Federal as well as of the Provincial Legislature. The Provincial seat becomes vacant at the expiration of a prescribed period unless he has resigned his seat in the Federal Legislature. The seat of a member becomes vacant if he resigns it or becomes subject to any of the prescribed disqualifications, which are: (1) holding of an office of profit under the Crown; (2) unsoundness of mind declared by a competent Court; (3) undischarged bankruptcy; (4) conviction of offences in connection with elections; (5) conviction in British India or a Federated State of an offence punished by transportation or imprisonment for not less than two years, unless five years have elapsed since release; and (6) failure in certain cases to return electoral expenses. No person serving a sentence of transportation or of imprisonment for a criminal offence can be chosen. If a disqualified person sits and votes he has to pay a penalty of Rs. 500 for each day on which he has done so, which is recoverable as a debt due to the Province.[1]

PRIVILEGES OF MEMBERS

With the object of enabling the members to express their opinion freely and fearlessly on all issues in the Legislature they are given

[1] Ss. 67 to 72. The provisions as regards all the topics dealt with hereafter are similar to those in the Central Legislature. For details and criticism see Chapter VIII.

certain valuable privileges. Subject to the rules and standing orders regulating procedure, freedom of speech is assured to members in each Chamber. No member is liable to any proceedings in any court for anything said or any vote given by him, and no person is liable for the publication by the order of a Chamber of any report, paper, votes or proceedings. Till other privileges are defined by the Legislature, the members are to enjoy all the privileges of the members of the former Legislature. Each Chamber has the right of removing or excluding persons infringing the rules or standing orders or otherwise behaving in a disorderly manner.

Members receive such salaries and allowances as may be fixed by the Legislature, and till these are so fixed they are to be the same as in the former Legislature.

PROCEDURE IN FINANCIAL MATTERS

The Governor is required to lay before the Legislature the annual financial statement of the estimated receipts and expenditure showing separately the sums charged on the revenues of the Province, and sums required to meet other expenditure proposed to be made from Provincial revenue. Expenditure necessary for the discharge of any of the Governor's special responsibilities is also to be distinctly indicated.

The items of expenditure charged on the revenues of the Province and which are non-votable are: (1) Governor's salary and allowance; (2) debt charges; (3) the salaries and allowances of Ministers, the Advocate-General, and judges of the High Court; (4) expenditure for excluded areas; (5) sums necessary to satisfy any judgment, decree or award of court; (6) any other expenditure charged by the Act. The Governor in his discretion decides whether any pro-

posed expenditure is to be so charged or not. Except the sum for the salary and allowances of the Governor, which is not subject to discussion, the other items of this expenditure may be discussed by the Legislature but they are not votable by it. Expenditure not so charged is votable and must be submitted to the Legislative Assembly in the form of demands for grants. The Assembly may assent or refuse or reduce the amount. Only the Governor can recommend the expenditure.

The Governor authenticates by signature a schedule of grants made, sums charged on the revenues of the Province, and also grants refused or reduced by the Assembly but included by him to enable him to discharge any special responsibility. The authenticated schedule must be presented to the Assembly, but it is open neither to discussion nor vote. It forms the authority for the expenditure for the year. The Governor may submit a supplementary statement for additional expenditure when necessary.

The Legislature has no initiative in the case of a Bill or amendment for imposing or increasing taxation, regulating the borrowing of money, giving a guarantee affecting financial obligations undertaken or to be undertaken by the Province, or charging any expenditure on Provincial revenues or increasing its amount. The Governor has the initiative in recommending such a Bill, but it cannot be introduced in the Legislative Council. No Bill involving expenditure of Provincial revenues may be passed by the Legislature except on the Governor's recommendation. Special security is provided for the expenditure on European and Anglo-Indian education.[1]

[1] Ss. 78–83.

PROCEDURE GENERALLY

The Provincial Legislature regulates its own procedure and business. The Governor in his discretion, after consultation with the Speaker, makes rules regulating the procedure and the conduct of business in matters arising out of or affecting any of his special responsibilities. He makes rules for securing the timely completion of financial business, prohibiting discussion or questions on any matter connected with any Indian State unless in his opinion it affects the interest of the Provincial Government or of a British subject resident in the Province. He may make rules prohibiting save with his permission discussion or questions on matters connected with the relation between the King or the Governor-General and any foreign State or Prince, with tribal areas or excluded or partially excluded areas, or with the personal conduct of the Ruler of any Indian State or a member of the ruling family. The Governor also makes rules for joint sittings of the Chambers and communications between them. The Courts have no jurisdiction to question the validity of any proceedings in the Legislature on the ground of any alleged irregularity of procedure. Similarly, no officer or member of the Legislature in whom powers are vested for regulating procedure or the conduct of business or maintaining order in the Legislature is subject to the jurisdiction of any court in respect of the exercise by him of those powers.[1]

All proceedings in the Provincial Legislature are to be in English, but the rules allow persons unacquainted, or not sufficiently acquainted, with English to use another language.

[1] Ss. 84–87.

LEGISLATIVE PROCEDURE

A Bill other than a financial Bill may originate in either Chamber. A pending Bill does not lapse on the prorogation of the Chamber or Chambers. A Bill pending or passed by the Assembly but pending in the Council lapses on the dissolution of the Assembly. In Provinces with two Chambers, a Bill requires the assent of both Chambers to become law. If a Bill is not presented to the Governor for his assent within twelve months after it has been sent from one Chamber to another, the Governor may in his discretion call a joint sitting, and he may do so within a shorter period if the Bill relates to finance or a matter of his special responsibility. If the Bill is passed by a majority at a joint sitting, it is deemed to have been passed by both Chambers. When a Bill has been passed by a Chamber or Chambers it must be presented for assent to the Governor. He may assent to it in the name of the King, or withhold his assent, or reserve the Bill for the consideration of the Governor-General. He may return it with a message to the Chamber to reconsider it with amendments. If a Bill is repugnant to an Imperial Act, or is derogatory to the position of the High Court, or affects the Permanent Settlement, or appears to provide for discrimination, it has to be reserved. The Governor-General may assent to a reserved Bill, or refuse assent, or reserve the Bill for the signification of the King's pleasure, or direct the Governor to return it with a message for reconsideration. A Bill reserved becomes an Act only if within twelve months of its presentation to the Governor he publishes the assent of the King. An Act assented to by the Governor or Governor-General may be disallowed by the King within twelve months, and if

it is disallowed it becomes void from the date of disallowance.

No discussion is allowed with respect to the conduct of a judge of the Federal Court or of a High Court in discharge of his duties. The Governor has power to prevent discussion of any Bill, clause or amendment which is likely to affect the discharge of his responsibility for the peace or tranquillity of the Province.

The members of the Chamber or Chambers have the right of asking questions and also supplementary questions on public matters. They have also the right to move resolutions on any matters falling within the sphere of the Legislature. These rights are exercised with a view to acquainting the Executive with the opinion and feeling of the members on the policy and action of the Government. The members have also the right of moving a motion for adjournment whenever they wish to draw attention to an event of recent occurrence or to any matter of public interest which has arisen suddenly. A regular procedure is laid down for the exercise of this right.[1]

POWERS OF GOVERNOR TO PROMULGATE ORDINANCES DURING RECESS OF LEGISLATURE

The Governor is given emergency powers as regards legislation. He may at the instance of his Ministers, when the Legislature is not in session, if satisfied that circumstances exist which require immediate action, issue an ordinance. The Governor must use his judgment as regards promulgating an ordinance, if a Bill containing the same provisions would have required his or the Governor-General's prior sanction before being introduced into the Legislature. He

[1] Ss. 73–77.

must not without the Governor-General's sanction issue an ordinance which, if it had been a Bill, could only have been introduced with the Governor-General's sanction or must have been reserved. An ordinance has the same force and effect as an Act of the Legislature. It must be laid before the Legislature when it meets, and it lasts only for six weeks unless disapproved earlier by resolution of the Chamber or Chambers. It may be disallowed by the Crown, and may be withdrawn by the Governor at any time.[1]

POWER OF GOVERNOR TO PROMULGATE ORDINANCES AT ANY TIME WITH REGARD TO CERTAIN MATTERS

The Governor may also, under similar circumstances in matters involving his discretion or individual judgment, issue an ordinance having a duration of six months but capable of being extended for a further period of six months. It may be disallowed by the Crown or withdrawn by the Governor. If it is an extended ordinance it must be communicated through the Governor-General to the Secretary of State and laid before Parliament. This power of issuing ordinances must only be used with the concurrence of the Governor-General except in emergency. If it is issued without the concurrence of the Governor-General, he may direct the Governor to withdraw it.[2]

GOVERNOR'S POWERS TO ENACT ACTS

The Governor, if he thinks that provision by legislation is necessary for the proper discharge of the functions which are in his discretion or judgment, may, with the concurrence of the Governor-General, issue permanent Acts known as Governor's Acts either forthwith or

[1] S. 88. [2] S. 89.

after considering the views of the Legislature. Every Governor's Act must be communicated forthwith through the Governor-General to the Secretary of State and laid before Parliament. This is a new power given to the Governor.[1]

3. Excluded Areas and Partially Excluded Areas

In the whole of British India, there are certain communities inhabiting certain districts which are politically backward. It is believed that these backward people will be victimized if an attempt is made to impose upon them institutions which, while they may be suitable for more advanced peoples, will do nothing but lead to their exploitation. It is recognized that there is reason to fear that they may become subject to criminal and civil codes, and all that is connected with them, which, while they may be admirable for advanced communities, are extremely dangerous and injurious to these backward races. These districts are accordingly specified and defined by Order in Council issued on March 3, 1936, and they are withdrawn from Parliamentary institutions. They do not cover the whole of the backward peoples of India, but they do cover those populations which are self-contained. These enclaves are classified, on the basis of their backwardness, as excluded and partially excluded areas. Where they are so backward that Parliamentary institutions or legislation ought not to apply to them, they are classed as excluded areas, and are placed under the direct administration of the Governor. In the second category are placed those which are less backward and to which certain laws

[1] S. 90.

might from time to time be applied, but only with the Governor's previous assent. The Governor has a special responsibility for the administration of these areas.

The Act provides that the King may by Order in Council direct that the whole or part of an excluded area shall become part of a partially excluded area, or that the whole or part of a partially excluded area shall cease to be excluded; alter any such area by the rectification of its boundaries; and on any alteration of the boundaries of a Province, or the creation of a new Province, declare any area not previously included in the Province to be excluded or partially excluded. The original exclusion of areas cannot be varied by any subsequent Order.[1]

The Governor is given special powers as regards these areas. The Executive authority of the Province extends to them, but in the case of excluded areas, the Governor exercises his functions in his discretion, while in the case of partially excluded areas, he does so with the advice of Ministers in his individual judgment. No Federal or Provincial Act will apply to them save under public notification by the Governor, who may provide for such exceptions or modifications of the Act as he thinks fit. Moreover, the Governor may make regulations for the peace and good government of any of these areas, and may repeal or amend any Federal or Provincial Act, or any existing Indian law, applicable to these areas. These regulations must be submitted at once to the Governor-General, and they shall have no effect until assented to by the Governor-General in his discretion.[2]

[1] S. 91. [2] S. 92.

4. Provisions in Case of Failure of Constitutional Machinery

The Governor is given special powers in case of failure of constitutional machinery. If he is satisfied that a situation has arisen in which the government of a Province cannot be carried on under the Act, he may in his discretion, with the concurrence of the Governor-General, issue a proclamation declaring that his functions to such extent as may be specified in the proclamation shall be exercised by him at his discretion, and assuming to himself all or any powers exercisable by any Provincial body or authority. To give effect to it he may modify the Act as far as it affects any Provincial body or authority, except the powers vested in and exercisable by the High Court. Any such proclamation may be revoked or varied by subsequent proclamation. It must be communicated forthwith to the Secretary of State and laid before both Houses of Parliament. It ceases to operate after six months unless both Houses of Parliament approve its continuance. In that case it shall remain in force for a further period of twelve months, but in no case will it remain in force for more than three years. Laws made by the Governor under the proclamation have effect for two years after its expiry, subject to its repeal or amendment by the appropriate Legislature.[1]

[1] S. 93.

CHAPTER XI

THE CHIEF COMMISSIONERS' PROVINCES

The territories of British India which are not included in the Governors' Provinces are governed directly by the Governor-General through his Agents known as Chief Commissioners. These territories are described in the Act as Chief Commissioners' Provinces, and they are included as units of the Federation. Most of these areas are of strategic or political significance or importance.

The Chief Commissioners' Provinces are British Baluchistan, Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands, the area known as Panth Piploda, and such other Chief Commissioners' Provinces as may be created under the Act.[1]

Every Chief Commissioners' Province is administered by the Governor-General acting through a Chief Commissioner appointed by him in his discretion.

In directing and controlling the administration of British Baluchistan, the Governor-General has to act in his discretion. It is under the executive authority of the Federation like the other Chief Commissioners' Provinces, but no Federal Act shall apply to this territory save under public notification by the Governor-General, who may provide for such exceptions and modifications of the Act as he thinks fit. The Governor-General is also empowered at his discretion to make regulations having the force of law for the

[1] S. 94.

peace and good government of the territory, which may supersede or modify any Federal Act or any existing Indian law applicable thereto. Such regulations and modifications are subject to disallowance by the Crown as in the case of an Act. The Governor-General has similar powers and authority to make regulations for the Andaman and Nicobar Islands.[1]

In Coorg, the existing Legislative Council and the financial arrangements are to continue unchanged until altered by the King in Council.[2]

The rules applicable to Governors' Provinces as regards police regulations, the prevention of crimes of violence, and restrictions on the disclosure of documents and information, apply also to the Chief Commissioners' Provinces, but in relation to the latter the Governor-General and the Federal Legislature take the place of the Governor and the Provincial Legislature[3].

Aden ceases to be part of British India,[4] and its government is regulated by Order in Council made on September 26th, 1936.

The Order provides for appeal from Courts in Aden to the High Court of Judicature at Bombay, and also for the expenses for this service to be paid to the High Court as the King in Council may determine. It also regulates as regards Aden for appeals from the Bombay High Court to the Privy Council. Property held by the Government in Aden is vested in the Crown for the purposes of that territory.

[1] Ss. 95 and 96. [2] S. 97. [3] S. 98.
[4] S. 288.

CHAPTER XII

DISTRIBUTION OF POWERS

Under the Act of 1919, the real nature of the Indian Government was unitary. The Central Legislature had the legal power to legislate on any subject even though it was classified by the Government of India Act as a Provincial subject, and the Provincial Legislature could similarly legislate for its own territory on any subject even though it was classified as a Central subject. An Act of each Legislature, Central or Provincial, required the assent of the Governor-General. That assent having been given, the validity of any Act of any such Legislature was not open to question in any legal proceedings on the ground that the Act affected a Provincial subject or a Central subject.

THE SCHEME OF DISTRIBUTION OF POWERS IN THE ACT

The essence of Federalism is the distribution of powers between the Federal Government and the Federating Governments. The principle of the Act of 1935 is the statutory allocation of exclusive powers to the Federal Government and the Provinces. This marks a fundamental departure. The establishment of Federation and the grant of Provincial Autonomy have necessitated the statutory allocation of exclusive jurisdiction to the Centre and the Provinces respectively. The principle of distribution of powers followed in other Constitutions has been to specify exhaustively the subjects allotted

to one Legislature, and to assign to the other the whole of the unspecified residue. In the Federations of Australia and the United States, powers which are not given to the Centre are reserved to the States or Provinces, that is to say, the States or Provinces have the residuary legislative powers. In Canada, the Centre and the Provinces have only specific powers and the residuary power is with the Centre. In the Indian Federation, the scheme of distribution of powers is two-fold. There is one scheme as regards the Federation and the British Indian Provinces and a quite different scheme as regards the Federation and the States. As regards the Federation and the British Indian Provinces, these powers are specified in three lists which represent the allocation by enumeration of the functions of legislation, including taxation, to rival Legislatures. The Federal List consists of fifty-nine subjects, the Provincial List of fifty-four subjects, and the Concurrent List of thirty-six subjects of which twenty-six are in Part I, and eleven in Part II. Thus the subjects of legislative activity are enumerated under 149 heads. The Legislative Lists are given in Appendix E.

This method of distribution of powers by allocation covering the whole field of legislation by specific enumeration is without parallel. It was urged that this method will lead to endless litigation and disputes. It was pointed out, however, that it was in consequence of the existence of two sharply opposing schools of thought in India on the subject—one favouring the enumeration of Federal powers, the other only that of Provincial powers, leaving the residue to the Provinces and the Federation respectively—that the compromise of the specific enumeration of their

respective powers was adopted.[1] Under the Act there are three lists: (1) the Federal List, (2) the Concurrent List and (3) the Provincial List. The enumeration of subjects in the three Lists is so elaborate, careful, and exhaustive that the residue is almost negligible. But even so it is beyond the wit of man to provide for all possible contingencies, and provision is accordingly made for the residual power of legislation which is to be assigned by the Governor-General, acting in his discretion, to the Centre or to the Provinces as he may think right. In doing so, he is directed to seek the advisory opinion of the Federal Court. Thus

[1] The reasons for providing three Legislative Lists in the case of India are given by Sir Samuel Hoare in these words: "If it had been possible to have one List, we should have been glad, but unfortunately in my opinion, for these Indian problems, when we came to apply to the actual facts what we desire, we found it to be impossible. We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant power in the Centre, and the Mussulmans who wish to keep the predominant power in the Provinces. The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field, the Hindus demanding that the residuary field should remain with the Centre, and the Mussulmans equally strongly demanding that the residuary field should remain with the Provinces.

"My Hon. friend will believe me when I say that the feeling was very deep and very bitter on this issue. We tried . . . to bridge the difference, but the only bridge that we could find between the two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the Concurrent List. Each is as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field. I believe we have succeeded in that attempt, and that all that is likely to go into the residuary field is perhaps some quite unknown sphere of activity that neither my Hon. friend nor I can contemplate at this moment. We find that we have already exhausted the ordinary activities of Government in these three lists. I agree with my Hon. friend that it means complications. I believe that it also means the possibility of increased litigation. I very much regret that that is so, but I would say . . . that in view of the very strong and bitter feeling that is in India on the subject, this is the only way to deal with the difficulty." (*House of Commons Debates.*)

the scheme of the Indian Federation differs from that of other Federal Constitutions.

The Federal List comprises subjects which are essential and vital for the existence of the Federation. They are also subjects which concern India as a whole, and which require uniform treatment. The Provincial List comprises subjects which are essentially of a Provincial nature, and in which the Provinces are vitally interested. The Concurrent List contains subjects which are essentially of Provincial interest, but which require uniform treatment and co-ordination throughout India. Having regard to the system of legislation prevalent in India till now, the importance of the Concurrent List cannot be over-stated. It is also to be remembered that the different Provinces of India are in many matters not equally advanced; hence the importance of the Concurrent field, which enables the Federal Legislature to legislate while leaving sufficient freedom to the Provincial Legislature to vary Federal legislation to suit the Province, can hardly be doubted. This provision may open a fruitful field for litigation, but under the circumstances it is nevitable.

As regards the Federation and the States, there is only one list, that is to say, the Federal Legislative List. It is to be noted that in this list only those items are Federal which are accepted by the States as Federal by their respective Instruments of Accession, with all the limitations and reservations contained therein. There is no other list, as the whole of the residuary power is reserved to the States.

The power of the Federal Legislature, or its legislative competence, extends to making laws for the whole or any part of British India or of any Federated

State, and that of the Provincial Legislature to making laws for the Province or any part thereof.[1] Federal Acts may have extra-territorial operation with respect to (*a*) British subjects and servants of the Crown in any part of India; (*b*) British subjects domiciled in any part of India wherever they may be; (*c*) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; (*d*) in the case of a matter on which the Federal Legislature will legislate for the State, to the subjects of that State wherever they may be; (*e*) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be.

As already noted, the Constitution provides three lists for the subject-matter of Federal and Provincial laws, covering the whole known sphere of Government activities.[2] Provision is also made for the residual powers.

The Federal Legislature alone has power to make laws as regards matters in the Federal List. It is to be noted that the legislative competence of the Federal Legislature as regards the States is strictly restricted to the matters accepted by the Instrument of Accession of the State concerned.[3] The Federal Legislature and the Provincial Legislatures have concurrent powers to make laws on matters in the Concurrent List. The Provincial Legislature alone has power to make laws on matters in the Provincial List. The Federal Legislature can legislate on matters in the Provincial List except for a Province or any part thereof. However, if the Governor-General in his discretion declares by proclamation that a grave emergency exists whereby

[1] S. 99. [2] S. 100 (7th Schedule). See Appendix E. [3] S. 101.

the security of India is threatened, whether by war or internal disturbance, the Federal Legislature has power to make laws for a Province with respect to matters in the Provincial List. Thus the Federal Legislature may invade the field of the Provincial Legislature. But no Bill or amendment for this purpose shall be introduced without the previous sanction of the Governor-General given in his discretion, and before giving his sanction the Governor-General must satisfy himself that the proposed provision is proper. The Provincial Legislature is not debarred from legislating, but if Provincial legislation prior or subsequent to Federal legislation is repugnant to the Federal legislation, the latter shall prevail during its operation. The proclamation of emergency may be revoked by subsequent proclamation by the Governor-General. It must be communicated to the Secretary of State forthwith, and shall be laid before both Houses of Parliament, and ceases to operate at the end of six months, unless approved within that period by resolutions of both Houses of Parliament. Any such Federal law expires six months after the expiry of the proclamation of emergency.[1] Such a power is absent in the American, Canadian, and Australian Constitutions, except during war, when the Federation may legislate for the units on matters on which it cannot do so during peace. With all the devolution under the Act of 1935, the ultimate responsibility of the Governor-General to the Secretary of State for the peace and tranquillity of British India remains, and with a view to enabling him to discharge his responsibility, this power is given to the Federation. It is a legacy of the pre-Federation Constitution.

[1] S. 102.

The Federal Legislature may pass an Act for regulating any Provincial subject for two or more Provinces at the request of the Chambers of those Provinces expressed in resolutions to that effect. Such a Federal Act may be amended or repealed by the Provincial Legislatures.[1]

RESIDUAL POWERS

The residual power of legislation is given to the Governor-General. The Governor-General in his discretion may by notification empower either the Federal Legislature or the Provincial Legislature to enact a law on any subject-matter not enumerated in any of the three lists, or impose a tax not mentioned in them, and unless as otherwise directed, the executive authority of the Federation or of the Province, as the case may be, extends to the administration of any law so made.[2] The three lists, as already stated, are so comprehensive and exhaustive as to render the aid of this provision unnecessary. Before allocating such a subject, the Governor-General has to satisfy himself that it is not already included in the lists, and he may seek the advisory opinion of the Federal Court. Before granting his previous sanction to the introduction into the Federal Legislature of any Bill or amendment relating to a matter in the Concurrent List, the Governor-General should see that the Governments of the Provinces which will be affected by any such measure are duly consulted upon a proposal or proposals involving any burden on the revenues of the Province.[3] When giving his assent to a Provincial law on a matter in the Concurrent List reserved for consideration on the ground of repugnancy to the Federal law, the Governor-General has to have due regard to the

[1] S. 103. [2] S. 104. [3] Draft Instrument of Instructions, XXV.

importance of preserving substantially the broad principles of those codes of law through which uniformity of legislation has hitherto been secured.[1]

RESIDUAL POWERS AS REGARDS THE STATES

It is to be clearly noted that the question of residual powers refers to the Federal Legislature legislating for British India in relation to the Provinces, and for British India alone. As the whole field of legislative activity is mapped out in the three lists between the Federation and the Provinces of British India, a doubt may arise as to whether a subject unenumerated in either list falls within the Federal list or the Provincial list or the Concurrent list. To resolve this doubt, provision is made for the residuary power. As regards the States, there is only one list, that is to say the Federal List. There is no State List. Unlike in British India, the whole field of legislative activity is not mapped out. What is mapped out is only the Federal sphere with respect to every State. The residue rests entirely with the States. Hence, the question of residuary powers as between the Federal Legislature and the States does not arise. In other words, all powers not expressly conceded by the States to the Federation are expressly reserved to the States.

The Federal Legislature may by its Act apply the Naval Discipline Act to the Indian naval forces, subject to such modifications as may be made by the Federal Act to adopt the provisions of the Imperial Act to Indian circumstances, and to such changes as may be made by the King in Council to regulate the relation of British forces and ships to those of India. But if the Indian forces and the ships of the Indian Navy are placed at the disposal of the Admiralty

[1] Draft Instrument of Instructions, XXVI.

the Naval Discipline Act shall have effect without any modifications or adaptations.[1]

The Federal Legislature, even if the subject is in the Federal List, has no power to give effect to international legislation or the implementing of treaties and agreements with foreign countries in relation to the Provinces or States without the previous consent of the Governor of the Province or the Ruler of the State affected.[2] Any such Federal Act may be repealed by the Federation, or, when the treaty or agreement ceases to have effect, by the Province or the State. This restriction applies only where the subject-matter is not otherwise included in the Federal authority, exclusive or concurrent.

PROVISIONS AS TO REPUGNANCY

The very existence of the three lists defining the jurisdictions of the Federal and the Provincial Legislatures makes it necessary to provide for cases of repugnancy or inconsistency between the Federal law and the Provincial law.

If a Provincial law is repugnant to a Federal law which the Federal Legislature is competent to enact or to any existing Indian law on a matter in the Concurrent List, the Federal law either previous or subsequent to the Provincial law shall prevail, and the Provincial law, to the extent of the repugnancy, is void. In the Concurrent List the general precedent that a Federal law supersedes a Provincial law is not given full effect. On the Concurrent subjects, a Federal law or a Central law normally overrides a Provincial law. But if the Provincial law is reserved for the Governor-General or for the Crown and has received assent, it prevails over prior legislation, but the Federal Legislature may with the previous sanction

[1] S. 105. [2] S. 106.

of the Governor-General in his discretion enact further legislation on the matter.

It is to be noted that under the Act as regards all items accepted by the State as Federal, both the Federal Legislature and the States have concurrent power to legislate. This means that the laws of the Federal States and their right to legislate on the items accepted by them as Federal continue in force till the Federal Legislature enacts a law in respect of them.

If a State law is repugnant to a Federal law which extends to that State, whether passed before or after the State law, it is void to the extent of the repugnancy, and the Federal law shall prevail.[1] This provision is necessary because, unlike the Provinces, the States are competent to legislate for their territories even on a subject accepted by them as Federal.

[1] S. 107.

CHAPTER XIII

LEGISLATIVE COMPETENCE OF INDIAN LEGISLATURES

The Federal Legislature is a non-sovereign law-making body. It has no constituent powers. The power of the Imperial Parliament to legislate for British India is in no way affected by the Act of 1935.[1] This power was unequivocally asserted in the Preamble to the Act of 1919, which is not repealed though the Act itself is repealed. Positively the British Parliament can legislate for British India, and negatively the Federal Legislature is absolutely prohibited from legislating on certain subjects. Certain absolute restrictions are imposed on the legislative competence of the Federal Legislature. The Federal Legislature is not competent, firstly, to make any laws affecting the Sovereign or the Royal Family, or the Succession to the Crown or the sovereignty, dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of Prize or Prize courts; secondly, to amend the Constitution Act itself except in so far as is expressly permitted by the provisions of the Act; thirdly, to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal to the Privy Council from any Court. The right of appeal to His Majesty is a prerogative right, but it has been negatived

[1] S. 110.

by the Irish Parliament and the Canadian Legislature acting under the Statute of Westminster; statutory provision has therefore been made to preserve this right.

Restrictions are also imposed on the law-making power of the Legislature.[1] The consent of the Governor-General given in his discretion is required for the introduction in the Federal Legislature of legislation which (*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; (*b*) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor; (*c*) affects matters in which the Governor-General is required to act in his discretion; (*d*) repeals, amends or affects any Act relating to any police force; (*e*) affects the procedure for criminal proceedings in which European British subjects are concerned; (*f*) subjects persons not resident in British India to greater taxation than persons resident in British India, or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein (or which in other words discriminates against non-British Indians and non-British Indian companies in matters of taxation); (*g*) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom. Further, no Bill or amendment affecting the coinage or currency, or the constitution or functions of the Reserve Bank of India, may be introduced in the Federal Legislature save with the sanction of the Governor-General given in his

[1] S. 108.

discretion.[1] Again, the previous sanction of the Governor-General is necessary to the introduction of a Bill or amendment prescribing professional qualifications.

The legislative competence of the Provincial Legislatures is equally restricted. The previous sanction of the Governor-General given in his discretion is required for the introduction of any Bill or amendment in the Provincial Legislatures which (*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; (*b*) repeals, amends or is repugnant to any Governor-General's Act or any ordinance promulgated in his discretion by the Governor-General; (*c*) affects matters in which the Governor-General is to act in his discretion; (*d*) affects the procedure for criminal proceedings in which European British subjects are concerned. Moreover, the previous sanction of the Governor given in his discretion is required for the introduction of any Bill or amendment which (*i*) repeals or amends or is repugnant to any Governor's Act or any ordinance promulgated by the Governor in his discretion; (*ii*) repeals, amends or affects any Act relating to any police force.

In addition to these general provisions, prior sanction of the Governor-General or a Governor is also requisite in certain other cases. Thus the Governor-General or Governor must sanction the introduction of financial Bills.[2] Then the Governor-General must sanction the introduction of any Bill in the Concurrent sphere which provides for the giving of directions to the Provincial Governments, or any Bill which affects taxation in which the Provinces are interested.[3]

[1] S. 153. [2] S. 37. [3] S. 82.

Under the Instrument of Instructions[1] the Governor-General is directed not to assent to, but to reserve for the signification of His Majesty's pleasure, (*a*) any Bill which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India; (*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court of any Province as to endanger the position which these Courts are by the said Act designed to fill; (*c*) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement; (*d*) any Bill regarding which he has doubts whether it does or does not offend against the provisions against discrimination, etc.

The legislative competence of the Indian Legislature is thus restricted in a four-fold manner. Firstly, it has no constituent powers, and the power of the British Parliament to legislate for India is reiterated. Secondly, absolute restrictions are imposed with respect to certain matters, while the previous sanction of the Governor-General is necessary with respect to others. Thirdly, the Governor-General is directed to reserve certain Bills for the signification of His Majesty's pleasure. In addition to this, the Governor-General and the Governor have the power of vetoing any Bill or disallowing it, and His Majesty may disallow an Act passed by the Indian Legislature within twelve months after it has received the assent of the Governor-General. Fourthly, all the provisions with respect to discrimination are also in the nature of restrictions on the legislative competence of the Legislature. All these provisions in their cumulative effect

[1] XIII.

make it abundantly clear that the Indian Legislature is a non-sovereign law-making body.

The legislative competence of the Indian Legislature differs from that of the Dominion Legislatures, which, under the Statute of Westminster, 1931, are both legislative and constituent assemblies. The Legislatures of Canada, the Union of South Africa, and the Irish Free State, which have adopted the provisions of the Statute of Westminster, are free from any legislative restrictions, save such as are due in the case of Canada to the federal character of the Constitution. Australia and New Zealand, as they have not adopted the Statute of Westminster, are subject to the restrictions imposed by the Colonial Laws Validity Act of 1865, under which their Act, if repugnant to the Imperial law which applies to them, is to that extent void. Further, they have no competence for extra-territorial legislation. With their adoption of the Statute these legislative fetters will be abrogated. In the case of India, the limitations are partly absolute and partly conditional. The position of the Indian Legislatures under the Act of 1935 resembles to some extent that of the Dominion Legislatures under the Colonial Laws Validity Act of 1865.[1]

Provisions with Respect to Discrimination, etc.

Fears have been entertained and expressed by British business men that the exercise of its power by the Indian Legislature may result in the imposition of penal tariffs on British goods, or in the application to them or to British companies of penal restrictive regulations with the object, not of fostering Indian

[1] See also Chapter XXIII.

trade, but of injuring and excluding British trade. Similarly, apprehensions have been felt by Indians that under the plea of safeguarding the legitimate interests of British business in India, India's efforts to encourage her industries may be throttled. With the object of allaying these fears and suspicions on both sides, elaborate provisions with respect to these subjects are made in the Act. The cardinal principle of all the provisions relating to discrimination is reciprocity of treatment for the nationals of one country in the other country in all matters to which these provisions refer. Normally, these are not in the nature of the fundamental provisions of the Constitution, but are only safeguards against possible discrimination. Having regard to the interests of the British in India and the insistence of British commercial interests on adequate and effective safeguards in the Constitution against discriminatory treatment, they are embodied in the Act as sections.

British Subjects Domiciled in the United Kingdom

A British subject domiciled in the United Kingdom is exempt from the operation of so much of any Federal or Provincial law as (*a*) imposes any restriction on the right of entry into British India; (*b*) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or duration of residence, any disability, liability, restriction or condition in regard to travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession.[1] This exemption is not valid if and so long as British subjects domiciled in British India are subject to any disability imposed in regard to the same matter

[1] S. 111.

on the same grounds under the law of the United Kingdom. But the imposition of quarantine regulations or the exclusion or deportation of individuals, wherever domiciled, who are considered by any public authority to be undesirable persons, are not deemed restrictions on the right of entry. The Governor-General or Governor may in his discretion, to prevent any grave menace to the peace or tranquillity of any part of India, or any part of the Province, and for the purpose of combating crimes of violence intended to overthrow the Government, suspend the operation of such exemptions for such time as he thinks fit.

TAXATION

Discrimination in taxation either by Federal Act or Provincial Act against British subjects domiciled in the United Kingdom or Burma, or companies incorporated under the laws of the United Kingdom or Burma either before or after the Act, is forbidden. Any Act which contravenes these provisions is invalid to the extent of the contravention. It constitutes discrimination if the law would result in rendering any such persons or companies liable to greater taxation than if they had been domiciled or incorporated in British India. A company incorporated and registered in Burma under Indian legislation before the Federation is deemed to be a company incorporated under the laws of Burma.[1] Companies incorporated before or after the Federal Act in the United Kingdom, their directors, the holders of their shares, debenture stock or bonds, their officers, agents, and servants, are to be deemed to comply with the requirements of any Federal or Provincial law as regards the place of incorporation, situation of their registered office, the

[1] S. 112.

currency in which their capital or loan is expressed; or the place of birth, race, descent, language, etc., of the directors, shareholders, officers, agents and servants.

COMPANIES INCORPORATED IN THE UNITED KINGDOM AND IN INDIA

In like manner, companies incorporated in the United Kingdom are deemed to be entitled to any total or partial exemption or preferential treatment in respect of Federal or Provincial taxation in relation to these matters.[1] But, in both these cases, the right to be treated on the same footing as Indian companies and to benefit by any exemption or preferential treatment with regard to taxation, is dependent on similar reciprocal rights being given to Indian companies in the United Kingdom. If there is no such reciprocity, the right is lost. For all practical purposes, having regard to the nature and extent of Indian enterprise, this reciprocal right is of very little practical value to India. A British subject domiciled in the United Kingdom is deemed to comply with the requirements of the Federal or Provincial Act, as to place of birth, race, descent, etc., in respect of companies incorporated in India, so as to be eligible as director, shareholder, officer, agent or servant, provided reciprocal treatment is given in the United Kingdom to British subjects domiciled in British India. Similarly, on the basis of reciprocity, British companies are entitled to any total or partial exemption and to preferential treatment in respect of any Federal or Provincial taxation. For this purpose, a company registered in Burma under Indian law before the Federation is a company incorporated under the laws of British India.[2]

[1] S. 113. [2] S. 114.

SHIPS AND AIRCRAFT

Further, ships registered in the United Kingdom shall not be subject to, any discriminatory treatment in respect of the ship or her master, officers, crew, passengers or cargo, as compared with ships registered in British India, except if there is discriminatory treatment of a like nature in the United Kingdom against ships registered in British India. This rule also applies to aircraft.[1]

SUBSIDIES TO TRADE OR INDUSTRY

Companies incorporated in the United Kingdom before or after this Act are, on the basis of reciprocity, eligible for any grant, bounty or subsidy provided from public funds of the Federation or a Province for the encouragement of any trade or industry, where a company was not in existence at the date of the passing of this Act. In that case it is made a condition of eligibility for the grant that the company should be incorporated by or under Indian law; that a proportion, not exceeding one half, of the directors are Indians; and that the company shall give such reasonable facilities for the training of Indians as the Act may prescribe. For this purpose, a company incorporated in the United Kingdom and owning ships which habitually trade to and from ports in India, is to be deemed to be carrying on business in India.[2]

FISCAL CONVENTION

It was felt that a friendly settlement by negotiation is by far the most appropriate and satisfactory method of dealing with the question of discrimination, and that this object can be achieved between Great Britain and India, by an appropriate convention based on reciprocity for the purpose of regulating these rights. It was admitted that the conventional method is preferable to the

[1] S. 115. [2] S. 116.

statutory method and that agreement and goodwill form the most satisfactory basis for commercial relations between Great Britain and India. If the basis is conventional, it is also contractual, and Indians will not feel that it has been imposed upon them. The Act therefore makes provision to secure reciprocal treatment by convention. Accordingly, if a convention has been made between His Majesty's Government and the Federation, and His Majesty is satisfied that the necessary legislation for implementing it has been passed by Parliament and by the Indian Legislature, he is empowered to declare by Order in Council that the statutory provisions in the Act shall not apply so long as the convention continues in force between the two countries. An Order in Council suspending the provisions ceases to have effect if and when the convention to which it relates expires or is terminated by either party thereto.[1] The objection has been put forward that, considering the acquired industrial advantages of Great Britain and the industrial backwardness of India not due to natural handicaps, the insistence on reciprocity of treatment in the absence of equality of conditions is not reasonable.

PROFESSIONAL AND TECHNICAL QUALIFICATIONS IN GENERAL

It was suggested in some quarters that the Indian Legislature, which has a right to prescribe the conditions under which the practice of professions generally is to be carried on in India, might discriminate against persons holding qualifications acquired in the United Kingdom. The right of the Legislature to prescribe these conditions cannot be restricted. But with the object of securing to these persons the statutory right to continue to practise notwithstanding

[1] S. 118.

any future Act of the Indian Legislature or a Provincial Legislature, the Act provides that no legislation laying down professional or technical qualifications for the exercise of any profession, occupation, trade or business, or the holding of any office in British India, can be introduced without the previous sanction of the Governor-General in his discretion or of the Governor in his discretion. The Governor-General or Governor shall not give his sanction to such legislation unless provision is made therein to secure that no person lawfully practising any profession, carrying on any occupation, trade or business, or holding any office in British India at the time shall be debarred from continuing to do so unless it is necessary in the interests of the public. Further, all regulations for this purpose made under any Federal or Provincial Act must be published four months before they come into operation. If, within two months after publication, the Governor-General or Governor receives representations against them and is satisfied that there is good ground for the complaints, he may in his individual judgment, by public notification, disallow the regulations or any of them.[1] The Governor-General may apply these principles to regulations made under any Indian law existing before this Act comes into operation, and the functions under the Federal or Provincial law shall be performed by the Governor-General or the Governor in his individual judgment.[2]

MEDICAL QUALIFICATIONS

The profession of medicine has received special protection. An attempt was once made by the Indian Legislature to restrict the right of British medical practitioners with British

[1] Regulations include rules, bye-laws, orders and ordinances.
[2] S. 119.

qualifications to practise. Parliament has therefore provided elaborate safeguards in their favour. The basic principle of these provisions is reciprocity. The Medical Practitioners' Act of 1886, which is applied to British India, accords recognition to Indian practitioners registered in the United Kingdom. It entitles any person who holds an Indian medical diploma recognized for the time being by the General Medical Council as furnishing a sufficient guarantee of his possession of the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery, to be registered on application in the Medical Register of the United Kingdom. The Act also provides that where the General Medical Council have refused to recognize a medical diploma for this purpose, the Privy Council, on application being made to them, may, if they think fit, after considering the application and after communication with the General Medical Council, order the latter to recognize the diploma, and the Council are thereupon under a statutory obligation to do so. There is also in India a Medical Council set up under the Indian Medical Councils Act of 1933 with analogous rights and powers to those of the British Medical Council. To secure equal treatment for British medical practitioners in India, it is provided that British medical practitioners domiciled in the United Kingdom or India, duly qualified in the United Kingdom, shall not by virtue of any existing Indian Act or Federal Act or Provincial Act be excluded from practising medicine, surgery or midwifery in British India or from being registered therein as qualified medical practitioners, except on the ground that the diploma held by him is not sufficient proof of his knowledge and skill for the practice of the

profession. But he shall not be excluded on this ground unless twelve months' notice is given to the Governor-General and to the University or other body granting that diploma, and unless the Privy Council, if appealed to, holds that the diploma does not furnish sufficient guarantee of his possession of the requisite skill and knowledge. Provision is made enabling any University or other body which grants such a diploma, if aggrieved at the exclusion of such a practitioner, to apply to the Privy Council, which, after having considered the evidence and representations, shall determine whether the diploma[1] in question does furnish such a guarantee, and shall communicate its decision to the Governor-General, who shall cause it to be published. Thus the same treatment which Indians receive in the United Kingdom is secured statutorily to British practitioners in India. The power of any recognized authority in the United Kingdom or British India to suspend or debar any person from practice on the ground of misconduct, or to remove any person from a register on that ground, remains unaffected.[2] Provision is also made for safeguarding persons domiciled in Burma and entitled to practise in the United Kingdom under British or Burmese qualifications. Again, any medical officer on the active list of the Indian Medical Service or any other branch of His Majesty's forces is automatically entitled to be registered in British India as so qualified to practise in British India, and thus secures his right to treat the civil population.[3]

All these provisions aimed at preventing discrimination against British subjects domiciled in the United

[1] Diploma includes any certificate, degree, fellowship, or other document or status granted to persons passing examinations.
[2] S. 120.
[3] S. 121.

Kingdom, or companies incorporated in the United Kingdom, or ships or aircraft owned by Britishers, or British professional men, are very complex. All these matters are within the legitimate ambit of the Legislature. Any attempts to restrict that ambit statutorily or even conditionally, or even on the ground of reciprocity, are unknown to the Dominion Constitutions. They are incompatible with the grant of full legislative power to the Federal and Provincial Legislatures. Legally, this view is unchallengeable. But these provisions are in the nature of safeguards to protect the interests of British citizens who have acquired vested interests in various spheres of India's life in the course of British rule in India. Having regard to the amount of capital invested by the British[1] in India, and the position occupied by British professional men in Indian business, and by the practitioners in various professions, and also by the members of the Services, and finally having regard to the conception of partnership between the United Kingdom and India, which is mutually beneficial to both countries, these provisions are not only justified, but are considered essential and beneficial to India.

RIGHTS IN THE NATURE OF FUNDAMENTAL RIGHTS

Some Indians insisted that the Constitution should contain a declaration of fundamental rights of different kinds to reassure the minorities and to assert the equality of all persons before the Law, and for other like purposes. In many constitutions, notably those of the European States, after the War, there is an explicit declaration of the fundamental rights of

[1] It is estimated that the total British capital invested in India is one thousand million pounds.

citizens. With the exception of the English Constitution[1] all modern constitutions contain provisions declaring these rights. The necessity for these provisions is recognized. In England the principles of the Constitution do not originate in the Constitution, but the Constitution itself originates and is based on the fundamental rights of the individuals. These rights are assumed, and every attention is directed to securing effective measures for enforcing those rights. But the English precedent is an exception. However, the Indian demand was negatived on the ground that such a declaration is not of any great practical value. "Abstract declarations are useless unless there exist the will and the means to make them effective." It was further negatived on the ground that the States had made it abundantly clear that no declaration of fundamental rights is to apply in State territories, and that it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation. While negativing this demand, the Constitution has given effect to some of the legal principles analogous to these rights, and these principles are embodied in the provisions which impose restrictions on the Legislature and Executive in certain matters. No Provincial Legislature or Government, by reason of its power as to trade and commerce in the Province and the production, supply and distribution of commodities, has power to prohibit or restrict the entry into, or export from, the Province of goods of any description, nor has it power to discriminate in toll, cess, tax or due as between the goods manufactured or produced in the Province and other goods, or

[1] There is no such declaration of fundamental rights even in the constitutions of Canada and Australia.

between goods manufactured and produced outside the Province according to locality. Any law passed in contravention of this provision is to the extent of the contravention invalid.[1]

Further, it is provided that no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India. But this prohibition does not exclude legislation prohibiting absolutely or partially the sale or mortgage of agricultural land, situate in any particular area and owned by agriculturists, to non-agriculturists, or to interfere with any rights of members of a community that arise from personal law or custom having the force of law.[2] This provision is in addition to the special responsibility of the Governor-General or Governor for safeguarding the legitimate interests of the minorities. The possibility of expropriation is recognized. Hence it is provided that no person may be deprived of his property in British India save by the authority of law. Laws, either Federal or Provincial, authorising the compulsory acquisition for public purposes of land, or any commercial or industrial undertaking or interest therein, must also provide for the payment of compensation for the property acquired, and must specify either the amount or the principles and the mode in which it is to be assessed. Further, the prior sanction of the Governor-General or Governor is necessary to any Federal or Provincial Bill transferring land to public ownership,

[1] S. 297. [2] S. 298.

or modifying rights therein, including land revenue rights.[1]

Similarly, it is provided that no rights or privileges in respect of land granted before January 1, 1870, or thereafter for services rendered, and no pensions awarded for political considerations or on compassionate grounds shall be taken away or varied except with the assent of the Governor-General or Governor given in his individual judgment. This protection is given for the rights and privileges and the pensions of persons who have rendered services to the Government.[2] The remedy for a breach of any condition on which the grant is made is not affected by this provision.

All these provisions are intended to serve the purpose of a declaration of the fundamental rights of citizens.

[1] S. 299. "Land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

[2] S. 300.

CHAPTER XIV

ADMINISTRATIVE RELATIONS BETWEEN FEDERATION, PROVINCES AND STATES

Under the New Constitution, British India is transformed from a unitary into a Federal State, and the respective spheres of the Centre and of the Provinces are strictly delimited, and the jurisdiction of each (except in the Concurrent List) excludes the jurisdiction of the other. But it is necessary to remember that while the Provinces are autonomous, the ultimate and residuary responsibility for the peace and tranquillity of the whole of India vests in the Governor-General, which requires the supervision and control of Provincial Governments by the Governor-General. There is a necessity for an effective administrative nexus between the Federation and its constituent units. As the ambit of the legislative and executive authority of the Federation and its constituent units is delimited, it is expressly provided that the executive authority of the Provinces and the Federated States shall be so exercised as to secure respect for the laws of the Federation applicable to the Provinces and the States.[1] But in the exercise of the executive authority of the Federation in any Province or State, regard shall be had to the interests of the Province or State.[2] Thus there is a statutory

GENERAL

[1] Laws of the Federal Legislature in relation to any Province include a reference to any existing Indian law applying in that Province.

[2] S. 122.

obligation imposed on the Provinces and the States to secure respect for Federal laws within their territories. The Governor-General may direct any Governor to act as his agent in the Province in respect of tribal areas, defence, foreign affairs or ecclesiastical affairs, and in this capacity the Governor shall act in his discretion subject to the directions of the Governor-General.[1]

To understand the administrative nexus, it is to be remembered that Administration generally includes three things: (*a*) the prescribing of regulations for giving effect to the laws and activities of the Federal Government, including the issue of explanatory circulars and instructions; (*b*) the actual carrying out of the laws and regulations on the spot by means of officials; and (*c*) the function of inspection.

As regards the British Indian Provinces, the Act provides four methods of Provincial or local administration of Federal laws: (*i*) In some matters the Federal subjects are administered in Provinces directly by the Federal officers. (*ii*) The Governor-General may, with the consent of the Government of a Province, entrust either conditionally or unconditionally to the Provincial Government, or its officers, functions in relation to any matter to which the executive authority of the Federation extends.[2] (*iii*) the Federal Government may by a Federal Act confer powers and impose duties upon a Province or officers and authorities thereof.[3] If methods (*ii*) and (*iii*) are adopted, the Province shall be paid such sum as may be agreed or, in default of agreement, determined by arbitration in respect of any extra cost of administration incurred by the Province. The Federal Government lays down

[1] S. 123. [2] S. 124 (i). [3] S. 124 (2).

detailed regulations for giving effect to its laws and activities, and the Provinces are under an obligation under the Act to enforce all the laws in the Provinces. The Federal Government has also the power of inspection in Federal matters.

As regards the States, the Act provides four possible methods of dealing with local administration: (1) The administration may, with the Ruler's consent, be entrusted to him or to his officers by the Governor-General.[1] It is the Federal Government which decides in any given case whether and to what extent local administration is to be entrusted to the Ruler. If the local administration is entrusted unconditionally to the Ruler, his officials alone will apply the laws in the State, and they will be under his control, subject only to following the instructions issued by the Federal Government. The administration may also be entrusted to the States partially and conditionally.

Secondly, the Federal Legislature by its Act may confer powers and impose duties on the State or upon officers and authorities thereof to be designated for the purpose by the Ruler.[2] The Federal Act itself lays down in a binding manner what the State and its officers are to do in the way of administering the Act, although it rests with the Ruler to designate the persons who are to carry out the duties provided for. The Act may withdraw the officers designated from the Ruler's control and authority, and place them entirely under the authority of the Federal Government. In case these methods are adopted, the Act provides that there shall be paid to the State such sum as may be agreed, or, in default of agreement, determined by arbitration, in respect of any extra cost of administra-

[1] S. 124 (1). [2] S. 124 (3).

tion incurred by the State in connection with the exercise of the powers and duties conferred or imposed upon it.[1]

The third method is to entrust the administration to the State under an agreement. It is provided that, notwithstanding anything in the Act, agreements may, and, if provision has been made in the Instrument of Accession, shall be made between the Governor-General and the Ruler for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies therein. Any such agreement must contain provisions enabling the Governor-General to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is carried out in accordance with the policy of the Federal Government, and, if he is not so satisfied, the Governor-General in his discretion may issue such directions to the Ruler as he thinks fit.[2] It is understood that only large States and those in which good and efficient administration is most likely to be provided will get the advantage of such an agreement. It is to be noted that the undertaking of local administration by the States under such an agreement does not entitle them to any payment for the expenses of the administration.

Fourthly, if there is no reservation in the Instrument of Accession by a State, or any of the arrangements already stated, the Federal Government itself may administer the Federal law in a State by means of Federal officials under the Federal Government's direct and exclusive control.

Provincial executive authority shall be so exercised as not to impede or prejudice the Federal executive

[1] S. 124 (4). [2] S. 125.

authority. The Federal executive authority extends to giving directions to Provinces for that purpose. The Federation is authorized to give directions to the Provincial Governments on matters of the execution of Federal laws on concurrent issues, but the previous sanction of the Governor-General in his discretion is necessary to the introduction of any Bill or amendment in the Legislature authorising such directions. The Federation is also authorized to give directions to the Provinces for the construction and maintenance of means of communication of military importance, though usually the Federation itself will construct and maintain them under its powers of defence. If such directions are not given effect to by any Province, the Governor-General in his discretion may issue orders to the Governor embodying those directions, and the Governor under his special responsibility has to give effect to those orders, even against the advice of Ministers. Finally, the Governor-General in his discretion may issue orders to the Governor of a Province as to the mode in which the Provincial executive authority for preventing grave menace to the peace or tranquillity of India is to be exercised.[1] Thus, the powers of the Governor-General to give directions in certain matters and to issue orders for certain other matters are comprehensive. It may be stated that these powers are incompatible with Provincial Autonomy, but having regard to the responsibility of the Governor-General for the Government of India, they are inevitable.

As regards the States, the executive authority of the State shall be so exercised as not to impede or prejudice the exercise of Federal authority under any

[1] S. 126.

law. Any question as to whether the executive authority of the Federation is exercisable in a State, or as to its extent, is to be determined at the instance of the Federation or the Ruler by the Federal Court in the exercise of its original jurisdiction. If the Governor-General finds that the Ruler has failed to fulfil his obligations in the matter, he may in his discretion, after considering the representations of the Ruler on the matter, if not satisfied with the executive action of the State, issue the necessary instructions to the Ruler.[1] This provision is to secure the execution of the Federal laws in the States. Having regard to the status of the Rulers, these directions have not the same force as those issued to the Governors under similar circumstances. If the Governors fail to give effect to the directions, they can be dealt with constitutionally by Parliament, to which they are responsible. If the Rulers fail to give effect to the directions, there is no provision in the Constitution to deal with the situation, except in so far as it can be dealt with under Paramountcy.

The Federation, if it requires any land situate in the Province for a Federal purpose, may require the Province to acquire it on behalf and at the expense of the Federation, and if it is Government land, to transfer it to the Federation at a price agreed upon, or in default of agreement determined by an arbitrator appointed by the Chief Justice of India.[2]

BROADCASTING

Broadcasting is of vital importance in creating, influencing and guiding public opinion in modern times. Having regard to the close connection between public opinion and executive action or policy, the Constitution has made comprehensive

[1] S. 128. [2] S. 127.

provisions as regards broadcasting. It was suggested that, for the purposes of both legislation and administration, broadcasting should be a Federal subject, but that suggestion was not accepted, and the control of the Federal Government over Provinces and States is asserted only in certain matters and under certain circumstances. It is provided that the Federal Government shall not unreasonably refuse to allow a Provincial Government or the Ruler of a State to construct and use transmitters in the Province or State, and to regulate and impose fees for their use or the use of receiving apparatus. But this does not empower the Province or the State to regulate the use of transmitters constructed or maintained or authorised by the Federal Government. The functions entrusted to a Provincial Government or a Ruler shall be exercised subject to conditions, including those relating to finance, made by the Federal Government, but the matter broadcast by, or by authority of, the Provincial Government or a Ruler, except in so far as it appears to be necessary to enable the Governor-General to discharge his functions in his discretion or in respect of the peace or tranquillity of India in his individual judgment, shall not be subject to conditions. Every Federal Act relating to broadcasting shall secure that effect will be given to these provisions. Any question as to whether any condition imposed, or any refusal to entrust functions to a Province or a State, is unreasonable, is to be decided by the Governor-General in his discretion.[1]

INTERFERENCE WITH WATER SUPPLIES

The Government of India has always a common law right to use and control, in the public interest, the water

[1] S. 129.

supply of the country, and a similar right has been asserted by the legislation of more than one Province as regards the water supplies of the Province. Under the Act of 1919, water supply was a Provincial subject for legislation and administration. But the Central Legislature could also legislate upon it with regard to matters of inter-Provincial concern, or affecting the relations of Provinces with any other territory. Its administration in a Province was reserved to the Governor in Council. Thus it was under the control of the Secretary of State, who finally decided claims or disputes arising between one Provincial Government and another, or between a Province and a State.

There are many rivers or watercourses running through more than one Province, and there are some which run through a Province and a State or a State and a Province. With the adoption of a Federal Constitution, disputes amongst the various units relating to this subject are not unlikely. The Act provides that if a Province or State complains to the Governor-General that it is affected prejudicially by any executive action or non-action or legislation of another unit with respect to the use, distribution, or control from any natural source of supply, the Governor-General may, if he regards the issue as serious, appoint a Commission of experts in irrigation, engineering, administration, finance or law, to investigate the matter and report on it with its recommendations. If necessary, the Governor-General may refer the matter to the Commission for further report. To assist the Commission, the Federal Court shall make orders or issue letters of request for the purposes of the proceedings before the Commission. After considering the report of the Commission, the Governor-General shall decide and

make any order he thinks proper, unless, before his decision is given, the Province or Ruler asks for decision by the King in Council. The order of either authority—the King in Council or Governor-General—shall override any Federal or Provincial or State Act to the extent of its repugnancy to the order. Such a decision or order may be varied on further application from any party concerned. In the case of a decision or order by the King in Council, it may be referred back by the Governor-General to the King in Council, who may vary it. The order shall also fix the amount of costs to be paid to the Commission or Province or State or to other persons, and specify the persons liable for the costs, and the part of the order relating to the costs may be enforced as if it were an order made by the Federal Court. The Governor-General is similarly empowered in cases affecting the water supply of Chief Commissioners' Provinces. In all matters relating to interference with water supplies, and orders issued and action taken on them, the jurisdiction of the courts is excluded. A Ruler of a State may exclude the application of the provisions as to water supplies by his Instrument of Accession.[1]

INTER-PROVINCIAL CO-OPERATION

There are many problems in India which are common to all the Provinces, and whose solution is only possible if attempted on a uniform All-India basis. Under the Act of 1919, the Governor-General in Council has the power to decide questions arising between two Provinces in cases where the Provinces fail to arrive at an agreement. The necessity for machinery to adjust disputes or claims between Provinces, and for evolving and adopting a common policy affecting all the Provinces

[1] Ss. 130 to 134.

interested in these subjects, cannot be exaggerated. The desirability for establishing this inter-Provincial machinery was recognized, but the Act does not provide the actual machinery. It provides for setting up such machinery in the light of experience and the working of the new Constitution. The Act gives power to the King in Council to set up an Inter-Provincial Council charged with the duty of enquiring into and advising on all disputes between Provinces, and discussing subjects in which some or all of the Provinces have a common interest and making recommendations upon them, and in particular for the better co-ordination of policy and action with respect to those subjects. The Order establishing such a Council may make provision for representatives of Indian States to participate in the work of the Council.[1]

Thus the new Constitution, which recognizes the autonomy of the federating units, also establishes an administrative nexus between the Federation and the units. There are legislative and administrative nexuses both for the security and the safety of the States and for securing uniformity and co-ordination in matters of common interest, and also for dealing with the inevitable disputes in certain matters in which more than one Province is interested. On the cumulative effect of these provisions, there is an impress of the fact that India had a centralized government before the Federation. This is inevitable and desirable.

[1] S. 135.

CHAPTER XV

FEDERAL FINANCE

1. Historical

Finance is the life-blood of a modern State. The success or otherwise of the Federal Constitution in India depends upon its financial provisions in relation both to the Federation and to the federating units. The effect and the implications of these provisions cannot be appreciated unless they are viewed in historical perspective. With this object, it is necessary to review briefly the history of the financial relations between the Government of India and the Provinces.

The East India Company, working on commercial principles, kept full control of all revenues and expenditure in its own hands. Till 1858 there was a highly centralized system of government under which the Governor-General in Council retained complete control over financial resources as well as expenditure. Though there was a complete re-organization of the finances of British India after the transfer of the government from the Company to the Crown in 1858, no innovation was made in this respect. The Provincial Governments remained merely agents of the Central Government for collecting revenues, and they could not incur any expenditure, however trivial, without the formal orders of the Government of India. In short, in 1861 there was complete, thorough, and effective financial centralization. The financial history of the next sixty years is

very largely a history of the growth of the financial authority of the Provincial Governments by a gradual process of devolution of powers to them from the Central Government. The deficit in the Central budget and the financial stringency in 1859 rendered relaxation of central control over the Provinces impossible. The centralized system had three defects: (1) the distribution of the public income among the Provincial Governments every year degenerated into something like a scramble in which the most violent had the advantage; (2) as local economy brought no local advantage, the incentive to avoid waste was reduced to a minimum; and (3) as no local growth of income led to local measures of improvement, the interest in developing the public revenues was also brought down to the lowest level. To remove some of these defects, Lord Mayo's Government in 1870 took the first important step towards financial decentralization. An attempt was made to make the Provincial Governments responsible for the management of their own Provinces. Each Provincial Government was given a fixed grant for the upkeep of definite services such as police, jails, education, and the medical services, with conditional powers to provide for additional expenditure by the exercise of economy, and if necessary by raising local taxes. The Government of India retained all the residuary revenues for its own needs.

This limited measure proved markedly successful and provided the justification for a further step taken during the time of Lord Lytton in 1877. Important heads of revenue such as stamp duty, alcoholic excise and income tax collected in the Provinces were provincialized, while the responsibility of the Provinces

in regard to expenditure was extended to the departments of land revenue, general administration, and law and justice. Fixed grants from the Centre continued, however, and in the case of two Provinces a definite proportion of land revenue was assigned in lieu of a fixed sum. For the first time, there was a classification of the revenue heads into Central, Provincial and Divided. The growing needs of other Provinces were met by treating land revenue as one of the Divided heads. Settlements on these lines were made with the Provinces for five years, and they were renewed every fifth year. In 1904 they were made quasi-permanent. The Decentralization Commission (1908) considered the question, but did not propose any changes. In 1911 Lord Hardinge's Government made the settlement permanent. In distributing these revenues, the respective needs of the Provinces were taken into consideration, but it is rightly pointed out that in practice that Province came off best which was able to exercise the greatest pressure at Delhi or Simla.

To summarize the position before the Reforms of 1919, the heads of revenue were classified into Central, Provincial, and Divided. Customs, Salt, Opium, Railways, Posts and Telegraphs, Mint, and Tributes from Native Princes were Central heads. Registration, Police, Education, Law and Justice, Medical Relief, Minor Irrigation, Provincial Civil Works, were Provincial heads; Land Revenue, Excise, Income Tax, Stamps, Forest, and Major Irrigation were Divided heads. Receipts from the first went to the Central Government, from the second to the Provincial Governments; while those from the third were shared equally by the Central and Provincial Governments. The Central Government was responsible for Central

expenditure, and Provincial Governments for Provincial expenditure. The Provincial Governments had no independent power of taxation or of borrowing, and there was a strict Central budgetary control over the Provincial Governments.

The Montagu-Chelmsford Report is an important document in the history of financial devolution in India. After reviewing the then existing financial system, the joint authors pointed out how seriously it operated as an obstacle to Provincial enfranchisement. They laid down that financial devolution was a condition precedent to the introduction of a measure of responsibility in the Provinces. With this object, they formulated a new basis of financial settlement to suit a wide measure of administrative and legislative devolution. The scheme was based on the abolition of divided heads and the securing of independent sources of revenue to the Centre and the Provinces to meet their respective obligations. A clear-cut division of the revenue heads was made. Income tax was made Central, while stamps were classified as general and judicial, the former Central and the latter Provincial. This redistribution of the sources of revenue resulted in a deficit of ten crores in the Central budget. Hence, as a transitional measure to maintain the existing relative financial position of the Centre and the Provinces, a system of contribution from each Province to the Centre was adopted. Such contributions were fixed on the estimated Provincial surpluses resulting from the redistribution of the heads of revenue. For this purpose, a Committee was appointed under Lord Meston, which made its award fixing the contribution from the Provinces.

Thus, under the Act of 1919, the most important

sources of Provincial revenue were: (1) Receipts from irrigation, land revenue, forests, excise and alcoholic liquors and narcotics, stamps and minerals; (2) a share in the growth of revenue derived from income tax in the Provinces so far as that growth is attributable to an increase in the amount assessed; (3) proceeds of any tax which may lawfully be imposed for Provincial purposes. The Provincial Legislature was empowered to impose a new tax if it is included in the Schedule. Such new taxes were either for the local Governments (succession duties, tax on betting, advertisements, amusements and specified luxuries), or for local authorities (stalls, taxes on buildings, terminal taxes and professional taxes). The sources of the Central Government were not specified as such in the Act, but the subjects classified as Central included customs, posts and telegraphs, railways, the cultivation of opium and its sale for export, mints and tributes from Native Princes. The residuary power of taxation remained with the Central Government. Provincial Governments were for the first time empowered to borrow loans for certain purposes on certain conditions. Provincial Accounts were separated and the budgetary control of the Central Government was relaxed.

This arrangement was seriously criticized. The Meston Award was condemned by almost all Provinces on different grounds. It was pointed out that the Central Government took all the elastic sources of revenue with fixed expenditure, while the Provincial Governments were given inelastic sources of revenue and growing heads of expenditure.

DEVELOPMENT SINCE 1919

It was anticipated that the substantial initial surpluses which the Provinces were expected to get under the new scheme would

enable the Ministers to develop the nation-building departments without resort to fresh taxation. However, circumstances rendered the realization of these hopes impossible, and the expected surpluses turned out to be actual deficits, thus disabling the Ministers from carrying out useful work in their departments. So far from there being any marked development of the nation-building services entrusted to Ministers, the expenditure on them at the end of 1923–24 was actually less than in 1921–22. The financial difficulties of the Central Government were equally great. In the first budget of the Central Government under the reformed Constitution, taxes were increased and added, and it was hoped that this would provide a surplus, whereas in fact it revealed a deficit of eighteen crores of rupees. Additional taxation was imposed in the following year, and still there was no balanced budget. When strict economy and retrenchment were practised on the recommendations of the Inchcape Committee, financial equilibrium was restored[1] by 1927–28, when the Provincial contributions were also abolished. After 1928, neither the Central Government nor the Provincial Governments were in a flourishing condition. Mr. W. T. Layton, who acted as Financial Assessor to the Statutory Commission, reviewed the sources of revenue and the obligations of the Central and Provincial Governments. He pointed out that the expenditure in India on social and beneficent services was remarkably low, whilst that on the defence services was remarkably high. Keeping this in mind, he suggested a scheme for the division of the sources of revenue between the Centre and the Provinces on a federal basis. As the recommendations of the Simon Commission were not considered on their merits

owing to the subsequent political developments, Mr. Layton's scheme was dropped. With the acceptance of the scheme of an All-India Federation, the subject of the distribution of the sources of revenue was carefully considered by a special Committee of the Second Round Table Conference under Lord Peel. This Committee laid down the general principles upon which the financial resources and obligations of India should be apportioned between the Federation and the British Provinces and the States. The Committee laid down that the Federal sources of revenue should be largely confined to indirect taxes, but it stated that as in practice indirect taxes alone were found to be inadequate for Federal needs in other Federations, the Federation should have some portion of direct taxes also. This Committee left the question of details to be decided by another Committee. In 1932 the Facts-Finding Committee under Lord Eustace Percy examined the details in the light of the principles laid down by the Peel Committee. The allocation of the revenue heads in the new Constitution is based on the findings of this Committee.

2. The Problem of Federal Finance

Financial stability, the creation and operation of the Reserve Bank, the balancing of the budget, the provision of adequate reserves and the attainment of favourable trade balances, were laid down as the requisite conditions for the inauguration of the Federation. Most of these conditions were more or less fulfilled by the end of 1935. However, the problem of Federal finance, namely, the distribution of the sources of revenue between the Federal Government

and the federating units to meet their respective needs presented great difficulty. The problem as presented to the authors of the Constitution is easily stated. The revenues of the Central and Provincial Governments have considerably fallen in recent years. Some of the new Provinces are likely to remain deficit Provinces. Their revenue will be inadequate to meet their normal requirements. Hence they will have to be subsidized by subventions or grants from the Central Government. The separation of Burma will result in a loss of three crores of rupees to the Central Exchequer. The inauguration of the new Constitution requires an additional expenditure of a crore and a half. The necessity of maintaining the stability of Central finances can hardly be exaggerated. The Central Government has expansive sources of revenue, whilst its expenditure is of a fixed character. The Provincial Governments have inelastic sources of revenue, whilst their expenditure is growing and the desirability of increasing it on social services in particular is generally conceded. Thus the problem of Federal finance is to distribute the sources of revenue in such a manner as to secure the financial stability of the Centre by giving it sufficient revenue for its requirements, and also to secure the Provinces adequate revenues for their growing needs.

In every Federation, the problem of the allocation of the sources of revenue is necessarily one of difficulty, since two different authorities—the Government of the Federation and the Government of the unit—each with independent powers, are raising money from the same body of taxpayers. It may be noted that no entirely satisfactory solution of this problem has yet been found in any Federal system. In India it

is further complicated by the existing distribution of the sources of revenue and her peculiar economic conditions.

During recent years, industrialized Provinces like Bombay and Bengal have been demanding a share in the income tax to meet their growing expenditure. The States have also been demanding a share in the customs revenue of British India, as their subjects also indirectly contribute to that source. But the entry of the States into the Federation removed this problem of customs because they will have a say henceforth in the fixing of the tariff. Their entry has removed one complication, but it has introduced another. According to the Federal precedent, all the Federal units contribute to the Federal Fisc on an equitable basis of their taxable capacity. No difficulty arises in the sphere of indirect taxation, which constitutes four-fifths of the Central revenues, but the real difficulty arises over direct taxation. The Central needs require the retention by the Centre of the whole of the taxes on income assessed in British India. Hence the subjects of the Federating States should also pay income tax, and the proceeds should be made available for the Federal fisc. But the States were opposed to the imposition of any direct tax by the Federation. This attitude of the States further complicated the problem. In addition, they argued that they ought to be exempt from bearing much of the expenditure of the Federation, such as that arising out of subsidies or subventions to the deficit Provinces, and that the services of the pre-Federation debts should be borne by British India alone. Not only this, but they opposed the abolition of customs duties on their land frontiers. The States derive substantial revenues from customs duties at

their frontiers on goods entering the States from other parts of India. These duties are known as internal customs duties, and in many of the smaller States are akin to octroi and terminal taxes. One would have expected the States to agree to abolish all these duties, which is one of the requisite conditions of a Federation. Internal customs barriers are in principle inconsistent with the freedom of interchange of goods which is found in a fully developed Federation. But as the States at present derive substantial revenues from these sources, they are allowed to retain them. For all practical purposes, the entry of the States does not bring any additional benefit to the Federal Fisc. Thus the problem of Federal finance, in relation both to revenues and expenditure, was very complicated and acute. In spite of careful investigation of the subject, Parliament wanted to be assured of the practicability of successfully launching Provincial Autonomy from a financial point of view, and therefore insisted on an expert investigation before the final decision for its introduction was taken. This investigation was made by Sir Otto Niemeyer, who reported that the financial position was favourable to the introduction of Provincial Autonomy.

3. Federal Finance

The Constitution only supplies an outline of the scheme, and the details are filled in by Order in Council made on 3rd July, 1936, on the report of Sir Otto Niemeyer, who found the financial position of the Central and Provincial Governments satisfactory enough to justify the inauguration of the new Constitution.

SOURCES OF FEDERAL REVENUES

The Act lays down a very complex scheme as regards taxation.[1] The heads of taxes and the powers of the Federation relating to them are set out in the Act.[2]

Firstly, the Federation levies and collects duties in respect of succession to property other than agricultural land, stamp duties included in the Federal Legislative List (bills of exchange, cheques, promissory notes, bills of lading, letters of credit, insurance policies, proxies and receipts); terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, and their net proceeds (except those attributable to Chief Commissioners' Provinces) are distributable among the Provinces and Federated States in such a manner as the Federal Act prescribes. The Federation, however, by a Federal Act may increase these duties by a surcharge for Federal purposes.[3]

Secondly, the Federation levies and collects income tax not including a corporation tax, but fifty per cent of the net proceeds (exclusive of sums attributable to Chief Commissioners' Provinces or payable on Federal emoluments) is payable to the Provinces and the States, if any, in which that tax is leviable.[4] The

[1] The expression "revenues of the Federation" includes all revenues and public moneys raised or received by the Federation, and the expression "revenues of the Province" includes all revenues and public moneys raised or received by a Province.

[2] The Federal heads of revenue are not specified as financial heads but are included in the Federal Legislative List. They arise under Federal legislative items: 19, 44, 45, 46, 47, 48, 54, 55, 56, 58 and 59. (See Appendix E.) There are some other taxes under Ss. 137, 140 which are not levied, but for the levy of which provision is made.

[3] S. 137.

[4] S. 138. Order in Council dated July 3rd, 1936. Federal emoluments includes all emoluments and pensions payable out of the revenues of the Federation or of the Federal Railway Authority in respect of which income tax is chargeable.

percentage fixed at 50 per cent cannot be increased. The Federation may impose for Federal purposes any surcharge on the income tax. As the financial position of the Central Government for the present does not permit the immediate assignment to the Provinces of the percentage fixed, the Federation is to retain for the first period of five years the whole or such amount as together with any general budget receipts from railways will bring the Central Government's share in the divisible total up to thirteen crores, whichever is less; and for the second period of five years, for each year, it is to retain a definite proportion of the 50 per cent share of income tax assigned to the Provinces. The distribution of the 50 per cent of income tax among the Provinces, whenever it is to be made, should be as follows:—Madras 15 per cent; Bombay 20 per cent; Bengal 20 per cent; the United Provinces 15 per cent; the Punjab 8 per cent; Bihar 10 per cent; the Central Provinces 5 per cent; Assam 2 per cent; the North-West Frontier Province 1 per cent; and Sind 2 per cent. It is to be noted that the provision for the assignment of 50 per cent of income tax is only a paper provision for the first five years, and even for the next five years its execution is dependent upon the recovery of railway receipts and the satisfactory condition of the Central finances. It is forbidden to shorten either of the prescribed periods, and the Governor-General may in any year of the second period maintain the same quota at the same rate as in the year before, but should consult the Federation, Provinces and States before he takes such action, which is only justified if necessary for financial stability. If a surcharge is levied on the income tax by the Federation in the Provinces, the Federated States

have to contribute to the Federal revenues a sum equivalent to the net proceeds which would have been collected from them if they were liable to income tax [1]

Thirdly, the Federation levies and collects Corporation tax. "Corporation tax" means any tax on so much of the income of companies as does not represent agricultural income, being a tax to which the enactments requiring or authorising companies to make deductions in respect of income tax from payments of interest or dividends, or from other payments representing a distribution of profits, have no application.[2] The States objected to all kinds of direct taxation, but they agreed to the imposition of corporation tax after a certain period.[3] It is provided that it shall not be levied in a State until ten years from the Federation, and a Ruler may demand that instead of the tax being levied in the State, a contribution shall be payable equivalent to the net proceeds which a tax would yield in the State. When a Ruler elects to contribute a fixed sum, he shall cause to be supplied to the Auditor-General of India such information as the Auditor-General may reasonably require in order to fix the contribution. If the Ruler is dissatisfied with the amount fixed, he may appeal to the Federal Court, which, if satisfied that the amount is excessive, can reduce it. No appeal lies from the decision of the Federal Court.[4] This provision as

[1] S. 311.

[2] S. 138 (3). "Before granting his previous sanction to the introduction of a Bill . . . imposing a Federal surcharge on taxes on income, Our Governor-General shall satisfy himself that the results of all practicable economies . . . would be inadequate to balance Federal receipts and expenditure." Instrument of Instructions, XXIII.

[3] The other direct tax to which the States are liable under special circumstances is a surcharge on income tax.

[4] Ss. 139 to 141.

regards the State is also a paper provision for ten years.

Fourthly, the Federation levies and collects salt duties, Federal Excise duties and export duties; but the whole or part of the proceeds may be distributed to the Provinces and the States under the Act. In the case of the export duties on jute, 62 per cent of the net proceeds is assigned to the Provinces exporting jute—Bengal, Bihar, Assam and Orissa—in proportion to the crops grown therein. With a view to protecting the interests of the Provinces and the States, it is provided that the prior sanction of the Governor-General in his discretion is necessary for the introduction of all Bills varying any tax or duty in which the Provinces are interested, or varying the meaning of "agricultural income" (as defined in the Income Tax Act), or affecting the principle on which moneys are distributed to Provinces or States, or imposing Federal surcharges.

Fifthly, as regards other sources of taxation, the Act makes no specific provision. The Federation can impose, in addition to the taxes already mentioned, customs duties, a tax on the capital value of the assets, exclusive of agricultural land, of individuals and companies, and taxes on the capital of companies.[1]

The Federal revenues are charged with the following grants to the Provinces:

United Provinces	..	25 lakhs for a fixed period of five years.
Assam	..	30 lakhs (subject to the proposal as to rifles in Paragraph 15).

[1] Sch. 7 and S. 142 and Order in Council.

North-West Frontier Province	100 lakhs (subject to reconsideration at the end of five years).
Orissa	40 lakhs, with 7 lakhs additional in the first year and 3 lakhs additional in each of the next four years.
Sind	105 lakhs for ten years, with 5 lakhs additional for the first year, then as provided in Paragraph 13 until the grant ceases entirely on the extinction of the Barrage Debt in about forty-five years' time.

SOURCES OF PROVINCIAL REVENUES

The heads of Provincial revenues are also set out in the Provincial Legislative List and not specified as heads of taxation.[1] The Provincial sources of revenue, in addition to the share in the income tax, grants from the Central revenue in some cases, and a share in the export of jute in certain Provinces, are: (1) land revenue tax on land and buildings, hearths and windows;[2] (2) tax on agricultural income and duties in respect of succession to agricultural land; (3) duty or excise on goods manufactured or produced in the Provinces and countervailing duties on goods purchased or manufactured elsewhere in India, alcoholic liquor for human consumption, opium, hemp and other narcotic drugs and narcotic non-drugs; medicinal and toilet preparations; (4) taxes on mineral rights, capitation taxes; (5) taxes on professions, callings and employ-

[1] They arise from items: 19, 22, 23, 24, 31, 35, 36 and from 39 to 54 in the Provincial Legislative List, Appendix E.

[2] Sch. 7, Appendix E.

ments; (6) taxes on animals, bets, the sale of goods, advertisements, and luxuries, including entertainments, amusements, betting, gambling; (7) cesses on the entry of goods in local areas, duties on passengers and goods carried on Indian waterways, tolls; (8) stamp duty in respect of the documents not included in the Federal List.

Any taxes or duties levied in the States otherwise than by a Federal Act remain unaffected; also taxes, duties, cesses, or fees levied by a Province or local authorities or bodies for the purposes of a Province, municipality or district area on or before January 1, 1935, though mentioned in the Federal List, continue to be levied and applied to the same purposes, until provision is made to the contrary by a Federal Act, as regards the manner in which assignments of revenue or contributions by the Federal Government to the Provinces or States, or by the latter to the Federation, are to be calculated.[1]

THE CROWN AND THE STATES

The States which have acceded to the Federation contribute to the Federal Fisc through indirect taxation. They have, as already explained, emphatically declined to accept any direct taxes, except corporation tax after ten years and surcharge on income tax in certain circumstances. They are also liable, if they have acceded to these matters, to surcharge for Federal purposes on succession duties, stamp duties, Federal excise and export duties.[2] While this is the position as regards taxation, the Act provides for various financial adjustments between the Federation and the States. At present many States pay cash contributions and tributes to the Central Government in lieu of military and other

[1] Ss. 143 and 144. [2] Ss. 137, 140.

obligations. With the entry of the States into the Federation, these payments became anomalous, hence provisions are made for their adjustment. The basic principle of financial adjustments between the Federation and the States under the Act is the gradual abolition over a period of twenty years of such contributions paid by the States to the Crown as are in excess of the immunities which they enjoy. Provision is also made for remissions of such contributions and for payments to the maritime States if they enter into agreements with the Federation for the purpose. The effect of these adjustments is the payment to the States of a sum of seventy-five lakhs of rupees per year by the Federation. It may be noted that the entry of the States into the Federation has brought no financial gains to the Federal revenues. On the contrary, the Federal Fisc has to pay them a substantial amount. This arrangement is criticized on the ground that it is unusual. It was pointed out that this liberal treatment was meant as a sop to the States to enter the Federation. It is true that once the States are members of the Federation, the question of cash contributions or their tributes is anomalous. But as the States refuse to accept all the incidents and financial implications of Federation, and even to agree to the abolition of internal customs, this arrangement could not have been avoided.[1]

The Federation pays to the representative of the Crown out of the Federal revenues such sums, including the payments for customary allowances, as he requires for the discharge of his functions in relation to the States. Similarly, the Crown receives all cash contributions and payments in respect of loans and other

[1] S. 145.

payments due from or by any State and may place them at the disposal of the Federation. The Crown may remit at any time the whole or any part of any such contributions or payments.[1]

The King, in signifying his acceptance of the Instrument of Accession of a State, may remit over a period not exceeding twenty years any cash contributions payable by the State. The Crown may also direct such sums as it thinks fit to be paid to any State which has in the past voluntarily ceded territory to the Crown in return for specific military guarantees, or in return for the discharge of the State from obligations to provide military assistance, on the condition that the State waives such guarantees. But such remissions or payments shall not be made until the Provinces have begun to receive their share of the income tax receipts, and the remissions shall be complete before the expiration of twenty years from the date of the State's accession to the Federation, or before the end of ten years, whichever first occurs. In fixing the amount of payments or contributions, account shall be taken of the value of any privilege or immunity enjoyed by the State, but the contribution shall not exceed the value of that privilege or immunity. If such cash contributions have already been capitalised and discharged before the Act, they are to be repaid either by instalments or otherwise in lieu of such remissions. The cash contributions to be remitted are defined by the Act as: (*a*) periodical contributions in acknowledgment of the suzerainty of the Crown including contributions payable for the aid and protection of a State by the Crown, and contributions in commutation of any obligation of a

[1] S. 146.

State to provide military assistance to the Crown, or in respect of the maintenance by the Crown of a special force for service in connection with a State, or in respect of the maintenance of local military forces or police, or in respect of the expenses of an agent; (*b*) periodical contributions fixed on the creation or restoration of a State, or on a re-grant or increase of territory, including annual payments for grants of land on perpetual tenure, or for equalisation of the value of exchanged territory; (*c*) periodical contributions formerly payable to another State, but now payable to the Crown by right of conquest, assignment or lapse.

The privileges and immunities defined by the Act are of a financial character and include (*a*) rights, privileges and advantages in respect of the levying of sea customs or the production and sale of untaxed salt; (*b*) sums payable in respect of the surrender of the right to levy internal customs duties, or to produce or manufacture salt, or to tax salt or other commodities or goods in transit, or sums receivable in lieu of grants of free salt; (*c*) the annual value to the Ruler of any privilege or territory granted in respect of the abandonment or surrender of any such right; (*d*) privileges in respect of free service stamps or the free carriage of State mails on Government business; (*e*) the privilege of entry free from customs duties of goods imported by sea and transported in bond to the State in question; and (*f*) the right to issue currency notes. But no such rights or privileges as are surrendered by the States on their accession, or which in the opinion of the Crown ought not to be regarded as such, should be taken into account for the purposes of payments and contributions. Every Instrument of

Accession of a State shall contain all the particulars necessary to fix the contributions and payments and their amounts, and also particulars for determining the value to be attributed to any privilege or immunity, the value of which is fluctuating or uncertain.[1]

Any payments under these provisions and any payments hitherto made to any State by the Central Government or by the Provincial Governments are to be charged on the revenues of the Federation or on those of the corresponding Provinces. The value of any privilege or immunity enjoyed by a State in respect of any former or existing source of revenue from a duty or tax or from goods, being a privilege or immunity which has not otherwise been taken into account, shall be set off against the payment or distribution by the Federation to the States.[2]

Thus all these provisions as regards the financial adjustments on various grounds between the Federation and the States are consequential to the formation of the Federation. It is maintained that in effect they are more beneficial to the States than to the Federation.

EXPENDITURE DEFRAYABLE OUT OF INDIAN REVENUES

Neither the Federation nor the Provinces may impose any burden on their revenues except for the purposes of India or some part of India. This provision does not prevent them from making grants for any purpose not within their legislative competence. The Governor-General and the Governors are given powers to make rules in their individual judgment to secure that all moneys raised on account of the revenues of the Federation or of the Provinces shall be paid into the accounts of the Federation or of the Provinces,

[1] S. 147. [2] Ss. 148 and 149.

prescribing the procedure of the payment, withdrawal and custody of the moneys, and the regularity of the accounting.[1]

RESERVE BANK OF INDIA

In order to maintain the financial stability of India, it was recognized that adequate provision must be made to ensure that control of currency and credit, including the issue of bank notes and the maintenance of reserves, must be entrusted to an independent body like the Reserve Bank. Hence the establishment of a Reserve Bank for India was made a condition precedent to the introduction of the new Constitution. The Reserve Bank of India Act was passed in 1934, and the Bank started operations in 1935. The capital of the Bank is five crores of rupees divided into fully paid up shares of Rs. 100 each. The Central Board of Directors is composed of a Governor and two Deputy Governors appointed by the Governor-General in Council, four directors nominated by the same authority, eight elected directors, and a Government official nominated by the Central Government. The Governor-General is to exercise his discretion in the appointment or removal of the Governor or Deputy Governors, the fixing of their salaries and terms of office; the appointment of an officiating Governor or Deputy Governor; the supersession of the Central Board of the Bank and any action consequent thereon; and the liquidation of the Bank. In nominating directors and in removing nominated directors, the Governor-General is to act in his individual judgment. Further no Bill or amendment affecting the coinage or currency or the constitution or functions of the Reserve Bank of India may be introduced in the Federal Legislature save

[1] S. 151.

with the sanction of the Governor-General given in his discretion.[1]

MISCELLANEOUS FINANCIAL PROVISIONS

The property of the Federation, unless otherwise provided by the Federal Act, is exempted from all Provincial or State taxation. But any such property which was immediately before the Federation liable to such taxation continues to be liable or will be treated as liable unless otherwise provided by the Federal Act.[2]

Provincial Governments and Rulers of States are exempted from Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India. This exemption does not apply to a trade or business (or to income therefrom or property occupied for the purpose) carried on by or on behalf of the Provincial Government outside the Province or by a Ruler in any part of British India, or to any lands or buildings or income being the personal property or income of a Ruler. Any exemption from taxation enjoyed by the Ruler in respect of Government securities issued before this Act is unaffected.[3]

Provision is made for assigning the expenditure of any Court or Commission, or the pension payable to a person who has served under the Crown in India, either to the Federal or the Provincial Governments, according to the nature of the services rendered and the authority liable for it, in an agreed proportion, and in default of an agreement, as determined by an arbitrator appointed by the Chief Justice of India.[4]

The Federation and the Provinces must keep the Secretary of State in sufficient funds to make payments and meet the liabilities to be met out of the

[1] Ss. 152 and 153. [2] S. 154. [3] S. 155. [4] S. 156.

Federal or Provincial revenues, and in particular they must keep the Secretary of State and the High Commissioner in funds to pay pensions payable in the United Kingdom out of the Federal or Provincial revenues.[1]

As Burma is separated from British India, and as the monetary system of both countries is the same, provision is made for this matter on separation. The King in Council is empowered to regulate the relations between the monetary systems of India and Burma,[2] to give relief for Federal taxation in respect of income taxable in Burma, and with a view to preventing undue disturbance of trade between India and Burma, and to safeguarding the economic interests of Burma, to regulate in the period immediately following separation the duties to be levied on goods imported into or exported from India or Burma.[3]

4. Borrowing

Generally, in all Constitutions, the power of borrowing is only incidental to the general powers of the Government, and no specific provisions are made as regards the limits or the modes of borrowing. But, under the new Constitution, specific provisions are made in this matter, and there are good reasons for it. Firstly, India has already borrowed large sums of money in London. These borrowings are by the Government of India on the security of Indian revenues. With the transfer of power to the Indian Legislature, it is apprehended that the Legislature may adopt measures affecting these borrowings, and

[1] S. 157.
[2] This provision is made by Order in Council.
[3] Ss. 158–160.

it is this apprehension which is mostly responsible for the specific provisions. Secondly, in India there is only one money market, and the requirements of the Federation and the Provinces are different. All these Governments have to raise internal loans from one market. Hence there is every likelihood of competition amongst the borrowers, who may offer preferential terms in competition, thus affecting the soundness and stability of the money market in India.

On the introduction of Provincial Autonomy on April 1st, 1937, the powers of borrowing on the security of the revenues of India vested in the Secretary of State, stand determined, except during the period between April, 1937, and the establishment of the Federation, for which he is authorized to borrow up to the total amount of £320,000,000 inclusive of the outstanding sterling debt.[1] Both the Federation and the Provinces are authorised to borrow upon the security of the revenues of the Federation and the Provincial revenues respectively up to the limits prescribed by the Federal and Provincial Acts. The Federation may make loans to the Provinces or guarantee Provincial loans if the limits of their borrowing have not been exceeded. Such a sum for Provincial loans is charged on the revenues of the Federation. But no Province may borrow outside India without the consent of the Federation. This consent is also necessary for borrowing by the Provinces if there is still outstanding any part of the loan made to the Provinces by the Federation or the Government of India, or a loan guaranteed by the Federation or the Government of India. Such consent may be granted

[1] The outstanding sterling debt of the Government of India on January 20, 1937, was £276,000,000.

on conditions made by the Federation. But, it shall neither be unreasonably withheld nor refused by the Federation if sufficient cause is shown, and no unreasonable conditions shall be imposed. If any dispute arises as to whether a refusal or consent to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter is to be determined by the Governor-General in his discretion, and his decision is final.[1] The Federation may make loans to, and within its borrowing limits give guarantees in respect of loans raised by, any Federated State. The sterling stock is given the benefit of the terms of the Colonial Stock Acts, 1877–1900, after the establishment of the Federation, and the British Treasury conditions under the Colonial Stock Act, 1900, are to be deemed to be complied with, with respect to all such stock so issued by the Federation, until Parliament otherwise determines. Securities in which a trustee might invest trust funds before April 1, 1937, continue to be trust securities. All these conditions are intended to secure reasonable conditions of borrowing without competition, and sufficient safeguards for the repayment of the loans.[2]

AUDIT AND ACCOUNTS

For effective responsible government, it is not enough that the money should be raised and be spent under the authority of the Legislature. It is also essential that the items of expenditure are strictly kept within the grants made by the Legislature. This function is performed by the Auditor-General, who occupies a unique position in the English Constitution. He is at once the custodian of the public purse and the

AUDITOR-GENERAL OF INDIA

[1] Draft Instrument of Instructions, XXIV.
[2] S. 165.

controller of the expenditure. This feature of the English Constitution is also to some extent embodied in the new Constitution, under which the Auditor-General occupies an independent and responsible position. To assure regularity of accounting of the public revenue, the Governor-General and the Governors are given powers to make rules for the purpose.

The King appoints an Auditor-General, whose status as regards tenure of office is that of a Federal Judge. He is debarred from holding further office under the Crown in India. Neither his salary nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment. He performs such duties and exercises such powers in relation to the Crown, the Federation or the Provinces as are prescribed by an Order in Council or rules made thereunder, which may be varied by an Act of the Legislature.[1] But

[1] The Auditor-General receives a salary of Rs. 60,000 per annum. On his appointment he has to give the Governor-General an undertaking that he will not, after he has ceased to hold his office, accept any employment in the service of any local authority, or railway company in India or Indian State, or any other employment without the consent of the Governor-General given in his discretion. He holds office till he reaches the age of fifty-five. He is responsible for the keeping of the accounts of the Federation and of each Province. From the accounts kept by him he has to prepare in each year a statement showing the annual receipts and disbursements for the Federation and each Province distinguished under the respective heads, and has to submit those accounts to the Federal Government and to the Governments of the Provinces. The Auditor-General has to comply with any general or special orders issued by the Governor-General or Governor in his individual judgment. He has to prepare annually and submit to the Governor-General a general financial statement containing a summary of the accounts of the Federation and of all Provinces, and particulars of their borrowings and outstanding liabilities and other financial information. It is the duty of the Auditor-General to audit all expenditure from the Federal and Provincial revenues, and to ascertain whether moneys shown in the accounts as having been disbursed were legally available for or applicable to the service

no Bill or amendment for this purpose shall be introduced without the previous sanction of the Governor-General in his discretion. The salary, allowances and pensions of the Auditor-General are charged on the revenues of the Federation, as are also the salaries, allowances and pensions of the members of his staff.[1]

A Provincial Legislature, not earlier than two years after Federation, may provide for the appointment on similar terms of a Provincial Auditor-General to do similar duties, but the post must not be filled for at least three years after the date of the Act of the Provincial Legislature by which provision is made for such appointment. All conditions as regards the salaries, allowances, etc., of the Auditor-General of the Federation and his staff apply, with consequential modifications, to the Auditor-General of the Provinces and his staff, but a Provincial Auditor-General is eligible for the appointment of Auditor-General for India. The Auditor-General may give directions in respect of the accounts of the Provinces. The Auditor-General, with the approval of the Governor-General, prescribes the form in which the accounts of the Federation are to be kept, and he may also, with the like approval, give directions to the Provinces as regards the methods or principles of keeping the

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or purpose to which they have been applied or charged, or whether the expenditure conforms to the authority which governs it. He has also to audit all trading, manufacturing and profit and loss accounts and has in each case to report on the expenditure, transactions or accounts so audited by him. He has to give the necessary information to the Federal and the Provincial Governments for preparing the budget, and these Governments have to supply to him all documents necessary for the discharge of his duties. Similar provisions are made for the Auditor of the Indian Home Accounts. (Order in Council, December 16, 1936.)

[1] S. 166.

accounts of the Provinces, and the Provincial Governments shall cause accounts to be kept accordingly. The Auditor-General submits his report relating to the accounts of the Federation to the Governor-General, who causes them to be laid before the Federal Legislature, and similarly Provincial accounts are submitted to the Governors, who cause them to be laid before the Provincial Legislatures. Thus there is a statutory provision for placing the reports before the Legislatures. There is also an Auditor of Indian Home Accounts, who is appointed by the Governor-General in his discretion. The conditions of his service are fixed by the Governor-General in his discretion. They are not to be varied after his appointment. He shall perform such duties and exercise such powers in relation to transactions in the United Kingdom affecting the revenues of the Federation, of the Federal Railway Authority, or of any Province, as may be prescribed by an Order in Council or by a Federal Act amounting to an Order, but no Bill for the purpose can be introduced in the Legislature without the previous sanction of the Governor-General in his discretion. The reports of the Auditor of Indian Home Accounts are to be submitted to the Auditor-General of India or to the Auditor-General of the Province as the case may be. These accounts will be embodied in the accounts to be submitted by the Auditor-General of India or that of the Province to the Governor-General or the Governor. The Auditor-General of Indian Home Accounts is subject to the general superintendence of the Auditor-General of India, and his salary and allowances and those of his staff are charged on the revenues of the Federation. Payments in respect of the relations of the Crown

and the States are to be audited by the Auditor-General of India, and as regards transactions in the United Kingdom by the Auditor of Indian Home Accounts, acting under the general superintendence of the Auditor-General of India, reporting to the Secretary of State on the accounts so audited by him on his behalf.[1]

It is clear that the Legislatures are given opportunities to consider the accounts of the Auditor-General, thus enabling them to hold a post-mortem examination of the expenditure of the Government.

NATURE OF FEDERAL FINANCE

The basis of Federal finance in the new Constitution is in no way different from that of the Act of 1919. The distribution of the sources of revenue has remained practically the same. Only the lists of the Federal and Provincial sources of revenue are exhaustively set out. The real criticism of the financial arrangements under the Act of 1919 was that the Central Government had kept to itself all expansive sources of revenue, whilst the Provincial Governments were given non-expansive or inelastic sources. It was further pointed out that admitting the necessity of a strong Central Government with financial stability, the requirements of the Central Government had received overriding consideration. The crux of the financial problem of India is how to secure more funds for the Provinces either by assigning to them a share of the Central taxes or by allocating to them growing sources of revenue. This fundamental problem of Indian finance has remained unsolved. It was expected that the Provinces would be given a substantial share of income tax from the very beginning, but this hope is to remain

[1] S. 167-170.

unfulfilled for ten years. Sir Otto Niemeyer in his report clearly states: "Expenditure at the Centre cannot be expected, consistently with safety, to decrease much below the point to which it has now been reduced. . . . Expenditure in the Provinces could obviously be increased with advantage on many heads." Thus Provinces which admittedly require more funds cannot expect any relief from the Central Government, which has no surplus to spare. There is every possibility of an increase in the Central revenues, but it will not bring immediate relief to the Provinces. It is not unlikely that the Provincial revenues may actually dwindle, thus intensifying the problem. The entry of the States into the Federation has brought no additional financial gain. For all practical purposes, from a financial point of view, the new Constitution has given neither relief nor added strength to the Provinces. On the contrary, it has imposed on them an additional burden of seventy lakhs of rupees incidental to the inauguration of the new Constitution.

Moreover, the possible relief in future from the Centre by way of a share or assignment from Central revenues to the Provinces except as provided in the Act is excluded, because the States would not agree to such a course, as it does not benefit them. If the Federation requires more revenue, it can only be raised by increasing indirect taxation, because all the members of the Federation ought to contribute to the Federal Fisc, and this is only possible by indirect taxation, as the States have excluded themselves from direct taxation, except surcharge on income and some other surcharges if they have not excluded their liability for those surcharges by their Instruments

of Accession. This will result in an increase of burden on the consumers, and will direct the evolution of Indian finance into a channel which is objectionable and opposed to all modern principles of sound finance. The States, under the plea of affecting their accession to the Federation, may in practice indirectly compel the Federation to meet all further requirements by additional taxation from British India, because indirect taxation, which is the only All-India Federal taxation beyond a particular limit, cannot be increased, thus compelling the Federation to sacrifice the canon of equity in relation to the citizens of British India.

CHAPTER XVI

PROPERTY, CONTRACTS, LIABILITIES AND SUITS

VESTING OF PROPERTY

As the legal phraseology regarding the vesting of the territories of India is altered in the new Constitution, consequential provision is made as regards the vesting of property, the making of contracts and the filing of suits. The Act vests in His Majesty, for the purposes of the government of the Provinces, lands and buildings situate in the Provinces, unless they were used before the Act, otherwise than under a tenancy agreement between the Governor-General in Council and the Provincial Governments, for the future purposes of the Federal Government, or for the exercise of the functions of the Crown in relation to Indian States. Similarly it vests in His Majesty, for Federal purposes, or for the exercise of his functions in relation to the States, lands and buildings not vested in the Crown under the aforesaid provision, situate in India elsewhere than in a Province. Similarly, property situate outside India (except lands and buildings in Burma and Aden) vests in His Majesty for the purposes of the Federation if it was before April 1, 1937, used by the Secretary of State. Property situate in the United Kingdom is under the management of the Commissioners of Works, but its disposal is subject to the consent of the Governor-General. All other property similarly vests in the Crown according to

its use for the purposes of the Federation, or for the exercise of the Crown's relations with Indian States, or for the purposes of a Provincial Government. The arrears of taxes with respect to the said properties may be recovered by the authority to which the tax is assigned.[1]

Any property in India accruing to His Majesty by escheat or lapse, or as bona vacantia for want of a rightful owner, vests in the Crown, if it is in a Province, for the purposes of the government of that Province, and in any other case vests in His Majesty for the Federation. If any such property was in the possession of the Federal Government or a Provincial Government, it vests in His Majesty for the purposes of the Government controlling it at the time it accrued.[2]

The executive authority of the Federation and a Province extends to the grant, sale, disposition or mortgage of any property vested in the Crown, or its purchase or acquisition, and to the making of contracts, which are made in the name of the Governor-General, or Governor, as the case may be, and executed by such persons and in such manner as he may direct or authorize. No property used as the official residence of the Governor-General or a Governor may be sold or its use changed without previous sanction given in his discretion by the Governor-General or Governor. Neither the Governor-General nor the Governor nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of the Act. All properties acquired for the Federation or Province or for the exercise of the functions of the Crown are vested in His Majesty.[3]

[1] Ss. 172–3. [2] S. 174. [3] S. 175.

SUITS AND PROCEEDINGS

The underlying principle of all the provisions as regards suits and liabilities is that the liability to sue in cases not under contract is determined by the liability of the Secretary of State in Council before April 1, 1937, which is in turn to be determined by that of the East India Company before 1858. The principle for determining this liability is now well established.[1]

The Federation or a Province may sue or be sued by the name of the Federation or a Province in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed. When claims arise in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Federal Railway Authority, or Province as may be specified under the rules.[2] Contracts existing on April 1, 1937, are deemed to be made by the Federation or the Provinces according to their subject matter.[3] All liabilities of the Secretary of State in Council in respect of loans, guarantees, or other financial obligations outstanding on March 31, 1937, and secured on the revenues of India may be enforced against the Secretary

[1] Peninsular and Oriental Steam Navigation Co. *v.* Secretary of State (1861). 5 Bom. H.C.R. App. 1. "The Company had therefore two distinctive functions which are even to-day exercised by the Government of India. In so far as the Company exercises sovereign rights, they are exempt from liability to be sued in the Municipal courts. But with reference to transactions which they carried on for public purposes and for the public benefit, which are of such nature as to have been undertaken by private individuals or a trading corporation, they are governed by laws regulating private rules and obligations."—Secretary of State *v.* Cockcraft. 39 Mad. 351.

[2] S. 176.

[3] S. 177.

of State; and from April 1, 1937, they become the liabilities of the Federation and are charged on the revenues of the Federation and of all the Provinces alike. Deduction in respect of taxation, Central, Federal or Provincial, from any payment of principal or interest in respect of sterling securities is forbidden. Any outstanding liabilities of a Provincial Government are charged on the revenues of the Province.[1]

Existing or contingent liabilities before the Federation may be enforced against the Federation or a Province, as well as against the Secretary of State, according to the subject-matter of the proceedings, and the liability will be satisfied from the revenues of the Federation or Province, or from such revenues as the Secretary of State may direct. In any legal proceedings pending in the United Kingdom on April 1, 1937, to which the Secretary of State in Council is a party, the Secretary of State shall be substituted for the Secretary of State in Council, with all consequential amendments in pleadings and also reliefs. If the Secretary of State makes any contract for the Federation or a Province after the Federation, he may agree that any proceedings under that contract may be brought against him. In any case, he decides whether the Federation or a Province pays, and no liability is imposed on the Exchequer of the United Kingdom. The Secretary of State in the same manner becomes responsible in respect of contracts in connection with the functions of the Crown in its relation with Indian States, and any sums he receives as a result of legal proceedings are

[1] This includes the liabilities of the Secretary of State in respect of Burma 3 per cent debenture stock.

to be paid or credited to the Federation. Any damages or costs he may be ordered to pay will be included in the amount to be paid by the Federation in respect of the expenses of the Crown in connection with Indian States.

CHAPTER XVII

THE FEDERAL RAILWAY AUTHORITY

Under the Act of 1919, Railways are managed by the Railway Board, which is under the executive member in charge of the Department of Commerce and Industry. To secure the working of the railways on business principles, and to free their administration from political and governmental influence, their administration under the new Constitution is vested in a separate corporate statutory body called the Federal Railway Authority. Having regard to the strategic and commercial importance of railways in India, and also to the fact that a substantial sum of capital invested in them is sterling capital, the necessity for constituting such an Authority was readily admitted by Parliament. The Government of India are the proprietors of the railways; hence it is important that their administration should be strictly on business principles.

Thus the management of the State-owned and managed railways in India, and the supervision and general policy of other railways, are brought under the direct control of the Railway Authority. The control of the railways is removed from politics. Railways are subject to Federal legislation, but are only subject to the control of the Federal Ministers as regards safety and to some extent as regards general policy. Thus the functions of the Authority extend beyond the field of management and also embrace the

governmental functions which would otherwise be exercisable by a Minister. The Constitution has provided beyond all doubt against all possible dangers of mismanagement or corruption or unsound finance. It is conceded that railways constitute an important element in the development of the country, and as such their policy should be under the control of the Legislature. But there is sufficient provision for the achievement of this object, as the Authority is to receive directions as regards the policy it is to pursue. Indian public opinion considers the statutory provision of the Authority with its composition and powers as an unreasonable encroachment on the legislative sphere of the Legislature. While admitting the necessity for a Railway Authority, Indians insist that the Federal Legislature should have been empowered to pass legislation setting up a statutory Authority with clearly defined powers and functions, thus securing legislative control over the Authority. But this suggestion was negatived, and the Authority is established by the Constitution Act itself. The Legislature has no competence to alter the composition, powers and functions of the Authority in so far as they are provided by the Act, and even for other matters the previous sanction of the Governor-General is requisite. Moreover the Governor-General has a special responsibility in respect of the Railway Authority. The Act lays down not only the extent of the control of the Federal Government and the Legislature over the Railway Authority, but also the principles which should guide the Authority, the method of appointing members, its financial obligations, the safeguarding of the existing interests of the companies working some railways under contract with the Secretary of State,

and the machinery for the arbitration of disputed issues in connection with railways.

EXECUTIVE AUTHORITY IN RESPECT OF RAILWAYS TO BE EXERCISED BY RAILWAY AUTHORITY

Under the Act[1] the executive authority of the Federation in respect of the regulation and the construction, maintenance and operation of railways is to be exercised by the Federal Railway Authority.[2] This executive authority extends to the carrying on of undertakings in connection with the railways, and to the making and carrying into effect of all arrangements with other persons for the carrying on by those persons of such undertakings. The Authority is subject to the relevant provisions of any Indian Federal or Provincial Act, and also to the provisions of the Act regulating the relations of the Federation with the Provinces and States. The Federal Government and its officers are directed to perform, in regard to the construction, equipment and operation of railways, such functions for securing the safety both of members of the public and of persons operating the railways, including the holding of inquiries into the causes of accidents, as in the opinion of the Federal Government should be performed by persons independent of the Federal Railway Authority. Further, the complete control of the Federal Railway Authority over the Federal executive power in relation to railways is qualified by the fact that in the discharge of their functions the Authority is to be guided by such instructions on questions of policy as may be given by the Federal Government. The powers of the

[1] The Federation has full legislative power with regard to railways in British India (other than minor railways).

[2] S. 181 (1).

Authority in relation to the railway services of the Federation do not apply to officers of the Federal Government.[1]

COMPOSITION, ETC., OF RAILWAY AUTHORITY

The Authority consists of seven members. Not less than three of the members are to be appointed by the Governor-General in his discretion, and the rest by the Federal Government.[2] The Governor-General in his discretion shall appoint a member of the Authority to be its President. Its members hold office normally for five years, but of the first members, three shall be appointed for three years. They are eligible for re-appointment. No person is qualified to be appointed a member of the Authority unless he has had experience in commerce, industry, agriculture, finance or administration, or if he is, or within the twelve months last preceding has been, a member of the Federal or Provincial Legislature, or in the service of the Crown in India, or a railway official in India. The Governor-General in his individual judgment may terminate the appointment of any member if he is satisfied that that member is for any reason unable or unfit to continue to perform the duties of his office. The conditions of service, salaries and allowances are determined by the Governor-General in his individual judgment. The emoluments of members are not to be reduced during their term of office. All acts and all questions are to be done and decided by a majority of persons present and voting at a meeting of the Authority. In the case of equality of votes, the person presiding has a second or casting vote. If a member becomes interested in any contract with the railway, or he becomes concerned in the management

[1] S. 181 (3). [2] S. 182 (1).

of the company holding or tendering such a contract, he shall make a full disclosure of the facts to the Authority, and shall not take part in the consideration or discussion of, or vote on, any question with respect to it. The Governor-General may depute a person to attend and speak at a meeting of the Authority, but he has no right to vote. The Authority makes standing orders for the regulation of proceedings and business. The proceedings shall not be invalidated by the absence, or any defect in the appointment, of any member. At the head of the executive staff of the Authority, there is a Chief Railway Commissioner, being a person with railway administrative experience appointed by the Governor-General in his individual judgment after consultation with the Authority. He is assisted by a Financial Commissioner appointed by the Governor-General, being a person with experience in railway administration, and by such additional Commissioners with this experience as the Authority may appoint on the recommendation of the Chief Railway Commissioner. The Chief Railway Commissioner can be removed by the Authority only with the approval of the Governor-General in his individual judgment, and the Financial Commissioner by the Governor-General in his individual judgment. These officers have the right to attend a meeting of the Authority, and the Financial Commissioner has the right to require any matter which relates to, or affects, finance to be referred to the Authority. The Authority is exempted from income tax or super-tax on any of its income, profits or gains. The Reserve Bank of India is to act as the bank of the Authority for all purposes. No Bill or amendment affecting or amending these provisions can be introduced without

the previous sanction of the Governor-General in his discretion.[1]

DIRECTIONS AND PRINCIPLES TO BE OBSERVED BY RAILWAY AUTHORITY

The Authority in discharging its functions must act on business principles, due regard being had to the interests of agriculture, industry, commerce and general public, and must take care to meet out of the revenues the expenditure charged thereon. In the discharge of its functions it is to be guided by any instructions on questions of policy given by the Federal Government. Whether a question is or is not one of policy is to be decided by the Governor-General in his discretion. The Governor-General has the right to give directions to the Authority on matters affecting his special responsibility or matters in which he is to act in his discretion or individual judgment.[2] He may, in his individual judgment, but after consultation with the Authority, make rules for the transaction of business arising out of the relations between the Federal Government and the Authority, and also with respect to the relations between the Authority and the Federal Government regarding railway finance and other cognate matters, and also to secure that any matter affecting his responsibility is brought to his notice.[3] The land to be acquired compulsorily by the railways is to be acquired for the Authority, and at its expense, by the Federal Government. The Authority, being a body corporate, may sue and be sued in respect of contracts and is subject to all rights and liabilities of a competent contracting party. This does not apply to contracts which are supplemental to those made before the establishment of the Authority. The Authority may make working agree-

[1] Eighth Schedule. [2] S. 183. [3] S. 184.

ments with, and carry out working agreements made with, any Indian State or person owning or operating any railway in India, or in territories adjacent to India, with respect to the persons by whom and the terms on which any of the railways with which the parties are respectively concerned shall be operated.[1]

FINANCE OF RAILWAY AUTHORITY

The Authority has to establish, maintain and control a fund (the Railway Fund) to which receipts, whether on revenue account or on capital account, are to be paid, and all moneys provided, on revenue account or capital account, out of the revenues of the Federation to enable it to discharge its functions shall be paid into, and all expenditure, whether on revenue account or on capital account, required for the discharge of its functions shall be defrayed from, that Fund. Thus there is one consolidated Fund both for incomings and outgoings from railways, but the Authority is not precluded from maintaining a separate Provident Fund for the benefit of employees.

The income of the Authority on revenue account in any financial year is applied in: (*a*) defraying working expenses; (*b*) meeting payments due under contracts or agreements to railway undertakings; (*c*) paying pensions and contributions to provident funds; (*d*) repayments to the revenues of the Federation of so much of any pensions and contributions to provident funds as is attributable to service on railways in India; (*e*) making due provisions for maintenance, renewals, improvements and depreciation; (*f*) making to the revenues of the Federation any payments by way of interest required by the Act; and (*g*) defraying other expenses properly chargeable against revenue in that year.

[1] S. 185.

After meeting all these expenses, any surplus is to be shared between the Federation and the Authority on the existing basis or according to a scheme which may be prepared. The Federation may provide any moneys, whether on revenue account or capital account, for the purposes of the Railway Authority, and such moneys shall be deemed to be expenditure and shall be shown in the estimates of expenditure laid before the Legislature.[1]

The Authority is to be debited with the moneys provided, either before or after the Act, out of the revenues of India for capital purposes in connection with railways in India, and the Authority is to pay out of its revenue interest charges and also a fixed amount towards the repayment of the debt. Any obligation incurred by the Secretary of State in relation to the railways is to be treated in a similar manner. The Authority will also make payments to the Federation in reduction of the principal of any such debt out of moneys other than receipts on revenue account. The Authority has to indemnify the Federation in respect of any debt, damages, costs or expenses in, or in connection with, any proceedings brought or continued by or against the Federation or against the Secretary of State in respect of railways in India. The Authority has to pay any expenses incurred by a Province or State in providing police for the maintenance of order on Federal railway premises, and in case of dispute as to the amount, it is to be determined by the Governor-General in his discretion.[2] The Authority is empowered to invest its funds in the Railway Fund or Provident Fund, and also to transfer or realize such investments.[3] The Authority has no right to call upon the Federation

[1] S. 186 [2] S. 187. [3] S. 188.

to transfer to it, for investment, funds kept by the Central Government on account of any railway depreciation fund, reserve fund or provident fund, but the Authority may require the transfer of such funds to itself to defray expenses chargeable against that fund. In the meanwhile, the Federal Government shall credit each such fund with interest on the untransferred balance thereof at an agreed rate, or, in default of agreement, at a rate determined by the Governor-General in his discretion.[1] The Authority's accounts shall be audited by the Auditor-General of India, and it shall publish annually a report of its operations during the preceding year, and a statement of accounts.[2] Provision is made for the appointment of a Railway Rates Committee by the Governor-General to give advice to the Authority in connection with any dispute between the users and the Authority as to rates or traffic facilities which he may require the Authority to refer to the Committee.[3] The recommendation of the Governor-General is necessary for the introduction of any bill or amendment making provision for regulating the rates or fares to be charged on any railway.[4] The Authority and the Federated States are bound to afford reasonable facilities for through traffic on the railways for which they are responsible, and there is to be no unfair discrimination between one railway system and another by the granting of undue preferences or otherwise, and no unfair or uneconomic competition.[5] Complaints by the Authority or by a Federated State are to be determined by the Railway Tribunal. Any complaint by a State against a direction by the Authority as to interchange of traffic,

RAILWAY RATES COMMITTEE

[1] S. 189. [2] S. 190. [3] S. 191. [4] S. 192. [5] S. 193.

or maximum or minimum rates and fares, or station or service terminal charges, which involves discrimination or imposes an obligation on the State to construct a new railway, where it is alleged that unfair or uneconomic competition would result, is to be referred to the Railway Tribunal.[1]

RAILWAY TRIBUNAL

Provision is made for constituting a Railway Tribunal consisting of a President and two other persons to be selected in each case by the Governor-General in his discretion from a panel of eight persons appointed by him in his discretion, being persons with railway, administrative, or business experience. The President is one of the judges of the Federal Court appointed for the purpose by the Governor-General in his discretion, after consultation with the Chief Justice of India. He holds office for five years and is eligible for re-appointment. If he ceases to be a judge of the Federal Court he ceases to be the President of the Tribunal. The Tribunal alone has jurisdiction in such cases, and has all the powers of a Court for conducting proceedings, making orders, etc., and is subject on a point of law only to an appeal to the Federal Court, whence no appeal lies. The salaries of the members of the Tribunal are fixed by the Governor-General in his discretion, and their salaries and the administrative expenses are charged on the revenues of the Federation. In fixing this amount, the Governor-General is to act in his individual judgment.[2] It is provided that the railway companies

[1] The provision requiring a reference to the Tribunal does not apply in any case where the Governor-General in his discretion certifies that, for reasons connected with defence, effect should or should not be given to a proposal for the construction or reconstruction of a railway.

[2] S. 196.

which have agreements with the Secretary of State for India in Council under which arbitration may be claimed will be entitled to such arbitration as against the Secretary of State, in the case of any award which will be payable by the Federation and due to it by the Authority.[1] It is also provided that the Authority may also be required to act for the Crown in relation to railway matters in non-federated States, and the power of the Secretary of State in Council with respect to the appointment of directors and deputy directors of Indian railway companies shall be exercised by the Governor-General in his discretion after consultation with the Authority.[2]

[1] S. 197. [2] Ss. 198 and 199.

CHAPTER XVIII

THE FEDERAL JUDICATURE

A Federation postulates an agreement and the distribution of the legislative, financial and executive power between the Federation and the federating units. Both the Federal Government and the federating Governments have to function within their demarcated and delimited sphere. Disputes as regards the interpretation of the Constitution and the respective rights of the Federation and the units are common in all Federations. Hence it is an essential feature of a federal polity that there should be a judicial body independent both of the Federal Legislature and Executive and the Governments of the units, whose duty it is to interpret the Constitution and to adjudicate upon any disputes of this nature. A Federal Court thus acts at once as the interpreter and the guardian of the Constitution.

There is no central Court for the whole of British India. The High Court of a Province is the highest judicial tribunal in the country, and appeals from High Courts in certain cases lie to the Privy Council in London. Indian public opinion favoured the creation of a Supreme Court, both as a Federal Court and a Court of Appeal from Provincial High Courts, but this demand was rejected by Parliament firstly on financial grounds, and secondly on the ground that it was not desirable to abolish the jurisdiction of the Privy Council. The new Constitution provides for the establishment of a Federal Court, which is, however,

empowered to extend its jurisdiction by a Federal Act to hear appeals from High Courts. The Federal Court has two distinct jurisdictions: (1) original jurisdiction in Federal issues, and (2) appellate jurisdiction in Federal issues and also in other matters being appeals from High Courts if such a jurisdiction is conferred upon it by the Federal Act.

CONSTITUTION OF THE FEDERAL COURT[1]

The Federal Court will consist of a Chief Justice of India and such number of other judges as His Majesty thinks necessary. The number of judges is not to exceed six unless an address is presented by the Federal Legislature to His Majesty through the Governor-General asking for such an increase. Every Federal judge is appointed by His Majesty by warrant under the Royal Sign Manual, and holds office until he attains the age of sixty-five years. A judge may resign his office, and he may be removed from his office by His Majesty on the ground of misbehaviour or of infirmity of mind or body, if the Privy Council, on reference to them from His Majesty, recommend that he ought on any such ground be removed. It is to be noted that there is no provision either for the suspension or the removal of the judge by the Governor-General or by an address of the Legislature. All these provisions are intended to secure the tenure of office to the judges with a view to ensuring their independence of political influence, so essential for the functioning of

[1] Ss. 200 to 203. A Federal Court consisting of the Chief Justice and two other judges has been constituted. It will begin its work on October 1, 1937. Section 215, which relates to the appellate jurisdiction of the Federal Court in appeals from High Courts in British India, comes into force on April 1, 1937, and accordingly certificates may be given under that section at any time after that date, notwithstanding that the Federal Court has not yet been constituted. (Federal Court Order.)

the Constitution. This independence is further secured by the provision that no discussion may take place in the Federal or Provincial Legislatures with regard to the conduct of any Federal judge.[1]

QUALIFICATIONS FOR APPOINTMENT AS A FEDERAL JUDGE

A judge of the Federal Court must have been for at least five years a judge of a High Court in British India or in a Federated State, a barrister of England or Northern Ireland, a member of the Faculty of Advocates in Scotland, or a pleader of a High Court or Courts in British India or in a Federated State, of ten years' standing. The Chief Justice, however, must be, or must have been when first appointed to judicial office, a barrister, an advocate, or a pleader, and must be of fifteen instead of ten years' standing. This provision is intended to exclude Civilian judges from the post of Chief Justice. Every judge before he enters upon his office has to take a judicial oath in the form set out in the fourth Schedule to the Act.[2] Their salaries are charged on the revenues of the Federation and cannot be voted upon by the Federal Legislature, though it is entitled to discuss the salaries.[3] Their salaries and allowances, and their rights in respect of leave and pensions, are fixed by the King in Council, and cannot be varied to their disadvantage after their appointment.[4]

By an Order in Council called the Federal Court Order, made on December 18, 1936, the salary of the Chief Justice is fixed at Rs. 7,000 per month and that of the other judges at Rs. 5,500 per month. The Chief Justice is to be paid on his retirement a pension at the rate of £75 per annum in respect of each period of six months' service, but it is not in any case to

[1] S. 40 (1). [2] S. 200 (4). [3] S. 33 (3) (*d*). [4] S. 201.

exceed £2,000 per annum. If the Chief Justice dies during his service as such, a gratuity of £3,000 is to be paid to his personal legal representatives. A Chief Justice who is resident in Europe at the date of his appointment commences his service when he embarks for India to assume his office. The rights of other judges in respect of pensions are fixed by the King in Council. A judge, including the Chief Justice, who was permanently resident in Europe at the date of his appointment, and was not a member of a Civil Service of the Crown in India, is to be paid an allowance of £500 for expenses in respect of equipment and travelling expenses. Every judge is to receive reasonable travelling allowances and facilities as the Governor-General may from time to time prescribe in his individual judgment. The privileges of a judge in respect of leave and passages, and the other conditions of his service, are to be determined by the rules for the time being applicable to an officer appointed by the Secretary of State to a Civil Service of the Crown in India and holding the rank of Secretary to the Government of India.

When the office of the Chief Justice becomes vacant, or if the Chief Justice is unable for any reasons to perform the duties of his office, the Governor-General in his discretion appoints a substitute from amongst the Federal judges, including the Civilian judges, to act until such time as a new Chief Justice is appointed by the King, or the Chief Justice is able to return to his duties.[1] The Federal Court is a court of record and shall normally sit in Delhi, but it may also sit at such other places as the Chief Justice, with the approval of the Governor-General, may from time to time appoint.

[1] S. 202.

JURISDICTION OF FEDERAL COURT

The Federal Court has both original and appellate jurisdiction. The Court has exclusive original jurisdiction[1] in any disputes

ORIGINAL JURISDICTION

between the Federation, any of the Provinces or any of the Federated States, which involves any question of law or fact on which the existence or extent of a legal right depends. Thus the parties to the suit must be Governments, either the Federation itself or the Federal units. But its jurisdiction does not cover a dispute to which a State is a party, unless that dispute concerns the interpretation of the Act or of an Order in Council thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of the Act relating to the administration of a Federal law in that State, or otherwise concerns some matter in which the Federal Legislature has power to legislate for the State, or arises under an agreement made after the Federation, with the approval of the Representative of the Crown, between the State and the Federation or a Province, and expressly providing that the Court's jurisdiction shall extend to such a dispute. No dispute can come within the jurisdiction of the Court if it arises under an agreement expressly excluding that jurisdiction. Only legal rights or justiciable issues can be decided by the Federal Court. Its judgments in its original jurisdiction are declaratory judgments;[2] they declare what are the rights of the parties to the dispute.

[1] This means that suits can originate in the Federal Court itself and cannot originate in any other Court.

[2] S. 204.

APPELLATE JURISDICTION

In addition to its original jurisdiction, the Federal Court has also an appellate jurisdiction from the High Courts in British India and the Federated States. In every case, in British India, it is the duty of the High Court to grant a certificate of its own motion that the case before it involves a substantial question of law as to the interpretation of the Act or Order in Council thereunder, and if such a certificate is granted, an appeal lies to the Federal Court from the judgment, decree or order of the High Court. Where such a certificate is granted, any party may appeal to the Federal Court on the ground that the question was wrongly decided, and on any other ground on which appeal would have lain without special leave of the Privy Council, and, with the leave of the Federal Court, on any other ground. In all such cases, no direct appeal lies to the Privy Council either with or without special leave.

The Federal Legislature has been given power to enlarge, by Act introduced in the Legislature with the previous sanction of the Governor-General in his discretion, the appellate jurisdiction of the Federal Court, so as to make it a final court of appeal from High Courts in British India in ordinary non-constitutional issues, in substitution for the present right of appeal to the Privy Council, and to empower it to hear appeals in civil cases from High Courts in British India without any certificate. But in such cases the amount or value of the subject matter of the dispute in the first Court must be fifty thousand rupees or such sum not under fifteen thousand rupees as the Act may specify, or the judgment, decree or final order must involve directly or indirectly property of the like value, or else the Federal Court must have

given special leave to appeal. When such provision is made by a Federal Act, consequential provision is also to be made simultaneously by the Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to the Privy Council either with or without special leave. It should be noted that, even with the extension of the appellate jurisdiction of the Federal Court, the jurisdiction of the Privy Council in relation to appeals from India is not abolished, but more restrictions will be placed on it both as regards the value of the subject matter and the nature of the dispute.

As regards State Courts, appeal lies to the Federal Court[1] from State Courts on a question concerning the interpretation of the Act or Orders in Council thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of the State, or arising under an agreement under Part VI of the Act relating to the administration of Federal law in the States. Such an appeal shall be by way of a special case to be stated for the opinion of the Federal Court by the High Court. Either of the parties in the suit before the State Court who is dissatisfied with the judgment is entitled to apply to the High Court to state a case for the consideration of the Federal Court. The Federal Court may, if it thinks fit, cause letters of request to be sent to the Ruler of the State, calling upon the High Court to state a case—to set out the facts of the dispute and the law which it applied to those facts. The Ruler passes on the letter of request to the State High Court, which must then state a case.

[1] S. 207 (1).

The Federal Court may, if necessary, return the case so stated and require the State High Court to set forth further facts.

An appeal lies to His Majesty in Council, as of right and without leave, from any decision of the Federal Court in its original jurisdiction dealing with a dispute concerning the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of any State, or arising under an agreement under Part VI of the Act in relation to the administration in any State of the Federal law; and in any other case, by leave of the Federal Court or of His Majesty in Council.[1] In effect, the ultimate tribunal upon all constitutional issues under the Act, Orders in Council thereunder, or the Instrument of Accession, is the Privy Council. The principles which would guide the Federal Court or the Privy Council in granting leave to appeal are now well established, and it is believed that these principles will be followed.[2] It is well established that the Privy Council is not a formal Court of Criminal appeal, and appeals to the Privy Council in criminal matters will be rare as under the existing circumstances. The Federal Court may either allow the appeal or dismiss it. In allowing an appeal the Federal Court shall remit the case to the court from which the appeal was brought, with a declaration as to the judgment to be substituted for the judgment appealed against, and the court

[1] See Prince *v.* Gagnon (1882) 8 App. Cal. 103.

[2] Hanuman Prasad *v.* Bhagamati Prasad (1902) I.L.R. 24 Acc. 236. Ragunath Prasad Singh *v.* Pratapgar Deputy-Commissioner (1927) L.R. 54 Ind. App. 126. Jivangiri Guru Chamelgiri *v.* Gajanan Narayan Patkar (1926). 50 Bom. 573.

shall give effect to the judgment of the Federal Court.[1] Where the Federal Court orders costs, it shall transmit its order for the payment of the sum fixed to the court from which the appeal was brought, and it is that court's duty to give effect to the order.[2] The Federal Court may on conditions order a stay of execution pending the hearing of the appeal.[3]

ENFORCEMENT OF ORDERS AND DECREES OF FEDERAL COURT

All authorities, civil and judicial, throughout the Federation, must act in aid of the Federal Court. The Federal Court has power to make orders for the attendance of witnesses, the discovery or production of documents, and the investigation or punishment of contempt of court, and all such orders shall be enforceable in British India and the Federated States. Whenever it makes any such orders, it is the duty of the courts to enforce them as rigorously as if they had been made by the highest court in the Province or State itself.[4] In all matters relating to the States, the Federal Court shall act through letters of request to the Ruler, who shall secure their execution.[5] Where in any case the Federal Court requires a special case to be stated or restated by, or remits a case to, or orders a stay of execution in a case from, a High Court in a Federated State, or requires the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.[6]

It is to be noted that there is no direct provision

[1] Ss. 205–9. [2] S. 210. [3] S. 209 (3).
[4] S. 210 (2). [5] S. 210 [6] S. 211.

for the enforcement of Federal laws and orders in the States. The executive authority of the Federation in the States is to be given effect by the States. But, at the same time, it is provided that all authorities throughout the Federation shall act in aid of the Federal Court. The difficulty is how to secure this aid. Having regard to the internal sovereignty of the States and the absence of a Federal agency directly operating in the States, the only method of securing the object is to get the orders of the Court enforced in the States through the State agencies, and this is to be done, whenever necessary, by letters of request to the Ruler. This provision has no precedent, but the phraseology is used with a view to recognizing the sovereignty of the Rulers. "It is merely an enactment to show proper respect to a Sovereign Ruler, without the necessity of an order being directed to him to state a case, that letters of request shall be addressed to him."[1] The law declared by the Federal Court or the Privy Council shall bind all courts in British India, and the State courts in respect of the interpretation of the Act or Order in Council thereunder or any matter with respect to which the Federal Legislature can make laws in relation to the State.[2] If at any time the Governor-General thinks that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to the Federal Court for consideration, and the Court may, after such hearing as it thinks fit, report to the Governor-General thereon.

POWER OF GOVERNOR-GENERAL TO CONSULT FEDERAL COURT

[1] Attorney-General, *Hansard*, April 1, 1935. [2] S. 212.

The report shall be made in open court and in accordance with the opinion of the majority of the judges present at the hearing of the case. A dissenting judge may deliver a separate opinion.[1] This is the advisory or consultative jurisdiction of the Court, and is analogous to the consultative jurisdiction of the Privy Council. It is not stated whether the opinion has a binding effect on the Governor-General. It appears that the intention is to enable the Governor-General to take a decision in the light of the judicial opinion in matters in which he may feel doubt.

The Federal Court has power from time to time, with the approval of the Governor-General in his discretion, to make rules regulating generally the practice and procedure of the Court, including rules as to the persons entitled to practise before the Court, the time for entry of appeals, costs and fees, and for the summary disposal of appeals regarded as being frivolous or vexatious or brought for the purpose of delay.[2] Such rules may fix the number of judges who are to sit for any purpose, but no case shall be decided by less than three judges. The three judges constitute the minimum bench. The Court may be divided into divisions, and the Chief Justice, subject to any rules of Court, determines which judges are to sit in the various divisions. If the appellate jurisdiction of the Court is extended by the Federal Legislature, the rules must provide for the constitution of a special division to hear appeals which would have been within its jurisdiction without such addition. Judgments of the Court are to be delivered in open court with the concurrence of a majority of the judges present at the hearing. A judge who does not concur

[1] S. 213. [2] S. 214 (1).

may deliver a dissenting judgment. All proceedings in the Federal Court shall be in the English language.[1] The Federal Legislature may by an Act confer upon the Court ancillary powers necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under the Act.[2] The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, are charged upon the revenues of the Federation, and any fees or other moneys taken by the Court form part of the Federal revenues. The Governor-General decides in his discretion the amount to be included in the financial statement for such expenses.[3]

EXPENSES OF THE FEDERAL COURT

The State Courts which are declared by His Majesty, after communication with the Ruler, to be High Courts are to be deemed High Courts for the purpose of appeals.[4] The Federal Legislature is not empowered to confer any jurisdiction on the Federal Court to hear appeals from High Courts, when they exercise jurisdiction under the Foreign Jurisdiction Act, 1890, or to hear appeals from courts outside India. Nothing in the Act affects any right of appeal to the Privy Council in such cases, with or without special leave.[5]

In addition to what has been already stated, a right of appeal lies to the Federal Court from the decisions of the Railway Tribunal,[6] and from decisions as to the amount of a State's contribution in lieu of corporation tax.[7]

[1] S. 214. [2] S. 215. [3] S. 216. [4] S. 217.
[5] S. 318. [6] S. 196 (4). [7] S. 139 (3).

CHAPTER XIX

THE LAW OF BRITISH INDIA

The indigenous law of India is personal. It is divisible into two systems with reference to the two main classes of the population. Hindu and Muhammadan. Both systems claim divine origin through revelation. They are inextricably interwoven with religion, and derive their authority from religion as well as custom. The English first settled in India under licence from a Native Ruler, but they did not adopt native law. They had brought their own legal system with them, and the Charter Act of 1726 introduced common law into the three Presidency towns as regards Europeans. At first the English tried to make English law public and territorial, but by the end of the eighteenth century it was decided that Hindu law and usage should be applied to Hindus, and the law and custom of Islam to Muhammadans. Subsequently, owing to the influence of Western jurisprudence and the progress of education, the rules of the Shastras and the Kuran were gradually altered and relaxed. Substantial modifications were made both in Hindu and Muhammadan law by direct legislation, and also by the development of case law. A Law Commission for the codification of laws was appointed in 1833 under the chairmanship of Macaulay. As a result of the labours of this and other Commissions, the laws were simplified and codified by the passing of the Civil Procedure Code in 1859, the Criminal

Procedure Code in 1860, and the Penal Code in 1861. To-day the position is as follows. As regards criminal law and procedure, and also civil procedure and evidence, native law has been superseded by various codes and enactments, but the indigenous personal law of the Hindus and Muhammadans and other Natives still regulates most matters relating to the family, and matters of succession and inheritance amongst them. So apart from the personal and customary law which is specifically recognized by the courts, the law of British India is the creation of statutory enactments made for it either at Westminster or by the authority in India to whom the necessary law-making functions had been delegated. Under the Government of India Act of 1935, all the law in force in British India immediately before April 1, 1937, continues in force there until altered, repealed or amended by a competent Legislature or other competent authority.[1] The King in Council may make such adaptations and modifications as may be necessary or expedient to the changed conditions consequential on territorial redistribution and the creation of the new Provinces, and on the re-constitution of Governments and authorities.[2] By Order in Council some two dozen English Statutes applicable to India, and nearly two thousand Indian and Provincial Statutes and Acts, are modified and adopted to meet the changes consequential to the constitutional and administrative changes introduced by the Act of 1935.

[1] S. 292. [2] S. 293.

CHAPTER XX

THE PROVINCIAL JUDICIARY

1. Historical

The early Charters of the Company conferred judicial authority upon the Governor and Council of the several factories for the trial of persons belonging to the Company and living under them. In 1726 a Mayor's Court was established for this purpose at each of the three Presidencies of Calcutta, Madras and Bombay, with the right of appeal to the Governor and Council, and in certain cases to the King and Council. The Governors-in-Council were also constituted courts for the trial of all offences except high treason. Side by side with them were native courts. The native system of government was based upon the union of all authority, judicial, fiscal and military, in the same hands. At the head was the Nawab-Deputy of the Delhi Emperor, who was both a Diwan and a Nizam. As Diwan he collected the revenue and superintended the administration of Civil justice. As Nizam he exercised criminal jurisdiction and controlled the police. Under the Nawab, the zamindars exercised civil and criminal jurisdiction. The criminal law administered was the Muhammadan law. The civil law was Hindu or Muhammadan as the case required. With the acquisition of *Diwani* from the Moghul Emperor in 1765, Clive introduced a dual system. The Nawab of Bengal continued to administer

criminal justice in accordance with Muhammadan law through Muhammadan judges. The administration of civil justice and the collection of revenue were undertaken by the Company, but were still carried out by Indian judges. This dual system proved a miserable failure. In 1771, the Company "stood forth as Diwan," and Warren Hastings, who was appointed Governor of Bengal, devised a scheme which placed the entire administration of justice as well as the collection of revenues under the supervision of English officers. Each district was placed in charge of a Collector assisted by a native Diwan. The Collector and the Diwan constituted a court of civil justice called the Diwani Adalat, from which an appeal lay to the Sadar Diwani Adalat at Calcutta, composed of the Governor and Council, also assisted by native officers. A court of Fozdari Adalat was likewise established for each district, consisting of a kazi, a mufti, and two moulvis, with whom the Collector sat simply to watch the proceedings. From this court an appeal lay to the Sadar Nizamat Adalat, which was composed of a daroga, a kazi, a mufti and three moulvis, all appointed in the name of the Nizam. This court was also under the supervision of the Governor and Council.

The Regulating Act, 1773, which conferred legislative authority on the Governor-General and Council, also constituted the Supreme Court of Judicature in Bengal, composed of a Chief Justice and four puisne judges, all nominated by the Crown. It was intended to become the general supervisor of justice throughout Bengal, but the vague nature of its powers immediately led to difficalties with the executive authority of the Governor-General and Council and the native revenue officers. The dispute was settled by Parliament

by an Amending Act which declared, among other things, that the Supreme Court had no jurisdiction over the Governor-General in his public capacity.

In 1774, the Collectors were withdrawn and Native Amils were appointed in their places for the administration of civil justice, the superintendence of revenue being entrusted first to the Provincial courts and afterwards to a Committee of Revenue. In 1780 sixteen courts of Diwani Adalat were created, each under the charge of a covenanted Civilian styled the Superintendent. In 1781, the Provincial courts of the Company received express recognition from Parliament. The Governor-General and Council was constituted the highest court of appeal, with an ultimate appeal to the King in Council in cases exceeding £5,000 in value.

Reforms of Lord Cornwallis

Lord Cornwallis introduced considerable changes in the judicial system. In 1790 the Sadar Nizamat Adalat was reconstituted so as to consist of the Governor-General and Council, together with the kazi and two muftis. In 1793 ordinary criminal jurisdiction was entrusted to four courts of circuit, each composed of two or three covenanted Civilians with native assessors. As regards civil justice, the duties of the Collectors were separated from those of the magistrates. Twenty-six civil judges were appointed, each with a Hindu and Muhammadan assessor. From them appeals lay to four Provincial courts which were identical with four courts of circuits, and finally to the Sadar Diwani Adalat consisting of the Governor-General and Council. These civil judges were also constituted magistrates to hold preliminary inquiries in important criminal cases.

At the time of the Marquis of Wellesley the two appellate courts, Sadar Nizamat Adalat and Sadar Diwani Adalat, were reconstituted. Instead of consisting of the Governor-General and Council they were composed of three or more judges selected from the covenanted service, and thus they remained until merged in the High Court in 1862. The ordinary courts of justice were constituted in their present form by Lord William Bentinck (1828–35). The Provincial courts of appeal in civil cases were abolished. Full criminal jurisdiction was conferred upon the civil district judges, and the magisterial authority formerly exercised by the civil judges was transferred to the Collectors, a combination of executive and judicial functions in one person which continues to this day. Lord Cornwallis established inferior civil courts of Native Commissioners outside the Presidency towns with graded jurisdiction. Lord William Bentinck instituted a new class known as Principal Sadar Amins, who subsequently came to be known as subordinate judges.

THE INDIAN HIGH COURTS ACT OF 1862

In 1862 the Indian High Courts Act was passed. It established High Courts at Calcutta, Madras and Bombay in which the Supreme Courts as well as the Sadar Diwani Adalat and the Sadar Nizamat Adalat were merged. Under the same Act a High Court was established at Allahabad in 1866. Under the Indian High Courts Act of 1911, High Courts were constituted at Patna and Lahore. A Chief Court was established at Oudh, and Judicial Commissioners' Courts were constituted in the Central Provinces, the North-West Frontier Province and Sind. Thus the whole of British India before the Act of 1935 was under the jurisdiction of either Chartered High Courts or other courts with more

or less similar powers. There was no Supreme or Central Court for the Whole of British India. A High Court or similar Court was the supreme judicial tribunal in a Province, from which in certain cases ultimate appeal lay to the Privy Council in London.

2. The High Courts in British India

The High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore, Patna and Nagpur;[1] the Chief Court in Oudh; the Judicial Commissioners' Court in the North-West Frontier Province and in Sind, and any other court in British India constituted or reconstituted as a High Court, and any other comparable court in British India declared by His Majesty in Council as a High Court, are given the status of a High Court under the Act of 1935. Every High Court is a Court of Record and consists of a Chief Justice and such other judges as His Majesty may from time to time deem it necessary to appoint, but their number, including additional judges, is not to exceed the maximum fixed by His Majesty in Council. Judges are appointed by the Crown by warrant under the Royal Sign Manual and they hold office until they attain the age of sixty years. A judge may resign or may be removed by the Crown on the ground of misbehaviour or of mental or bodily infirmity, if the Privy Council, on reference from the Crown, reports that he ought to be removed on any such ground. A judge of a High Court must be a barrister of England

Constitution of High Courts

[1] The High Court of the Central Provinces and Berar was constituted under an Order in Council made in February, 1936.

or Northern Ireland, or a member of the Faculty of Advocates in Scotland, of at least ten years' standing; or a member of the Indian Civil Service of at least ten years' standing, who has for at least three years served as, or exercised the powers of, a district judge, or has for at least five years held a judicial office in British India not inferior to that of a subordinate judge or judge of a small cause court; or a pleader of any High Court or Courts of at least ten years' standing. The Chief Justice of a High Court constituted by Letters Patent must be, or have been when first appointed to judicial office, a barrister or advocate or pleader, or must have served for not less than three years as a judge of a High Court. The statutory requirement under the Act of 1919 that one-third of the judges should be barristers and one-third members of the Indian Civil Service is abrogated. Indian public opinion insisted on the exclusion of the Civilians from appointment as High Court judges. But the Civilian judges are considered necessary for the present to maintain the strength and efficiency of the Judiciary, and the Indian demand has not been conceded. Under the Act of 1919, neither a Civilian judge nor a non-barrister judge was entitled to hold the permanent post of Chief Justice. Indian public opinion demanded the removal of this disability in the case of non-barrister judges, and the Act removes it for both non-barrister and Civilian judges. Judges have to take a judicial oath before entering their office. Their salaries, allowances, leave and pensions are fixed by His Majesty in Council, and (except for the allowances) shall not be varied to their disadvantage after their appointment. A vacancy in the office of the Chief Justice is filled by the Governor-General in his

discretion from the judges, and other vacancies are filled by him in his discretion from qualified persons. When there is pressure of work, the Governor-General appoints any additional judges within the prescribed maximum number for two years.[1]

JURISDICTION AND POWERS OF HIGH COURTS

The High Courts of Calcutta, Bombay and Madras have both original and appellate jurisdiction, while other High Courts have mostly appellate jurisdiction. They have jurisdiction in all matters civil and criminal, and also in matters connected with wills, bankruptcy, admiralty, and, in cases of Christians and Parsis and of Hindus married under the Civil Marriage Act or Special Marriage Act, also of divorce. They have no original jurisdiction concerning the revenue or its collection so long as it is done in accordance with the usage and practice of the country or the law in force. Every High Court shall have superintendence over all courts in India subject to its appellate jurisdiction, and may call for returns, issue general rules and forms of practice and proceedings, and settle fees for sheriffs, attorneys, clerks and officers with the previous approval of the Governor. The High Court has no jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision. In all cases heard in the inferior courts the evidence is recorded and submitted, when required, to the High Court which is enabled to revise, if necessary, the proceedings of these courts. High Courts can transfer any suit from one court to another of equal or superior jurisdiction. A High Court may, on application by the Advocate-General for the Federation or by the Advocate-General of a Province, transfer to itself for

[1] Ss. 223–226. The jurisdiction of existing High Courts continues.

trial a case pending before an inferior court if the case involves, or is likely to involve, the question of the validity of any Federal or Provincial Act. In matters concerning constitutional issues under the Act of 1935, an appeal lies from the High Courts to the Federal Court and finally to the Privy Council. From a decision of a High Court in its original capacity an appeal lies to a bench of two or more judges of the same court. Under certain conditions, where the subject matter of the suit is of the value of Rs. 10,000/- or more, or when a substantial question of law is involved, an appeal lies from the High Court to the Privy Council in London.

No High Court has, unless otherwise provided, any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force. A Bill or amendment for making such a provision shall not be introduced in the Federal or Provincial Legislature without the previous sanction of the Governor-General in his discretion, or of the Governor in his discretion.

All proceedings in High Courts shall be in the English language.[1] The administrative charges of High Courts, including all salaries, allowances and pensions, payable to or in respect of the officers and servants of the Courts, and the salaries and allowances of the judges, are charged upon the revenues of the Provinces, and any fees or other moneys taken by them accrue to the Provincial revenues. The Governor in his individual judgment decides what amount of these expenses is to be included in the estimates of

[1] S. 227.

expenditure placed before the Legislature. The Governor-General, the Governors, the Counsellors of the Governor-General, Ministers, Chief Justices and Judges of High Courts are exempted from the jurisdiction of High Courts in any action that any one of them may have taken in the performance of his public duties, nor are they liable to arrest or imprisonment.

The Crown, on an address from the Legislature of a Province, may by Letters Patent constitute a High Court in that Province or for any part thereof, or reconstitute in like manner any existing High Court for that Province or for any part thereof, or where there are two High Courts in that Province, amalgamate those Courts. On an agreement between the Governments concerned, the King in Council may extend the jurisdiction of a High Court in any Province to any area in British India outside that Province, and in such a case the existing arrangement under which a High Court exercises jurisdiction in more than one Province or in relation to a Province and an area outside a Province remains unaffected. The Legislature of a Province in which the Court has its principal seat is not empowered to alter the Court's jurisdiction outside the Province, but the power to do so rests with the Legislature having authority over the area concerned. Similarly, the power to approve rules made by the High Court for the area rests with the head of the Executive of that area. Provision is also made for the consequential changes necessary by the constitution or re-constitution of High Courts as hereinbefore stated.[1]

Where any person has been sentenced to death in a Province, the Governor-General in his discretion

[1] Ss. 228–231.

has all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council. No other authority in India outside a Province has any power to suspend, remit or commute the sentence of any person convicted in the Province. Any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court-martial remains unaffected. The right of His Majesty to grant pardons, reprieves, respites or remissions of punishment is unaffected and is re-affirmed.[1]

The position of the Judiciary is analogous to that in other Federations. The judges have security of tenure and salaries and are made mostly independent of the Executive, as they are the interpreters and custodians of the Constitution.

RELATION OF HIGH COURTS TO THE GOVERNMENT

Under the Act of 1919, the High Courts, except that of Calcutta, were in direct relation with their respective Provincial Governments. In other words the Provincial Governments held themselves responsible for the expenditure and budget of the High Courts. Permanent judges were appointed by the Crown. Additional judges were appointed by the Governor-General in Council, while acting and temporary judges were appointed by the Provincial Governments. Under the Act of 1935 the administration, including the expenditure, of the High Courts (including that of the Calcutta High Court, in spite of opposition from Bengal) is provincialized. Appointments of judges continue to be Crown appointments. However, acting and temporary judges and additional judges are to be appointed by the Governor-General in his discretion.

[1] S. 295.

COURTS OF APPEAL IN REVENUE MATTERS

The Act provides that no member of the Federal Legislature or a Provincial Legislature is to be a member of any tribunal in British India which deals with revenue appeals. Where before April 1, 1937, the Governor in Council of a Province acted in such revenue matters as a court of appeal, the Governor is empowered in his individual judgment to constitute a tribunal consisting of such persons as he thinks fit to exercise the same function until other provision is made by the Provincial Legislature. The members of the tribunal are to be paid such salaries and allowances as the Governor in his individual judgment may fix, and these are charged on the revenues of the Province.[1]

[1] S. 296.

CHAPTER XXI

THE INDIAN CIVIL SERVICE

1. Historical

The Indian Civil Service derives its origin from the staff of merchants, factors, and writers employed by the East India Company when it was a purely commercial body. For some time after the Company acquired political power, the administration was left in the hands of the native subordinates. In 1722 the Company began to take the administration in its own hands. Between 1790 and 1793 all branches of the public service manned by European officers were placed on a clear and permanent basis by Lord Cornwallis, who created the "Covenanted Service." All civil posts were reserved for this service. Promotion was regulated by seniority. A college was set up at Calcutta for the training of junior Civilians in law and Oriental languages. In 1806 Haileybury College was established to train the members before they joined the service. Admission was by nomination by the Court of Directors. The principle of regulating admission to the college by open competition was laid down in 1853 and was reaffirmed on the transfer of the Government to the Crown in 1858.

It was enacted in 1833 that "no native of the said territories (India) nor any natural born subject of His Majesty resident therein shall by reason only of

his religion, place of birth, descent, colour, or any of these, be disabled from holding any place, office or employment under the said (East India) Company." In spite of this provision, up to 1870 only one native of India had successfully competed for the Covenanted Service. Owing to social, religious, and financial difficulties, it was not possible for Indians to go to England to compete for the service. An Act of 1870 accordingly provided that natives of India of proved merit and ability would be employed in the Civil Service without going through the competitive examination in London. One or two appointments only were made under it and those to the judicial branch of the service. The subject was reconsidered in 1879, and fresh provision was made by which the recruitment by this means was extended up to one-fifth of the total number of Civilians appointed in the year. These appointments were generally to be confined to young men of good family and social position, possessed of fair abilities and education. For some years a few persons were recruited from this source but the experiment proved a failure, as men who combined high social position with the requisite intellectual and educational qualifications could not be found. Thereupon the Government, with the object of devising a scheme to do justice to the claims of natives of India to higher employments in the public service, appointed a Commission which submitted its report in 1887. On the advice of this Commission, the Civil Service was divided into three branches, the Indian Civil Service, the Provincial Civil Service, and the Subordinate Civil Service, the first being entirely recruited in England by competitive examination.

THE ISLINGTON COMMISSION 1912–15

The Civil Service in India came under a detailed review in 1912 by the Royal Commission on Public Services, of which Lord Islington was chairman. It submitted its report in 1915. The Commission devoted itself mainly to exploring the possibilities of employment of Indians in the superior services and to an examination of the conditions of service. Owing to the War, the consideration of its proposals was deferred and the report was not published till June 26, 1917. Before it could be considered, the facts on which it was based had materially altered. On August 20, 1917, the Secretary of State announced in the House of Commons that the policy of His Majesty's Government towards India was, among other things, that of the increasing association of Indians in every branch of the administration. During the War, the cost of living had gone up, a factor which had not been taken into consideration by the Commission in the rates of pay proposed. Hence the orders passed on the recommendations of the Commission in 1919–20 suffered inevitably from having been based on an investigation which subsequent events had rendered obsolete.

The Montagu-Chelmsford Report reviewed the services and in a masterly manner explained their position under the Reforms. The authors of the Report pointed out that recruitment in England was not adequate to supply a sufficiency of Indian candidates, hence the system should be supplemented by fixing a definite percentage of recruitment to be made in India. The Report laid stress on Indianisation, improvement in the conditions of the European members, and statutory protection of the services. The members of the services were perturbed at the

introduction of the Reforms, and demanded safeguards. It was recommended that the members of the All-India services, with a few exceptions, might be allowed to retire before they completed the service ordinarily required for retiring pension, and in this case they were to receive a pension proportionate to their actual service. After the inauguration of the Reforms and the new policy, the relations between the political classes and the services, instead of being improved, were markedly worsened. Persistent criticisms in the Legislatures had a discouraging effect on services accustomed to a traditional respect. Other factors aggravated the trouble. The Non-Co-operation Movement of 1920–22 involved the officers and their families in general disrespect and even in serious danger. Moreover, owing to a great rise in prices, their financial position was at the time a source of great anxiety to them. Pursuant, therefore, to the recommendations of the Montagu-Chelmsford Report as regards officers in the service to whom the new conditions were so repugnant that they preferred to retire, a scheme was adopted under which All-India officers selected for appointment before January 1, 1920, and not permanently employed under the Government of India, were allowed to retire before they had completed the normal full service, on a pension proportionate to their length of service. Under this scheme, 200 All-India service officers had retired by 1922, and by 1924 the number had risen to 345. By far the greater number of them were officers of ten to twenty-five years' service. This exodus had a secondary effect which was equally important. Recruitment to the services in England was suspended during the War, and the tradition that India offered

a career for young Englishmen had hardly begun to revive when it was confronted with the outspoken discontent of the services in India and the premature retirement of many officers. The sources of recruitment in England had practically dried up. While this was the situation within the services, Indian political opinion was concentrated on two points: (1) The All-India Services were at this time mainly European in composition. Though the preamble to the Act of 1919 declared that the increasing association of Indians in every branch of Indian administration was the policy of Parliament, Indian opinion did not accept as adequate the rate of Indianisation that had been established. (2) It was also contended by some Indians that the recruitment and control of any service by the Secretary of State should cease altogether. These factors led to the appointment of the Royal Commission on the Superior Civil Services in India, of which Lord Lee was Chairman. The Commission submitted its report in 1924, and its recommendations have been accepted and acted upon by Government.

THE LEE COMMISSION: ITS RECOMMENDATIONS

The All-India services with which the Lee Commission was concerned were: (1) the Indian Civil Service, (2) the Indian Police Service, (3) the Indian Forest Service, (4) the Indian Agricultural Service, (5) the Indian Educational Service, (6) the Indian Service of Engineers, (7) Indian Veterinary Service and (8) the Indian Medical Service (civil). The total strength of these services was 4,279, of which the two first comprised 2,082.

RECRUITMENT

The Commission recommended that as regards the Indian Civil Service, the Indian Police Service, the Indian Forest Service, and

the Irrigation Branch of the Service of Engineers, on which public security and finance mainly depend, the Secretary of State should continue to recruit for these services, and that his control with safeguards should be maintained. These four services were the only services to which recruitment was on an All-India basis from 1924 till the introduction of the New Constitution. The remaining four services operated mostly in the transferred field. The Commission recommended that the control of Ministers over these services, except the Medical Service, should be made more complete by closing the recruitment on an All-India basis. The officers already in these services were free to remain, retaining their All-India status and privileges, and recruits for these branches of administration would in future be appointed by the Provincial Governments and would constitute Provincial services. This recommendation was not extended to the Indian Medical Service. Each Province was to employ in its civil Medical Department a certain number of officers lent from the Medical Department of the Army in India, such officers receiving commissions from the Crown.

INCREASED RATE OF INDIANISATION

In regard to the Indianisation of services which were still to be recruited by the Secretary of State the Commission recommended:—

For the Indian Civil Service 10 per cent of the superior posts should be filled by appointment of Provincial service officers to "listed" posts, and the direct recruitment in future should be Indian and European in equal numbers. On this basis it was calculated that by 1939 half the recruits to the Indian

Civil Service would be Indian and half European, allowing for Indians in listed posts.

For the Indian Police Service direct recruitment was to be in the proportion of five Europeans to three Indians, allowing for promotion from Provincial service to fill 20 per cent of all vacancies. It was calculated that by 1949 the personnel of the Police Service would be half Indian and half European.

For the Indian Forest Service the recruitment proposed was 75 per cent Indian and 25 per cent European. For the Irrigation branch of Indian Engineers, direct recruitment of Indians and Europeans in equal numbers was recommended.

CENTRAL SERVICES

For the Central Services the proportions of recruitment were: (1) Political Department: 25 per cent of total officers to be recruited annually should be Indians; (2) Imperial Customs: not less than half should be statutory natives of India; (3) Superior Telegraph and Wireless Branch: 25 per cent in England, 75 per cent in India; (4) State Railways: recruitment in India to be increased as soon as possible up to 75 per cent, i.e. the remaining 25 per cent in England.

In (2), (3), and (4) recruitment should be by open competition. Recruitment for the remaining Central Services was left at the discretion of the Government of India.

PROVINCIAL SERVICES

Recruitment for the services employed in the transferred field was handed over to the Provincial Governments, and no restriction was placed upon them as to the source of their recruitment.

INCREASE IN EMOLUMENTS AND PRIVILEGES

European members of all services were permitted or privileged to remit their overseas pay at a rate of two

shillings to the rupee or to draw it in London in sterling at that rate. At the time the actual exchange rate was 1*s.* 5*d.* European members of the superior Civil Services and their wives were to receive four return passages, and one single passage for each child during service. The family of a member of the services who died while serving was to be repatriated at the expense of the Government. The pensions of the members of the Indian Civil Service who attained the rank of members of the Executive Council or who served as Governors of Provinces were increased to £1,250 and £1,500 per annum. Attendance by medical officers of their own race was made available for members of the services and their families. Family Pension Funds on the lines of the one for the Indian Civil Service were introduced for other All-India Services. All future British recruits to the All-India Services were to be given, among other things, the option of retiring on proportionate pensions when the field of the service for which they had been recruited was transferred, the option to be exercised within a year from the date of such transfer. Claims from members of a service for compensation for the abolition of higher appointments were to be referred by the Secretary of State to the Public Services Commission.

PUBLIC SERVICE COMMISSION

The Government of India Act of 1919 provided for the establishment of a Public Service Commission to discharge functions "in regard to the recruitment and the control of the Public Services in India." The Lee Commission recommended its establishment immediately. The Commission was to be a central body composed of five whole-time members of the highest public

standing, detached from political associations, drawing salaries not less than those of the High Court Judges. Its functions were to be, firstly recruitment, and secondly, certain functions of a quasi-judicial character in connection with the disciplinary control and protection of the services. Such a Commission was appointed in 1925. A Public Service Commission for Madras Presidency was appointed in 1929. Since 1924 a certain proportion of recruitment to the Indian Civil Service is made on the result of a competitive examination held in India.

2. The Services of the Crown in India

Defence Services

Defence is entirely reserved to the Governor-General. The rights of the Crown in relation to defence services are secured. The pay and allowances of the Commander-in-Chief of His Majesty's forces in India and the other conditions of his service are determined by the King in Council. The King in Council may require that appointments to such offices connected with defence as he may specify shall be made by him or in such manner as he may direct. The power of His Majesty under the Act or by virtue of his Royal Prerogative remains unaffected. The result is that certain appointments in the Army and other forces in India may be reserved to the British Government itself. The King in Council may delegate the power of appointment to the Federal Ministers, but this is inconsistent with the scheme of the Act, and therefore unlikely. Commissions in any naval, military, or air force raised in India can only be granted by the King or by a person authorized by him, which in effect means the Governor-General

acting in his discretion.[1] As regards defence, the Governor-General is to act in his discretion, but the Instrument of Instructions draws attention to the fact that "the defence of India must to an increasing extent be the concern of the Indian people,"[2] and directs the Governor-General to bear in mind the desirability of ascertaining the views of his Ministers when he shall have occasion to consider matters relating to the general policy of appointing Indian officers to His Majesty's Indian forces. The Secretary of State, with the concurrence of his advisers, may specify what rules, regulations and orders affecting the conditions of service of His Majesty's forces in India shall be made only with his previous approval. The existing rights of appeal to the Secretary of State by members of His Majesty's forces remain unaffected. The pay, allowances and pensions of members of the defence forces are charged on the revenues of the Federation. Civilians holding posts in India connected with the forces or with defence are for these purposes to be deemed members of His Majesty's forces. Provision is also made, as regards the appointment of officers, for the appointment of sons of persons who have served in India in the military or civil service of the Crown.[3]

CIVIL SERVICES

The members of the Civil Services looked askance at the constitutional changes which were proposed to be introduced in India. They felt that with the introduction of responsible government their position would inevitably be affected. They believed that, without definite statutory safeguards, the future conditions and security of service would

[1] S. 8 (1) (iv) and S. 234.
[2] Draft Instrument of Instructions XVII.
[3] Ss. 232–239.

be in danger. They therefore vehemently insisted on safeguards as regards their position, emoluments, privileges and conditions of service. The Government of India Act, 1935, provides adequate safeguards to secure that the civil servants shall not suffer through the constitutional changes more than is inevitable. It also secures more or less the existing conditions for future recruitment. All existing service rights possessed by members of the services are secured, and a special right to compensation for loss of existing rights is provided. Special responsibility is imposed on the Governor-General and the Governors for "the securing to members of the Public Services of any right provided for them by the Constitution Act, and the safeguarding of their legitimate interests."

3. General Provisions

Tenure of Office of Persons Employed in Civil Capacities in India

Every person who is a member of the Civil Service of the Crown in India holds office during His Majesty's pleasure.[1] The Act permits for new recruits the inclusion, in their contracts of service, of provision for compensation in the event of premature abolition of office or being required to vacate the post for reasons not connected with misconduct, if the Governor-General or the Governor thinks such clause necessary to secure a person with special qualifications. A civil servant has no right of action against the Crown for wrongful dismissal. No civil servant can be dismissed by an authority inferior to the appointing authority. No member can be dismissed or reduced in rank unless he is given a

[1] *See* Denning *v.* Secretary of State (1920), T.L.R. 139

reasonable opportunity of showing cause against the action proposed to be taken in regard to him, unless he has been convicted of a criminal offence, or unless it is not reasonably practicable to afford such an opportunity.[1]

RECRUITMENT AND CONDITIONS OF SERVICE

The Governor-General, or some person authorized by him, makes appointment to civil services (except the Indian Civil Service, Indian Police Service, and Indian Medical Service [civil]) in the Federal sphere and makes rules for the conditions of these services. The Governor, or some other person authorized by him, makes appointments to services in the Provincial sphere and makes rules for the conditions of these services. The Legislature may also regulate the conditions of service. These rules cannot be altered to the disadvantage of the members except by the competent authority. These officers are permitted to address complaints against any order of punishment, censure or termination of service or alteration of conditions of service. Every member of the services shall have at least one appeal against any such order, not being an order of the Governor-General or a Governor. No Act of any Legislature in India shall be construed to limit the power of the Governor-General or a Governor to deal with the case of any person serving the Crown in a civil capacity in India in such a manner as may appear to him to be just and equitable.[2]

The Federal Railway Authority is given the powers of the Governor-General in the case of railway services. In the recruitment of persons to the higher grade of railway services the Authority must consult the Public

[1] S. 240. [2] S. 241.

Service Commission as to the rules to govern its actions. Except in regard to giving consideration to the claims of the Anglo-Indian community and following the directions of the Governor-General as to the proportions of recruitments from different communities, the Authority has unfettered discretion as to recruitment. The claims of the Anglo-Indian community are also to be considered in the recruitment of Central services: the customs, postal and telegraphic services. The rules of service for persons serving in the Federal Court or in a High Court will be made by the Chief Justice of India and the Chief Justice of the High Court respectively. But the Governor-General and the Governor may in their discretion require that recruitment for the Federal Court or the High Court from persons not already attached to the courts shall be made after consultation with the Public Service Commission or Provincial Public Service Commission, as the case may be. The rules relating to salaries, allowances, leave, or pensions, require the approval of the Governor or the Governor-General as the case may be.[1] The conditions of service of the subordinate ranks of the various police forces in India are to be regulated by Provincial Acts.[2]

4. Recruitment by Secretary of State and Provisions as to Certain Posts

Services Recruited by Secretary of State

Until Parliament otherwise determines, appointments to the Indian Civil Service, the Indian Medical Service (Civil), and the Indian Police Service are to be made by the Secretary of State, and the same applies to

[1] S. 242. [2] S. 243.

appointments to any new service or services established for the purpose of filling civil posts in connection with the discharge of the Governor-General's discretionary functions.[1] It is the Secretary of State's duty to decide whether it is necessary to establish such new service or services and what their strength is to be. The functions performed by the members of these services are so essential to the general administration of the country, and so vital for the stability of the new Constitution, that recruitment to them by the Secretary of State is deemed essential for the present. Particulars of appointments are to be laid annually before Parliament. The Governor-General has to report on the working of the system, and may, after a fixed period, suggest an alteration. In these matters he is to act in his discretion.[2] The Secretary of State is also empowered, for the purpose of securing efficiency in irrigation in any Province, to appoint persons to posts concerned with that subject.[3] The system of recruitment of these services is liable to alteration by Parliament, and it is understood that the whole system will be reconsidered not earlier than five years after April 1, 1937, when Parliament may provide that appointments to these services may be made by the Federal or Provincial Governments. All other civil services of the Crown are to be recruited by, and subject to the control of, the Federal and Provincial Governments, but the Secretary of State is empowered by the Act to create certain posts (reserved posts) to be filled by persons appointed by himself, the number and character of these posts being determined by himself. The occupants of these posts will not be under the control of

[1] S. 244 (1) and (2). [2] S. 244 (3) and (4). [3] S. 245.

the responsible Governments as regards promotions, dismissal or conditions of service, and the power of the Secretary of State in regard to reserved posts is a permanent one, not subject to alteration by Parliament. The conditions of service of such persons are regulated by the Secretary of State so far as he thinks fit; promotions, leave, and suspension require the sanction of the Governor-General or Governor in his individual judgment.[1] Their salaries and allowances are charged on the revenues of the Federation or of a Province according to their services. Their pensions are charged on the revenues of the Federation. The Secretary of State and the Governor-General or the Governor are given power in their discretion to deal justly and equitably with any such officer.[2] These officers are permitted to address complaints to the Governor-General or Governor or to appeal to the Secretary of State against any order of punishment, censure, or termination of service or alteration of conditions of service. The Secretary of State may also award compensation to any person appointed by him whose position is adversely affected by the new system, or in any other case where he considers it to be just and equitable to do so, or for any other cause, without prejudice to the right of the Governor-General or Governor to do so in other cases.[3] These privileges are continued or extended to officers appointed by the Secretary of State in Council before April 1, 1937. Similar provisions are made to secure the interests of the railway services with the consequential substitution of the Federal Railway Authority for the Governor-General.[4]

[1] S. 248.
[2] S. 247.
[3] S. 248.
[4] S. 249.

STAFFS OF THE HIGH COMMISSIONER FOR INDIA AND THE AUDITOR OF INDIAN HOME ACCOUNTS

The staffs of the High Commissioner for India and the Auditor of Indian Home Accounts are also protected. Though their services are rendered in England, they are deemed services rendered in India, and full protection is given to all the rights of the existing members. Appointments to the staff of the Auditor of Indian Home Accounts are made by the Auditor. The rules as regards their salaries, qualifications, etc., are subject to the approval of the Governor-General in his discretion. Their salaries and pensions are charged on the revenues of India.[1]

SPECIAL PROVISIONS AS TO JUDICIAL OFFICERS

These provisions do not apply to the judges of the Federal Court and the High Courts, but a Civilian acting temporarily as a judge of the High Court is not to be deemed to be a judge of that court. Again, Civilian judges, when they are appointed judges either of the Federal Court or a High Court, are not excluded from the application of the Order in Council relating to salaries, etc., of judges. The office of judge of the Federal Court or of a High Court is not excluded from the operation of the provision with respect to the eligibility for civil office of persons who are not British subjects. Pensions of civilian judges or liabilities in their favour are charged on the revenues of the Federation. Provisions are made for all the existing liabilities with respect to the judges who are acting on April 1, 1937, and other liabilities of the Secretary of State.

With the object of securing judicial impartiality, the Governor of a Province is given power in his

[1] S. 250.

individual judgment as regards the Provincial Judiciary.

DISTRICT JUDGES, ETC.

Appointments, posting and promotion of District Judges[1] in any Province are to be made by the Governor of the Province exercising his individual judgment. He must consult the High Court before making appointments. A person not already in the service of His Majesty shall be eligible for the post of a District Judge only if he has been a barrister, an Advocate of Scotland, or a pleader, of not less than five years' standing, and is recommended by the High Court for appointment.[2]

SUBORDINATE CIVIL JUDICIAL SERVICE

The subordinate judiciary comes into day-to-day contact with the people. The necessity for securing its impartiality and independence can hardly be exaggerated, and provision is therefore made to that end. The subordinate civil judicial service is defined as consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge. The Governor of a Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons for entry into this service. The Provincial Public Service Commission is to hold such examinations as the Governor thinks fit, and to prepare the list of qualified persons, from whom the Governor will make appointments based on such rules as he may lay down regarding the number of persons in the service who are to belong

[1] "District Judge" includes additional district judge, joint district judge, assistant district judge, Chief judge of a Small Cause Court, Chief Presidency magistrate, sessions judge, additional sessions judge, and assistant sessions judge.

[2] S. 254.

to the different communities in the Province. The posting and promotion of, and the grant of leave to, persons belonging to the service and holding any post inferior to the post of district judge, are in the hands of the High Court, but without prejudice to such rights of appeal as members enjoy under the provisions of the Act.[1]

SUBORDINATE CRIMINAL MAGISTRACY

With the object of securing the efficiency and impartiality of the criminal magistracy, it is provided that no recommendation is to be made for the grant of magisterial powers or the increase or withdrawal of such powers except after consultation with the district magistrate, or the Chief Presidency magistrate in whose area the person concerned is working or is to work.[2] It is to be noted that no provision is made, as in the case of the subordinate civil judiciary, for the recruitment of the subordinate criminal magistracy. Such a provision is necessary. Its omission may be an oversight, but it is serious. All the provisions as regards the subordinate civil judicial service should apply to the subordinate criminal magistracy, and the High Court must have the same power with respect to it.

SPECIAL PROVISIONS AS TO POLITICAL DEPARTMENT

The provisions as regards the members of the services generally do not apply in relation to persons wholly or mainly employed in connection with the exercise of the functions of the Crown in its relations with Indian States. Those who are already in the services remain unaffected, and their existing rights and privileges are continued. It is to be noted that every such person employed under

[1] S. 255. [2] S. 256.

the Crown also holds office during His Majesty's pleasure.[1]

SPECIAL PROTECTION OF CERTAIN EXISTING OFFICERS

Special provisions are made for the protection of existing officers of Central Services Classes I and II, Railway Services Classes I and II, and Provincial Services, against the abolition of posts in these services without the assent of the Governor-General or Governor in his individual judgment, who alone can affect the pay or pensions of persons who were officers of Central Services (Class V), Railway Services (Class I) or a Provincial Service before the Act came into operation.[2]

The salary and allowances of persons appointed before April 1, 1924, by the Secretary of State in Council, or occupying reserved posts, are charged on the revenues of the Federation or of the Province according to the nature of their services. If any such person is serving in connection with the railways in India, so much only of his salary and allowances shall be charged on the revenues of the Federation as is not paid out of the railway fund. All pensions payable to them are charged on the revenues of the Federation. This provision applies to those persons who had retired before April 1, 1924. Provision is also made as to persons retiring before April 1, 1937, securing their pensions on the revenues of the Federation or the Provinces according to the nature of their services.[3]

5. MISCELLANEOUS

The powers conferred by this Act on the Secretary of State are only exercisable by him with the concurrence

[1] S. 257. [2] S. 258. [3] Ss. 259–60.

of his advisers. In other words, all matters relating to the conditions of service are to be decided by the Secretary of State only with the concurrence of his advisers.[1] This is the only matter in which there is a statutory obligation on the Secretary of State to consult and to act according to the majority opinion of his advisers. Having regard to his responsibility to Parliament, this fetter on his authority is legally anomalous, but it is justified on the ground that the services require statutory protection.

In general, no person who is not a British subject is eligible to hold any office under the Crown in India, but the Governor-General in his discretion may by a declaration throw open posts in the Federal sphere to the Ruler or a subject of a Federated State, or a subject of a specified State not being a Federated State, or any native or tribal area or territory adjacent to India. The Governor may also do so in the Provincial sphere, and the Secretary of State may do the same in respect of posts to which he makes appointment.

A Ruler or subject of a Federated State shall be eligible for Federal office. All the functions relating to these matters are to be exercised by the Governor-General or Governor in his individual judgment.[2] Women are also generally qualified to hold civil posts, but they may be specifically excluded from office by the Governor-General, or Governor, or the Secretary of State, from the posts to which they make appointments.[3]

Provision is also made for joint services and posts, either as regards the Federation or the Provinces, by an agreement between the Federation and one or

[1] S. 261. [2] S. 262. [3] S. 275.

more Provinces, or between two or more Provinces, for the maintenance and creation of the service common to the Federation and one or more Provinces.[1]

6. Public Service Commissions

The Act of 1935 makes provision for the establishment of a Federal Public Service Commission which will replace the Central Public Services Commission. Provision is also made for the establishment of Provincial Public Service Commissions for each Province, but two or more Provinces may agree that one Commission shall serve that group of Provinces, or that all of them shall use one Commission. By an agreement of the Federal authority and the Governor, the Federal Commission may act for a Province, the agreement specifying by what Governor or Governors the functions in relation to the Commission are to be discharged.

Composition

The actual strength of the Federal Public Service Commission is to be determined by the Governor-General in his discretion, and that of a Provincial Commission by the Governor of the Province in his discretion. The Chairman and other members of the Public Service Commissions are appointed, in the case of the Federal Commission, by the Governor-General in his discretion, and in the case of a Provincial Commission, by the Governor in his discretion. One half of the members of every Commission must be persons who at the time of their appointments have held office for at least ten years under the Crown in India. In the case of the Federal Commission, the Governor-General in his discretion,

[1] S. 263.

and, in the case of a Provincial Commission, the Governor in his discretion, are to make regulations for determining the number of members of the Commission, their tenure of office and their conditions of service, and to make provisions with respect to the numbers of staff of the Commission and their conditions of service. The Chairman of any Commission is debarred from any further appointment under the Crown in India, this provision being made to ensure impartiality. The Chairman of a Provincial Commission is eligible for appointment as the Chairman or a member of the Federal Commission, or as the Chairman of another Provincial Commission, but not for any other employment under the Crown in India. No other member of the Federal or of any Provincial Commission is eligible for any other appointment under the Crown, except with the assent of the Governor-General or Governor.[1]

FUNCTIONS OF PUBLIC SERVICE COMMISSIONS

The Federal and the Provincial Commissions shall conduct examinations for appointments to the Federal and the Provincial services, and, if requested to do so by two or more Provinces, the Federal Commission must aid in the choosing of candidates with special qualifications for a particular service. The Secretary of State, the Governor-General in his discretion, and the Governor in his discretion, may make regulations specifying the matters relating to the services and posts to which they make appointments on which it is not necessary to consult the Public Service Commission. Except for these matters, the Commissions must be consulted on (1) all matters relating to methods of recruitment to civil services and posts; (2) the principles

[1] S. 265.

to be followed in making appointments, promotions and transfers from one civil service to another and on the suitability of the candidates; (3) all disciplinary matters affecting a person serving in a civil capacity in India; and (4) claims by a civil servant for the costs incurred in litigation in respect of acts done in discharge of his duties, or for the award of a pension for injuries sustained on duty, and the amount of such pension. The Commissioners are not to be consulted with respect to the manner in which appointments and posts are to be allocated as between communities in the Federation or Province, or, in the case of the subordinate ranks of the various police forces in India, as respects matters other than claims for payment of costs or pensions for injuries.[1]

Additional functions may be assigned on certain terms to the Commissions, with the prior sanction of the Governor-General or Governor,[2] by the Federal Act or Provincial Act.

All expenses of Federal and Provincial Commissions are paid from the Federal and Provincial revenues respectively.[3]

7. Chaplains

The Church of England in India was an integral part of the English Church till 1927. Under the Indian Church Act, 1927, the Church of England in India was separated, and its provisions were supplemented by the Church Measure of 1927 and the statutory rules of 1929 made by the Governor-General in Council, with the sanction of the Secretary of State in Council, with the concurrence of the Bishop of Calcutta.

[1] S. 266. [2] S. 267. [3] S. 268.

The Church of England in India has become distinct from March 1, 1930, with all the consequential changes as regards the property of the Church, etc. Under the Act of 1935, the Governor-General, as already explained, is to exercise his functions in ecclesiastical matters in his discretion, as it is a reserved subject. Chaplains are appointed in India to minister to the European army and the civilian European population. The Act continues the present establishment of chaplains for ministrations to Christians of the Churches of England and Scotland in India, appointed by the Secretary of State, and they are governed by the same conditions as those which govern persons in the service of the Crown and appointed by the Secretary of State. Nominations of chaplains are made by the Secretary of State on the advice of the Board of the Church of England. It is provided that, so long as the establishment of chaplains is maintained in the Province of Bengal, two members of that establishment in the Province must always be ministers of the Church of Scotland and shall be entitled to have out of the revenues of the Federation such salary as may be allotted to the military chaplains in that Province. Similar provision is made for the Provinces of Madras and Bombay. The ministers of the Church of Scotland so appointed must be ordained and inducted by the Presbytery of Edinburgh according to the forms and solemnities used in the Church of Scotland, and shall be subject to the spiritual and ecclesiastical jurisdiction in all things of the Presbytery of Edinburgh, whose judgment shall be subject to dissent, protest and appeal to the Provincial Synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland.[1]

[1] S. 269.

INDEMNITY FOR PAST ACTS

In view of threats which have been made in certain quarters, especially against the police, the Joint Committee recommended a measure of protection for men who have done no more than their duty in very difficult and trying circumstances. This recommendation is given effect to in the Act, and provision is made for the grant of indemnity for past acts. Civil servants are indemnified against civil and criminal proceedings in respect of acts done in good faith and done or purporting to be done in the execution of duty. The certificate of the Governor-General is conclusive on the question of good faith. The permission of the Governor-General or Governor in his discretion is necessary before civil or criminal proceedings are instituted against any officer in respect of official acts done before the commencement of Provincial Autonomy or the Federation, as the case may be. Any such civil or criminal proceedings instituted must be dismissed unless the court is satisfied that the acts complained of were not done in good faith, and the costs not recovered from the plaintiff must be paid either by the Federation or the Province, as the case may be.[1]

PROTECTION OF PUBLIC SERVANTS AGAINST PROSECUTION AND SUITS

Civil servants are to continue to enjoy the protection of Section 197 of the Code of Criminal Procedure and Sections 80 to 82 of the Code of Civil Procedure. The authority for sanctioning prosecutions and the determination of the courts which are to hold them is with the Governor-General or the Governor, in his individual judgment.

[1] S. 270.

The Act provides that in the case of civil proceedings the head of the Government in his discretion may order that any costs incurred by an officer, or any damages or costs to be paid by him, shall be defrayed or paid out of the revenues of the Federation or the Province. No Bill or amendment to vary the protection afforded can be introduced in the Federal or Provincial Legislature without the previous sanction of the Governor-General or Governor in his discretion.[1]

SAFEGUARDING OF EMOLUMENTS AND PENSIONS

The emoluments of the Civil Services are not subject to the vote of the Legislatures. Claims of all officers appointed by the Secretary of State for their pensions are primarily against the Federal Government and may subsequently be adjusted between the Federal Government and the Provincial Governments. The pensions of retired officers and those of their dependants are exempt from Indian taxation, if they are residing permanently outside India. The Governor-General has not only the responsibility but also the power to secure their payment, if necessary, by borrowing in the United Kingdom on the security of Indian revenues. Persons already in the service of His Majesty in India under the Governor-General in Council, those who serve in appointments made by the Crown or the Secretary of State, or in reserved posts or in military posts, are assured freedom from Indian taxation on pensions if permanently resident outside India.[2]

PROVISIONS AS TO FAMILY PENSION FUNDS

The Indian Military Widows and Orphans Fund, the Superior Services (India) Family Pension Fund, and funds to be formed out of the contributions under the Indian Military Service Family Pension Regulations

[1] S. 271. [2] S 272.

and the Indian Civil Service Family Pension Rules, are to be vested in Commissioners to be appointed by the King in Council. The Commissioners to whom the sums to the credit of these funds will be transferred are to hold and administer them. They will pay the pensions. Liberty is given to any contributor or beneficiary to object, and if he does so the sum representing his interest will be treated as part of the revenues of India, and such pensions shall be paid therefrom as the Secretary of State directs. No death duty will be payable in respect of any pension derived from the fund.[1]

Provision is also made for the adjustment of all these matters during the transitional period, and the old rules are to remain in operation till rules are made under the Act.[2]

Conclusion The Public Services in India are undoubtedly efficient. It is admitted that the system of responsible government, if it is to be successful in practical working, requires the existence of a competent and independent Civil Service staffed by persons capable of giving to successive Ministers advice based on long experience, secure in their positions during good behaviour, but required to carry out the policy upon which the Government and the Legislature eventually decide. The importance of an efficient and incorruptible public service in India can hardly be exaggerated, especially when she is on the way to full responsible government. Till the Reforms of 1919, generally speaking, the Civil Services governed the country. They worked with full personal responsibility and power. After the Reforms they worked with delegated responsibility and modified personal power.

[1] S. 273 [2] S. 276.

But their power and influence over the entire system of administration were neither substantially nor effectively diminished. They have acquired vested interests in the political system; hence their misgivings on the introduction of the constitutional reforms. Having enjoyed vast powers, privileges, position and respect, they naturally found it difficult to adapt themselves to new conditions under a responsible government. However, they have inevitably and admirably adjusted themselves to the new conditions.

The Civil Service of India has always been an attractive service and it continues to be so even under the new Constitution. The start is good, promotion certain, the future guaranteed, and the prizes it offers are many. Indian public opinion is critical about the comprehensive statutory safeguards provided for civil servants under the new Constitution, on the ground that these safeguards negative the spirit of responsible government. Again it is pointed out that the main administrative structure in British India is based on the district officers and the members of the Police Service. These officers have to work under Ministers, but the conditions of their service and recruitment are not within the control of the Ministers, so an anomalous situation arises which renders the working of the system difficult. Against this it is urged that it is only an inevitable and transitional measure while India is on the way to full responsible government.[1]

[1] The whole question of recruitment to these services is to be reviewed not earlier than five years after the inauguration of the new Constitution. ". . . To give the Provinces autonomy and the Central Government responsibility over a large field of administration and then to withhold from them the power of recruiting their public servants and exercising control over them, subject no doubt to ample and effective safeguards of their interests, is

As regards Indianization, the complaint has been made that even the recommendations of the Lee Commission, though accepted by the Government, are not fully carried out. In most of the services the full percentage of Indians as laid down by the Commission has not been established. Indians maintain that, except in some special cases which require technical or expert knowledge or for some particular reason, recruitment of Europeans to all services should cease henceforth altogether. They state that such Europeans in any number necessary for particular branches of administration may be appointed on a contract system on adequate remuneration. On the other hand the British element in the higher services is considered indispensable for an indefinite period.[1]

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not only to deny a very material element of responsibility, but is also calculated to have undesirable effects on the mutual relations of the Services and the Indian Legislature and the Minister. Further, the Indian Legislature of the future should be vitally interested in making every possible economy in public expenditure, and there does not seem to me to be any valid reason why the future Government in India should be made to submit, in the case of future recruits, to the scales of salaries prescribed by the Secretary of State. It has been urged in certain quarters that the right type of English recruits will not be available for these Services unless they are recruited by the Secretary of State. If the Indian Governments of the future desire to have any European element in their Services they must be left free to exercise their option in the matter.'' —Memorandum by Sir Tej Bahadur Sapru, K.C.S.I.—Joint Committee of Indian Constitutional Reform, Volume III.

[1] The Lee Commission laid down that by 1939 the fifty-fifty ratio of recruitment to the Indian Civil Service between Indians and Europeans shall be achieved. During recent years the number of European recruits was smaller than necessary for maintaining that ratio. Hence the Secretary of State recruited in 1936 a number of graduates of the British Universities by nomination instead of competitive examination to make good the deficiency of European members. This new policy of recruitment by nomination is disapproved by the Legislative Assembly. In defence of it Sir Henry Craik on behalf of the Government said that, though Delhi was made the main source of Indian recruitment in 1922, actually since that year only ninety-four Indians have been appointed

Indians maintain that, having regard to the poverty of the people and the available financial resources, the salaries and emoluments of the members of the services are very high, and that they constitute a heavy burden on the tax-payers. They favour a reduction in the scale of salaries. As against this demand it is pointed out that, having regard to the conditions of the services and their efficiency, the salaries and emoluments are not excessive, but only adequate.

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through it as against 194 through the London door. It was essential that the fifty-fifty ratio, fixed by the Lee Commission and accepted by Parliament, should not be disturbed till a statutory enquiry into the recruitment for the security services contemplated by the White Paper took place, not earlier than five years after Provincial Autonomy. Under this principle 350 candidates should have been recruited since 1931, of whom half should be Indians and the other half Europeans. Actually ninety-six Europeans and 162 Indians had been recruited, consequently the service was undermanned, causing serious administrative difficulties. On this ground he justified the new policy.

It is submitted that the construction of the fifty-fifty ratio by the Government is not in conformity with the policy of the Lee Commission, which intended to realize a fifty-fifty ratio not as regards the new recruitment, but as regards the actual personnel of the Civil Service by 1939.

CHAPTER XXII

THE HOME GOVERNMENT OF INDIA

Historical

After the Mutiny of 1858 the Act for the Better Government of India transferred the Government of India from the Company to the Crown and vested in the Crown all the territories and powers of the Company. That Act created the new office of Secretary of State for India to transact the affairs of India in England and to exercise all the powers formerly exercised by the Court of Directors and the Board of Control. It also established the Council of India, consisting of fifteen members, with the object of providing the Secretary of State with knowledge and advice on Indian questions.

The office of the Secretary of State for India and the Council of India, as already explained, were created by the Act of 1858. The Secretary of State for India, a member of the British Cabinet, is the immediate agent of Parliament for the discharge of its responsibility in Indian affairs. It is through him that Parliament maintains its control over the Government of India and keeps itself informed of everything that concerns its responsibility in that regard. The Government of India Act of 1919 prescribes his powers and defines the region within which he is held responsible to Parliament. He is authorized to superintend, direct

The Secretary of State for India

and control all acts, operations and concerns which relate to the Government or revenues of India. The Governor-General, and through him the Provincial Governments, are required to pay due obedience to his orders. He is the constitutional adviser of the Crown in matters relating to India. All official communications and orders are signed by him. It is on his advice that all appointments by the Crown are made, and he has the power of dismissal. Except in some specified matters he can override his Council.

THE COUNCIL OF INDIA

Till March 1937 the Council of India conducted, under the directions of the Secretary of State, the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. The Council was a consultative body, with a limited veto and without the power of initiative. Its constitution had been altered from time to time. Special care was taken to secure at least half of its members from amongst those who had long residence or service in India and who had only recently left India. Vacancies in the Council were filled by the Secretary of State. Each member received a salary of £1,200. An Indian member received an extra allowance of £600 a year. In 1936 the Council consisted of eight to twelve members. They were appointed by the Secretary of State for a term of five years, and half of them were persons who had long and recent experience of India. They were not and could not be members of Parliament. A member was removable from office only on an address of both Houses of Parliament. The questions which required the concurrence of a majority vote at a meeting of a Council were (1) grants or appropriations of any part of the revenues of India; (2) the making

of contracts for the purpose of the Act; (3) the making of rules regulating matters connected with the Civil Service. Outside this field, the Secretary of State had full powers to decide matters according to his own opinion. In 1907 two Indians were appointed as members of the Council. The Council was divided into committees for transacting business.

The salary of the Secretary of State and the expenditure of his office were not till 1919 included in the British budget but were paid from the Indian revenues. A detailed account of receipts and expenditure, both in India and in England, was annually laid before Parliament together with a report upon the moral and material progress of the people of India.

NATURE OF PARLIAMENTARY CONTROL

Thus, in theory, Parliamentary control over Indian affairs was complete, but in fact it was hardly real. Ever since the fall of the Coalition Ministry in 1783 Indian affairs have been kept outside British party politics. As the salary of the Secretary of State was not voted by the House of Commons, Parliament had few occasions to take active interest in Indian affairs. The presentation of accounts and the report by the Secretary of State to the House of Commons, generally at the fag-end of the session, was only a formal matter, and it was usually adopted as a matter of course. During the whole period from 1858 to 1919 the interest of Parliament in Indian affairs was neither well sustained nor well informed. After 1858 Parliament became a direct guardian of India, but it was not by any means an alert and active guardian. The Government of India was controlled by the Secretary of State in the name of Parliament, but his policy and

acts generally remained unscrutinized and uncontrolled by Parliament except in the few cases in which the United Kingdom was primarily interested. The declaration of August 20, 1917, stated that the progressive realization of responsible government as an integral part of the British Empire was the ultimate goal of British rule in India. It was not possible, consistent with Parliamentary sovereignty, to relax Parliamentary control over British India. It was also thought that no step could be taken towards responsible government at the Centre. The policy was therefore given effect in the Provinces, where partial responsibility was introduced, and the consequential changes were also introduced in both the Central and Home Government of India.

CHANGES INTRODUCED BY THE ACT OF 1919

By the Act of 1919 the salary of the Secretary of State and his political establishment was transferred to the British Exchequer. A joint Committee of both Houses of Parliament was appointed to study Indian questions and to help Parliament. Provision was made for the publication in England of a comprehensive report on the moral and material progress of India at a moderate price, with a view to enabling the British democracy to take an enlightened interest in Indian questions. The Act provided for the appointment of a Statutory Commission at the end of ten years to examine the working of the reforms with a view to either extending or withdrawing them. Thus Parliamentary control was strengthened over British India.

The control of the Secretary of State was relaxed to the extent to which partial responsibility was introduced in the Provinces and certain departments

transferred to Ministers. As Parliament remained supreme over the Government of India, there was no statutory delegation of authority, but the Secretary of State was given power to regulate and restrict his authority over the Government of India by rules approved by both Houses of Parliament. Under the rules, in purely Provincial matters which were reserved, and on which the Provincial Government and Legislature were in agreement, it was understood that their views should ordinarily be allowed to prevail. Over transferred subjects, the control of the Governor-General and that of the Secretary of State was restricted within the narrowest possible limits.

HIGH COMMISSIONER FOR INDIA

With the object of relieving the Secretary of State of agency work the new post of High Commissioner for India in London was created. He does the agency work on behalf of the Central and Provincial Governments. He is appointed by the Government of India, is paid from Indian revenues, and is primarily responsible to the Government of India. He advises and looks after Indian students studying in England. He usually represents India as one of the delegates at International Conferences. He supplies information and protects and promotes Indian commercial and trade interests in London.

FISCAL CONVENTION

It was often alleged that India's fisca policy was dictated from Whitehall in the interests of Great Britain. With the object of removing this belief the Joint Select Committee (1919) laid down that India should have the same liberty in fiscal policy to consider her own interests as Great Britain and the other self-governing Dominions. It was therefore understood that in fiscal matters,

when the Government of India and the Central Legislature were in agreement, the Secretary of State should avoid interference except to safeguard Imperial obligations or the arrangements within the Empire to which His Majesty's Government was a party. This understanding has come to be known as the "Fiscal Convention" and it has been unhesitatingly observed.

The Act of 1919 modified the composition of the Council of India. It also modified the qualifications of its members with the object of introducing more Indians into it. It shortened the period of service in order to ensure a continuous flow of fresh experience from India.

Thus, paradoxically, the Government of India Act, 1919, at once strengthened and relaxed Parliamentary control over British India.

THE HOME GOVERNMENT OF INDIA UNDER THE ACT OF 1935

Under the Act of 1919 the Secretary of State was in the foreground and the Crown was in the background. The office of Secretary of State for India is analogous to that of Secretary of State for the Colonies, but the two played quite different parts. The Secretary of State for the Colonies occupies no place in the constitutional law of the Dominions. The constitutional law of the Dominions is emphatic in its declaration that their executive and legislative authority is vested in the Crown, while the Government of India Act of 1919 gave a definite legal status to the Secretary of State. He was given such a prominent position that he had in practice put the Crown in the background. This was due to historical facts which go back to the passing of the Regulating Act of 1773, when the East India Company disputed

the right of the Crown to the possessions which it had acquired in the East. It was partly due to the position of the Council of India, which was intended to safeguard certain vested interests and hence was given statutory powers to bind even the Secretary of State in certain matters. Under the Act of 1935, the Council of India is abolished, and the reasons for assigning a prominent position to the Secretary of State in 1858 are no longer in existence. Moreover, under the Act of 1935, the Crown has resumed all authority relating to India, and the position of the Secretary of State is made to some extent analogous to that of Secretary of State for the Colonies. Henceforth the territories in India and the executive authority of India are vested in His Majesty and not in the Secretary of State for India.[1] This is the fundamental change made in the legal position of the Secretary of State, though in substance his control remains unaffected. His duty is to control the Governor-General and the Governors in all matters in which they have to act in their discretion or in their individual judgment, and to advise the Crown in all matters relating to India to allow or disallow particular Acts of Indian Legislatures. This change has placed the Crown and the Secretary of State in their true positions and has brought the constitutional law of India to some extent in line with that of the Dominions.

Under the Act of 1935 the authority of the Secretary of State in Council over India is vested in the Crown and is exercised on the advice of the Secretary of

[1] "It remains to add that the Act of 1935 increased greatly the formal place of the Crown in the Indian Constitution by sweeping away the doctrine of 1858, which vested control in the Secretary of State for India in Council."—*The King and the Imperial Crown*, p. 424, A. Berriedale Keith.

State, who is a member of the British Cabinet. The Prime Minister of Great Britain has the right to select the Governor-General, and he is to be consulted as regards other high appointments.

ADVISERS TO THE SECRETARY OF STATE

The Council of India is abolished as from April 1, 1937. However, in order that the Secretary of State may be provided with experience and advice on Indian questions, he is to be aided by a body of advisers with special duties in certain cases. The advisers are to be not less than three or more than six, of whom half at least must have served for ten years in India, and must be appointed within two years of ceasing to work in India. Advisers are appointed for five years and are not eligible for reappointment. This provision is intended to secure fresh experience from India. Any adviser may by writing under his hand resign his office, and the Secretary of State may, if he is satisfied that any person so appointed has by reason of infirmity of mind or body become unfit to continue to hold his office, remove him from it. The advisers cannot be members of either House of Parliament. Every adviser is paid a salary of £1,350 per year. An adviser with Indian domicile is to receive an extra allowance of £600. The Secretary of State is at liberty in his discretion to consult them individually or collectively or to ignore them, and he may act or refuse to act according to their advice except in certain specified matters—duties as regards services of the Crown—in which case he has to secure the concurrence of at least one half of the advisers present at the meeting. Members holding office on April 1, 1937, may be appointed as advisers for a period of less than five years. Parliament provides the salaries

of the Secretary of State and his advisers and also the expenses of his department.[1]

CONSEQUENTIAL CHANGES

The changes in the Constitution necessitated incidental changes in all arrangements as regards finance in England, as well as the transfer of the establishment of the Secretary of State in Council to the Secretary of State. Provision is made for all these consequential changes. All stock and money of the Secretary of State in Council at the Bank of England is transferred to the Secretary of State from April 1, 1937. All acts done by the Secretary of State in relation to these funds are valid and give discharge to the Bank. Any directions, authority or power of attorney given by the Secretary of State in Council before April 1, 1937, continue in force until countermanded or revoked by the Secretary of State. Provision is also made for the payment by the Federation to the British Exchequer of such sums as are due to the Secretary of State's department for performing services or functions on behalf of the Federation. All officers and servants on the permanent establishment of the Secretary of State in Council on April 1, 1937, are transferred to the department of the Secretary of State and are deemed to be permanent Civil Servants of the State. They are placed on the same footing as the members of the Home Civil Service for all practical purposes. The provisions of the Superannuation Acts, 1834 to 1935, apply to them. But the Superannuation Act of 1909 and Section 4 of the Superannuation Act of 1935 do not apply unless specifically applied to them. His Majesty may make exceptions in some cases. Officers and servants not on the permanent establishment of the Secretary of State

[1] S. 278.

in Council on April 1, 1937, are also transferred to the department of the Secretary of State, and for the purpose of the Superannuation Acts, 1834 to 1935, shall be treated as if they had been employed by the Secretary of State. If the conditions of service of any person include a condition as to eligibility for a retiring allowance in consideration of meritorious service, the British Treasury may grant him an allowance on his retirement. The Treasury and the Secretary of State may commute for a capital sum any superannuation, compensation or retiring allowance, and it will be paid from the Treasury and the revenues of the Federation respectively. Such a commutation shall be made according to conditions prescribed by the King in Council, not being more favourable than those which would have applied to the person in question if he had retired from the establishment of the Secretary of State in Council. Sums payable by way of superannuation, compensation, retiring or additional allowances or gratuities to the persons who are transferred from the department of the Secretary of State in Council to the Secretary of State, and which are determined by the King in Council as representing the proportion attributable to service before April 1, 1937, shall be paid from the revenues of the Federation. No account will be taken of any service for which such a sum was payable by Parliament before this Act. If any officer or servant who is transferred to the department of the Secretary of State, or who was on the establishment of the Secretary of State in Council, or a member of the staff of the High Commissioner for India, or who was the Auditor of the Accounts of the Secretary of State in Council or a member of his staff, loses his employment by reason of the abolition of his office

owing to any reorganization of the department, and if such abolition results, in the opinion of the Secretary of State, from the operation of this Act, the Secretary of State shall award him out of the revenues of India such compensation as he may think just and equitable to increase any allowance or gratuity to the officer or servant. These payments are to be made out of the revenues of the Federation and are charged on those revenues. All liabilities for the payment of the sums by way of superannuation, compensation, retiring or additional allowances and gratuities, for service up to April 1, 1937, to all the persons hereinbefore noted, are to be paid from the revenues of the Federation and are charged upon those revenues. The same arrangement applies to the payments of those who are transferred to the department of the Secretary of State, for their service attributable to the period before April 1, 1937. Any sums payable till now out of the revenues of India, in the way of various kinds of pensions, are to be paid out of the revenues of the Federation and charged on those revenues. These arrangements are consequential to the changes in the Constitution. As the financial obligations for the officers of the departments of the Secretary of State are transferred to the British Treasury from April 1, 1937, these provisions are made for apportioning the burden according to the services of these officers.[1]

HIGH COMMISSIONER

We have already seen that the office of High Commissioner for India was created under the Act of 1919, and have noted his functions. The Act of 1935 also provides for the appointment of a High Commissioner for India in the United Kingdom, by the Governor-General in

[1] Ss. 279 to 284.

his individual judgment. His salary and conditions of service are also to be prescribed by the Governor-General in his individual judgment. He is to perform on behalf of the Federation such functions in connection with the business of the Federation, and, in particular, in relation to the making of contracts, as the Governor-General may direct. He may, with the approval of the Governor-General and on such terms as may be agreed, undertake to perform for a Province or a Federated State, or for Burma, functions similar to those which he performs on behalf of the Federation.[1] His functions are analogous to those performed by the High Commissioners for the Dominions, but his position and status are not the same as those of the Dominion Commissioners, who represent their Governments in London and in all important matters act as the channel of communications between the Dominion Governments and the British Government. This difference is incidental to the difference in the constitutional status of India as a part of the British Empire.

The Auditor of Indian Home Accounts, who is appointed in London, is also to be under the control of the Governor-General.

NATURE OF PARLIAMENTARY CONTROL UNDER THE ACT OF 1935

The responsibility of the British Parliament for the Government of India remains undiminished. To the extent to which full Provincial Autonomy is introduced in the Provinces, and to the extent to which partial responsibility is introduced at the Centre, the control and authority of the Secretary of State is relaxed. But in matters which are reserved to the Governor-General, namely, defence, external

[1] S. 302.

affairs, ecclesiastical affairs, and tribal areas, and in matters for which the Governor-General and the Governors have special responsibilities and in which they have to act in their individual judgment, the Governor-General and the Governors are subject and responsible to the Secretary of State.

Pursuant to the Dominion precedents, in form and in terminology, the executive authority in India is vested in the Crown, and is exercised on behalf of His Majesty by the Governor-General and the Governors. But there is a fundamental difference between the position of India and that of the Dominions. In the Dominions, since the Statute of Westminster, 1931, the Governor-General and the Governors are mostly appointed on the advice of the Dominion Ministry and recently from amongst their own countrymen, and they act only as constitutional heads. The Crown—the Governor-General and the Governors—on all matters except perhaps external affairs, acts not on the advice of the British Ministers, but on that of the Dominion Ministry. The control of the British Ministry and British Parliament is eliminated, and the Crown has become divisible or multiple in relation to the Dominions. The King is the separate Constitutional head in relation to each Dominion and occupies the same position in relation to the Dominion Ministry as he does in relation to the British Ministry under the British Constitution. In the case of India, the Governor-General and the Governors are not appointed on the advice of the Indian Ministry, but are appointed on the advice of the British Ministry. They are not required even to consult their Ministers when they act in their discretion, and even in some matters in which they have to consult the Ministers they may act in

their individual judgment, ignoring that advice. In all these matters they are under the control of the Secretary of State and thus of the British Ministry. It is clear that in the case of India the authority of the British Ministry and the British Parliament in all vital matters is in substance effective, though the terminology used in the Constitution has an appearance of Dominion form.

CHAPTER XXIII

AMENDMENT OF THE CONSTITUTION AND MISCELLANEOUS PROVISIONS

The Indian Legislature is only a law-making body and not a Constituent Assembly. It has no constituent powers. The power of altering or amending the Constitution is vested in the British Parliament. It may be noted that since 1931 the Dominion Legislatures have constituent powers.[1]

The Government of India Act of 1935 can be amended only by the British Parliament, and neither the Federal Legislature nor any Provincial Legislature has power to amend any part of the Act[2] subject to one exception as regards extension of the jurisdiction of the Federal Court.[3] But in minor matters the Act authorises amendments by Order in Council with the assent of the British Parliament on request by the Federal Legislature or any Provincial Legislature, not earlier than ten years as a rule from the establishment of the Federation or Provincial Autonomy.

[1] If a Dominion Legislature passes an Act providing for the secession of the Dominion from the mother country, it is doubtful whether the Crown can refuse assent to it. This may be an extreme step, but in law it is competent. The recent Acts of the Irish Legislatures abolishing appeal to the Privy Council in all matters, and of the Canadian Legislature abolishing such appeal in criminal matters, are instructive on the point. The omission of the name of the Crown for internal purposes in the Irish Constitution, the abolition of the post of the Governor-General by the Irish Legislature in 1936, and the acceptance of these measures by the British Parliament without any protest, are also very instructive.

[2] S. 110 (ii).

[3] S. 206.

These matters are: (1) the size and composition of the chambers of the Federal Legislature and the choice and qualifications of members, but not so as to vary the relative proportion between the Council and Assembly or between the British India and State seats; (2) the number of Chambers in the Provincial Legislature, their size or membership; (3) the establishment of literacy in lieu of any higher educational qualifications for women's franchise, or the entry of names of qualified women without application; (4) any other amendment as to qualifications of voters. The changes under the third head may be made at any time if a request is received from a Provincial Legislature. These are all minor matters, but even in these the procedure of amendment is very elaborate.

Firstly resolutions must be passed by the Federal or Provincial Legislature on motions moved in either Chamber on behalf of the council of Ministers recommending such amendment. Secondly, an address must be passed in like manner asking for the communication of any such resolution to Parliament, and within six months after such communication the Secretary of State must lay before both Houses of Parliament a statement of the action which it is proposed to take. The Governor-General or Governor has to send with the address a statement of his opinion on the proposed amendment, its effect on any minority, the views of that minority, and whether it is supported by the majority of the representatives of that minority in the Legislature. This statement must be laid before Parliament. The King in Council may make any of these specified amendments at any time and even without the presentation of an address.

If no address is presented, the Secretary of State

must, before the draft of any amendment is laid before Parliament, take steps according to the direction of His Majesty for ascertaining the views of the Governments and the Legislatures affected, the views of any minority likely to be affected, and the attitude of the representatives of that minority in the Legislature concerned. No such amendment affecting the representation of any State is to be made without the consent of the Ruler affected. On a careful analysis of the subject-matter of these amendments, it is clear that they deal with minor issues as well as with the representation of the communities, especially the Communal Award, but they do not touch the vital matters of the Constitution. Even such minor amendments require very elaborate procedure, and the sanction of Parliament by Orders in Council, which are unlike ordinary Orders in Council, is necessary.[1]

ORDERS IN COUNCIL

The Government of India Act, 1935, provides for the issue of Orders in Council to implement the Act or to complete the details of the Constitution. The Act, taken together with the Orders in Council issued thereunder, constitutes a code by itself. These Orders in Council are issued not only to implement the Act but also to provide for the transitional period between the inauguration of Provincial Autonomy and the establishment of the Federation.

According to the theory of Parliamentary supremacy —Parliament is supreme as regards India—it is only Parliament that can legislate for India. However, delegated legislation has come into existence owing to the pressure of work before Parliament and the necessity of leaving the details of the complex legislation of modern times to the Ministers in charge of

[1] Ss. 309–10.

various departments. But there is one form of legislation which is in the nature of original legislation, and that is by Orders in Council. An Order in Council is an order issued by the Sovereign on the advice of the Privy Council, or more usually on the advice of a few selected Ministers. In practice, it is only issued on the advice of Ministers of the Crown, who are responsible to Parliament for their actions in the matter. Orders in Council are of two kinds: (1) those made in virtue of the royal prerogative; (2) those which are authorized by Statutes. Such Orders are largely used for the purpose of completing or implementing the administrative parts of Acts of Parliament. Statutory Orders in Council are made in virtue of, and in accordance with, the powers expressly delegated by Act of Parliament.

The Act of 1935 delegates powers for such Orders. All Orders in Council issued in relation to the new Constitution of India apply to the second category, being authorized by the Act of 1935.[1] As regards all Orders in Council except those referring to appeal to the King in Council, or sanctioning proceedings against the Governor-General, the Representative of the Crown in relation to the States, the Governors and the Secretary of State, the Act provides that a

[1] (*i*) Sind Order in Council, March 3, 1936; (*ii*) Orissa Order in Council, March 3, 1936; (*iii*) Excluded and Partially Excluded Areas Order, March 3, 1936; (*iv*) Provincial Legislative Assemblies Order, April 30, 1936; (*v*) Provincial Legislative Councils Order, April 30, 1936; (*vi*) Scheduled Castes Order, April 30, 1936; (*vii*) Distribution of Revenues Order, July 3, 1936; (*viii* Provincial Elections Corrupt Practices and Election Petitions Order, July 3, 1936; (*ix*) The Government of India (Commencement and Transitory Provisions Act), July 3, 1936; (*x*) Order constituting the Federal Court, (*xi*) Transitional Provisions Order, December 16, 1936; (*xii*) Audit and Accounts Order, December 16, 1936; (*xiii*) Governors' Allowances and Principles Order, December, 1936. All these Orders are called Government of India Orders, 1936.

draft must be laid before both Houses of Parliament, and an Order can be made with or without amendment. In an emergency, if Parliament is dissolved or prorogued or both Houses are adjourned for more than fifteen days, the Secretary of State may secure the immediate issue of an Order, but it lapses unless approved by both Houses within twenty-eight days after the next meeting of the House of Commons.

INSTRUMENTS OF INSTRUCTIONS

It is also to be remembered that the Instruments of Instructions to the Governor-General and Governors, which are prerogative documents, as already pointed out, also require Parliamentary sanction. Thus Parliamentary control over all changes or amendments, however minor they may be, is effectively ensured. The Constitution has an impress of finality. It is at once rigid and incapable of growth from within. "Every future change must come from the United Kingdom either in the shape of Parliamentary Statute or in the shape of His Majesty's Order in Council," or by way of the approval of Parliament in the amendment of the Instrument of Instructions. The conditions under which such amendments are possible and reasonable are not laid down. This aspect of the Constitution is inconsistent with the policy embodied in the Preamble to the Act of 1919, which lays down the progressive realization of Responsible Government in India as the constitutional goal of India. There is no effective provision for such a progressive realization. The Instrument of Instructions played a considerable rôle in adapting and developing the constitutional practice of Responsible Government in the Dominions. As it contains the prerogative powers of the Crown, with the growth of the power of the Dominions, all the prerogative

rights of a constitutional monarch were progressively exercised by the Dominion Governors-General and the Governors, acting under Instruments of Instructions, without any alteration in the framework of the Constitution by the British Parliament. Thus there were seeds of growth in the Dominion Constitutions which fructified in course of time. In the case of India, this possibility is excluded, as the Instruments of Instructions and their amendment have to be approved by Parliament. In spite of the emphasis laid by the Simon Commission on the need for the elasticity of the Constitution, the Constitution is almost of cast-iron and is incapable of growth from within.[1]

[1] "The first principle which we would lay down is that the new Constitution should as far as possible contain within itself provision for its own development. It should not lay down too rigid and uniform a plan but should allow for natural growth and diversity. Constitutional progress should be the outcome of practical experience. Where fresh legislation is required, it should result from the needs of the times not from the arbitrary demands of a fixed time-table. The Constitution, while contemplating and conforming to an ultimate objective, should not attempt to lay down the length or the number of stages of the journey. . . . In short, the Reforms of 1919 do not make provision for a steady evolution towards an ultimate objective, and to this extent they appear to us to fail to reproduce a feature which is essentially characteristic of the model on which they were partly based. As far as possible, therefore, the object which is to be aimed at is a reformed constitution which will not necessarily require revision at stipulated intervals, but which provides for opportunities for internal development." *Report of the Indian Statutory Commission*, Vol. II, Para. 7. These suggestions have been entirely ignored. The growth of the British Constitution and the Dominion Constitutions has been dependent upon the functioning of the conventions of the Constitution, but those conventions, in so far as they are introduced, are embodied either in the Act or in the Instruments. Hence there is no room for the automatic development of the Constitution. Moreover, these observations were in relation to the laying down of the time-table, but in the new Constitution, there is no time-table, and as a matter of fact there appears to be no destination for the journey.

In his evidence before the Joint Committee Sir Samuel Hoare stated: "In course of time, other Acts of Parliament will be necessary, more to recognise a state of affairs that is in existence than to make actually new changes." It is submitted that, having regard to the

There has been for many years a Sheriff in the three Presidency towns of Madras, Calcutta and Bombay.

THE SHERIFF OF CALCUTTA

In Bombay and Madras, the appointment is made by the Governor in Council, under the original Letters Patent of the Supreme Courts at these places, dating from 1823 and 1800 respectively. In these Provinces, the office had for some time been purely honorary and honorific. In Calcutta, however, the Sheriff, who is there appointed by the Governor-General in Council under the Charter establishing the Supreme Court, dated March 1774, is still responsible for the execution of writs of the High Courts and for the service of process. He maintains his own staff for this purpose, and, after changing service fees which are fixed by the High Court, he retains any surplus there may be. For some years there has been a considerable surplus, and both the Bengal Government and the Government of India agreed that it was desirable in these circumstances that the authority appointing the Sheriff, fixing his remuneration, and if need be dismissing him, should be one which is not entirely dependent upon political influence and intrigues. With this object, provision is made in the Act that the Sheriff of Calcutta is to be appointed annually by the Governor of Bengal from a panel of three persons to be nominated on the occasion of each vacancy by the High Court of Calcutta. The Sheriff of Calcutta is to hold office during the pleasure of the Governor, and is entitled to such remuneration as the Governor may fix, and no other remuneration. In

statutory provisions as regards the relations of the Governor-General and the Governors with their Ministers, the possibility of the growth of a new state of affairs is remote.

exercising his powers with respect to the appointment and dismissal of Sheriffs, and with respect to the determination of his remuneration, the Governor exercises his individual judgment.[1]

PROTECTION OF GOVERNOR-GENERAL, GOVERNOR OR SECRETARY OF STATE

The Governor-General, the Governors and the Secretary of State enjoy immunity while in office from any proceedings in Indian courts, and no process may issue from such courts against them, whether in a personal capacity or otherwise, and, except with the sanction of the King in Council, no proceedings can be brought in any Indian court against any person who has filled any of these offices in respect of any official acts or omissions. These privileges are unusual, but they are extended on the ground that they are representatives of the Crown. This immunity does not restrict the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are allowed under the Act. This immunity also extends to His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.[2]

Provision is made for the removal of certain disqualifications on the occasion of the first elections of persons to the Legislatures. No person is subject to any disqualification by reason only of the fact that he holds (*a*) an office of profit as a non-official member of the Executive Council of the Governor-General or a Governor, or as a minister in a Province; (*b*) an

[1] S. 303.

[2] These officials are liable to proceedings both for private debts and for official misdemeanours in English Courts if they are liable under English law. Mostyn *v.* Fabrigas (1774), 1 Comp. 161; Phillips *v.* Eyre (1870), L.R. 62 B.1. S, 306.

office which is not a whole time office remunerated either by salary or by fees.[1]

Under the Act His Majesty in Council is enabled to remove difficulties during the transitional period. It is provided that His Majesty may by Order in Council direct that the Act and any provisions of the Government of India Act still in force shall, during such limited period as mentioned in the Order, have effect subject to such adaptations and modifications as specified, and also make provisions that sufficient revenues are available to all Governments to enable the business of those Governments to be carried on, and make all necessary provisions for removing any such difficulties.[2]

[1] S. 307. [2] S. 310.

CHAPTER XXIV

TRANSITIONAL PROVISIONS

Provincial Autonomy and Federation are not to be introduced simultaneously, hence there is to be a transitional period between the inauguration of Provincial Autonomy and the establishment of the Federation. The establishment of Provincial Autonomy on April 1, 1937, necessitates consequential changes in the powers of both the Central Legislature and the Executive, and the Act makes provisions for this transitional period.

During the transitional period, the Central Legislature will exercise the functions of the Federal Legislature so far as British India is concerned. Executive power, such as the Federation will possess, will vest in the Governor-General in Council, or, in matters under the Federation placed in his discretion, in the Governor-General in respect of British India. The Governor-General will have special responsibilities as provided in the Federation. As there is no element of responsibility in the Central Government, no provision is made as regards the matters in which the Governor-General has under the Federation to exercise his individual judgment. In all matters, the Governor-General and the Governor-General in Council remain subject to the Secretary of State. The rules requiring prior sanction to certain legislation, the provisions as to broadcasting, directions to, and principles to be observed by, the Federal Railway Authority, and the services

recruited by the Secretary of State, are to have effect in regard to defence, ecclesiastical affairs, external affairs and the tribal areas as they have effect in relation to matters in which the Governor-General is required by the Act to act in his discretion.[1] In all other matters, the Governor-General in Council and the Governor-General, both as respects matters on which he is required to act in his discretion and as respects other matters, is under the general control of, and has to comply with such particular directions, if any, as may be given by, the Secretary of State, but the validity of anything done by the Governor-General in Council or the Governor-General is not to be questioned on the ground that it was done otherwise than in accordance with the directions of the Secretary of State. No direction with respect to any grant or appropriation of any part of the revenues of the Central Government is to be given by the Secretary of State except with the concurrence of a majority of his advisers, whose number is to be between eight and twelve.[2]

While this part of the Act is in operation, no sterling loans shall be contracted by the Governor-General in Council, but under the authority of Parliament a loan may be raised by the Secretary of State with the concurrence of a majority of his advisers. Such loans shall be free from Indian taxation and rank as Trust stocks, and claims in respect of them may be brought against the Secretary of State, but without imposing any liability on the British Exchequer.[3] The Indian Legislature is prohibited to limit the borrowing power of the Governor-General in Council.[4]

[1] S. 313.
[2] S. 314.
[3] S. 315.
[4] S. 316.

Provision is also made for the continuance of the Government of India Act relating to the Central Government and the Central Legislature. This is necessary during the transitional period till the Federation is established.[1] It is provided that, even before the Federation is established, the Federal Court, the Federal Public Service Commission and the Federal Railway Authority may be brought into existence, to perform in relation to British India the like functions as they are to perform under the Act in relation to the Federation when established. The Federal Court is already constituted, and it will begin functioning on October 1, 1937.[2] All rights acquired by, or liabilities incurred by or on behalf of, the Governor-General in Council or Governor-General between April 1, 1937, and the establishment of the Federation are, after the establishment of the Federation, to be treated as rights and liabilities of the Federation, and any legal proceedings pending at the establishment of the Federation by or against the Governor-General in Council or the Governor-General are, after the Federation, to be continued by or against the Federation. The same rule applies to rights and liabilities of the Secretary of State which have by the Act become rights and liabilities of the Governor-General in Council.[3]

By an Order in Council called the Government of India Commencement and Transitory Provisions Order, made on July 3, 1936, it was announced that the new Constitution would begin to function in the Provinces on April 1, 1937. This Order has also provided for all consequential and necessary changes for the working of the Central Government and the Central Legislature

[1] S. 317. [2] S. 318. [3] S. 319.

during the interval between the inauguration of Provincial Autonomy and the establishment of the Federation. By other Orders in Council all the necessary changes have been introduced for giving effect to the transitional provisions of the Act.

CHAPTER XXV

INDIA AND DOMINION STATUS

The Act of 1935 has no Preamble, but the policy of His Majesty's Government towards India is contained in the Declaration of August 20, 1917, which is embodied in the Preamble to the Act of 1919. In this Preamble, Parliament has set out finally and definitely the ultimate aims of British rule in India. Subsequent statements of policy have added nothing to the substance of this Declaration. According to this Preamble India is promised Responsible Government as an integral part of the British Empire. With a view to removing the doubts that had been raised as regards the exact meaning of the words used in the Preamble, Lord Irwin issued the following statement in 1929: "In view of the doubts which have been expressed both in India and Great Britain regarding the interpretation to be placed on the intentions of the British Government in enacting the Statute of 1919, I am authorized on behalf of His Majesty's Government to state clearly that in their judgment it is implicit in the Declaration of August 1917 that the natural issue of India's constitutional progress as there contemplated is the attainment of 'Dominion Status' . . ." Objections were taken by the Conservatives in England to the use of the term "Dominion Status" by the Governor-General of India; and his statement was repudiated by them. The Statute of Westminster of 1931 crystallised the conception

incidents and implications of Dominion Status and gave effect to the existing legal relationship between the Dominions and the mother country. When the Preamble to the Act of 1919 was drafted, the conception of Dominion Status was not definite, but in substance Responsible Government in the Dominions and Dominion Status were understood to be interchangeable terms. In 1935, Great Britain was neither prepared to grant nor to promise to grant Dominion Status to India. The Labour Members of Parliament insisted on the insertion of a Preamble to the Act of 1935 embodying Dominion Status as the goal of India's political destiny, but this demand was negatived. The Act of 1919 having been repealed, the question was raised as to whether the repeal of an Act also entails the repeal of the Preamble. Some argued that the Preamble was repealed together with the Act, others said that this was not necessarily the case. As this constitutional point was ticklish and not free from doubt, in the result, though the Act of 1919 is repealed, the Preamble is retained. The Preamble is kept on the statute-book with a view to disabusing the minds of Indians as regards their political destiny within the Empire. Refusing to insert a Preamble to the Act of 1935 specifying Dominion Status as India's political goal, Parliament retained the Preamble to the Act of 1919. This step is interpreted as promising Dominion Status to India when she attains the condition of the other Dominions.[1] Dominion Status

[1] A Preamble is not law. "The preamble of a statute has been said to be a good means to find out its meaning and, as it were, a key to the understanding of it." When the Statute itself is repealed, the existence of the Preamble has neither legal meaning nor significance. Its legal value is in no way greater than that of the Declaration of August 20, 1917. It is submitted that its retention has no legal value or significance.

is not held out in set terms as the political destiny of India, but by implication and inference it is believed that the natural issue of India's constitutional progress is the attainment of Dominion Status. Again, Indians are assured that India's ultimate political objective is Dominion Status and that she will achieve it in the long run. In the long run we all die. This long-run philosophy is hardly comforting to the Indian National Congress, whose declared objective is complete independence. Having regard to the fact that the ultimate constitutional status of India is not dependent so much on what status the British Parliament will confer upon or concede to her, as on what status she herself is able to assert and achieve by her political consciousness, unity, and strength, a realist looks upon this discussion as only academic. But to a student of constitutional law its significance can hardly be exaggerated.

The Preamble has neither executive nor operative effect. It is not law. That is why it is a Preamble and not an enacting part of the Act. But the Preamble has been retained because Parliament did not intend by the enactment of 1935 to deviate in any way from the statement of intention contained in the Preamble to the Act of 1919. The Preamble remains. It is not suspended in space. It remains as it was, a statement of the intention of Parliament, and it remains as it was, without enacting force, because that is never the function of a Preamble.

The question was raised as to whether India's future is only Responsible Government as an integral part of the British Empire or Dominion Status, but it was not definitely answered. However, it is maintained that it is possible for India to move forward

to full Responsible Government, which may be similar to Dominion Status.[1]

Having regard to the rigidity of the Constitution and also to the statutory nature of the Instrument of Instructions, it is difficult to visualize how India could move steadily forward to full Responsible Government without Parliamentary legislation.

As the Preamble to the Act of 1919 is retained on the statute-book, it is desirable to set it out:

"WHEREAS it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions with a view to the progressive realization of Responsible Government in British India, as an integral part of the Empire:

"AND WHEREAS the progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken:

"AND WHEREAS the time and manner of each advance can be determined only by Parliament upon whom responsibility lies for the welfare and advancement of the Indian peoples:

"AND WHEREAS the action of Parliament in such matter must be guided by the co-operation received from those on whom new opportunities of service will be conferred and by the extent to which it is found that confidence can be reposed in their sense of responsibility:

[1] "It is quite clear that no Bill can confer Dominion Status. No Parliamentary Bill would have power to do that in the sense of performing a unilateral or arbitrary act, because India has to overcome her own obstacles and it is at once our privilege and opportunity to help her to do so, and we are pledged to give her all help in that direction. I was a little surprised to hear the Noble Marquess state that he rather questioned whether there were any pledges as between us and India, but I would assert that this Bill and the Instrument of Instructions taken together undoubtedly establish conditions under which it is possible for India to move steadily forward to that full Responsible Government that we have promised to her, and of which the natural issue has been declared to be Dominion Status."—Viscount Halifax (*Parliamentary Debates*).

"AND WHEREAS concurrently with the gradual development of self-governing institutions in the Provinces of India, it is expedient to give to those Provinces in Provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities."

1. Dominion Status

As India's constitutional goal is Dominion Status, it is necessary to state clearly the implications of that term.

Dominion Status is the status enjoyed by the Dominions of Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland. They are now free and autonomous communities. With the United Kingdom, they are equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, and they are united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations. Except for Newfoundland, they are independent members of the League of Nations, though their international status is not precisely defined. Dominion Status in its legal incidents is crystallised in the Statute of Westminster, 1931. This Statute recognizes legally the new status acquired by the Dominions, and removes legislative fetters on the legislative competence of the Dominion Legislatures. The preamble to the Statute affirms the free association of the members of the British Commonwealth of Nations united by common allegiance to the Crown, and records that it would be in accord with the established constitutional position that any alteration in the law touching the succession to the Throne or the Royal

Style or Titles should hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom. This is only the preamble to the Act, but it was given effect during the recent constitutional crisis which led to the abdication of King Edward VIII. All the legislative fetters under the Colonial Laws Validity Act, 1865, are removed, and the safeguards for the States and the Provinces of Australia and Canada as regards constitutional amendment provided in the Statute are to be preserved so long as the people of those countries desire them. The legal supremacy of the Imperial Parliament has not been formally abolished, but it remains to be exercised with their consent and as a matter of convenience.

In their external affairs, the principle of their equality and autonomy is given full effect. They are competent to sign treaties with foreign countries, acting for themselves. The Crown has become divisible or multiple in relation to each of them, and the King is a King of each Dominion separately. Though not recognized in law, in practice the right of neutrality and secession is hardly doubted. In internal affairs they have become sovereign. The Dominion Legislatures are now sovereign legislatures, and whatever reservations are imposed are only for the sake of convenience. The nature of their legislative power is clearly defined in two recent judgments by Lord Sankey, the Lord Chancellor.[1] The King remains the one

[1] Moore *v.* Attorney-General for Irish Free State and Others (51 *Law Times*, p. 504).

British Coal Corporation *v.* The King (51 *Law Times*, p. 508). "It is true that before the Statute of Westminster, the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act. . . . But this limitation has been abrogated by the Statute. There now remain such limitations as flow from the

effective and vital link of the Empire. The Crown is the formal expression of unity, and allegiance to the King is the common tie for all British subjects of the Empire. For all practical purposes under the Statute of Westminster, and its judicial interpretation during recent years, the Dominions are both internally and externally independent sovereign States acknowledging their membership of the British Commonwealth of Nations on the grounds of expediency and mutual benefit. The recent action of the Irish Legislature in dropping the name of the Crown from the Irish Constitution for internal purposes, and the abolition of the post of the Governor-General, which make Ireland a Republic for internal purposes and a Dominion for external purposes, is at once instructive and refreshing.

2. India's Position in the British Empire

The position of India in relation to the other members of the British Empire is not very satisfactory. Restrictions are imposed on the settlement of Indians in the various parts of the Empire. The self-governing Dominions especially, South Africa, Australia, New Zealand and Canada, have by legislation forbidden the entry of Indians into their territories except for

Act itself, the operation of which as affecting the competence of Dominion legislation was saved by Section 7 of the Statute, a section which includes within the competence of the Dominion and Provincial Parliaments any power of repealing, amendment or alteration of the Act, and it is well known that Section 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired, in which the Imperial Parliament has, as a matter of abstract law, power to repeal or disregard Section 4 of the Statute. But this is theory and has no relation to realities."

certain temporary purposes. Indians now stand excluded from these Dominions, and when we speak of Indians in these Dominions, it is only with reference to those who were already settled when this excluding legislation was put in the various statute-books. The treatment meted out to Indians in Kenya and South Africa requires no comment.

In the case of Colonies, India has absolute control of immigration and permits it only under fair conditions approved by the Government and the Central Legislature. Such emigration is allowed to Ceylon and Malaya, but even in Ceylon the franchise is refused to Indians save after five years' residence and proof of intention to settle. Even in Kenya and Fiji, where Indians have been responsible for the development of the territories, they are not recognized on a footing of electoral equality. India is an integral part of the British Empire, but the treatment given to her nationals by the other members of the British Empire is anything but satisfactory. While the citizens of other Dominions enjoy all civic rights and amenities in India, Indians in those Dominions are excluded from the enjoyment of such rights and amenities. The status of India in relation to the Dominions cannot be improved unless her own status as a member of the British Empire is improved.

3. India and the League of Nations

In the eyes of international law, India has no legal status. India is not a sovereign State, and, as such, her status is unknown to international law. She is, however, an original member of the League of Nations, and a signatory to the Covenant of the League. In

all International Conferences and in the proceedings of the League of Nations, India is represented by her own representative. The Indian delegation always includes a representative of British India and an Indian State, but it acts and can act only as a part of the British delegation. She pays annually a substantial sum towards the expenditure of the League. It is true that her membership of the League of Nations is in practice of very little legal significance to her, as her representation, unlike that of the Dominions, is entirely through the British delegation, and she has no voice of her own apart from the British representation. She does not enjoy all the rights and privileges of an ordinary member of the League. But having regard to the growing importance of the League, though not in law, at least in form, India has acquired an international status through the League which may help her to acquire full legal status in future.

APPENDIX A (i)[1]

LETTERS PATENT PASSED UNDER THE GREAT SEAL OF THE REALM CONSTITUTING THE OFFICE OF GOVERNOR-GENERAL OF INDIA.

Dated 5th March 1937

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and of the Brtiish Dominions beyond the Seas King Defender of the Faith Emperor of India:

To all to whom these Presents shall come
GREETING:

WHEREAS by section 3 (1) of the Government of India Act, 1935 (hereinafter referred to as "the Act"), it is enacted that the Governor-General of India is appointed by Us by a Commission under Our Sign Manual:

AND WHEREAS by the Act it is further enacted that the Governor-General has all such powers and duties as are conferred on him by or under the Act and such other powers belonging to Us, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as We may be pleased to assign to him:

AND WHEREAS We are minded to make permanent provision for the office of Governor-General of India:

NOW, THEREFORE, We do declare Our Will and Pleasure to be as follows:—

1. We do hereby constitute, order and declare that there shall be a Governor-General of India.

2. And We do hereby authorise and empower our Governor-General in Our name and on Our behalf to

[1] These official documents are reprinted by permission of the Controller of H.M. Stationery Office.

grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within Our territories in India a pardon, either free or subject to such lawful conditions as to him may seem fit.

3. And We do hereby delegate to Our Governor-General authority and power to grant in Our name or on Our behalf Commissions in Our Naval Forces, Our Indian Land Forces and Our Indian Air Force.

4. After Part XIII of, and the Ninth Schedule to, the Act shall have ceased to have effect, one of Our Principal Secretaries of State may grant to Our Governor-General once during his term of office leave of absence from India for urgent reasons of public interest or of health or of private affairs. Such leave of absence shall not exceed four months in duration, unless Our Secretary of State shall see fit to extend the period so granted, in which case he shall set forth the reasons for the extension in a minute to be signed by himself and laid before both Houses of Parliament.

5. And We do hereby require and command all Our officers, civil and military, and all other the inhabitants of Our territories in India to be obedient, aiding and assisting unto Our said Governor-General.

6. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter or amend these Our Letters Patent as to Us or them shall seem meet.

7. Our Governor-General shall make public in India these Our Letters Patent in such manner as to him may seem fit.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster the Fifth day of March in the First year of Our Reign.

BY WARRANT UNDER THE KING'S SIGN MANUAL

SCHUSTER.

COMMISSION PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET APPOINTING THE MOST HONOURABLE THE MARQUESS OF LINLITHGOW, K.T., G.M.S.I., G.M.I.E., O.B.E., TO BE GOVERNOR-GENERAL OF INDIA AND CROWN'S REPRESENTATIVE.

Dated 8th March 1937.

GEORGE R.I.

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and of the British Dominions beyond the Seas King Defender of the Faith Emperor of India.

To Our Right Trusty and Right Well Beloved Cousin and Counsellor VICTOR ALEXANDER JOHN HOPE MARQUESS OF LINLITHGOW Knight of the Most Ancient and Most Noble Order of the Thistle Grand Master and First and Principal Knight of Our Most Exalted Order of the Star of India Grand Master and First and Principal Knight Grand Commander of Our Most Eminent Order of the Indian Empire Officer of Our Most Excellent Order of the British Empire

GREETING:

I. We do by this Our Commission under Our Sign Manual appoint you the said Victor Alexander John Hope Marquess of Linlithgow to be during Our pleasure Our Governor-General of India and Our Representative for the exercise of Our functions in Our relations with Indian States with all the powers rights privileges and advantages to the said offices belonging or appertaining.

II. And We do hereby declare that so long as you shall hold the said offices you shall while in India bear in addition to the styles and titles of the said offices the style and title of "Our Viceroy."

III. And We do hereby authorise empower and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the Great Seal bearing date at Westminster the Fifth day of March 1937 making provision for the offices of Governor-

General and of Our Representative or in any other Letters Patent adding to amending or substituted for the same according to such Orders and Instructions as Our Governor-General and Our Representative for the time being have already received or as you may hereafter receive from Us or from one of Our Principal Secretaries of State.

IV. And further We do hereby appoint that this Our present Commission shall supersede the Warrant under the Sign Manual of His former Majesty King Edward the Eighth bearing date the Tenth day of March 1936 appointing you the said Victor Alexander John Hope Marquess of Linlithgow to be Our Governor-General of India.

V. And We do hereby command all and singular Our officers and loving subjects in India and all others whom it may concern to take due notice hereof and to give their ready obedience accordingly.

GIVEN at Our Court at Buckingham Palace the Eighth day of March 1937 in the First year of Our Reign.

BY HIS MAJESTY'S COMMAND,

ZETLAND.

INSTRUCTIONS PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET TO THE GOVERNOR-GENERAL OF INDIA

Dated 8th March 1937.

GEORGE R.I.

INSTRUCTIONS TO OUR GOVERNOR-GENERAL OF INDIA.

GIVEN at Our Court at Buckingham Palace the Eighth day of March 1937 in the First year of Our Reign.

WHEREAS by Letters Patent bearing date the Fifth day of March, Nineteen hundred and thirty-seven We have made permanent provision for the office of Governor-General of India:

AND WHEREAS by those Letters Patent and by the Government of India Act, 1935 (hereinafter called "the Act") certain powers, functions and authority

for the government of India are declared to be vested in the Governor-General:

AND WHEREAS His late Majesty King George V did before the enactment of the Act issue certain Instructions under His Royal Sign Manual to Our said Governor-General bearing date the fifteenth day of March nineteen hundred and twenty-one, and did subsequently amend the same:

AND WHEREAS the impending commencement of Part III of the Act has rendered it necessary to revoke the said Instructions:

AND WHEREAS without prejudice to the provision in the Act that our Governor-General shall be under the general control of and comply with such particular directions, if any, as may from time to time be given by Our Secretary of State and to the duty of Our Governor-General to give effect to any Instructions so received, We are minded to make general provision regarding the manner in which during the operation of the provisions of Part XIII of the Act Our said Governor-General shall execute all things which according to the Act and the said Letters Patent belong to his office and to the trust which we have reposed in him:

NOW, THEREFORE, We do by these Our Instructions under Our Royal Sign Manual hereby revoke the aforesaid Instructions and declare Our pleasure to be as follows:—

A—Introductory

I. Under these Our Instructions, unless the context otherwise require, the term "Governor-General" shall include every person for the time being acting as Governor-General according to the provisions of the Act.

II. Our Governor-General shall, with all due solemnity, cause Our Commission under Our Royal Sign Manual appointing him to be read and published in the presence of the Chief Justice of India for the time being or, in his absence, other Judge of the Federal Court, and of so many of the members of the Executive Council of Our Governor-General as may conveniently be assembled.

III. Our Governor-General shall take oath of allegiance and the oath for the due execution of the office of Our Governor-General of India and for the due and impartial administration of justice, in the form hereto appended, which oaths the said Chief Justice or, in his absence, any Judge of the Federal Court, shall, and is hereby required to, tender and administer unto him.

IV. And we do authorise and require Our Governor-General by himself or by any other person to be appointed by him in that behalf to administer to every person appointed by Us or by the Governor-General in Council to be a member of the Governor-General's Executive Council and to every person appointed by him to be a Chief Commissioner the oaths of allegiance and of office and of secrecy hereto appended.

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. The provisions of the last four preceding paragraphs shall not apply to any person holding office at the date of the commencement of Part III of the Act.

B—In regard to the Executive Authority of the Governor-General in Council

VII. It is Our will and pleasure that Our Governor-General shall use all endeavour consistent with the fulfilment of his responsibilities to Us and to Our Parliament for the welfare of Our Indian subjects, that the administration of the matters committed to the charge of Our Governor-General in Council may be conducted in harmony with the wishes of Our said subjects as expressed by their representatives in the Indian Legislature so far as the same shall appear to him to be just and reasonable: and shall so order the administration of his government as to further the policy of the Act for its conversion into a Federation of all India.

C—In regard to Relations between the Governor-General in Council and the Provinces

VIII. Whereas it is expedient for the common good of British India that the authority of Our Governor-General in Council and of the Indian Legislature in those matters which are by law assigned to them should prevail:

And whereas at the same time it is the purpose of the Act that the Governments and Legislatures of the Provinces should be free in their own sphere to pursue their own policy:

And whereas in the interest of the harmonious co-operation of the several members of the body politic, the Act has empowered Our Governor-General to exercise, at his discretion, certain powers affecting the relations between his Government and the Provinces:

It is Our will and pleasure that Our Governor-General in the exercise of these powers should give unbiased consideration as well to the views of the Governments of the Provinces as to those of his own Government whenever those views are in conflict and, in particular, when it falls to him to exercise his power to issue orders to the Governor of a Province for the purpose of securing that the executive authority of the Governor-General in Council is not impeded or prejudiced, or his power to determine whether Provincial law or Central law shall regulate a matter in the sphere in which both Legislatures have power to make laws.

IX. It is Our desire that Our Governor-General shall by all reasonable means encourage consultation with a view to common action between his Government and the Provinces and between the Provinces themselves. It is further Our will and pleasure that Our Governor-General shall endeavour to secure the co-operation of the Provincial Governments in the maintenance of such Central agencies and institutions for research as may serve to assist the conduct by Provincial Governments of their own affairs.

X. In particular We require Our Governor-General before giving his previous sanction to any legislative proposal which it is proposed to introduce in the Indian

Legislature for the imposition or variation of taxes or duties by which the revenues of the provincial Governments are or may be directly affected or for varying the meaning of the expression "agricultural income," or for alteration of the principles on which under the provisions of the Act moneys are or may be distributed to the Provinces, to ascertain by the method which appears to him best suited to the circumstances of each case the views of those Governments upon the proposal.

XI. Before granting his previous sanction to the introduction into the Indian Legislature of any Bill or amendment wherein it is proposed to authorise the Governor-General in Council to give directions to a Province as to the carrying into execution in that Province of any Act of the Indian Legislature relating to a matter specified in Part II of the Concurrent Legislature List appended to the Act, it is Our will and pleasure that Our Governor-General shall take care to see that the Governments of the Provinces which would be affected by any such measure have been duly consulted upon the proposal, and upon any other proposals which may be contained in any such measure which involve the imposition of expenditure upon the revenues of the Provinces.

XII. In considering whether he shall give his assent to any Provincial law relating to a matter enumerated in the Concurrent Legislative List, which has been reserved for his consideration on the ground that it contains provisions repugnant to the provisions of an Act of the Indian Legislature, Our Governor-General, while giving full consideration to the proposals of the Provincial Legislature, shall have due regard to the importance of preserving substantially unimpaired the uniformity of law which the Indian Codes have hitherto embodied.

D—Matters affecting the Legislature

XIII. Without prejudice to the generality of his powers as to reservation of Bills, Our Governor-General shall not assent in Our name to, but shall reserve for the signification of Our pleasure, any Bill of any of the classes herein specified, that is to say:—

(*a*) any Bill the provisions of which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India;

(*b*) any Bill which in his opinion would if it became law, so derogate from the powers of the High Court of any Province as to endanger the position which those Courts are by the Act designed to fill;

(*c*) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III, Part V, or section 299 of the Act;

(*d*) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement.

XIV. It is further Our will and pleasure that in pursuance of the Agreement made between Us and His Exalted Highness the Nizam of Hyderabad as contemplated in Part III of the Act, Our Governor-General in declaring his assent in Our name to any Bill of the Legislature of the Central Provinces and Berar which has been reserved for his consideration, shall declare that his assent to the Bill in its application to Berar has been given by virtue of the Agreement between Us and His Exalted Highness the Nizam.

E—General

XV. And generally Our Governor-General shall do all that in him lies to maintain standards of good administration; to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in public life; and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments; and he shall further have regard to this Instruction in the exercise of the powers by law conferred upon him in relation to matters whether of legislation or of executive government.

XVI. And finally it is Our will and pleasure that Our Governor-General should so exercise the trust reposed in

him that the partnership between India and the United Kingdom within Our Empire may be furthered, to the end that India may attain its due place among Our Dominions.

XVII. And We do hereby charge Our Governor-General to communicate these Our Instructions to the Members of his Executive Council and to publish the same in such manner as he may think fit.

APPENDIX

Form of Oath of Allegiance.

I, , do swear that I will be faithful and bear true allegiance to His Majesty, King George the Sixth, Emperor of India, His Heirs and Successors, according to Law.

So help me God.

Form of Oath of Office.

I, , do swear that I will well and truly serve Our Sovereign, King George the Sixth, Emperor of India, in the Office of , and that I will do right to all manner of people after the laws and usages of India, without fear or favour, affection[1] or ill-will.

So help me God.

Form of Oath of Secrecy for Executive Councillors.

I, , do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or shall become known to me as a member of the Governor-General's Executive Council, except as may be required for the due discharge of my duties as such member, or as may be specially permitted by the Governor-General.

So help me God.

APPENDIX A (ii)

LETTERS PATENT PASSED UNDER THE GREAT SEAL OF THE REALM CONSTITUTING THE OFFICE OF GOVERNOR OF BOMBAY.

(Reprinted by permission of the Controller of H. M. Stationery Office.)

Dated 5th March 1937.

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and of the British Dominions beyond the Seas King Defender of the Faith Emperor of India:

To all to whom these Presents shall come

GREETING:

WHEREAS by sections 46 and 48 of the Government of India Act, 1935, it is enacted that the Governor of Bombay is appointed by Us by a Commission under Our Sign Manual:

AND WHEREAS provision is made in section 304 of the said Act for the appointment by Us of persons to act as the Governor of a Province during the absence of the Governor from India:

AND WHEREAS we are minded to make provision for the office of Our Governor of Bombay:

NOW, THEREFORE, We do declare Our Will and Pleasure to be as follows:—

1. We do hereby constitute, order and declare that there shall be a Governor of Bombay.

2. One of Our Principal Secretaries of State may grant to Our Governor of Bombay once during his term of office leave of absence from India for urgent reasons of health or private affairs. Such leave of absence shall not exceed four months in duration unless Our Secretary of State shall see fit to extend the period so granted,

in which case he shall set forth the reasons for the extension in a minute to be signed by himself and laid before both Houses of Parliament.

3. And We do hereby require and command all Our officers, civil and military, and all other the inhabitants of Bombay to be aiding and assisting unto Our said Governor.

4. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter or amend these Our Letters Patent as to Us or them shall seem meet.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster the Fifth day of March in the First year of Our Reign.

BY WARRANT UNDER THE KING'S SIGN MANUAL
SCHUSTER.

INSTRUCTIONS PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET TO THE GOVERNOR OF BOMBAY.

Dated 8th March 1937.

GEORGE R. I.

INSTRUCTIONS TO OUR GOVERNOR FOR THE TIME BEING OF BOMBAY.

GIVEN at Our Court at Buckingham Palace the Eighth day of March 1937 in the First year of Our Reign.

WHEREAS by Letters Patent bearing date the Fifth day of March Nineteen hundred and thirty-seven We have made permanent provision for the Office of Governor of Bombay:

AND WHEREAS by those Letters Patent and by the Act of Parliament passed on the second day of August, Nineteen hundred and thirty-five and entitled the Government of India Act, 1935 (hereinafter called "the Act"), certain powers, functions and authority for the government of the Province of Bombay are declared to be vested in the Governor as Our Representative:

AND WHEREAS, without prejudice to the provision in the Act that in certain regards therein specified the Governor shall act according to instructions received from time to time from Our Governor-General, and to the duty of Our Governor to give effect to instructions so received, We are minded to make general provision regarding the due manner in which Our said Governor shall execute all things which, according to the Act and the said Letters Patent belong to his Office, and to the trust which We have reposed in him:

AND WHEREAS a draft of these Instructions has been laid before Parliament in accordance with the provisions of sub-section (1) of section fifty-three of the Act and an Address has been presented to Us by both Houses of Parliament praying that instructions may be issued in the terms of these Instructions:

NOW, THEREFORE, We do by these Our Instructions under Our Sign Manual and Signet declare Our pleasure to be as follows:—

A—Introductory.

I. Under these Our Instructions, unless the context otherwise require, the term "Governor" shall include every person for the time being acting as Governor according to the provisions of the Act.

II. Our Governor for the time being shall, with all due solemnity, cause Our Commission under Our Sign Manual appointing him to be read and published in the presence of the Chief Justice for the time being, or, in his absence, other Judge, of the High Court of the Province.

III. Our said Governor shall take the oath of allegiance and the oath for the due execution of the Office of Our Governor of Bombay, and for the due and impartial administration of justice, in the form hereto appended, which oaths the Chief Justice for the time being, or in his absence any Judge, of the High Court, shall, and he is hereby required to, tender and administer unto him.

IV. And We do authorise and require Our Governor, by himself or by any other person to be authorised by

him in that behalf, to administer to every person appointed by him to hold office as a member of the Council of Ministers the oaths of office and of secrecy hereto appended.

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. And whereas great prejudice may happen to Our service by the absence of Our Governor, he shall not quit India during his term of office without having first obtained leave from Us under Our Sign Manual or through one of Our Principal Secretaries of State.

B—In regard to the Executive Authority of the Province.

VII. In making appointments to his Council of Ministers Our Governor shall use his best endeavours to select his Ministers in the following manner, that is to say, to appoint in consultation with the person who in his judgment is most likely to command a stable majority in the Legislature those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. In so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.

VIII. In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by or under the Act to exercise in his discretion, Our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the Act committed to him, or with the proper discharge of any of the functions which he is otherwise by or under the Act required to exercise in his individual judgment; in any of which cases Our Governor shall, notwithstanding his Ministers' advice, act in exercise of the powers by

or under the Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own.

IX. Our Governor shall interpret his special responsibility for the safeguarding of the legitimate interests of minorities as requiring him to secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Legislature, and those classes of the people committed to his charge who, whether on account of the smallness of their number or their primitive condition or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare upon joint political action in the Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority.

Further, Our Governor shall interpret the said special responsibility as requiring him to secure a due proportion of appointments in Our Services to the several communities, and, so far as there may be in his Province at the date of the issue of these Our Instructions an accepted policy, in this regard, he shall be guided thereby, unless he is fully satisfied that modification of that policy is essential in the interests of the communities affected or of the welfare of the public.

X. In the discharge of his special responsibility for the securing to members of the public services of any rights provided for them by or under the Act and the safeguarding of their legitimate interests Our Governor shall be careful to safeguard the members of Our Services not only in any rights provided for them by or under the Act or any other law for the time being in force, but also against any action which, in his judgment, would be inequitable.

XI. The special responsibility of Our Governor for securing in the sphere of executive action any of the purposes which the provisions of Chapter III of Part V of the Act are designed to secure in relation to legislation shall be construed by him as requiring him to differ from his Ministers if in his individual judgment their advice would have effects of the kind which it is the purpose of the said Chapter to prevent, even though the advice so tendered to him is not in conflict with any specific provision of the Act.

XII. Our Governor shall construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his Ministers which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognised, whether derived from treaty, grant, usage, sufferance or otherwise: and he shall refer to Our Governor-General any questions which may arise as to the existence of any such right.

XIII. In the framing of rules for the regulation of the business of the Provincial Government Our Governor shall ensure that, amongst other provisions for the effective discharge of that business, due provision is made that the Finance Minister shall be consulted upon any proposal by any other Minister which affects the finances of the Province: and further that no reappropriation within a Grant shall be made by any Department other than the Finance Department, except in accordance with such rules as the Finance Minister may approve; and that in any case in which the Finance Minister does not concur in any such proposal the matter shall be brought for decision before the Council of Ministers.

He shall further in those rules make due provision to secure that prompt attention is paid to any representation received by his Government from any minority.

XIV. Having regard to the powers conferred by the Act upon Our Secretary of State to appoint persons to Our service if, in his opinion, circumstances arise which render it necessary for him so to do in order to secure efficiency in irrigation, Our Governor shall make it his care to see that he is kept constantly supplied with

information as to the conduct of irrigation in his Province in order that he may, if need be, place this information at the disposal of Our Governor-General.

XV. In the exercise of the powers by law conferred upon him in relation to the administration of areas declared under the Act to be Excluded or Partially Excluded Areas, or to the discharge of his special responsibility for the safeguarding of the legitimate interests of minorities. Our Governor shall, if he thinks this course would enable him the better to discharge his duties to the inhabitants of those areas or to primitive sections of the population elsewhere, appoint an officer with the duty of bringing their needs to his notice and advising him regarding measures for their welfare.

C—MATTERS AFFECTING THE LEGISLATURE.

XVI. In determining whether he shall in Our Name give his assent to, or withhold his assent from, any Bill Our Governor shall, without prejudice to the generality of his power to withhold his assent on any ground which appears to him in his discretion to render such action necessary or expedient, have particular regard to the bearing of the provisions of the Bill upon any of the special responsibilities imposed upon him by the Act.

XVII. Without prejudice to the generality of his powers as to reservation of Bills, Our Governor shall not assent in Our name to, but shall reserve for the consideration of Our Governor-General, any Bill of any of the classes herein specified, that is to say:—

(*a*) any Bill the provisions of which would repeal or be repugnant to the provisions of any Act of Parliament extending to British India;

(*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Act designed to fill;

(*c*) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III of Part V or section 299 of the Act;

(*d*) any Bill which would alter the character of the Permanent Settlement.

And in view of the provisions in this clause of these Our Instructions, it is Our will and pleasure that if his previous sanction is required under the Act to the introduction of any Bill of the last-mentioned description Our Governor shall not withhold that sanction to the introduction of the Bill.

XVIII. It is Our will that the power vested by the Act in Our Governor to stay proceedings upon a Bill, clause or amendment in the Provincial Legislature in the discharge of his special responsibility for the prevention of grave menace to peace and tranquillity shall not be exercised unless, in his judgment, the public discussion of the Bill, clause or amendment would itself endanger peace and tranquillity.

XIX. It is Our will and pleasure that the seats in the Legislative Council to be filled by the nomination of Our Governor shall be so apportioned as in general to redress, so far as may be, inequalities of representation which may have resulted from election, and in particular to secure representation for women and the Scheduled Castes in that Chamber.

D—General.

XX. And generally Our Governor shall do all that in him lies to maintain standards of good administration; to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the Province; and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments; and he shall further have regard to this Instruction in the exercise of the powers by law conferred upon him in relation to matters whether of legislation or of executive government.

XXI. And We do hereby charge Our Governor to communicate these Our Instructions to his Ministers and to publish the same in his Province in such manner as he may think fit.

Form of Oath of Allegiance.

I, , do swear that I will be faithful and bear true allegiance to His Majesty, King George the Sixth, Emperor of India, His Heirs and Successors, according to law.

So help me God.

Form of Oath of Office.

I, , do swear that I will well and truly serve Our Sovereign, King George the Sixth, Emperor of India, in the Office of , and that I will do right to all manner of people after the laws and usages of India, without fear or favour, affection or ill-will.

So help me God.

Form of Oath of Secrecy for Ministers.

I, , do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or shall become known to me as a Minister in Bombay, except as may be required for the due discharge of my duties as such Minister or as may be specially permitted by the Governor in the case of any matter pertaining to the functions to be exercised by him in his discretion.

So help me God.

By order of His Excellency the Governor of Bombay,

C. W. A. TURNER,
Chief Secretary to Government.

APPENDIX B.

First Schedule to the Act of 1935.

Composition of the Federal Legislature.

(Only as regards British India.)

(Reprinted by permission of the Controller of H. M. Stationery Office.)

The Council of State

Representatives of British India.

(i) *Allocation of seats.*

1 Province or Community	2 Total Seats	3 General Seats	4 Seats for Scheduled Castes	5 Sikh Seats	6 Muhammadan Seats	7 Women's Seats
Madras . .	20	14	1	—	4	1
Bombay . .	16	10	1	—	4	1
Bengal .	20	8	1	—	10	1
United Provinces .	20	11	1	—	7	1
Punjab	16	3	—	4	8	1
Bihar	16	10	1	—	4	1
Central Provinces and Berar	8	6	1	—	1	—
Assam .	5	3	—	—	2	—
North-West Frontier Province	5	1	—	—	4	—
Orissa . .	5	4	—	—	1	—
Sind	5	2	—	—	3	—
British Baluchistan	1	—	—	—	1	—
Delhi	1	1	—	—	—	—
Ajmer-Merwara	1	1	—	—	—	—
Coorg .	1	1	—	—	—	—
Anglo-Indians .	1	—	—	—	1	—
Europeans	7	—	—	—	—	—
Indian Christians	2	—	—	—	—	—
Totals .	150	75	6	4	49	6

(ii) *Distribution of seats for purposes of triennial elections.*

1	Number of seats to be filled originally for three years only				
Province	2 General Seats	3 Seats for Scheduled Castes	4 Sikh Seats	5 Muhammadan Seats	6 Women's Seats
Madras	—	—	—	—	—
Bombay	5	—	—	2	1
Bengal	4	1	—	5	—
United Provinces	5	1	—	3	1
Punjab	2	—	2	4	—
Bihar	—	—	—		—
Central Provinces and Berar		—			—
Assam	—			—	
North-West Frontier Province	—	—		—	—
Orissa	4	—	—	1	
Sind	2	—	—	3	
British Baluchistan	—		—		
Delhi	—	—			—
Ajmer-Merwara	—		—	—	
Coorg	—	—	—	—	—
Totals	22	2	2	18	2

1	Number of seats to be filled originally for six years only.				
Province	7 General Seats	8 Seats for Scheduled Castes	9 Sikh Seats	10 Muhammadan Seats	11 Women's Seats
Madras	7	—	—	2	1
Bombay	—	—	—		
Bengal	—	—	—		—
United Provinces	6	—	—	4	—
Punjab	1	—	2	4	1
Bihar	5	1	—	2	—
Central Provinces and Berar	6	1	—	1	—
Assam	3	—	—	2	—
North-West Frontier Province		—	—	—	
Orissa	—	—	—	—	
Sind	—	—		—	—
British Baluchistan	—	—	—	—	—
Delhi	—	—	—	—	
Ajmer-Merwara	—	—		—	
Coorg	—	—	—	—	
Totals	28	2	2	15	2

1	Number of seats to be filled originally for nine years				
Province	12 General Seats	13 Seats for Scheduled Castes	14 Sikh Seats	15 Muhammadan Seats	16 Women's Seats
Madras	7	1	—	2	—
Bombay	5	1	—	2	—
Bengal	4	—	—	5	1
United Provinces	—	—	—	—	—
Punjab	—	—	—	—	—
Bihar	5	—	—	2	1
Central Provinces and Berar	—	—	—	—	—
Assam	—	—	—	—	—
North-West Frontier Province	1	—	—	4	—
Orissa	—	—	—	—	—
Sind	—	—	—	—	—
British Baluchistan	—	—	—	1	—
Delhi	1	—	—	—	—
Ajmer-Merwara	1	—	—	—	—
Coorg	1	—	—	—	—
Totals	25	2	—	16	2

TABLE OF SEATS

The Federal Assembly

Representatives of British India

1	2	3	4	5	6	7	8	9	10	11	12	13
		General Seats:—										
Province	Total Seats	Total of General Seats	General Seats reserved for Scheduled Castes	Sikh Seats	Muhammadan Seats	Anglo-Indian Seats	European Seats	Indian Christian Seats	Seats for representatives of commerce and industry	Landholders' Seats	Seats for representatives of labour	Women's Seats
Madras	37	19	4	—	8	1	1	2	2	1	1	2
Bombay	30	13	2	—	6	1	1	1	3	1	2	2
Bengal	37	10	3	—	17	1	1	1	3	1	2	1
United Provinces	37	19	3	—	12	1	1	1	—	1	1	1
Punjab	30	6	1	6	14	—	1	1	—	1	—	1
Bihar	30	16	2	—	9	—	1	1	—	1	1	1
Central Provinces and Berar	15	9	2	—	3	—	—	—	—	1	1	1
Assam	10	4	1	—	3	—	1	1	—	—	1	—
North-West Frontier Province	5	1	—	—	4	—	—	—	—	—	—	—
Orissa	5	4	1	—	1	—	—	—	—	—	—	—
Sind	5	1	—	—	3	—	1	—	—	—	—	—
British Baluchistan	1	—	—	—	1	—	—	—	—	—	—	—
Delhi	2	1	—	—	1	—	—	—	—	—	—	—
Ajmer-Merwara	1	1	—	—	—	—	—	—	—	—	—	—
Coorg	1	1	—	—	—	—	—	—	—	—	—	—
Non-Provincial Seats	4	—	—	—	—	—	—	—	3	—	1	—
Totals	250	105	19	6	82	4	8	8	11	7	10	9

APPENDIX C

SECOND SCHEDULE TO THE ACT OF 1935.

PROVISIONS OF THIS ACT WHICH MAY BE AMENDED WITHOUT AFFECTING THE ACCESSION OF A STATE.

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Part I, in so far as it relates to the Commander-in-Chief.

Part II, chapter II, save with respect to the exercise by the Governor-General on behalf of His Majesty of the executive authority of the Federation, and the definition of the functions of the Governor-General; the executive authority of the Federation; the functions of the council of ministers, and the choosing and summoning of ministers and their tenure of office; the power of the Governor-General to decide whether he is entitled to act in his discretion or exercise his individual judgment; the functions of the Governor-General with respect to external affairs and defence; the special responsibilities of the Governor-General relating to the peace or tranquillity of India or any part thereof, the financial stability and credit of the Federal Government, the rights of Indian States and the rights and dignity of their Rulers, and the discharge of his functions by or under the Act in his discretion or in the exercise of his individual judgment; His Majesty's Instrument of Instructions to the Governor-General; the superintendence of the Secretary of State; and the making of rules by the Governor-General in his discretion for the transaction of, and the securing of transmission to him of information with respect to, the business of the Federal Government.

Part II, chapter III, save with respect to the number of the representatives of British India and of the Indian States in the Council of State and the Federal Assembly and the manner in which the representatives of the

Indian States are to be chosen; the disqualifications for membership of a Chamber of the Federal Legislature in relation to the representatives of the States; the procedure for the introduction and passing of Bills; joint sittings of the two Chambers; the assent to Bills, or the withholding assent from Bills, by the Governor-General; the reservation of Bills for the signification of His Majesty's pleasure; the annual financial statement; the charging on the revenues of the Federation of the salaries, allowances and pensions payable to or in respect of judges of the Federal Court, of expenditure for the purpose of the discharge by the Governor-General of his functions with respect to external affairs, defence, and the administration of any territory in the direction and control of which he is required to act in his discretion and of the sums payable to His Majesty in respect of the expenses incurred in discharging the functions of the Crown in its relations with Indian States; the procedure with respect to estimates and demands for grants; supplementary financial statements; the making of rules by the Governor-General for regulating the procedure of, and the conduct of business in, the Legislature in relation to matters where he acts in his discretion or exercises his individual judgment, and for prohibiting the discussion of, or the asking of questions on, any matter connected with or the personal conduct of the Ruler or ruling family of any Indian State; the making of rules by the Governor-General as to the procedure with respect to joint sittings of, and communications between, the two chambers and the protection of judges of the Federal Court and State High Courts from discussion in the Legislature of their conduct.

Part II, chapter IV, save with respect to the power of the Governor-General to promulgate ordinances in his discretion or in the exercise of his individual judgment, or to enact Governor-General's Acts.

Part III, chapter I. The whole chapter.

Part III, chapter II, save with respect to the special responsibilities of the Governor relating to the rights of Indian States and the rights and dignity of the Rulers thereof and to the execution of orders or directions of

the Governor-General, and the superintendence of the Governor-General in relation to those responsibilities.

Part III, chapter III, save with respect to the making of rules by the Governor for prohibiting the discussion of, or the asking of questions on, any matter connected with or the personal conduct of the Ruler or ruling family of any Indian State, and the protection of judges of the Federal Court and State High Courts from discussion in the Legislature of their conduct.

Part III, chapter IV. The whole chapter.

Part III, chapter V. The whole chapter.

Part III, chapter VI. The whole chapter.

Part IV. The whole Part.

Part V, chapter I, save with respect to the power of the Federal Legislature to make laws for a State; the power of the Governor-General to empower either the Federal Legislature or Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act; any power of a State to repeal a Federal law, and the effect of inconsistences between Federal law and a State law.

Part V, chapter II, save with respect to the previous sanction of the Governor-General to the introduction or moving of any Bill or amendment affecting matters as respects which the Governor-General is required to act in his discretion; the power of Parliament to legislate for British India or any part thereof, or the restrictions on the power of the Federal Legislature and of Provincial Legislatures to make laws on certain matters.

Part V, chapter III. The whole chapter.

Part VI, save in so far as the provisions of that Part relate to Indian States, or empower the Governor-General to issue orders to the Governor of a Province for preventing any grave menace to the peace or tranquillity of India or any part thereof.

Part VII, chapter I, in so far as it relates to Burma.

Part VII, chapter II, save with respect to loans and guarantees to Federated States and the appointment, removal and conditions of service of the Auditor-General.

Part VII, chapter III, save in so far as it affects suits against the Federation by a Federated State.

Part VIII, save with respect to the constitution and functions of the Federal Railway Authority; the conduct of business between the Authority and the Federal Government, and the Railway Tribunal and any matter with respect to which it has jurisdiction.

Part IX, chapter I, in so far as it relates to appeals to the Federal Court from High Courts in British India; the power of the Federal Legislature to confer further powers upon the Federal Court for the purpose of enabling it more effectively to exercise the powers conferred upon it by this Act.

Part IX, chapter II. The whole chapter.

Part X, save with respect to the eligibility of Rulers and subjects of Federated States for civil Federal office.

Part XI. The whole Part.

Part XII, save with respect to the saving for rights and obligations of the Crown in its relations with Indian States; the use of His Majesty's forces in connection with the discharge of the functions of the Crown in its said relations; the limitation in relation to Federated States of His Majesty's power to adapt and modify existing Indian laws; His Majesty's powers and jurisdiction in Federated States, and resolutions of the Federal Legislature or any Provincial Legislature recommending amendments of this Act or Orders in Council made thereunder; and save also the provisions relating to the interpretation of this Act so far as they apply to provisions of this Act which may not be amended without affecting the accession of a State.

Part XIII. The whole Part.

Part XIV. The whole Part.

First Schedule. The whole Schedule, except Part II thereof.

Third Schedule. The whole Schedule.

Fourth Schedule, save with respect to the oath or affirmation to be taken or made by the Ruler or subject of an Indian State.

Fifth Schedule. The whole Schedule.

Sixth Schedule. The whole Schedule.

Seventh Schedule. Any entry in the Legislative Lists in so far as the matters to which it relates have not been

accepted by the State in question as matters with respect to which the Federal Legislature may make laws for that State.

Eighth Schedule. The whole Schedule.
Ninth Schedule. The whole Schedule.
Tenth Schedule. The whole Schedule.
Eleventh Schedule. The whole Schedule.
Twelfth Schedule. The whole Schedule.
Thirteenth Schedule. The whole Schedule.
Fourteenth Schedule. The whole Schedule.
Fifteenth Schedule. The whole Schedule.
Sixteenth Schedule. The whole Schedule.

APPENDIX D

FIFTH SCHEDULE TO THE ACT OF 1935

COMPOSITION OF THE PROVINCIAL LEGISLATURES

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TABLE OF SEATS. *Provincial Legislative Assemblies.*

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
		General Seats												Seats for Women				
Province	Total Seats	Total of General Seats	General Seats reserved for Scheduled Castes	Seats for representatives of backward areas and tribes	Sikh Seats	Muhammadan Seats	Anglo-Indian Seats	European Seats	Indian Christian Seats	Seats for representatives of commerce, industry, mining and planting	Landholders' Seats	University Seats	Seats for representatives of labour	General	Sikh	Muhammadan	Anglo-Indian	Indian Christian
Madras	215	146	30	1	—	28	2	3	8	6	6	1	6	6	—	1	—	1
Bombay	175	114	15	1	—	29	2	3	3	7	2	1	7	5	—	1	—	—
Bengal	250	78	30	—	—	117	3	11	2	19	5	2	8	2	—	2	1	—
United Provinces	228	140	20	—	—	64	1	2	2	3	6	1	3	4	—	2	—	—
Punjab	175	42	8	—	31	84	1	1	2	1	5	1	3	1	1	2	—	—
Bihar	152	86	15	7	—	39	1	2	1	4	4	1	3	3	—	1	—	—
Central Provinces and Berar	112	84	20	1	—	14	1	1	—	2	3	1	2	3	—	—	—	—
Assam	108	47	7	9	—	34	—	1	1	11	—	—	4	1	—	—	—	—
North-West Frontier Province	50	9	—	—	3	36	—	—	—	—	2	—	—	—	—	—	—	—
Orissa	60	44	6	5	—	4	—	—	1	1	2	—	1	2	—	—	—	—
Sind	60	18	—	—	—	33	—	2	—	2	2	—	1	1	—	1	—	—
Total	1,535	808	151	24	34	482	11	26	20	56	37	8	38	28	1	10	1	1

In Bombay seven of the general seats shall be reserved for Marathas.
In the Punjab one of the Landholders' seats shall be a seat to be filled by a Tumandar.
In Assam and Orissa the seats reserved for women shall be non-communal seats.

TABLE OF SEATS.

Provincial Legislative Councils.

1	2	3	4	5	6	7	8
Province	Total of Seats	General Seats	Muhammadan Seats	European Seats	Indian Christian Seats	Seats to be filled by Legislative Assembly	Seats to be filled by Governor
Madras	Not less than 54 Not more than 56	35	7	1	3	—	Not less than 8 Not more than 10
Bombay	Not less than 29 Not more than 30	20	5	1	—	—	Not less than 3 Not more than 4
Bengal	Not less than 63 Not more than 65	10	17	3	—	27	Not less than 6 Not more than 8
United Provinces	Not less than 58 Not more than 60	34	17	1	—	—	Not less than 6 Not more than 8
Bihar	Not less than 29 Not more than 30	9	4	1	—	12	Not less than 3 Not more than 4
Assam	Not less than 21 Not more than 22	10	6	2	—	—	Not less than 3 Not more than 4

APPENDIX E.

SEVENTH SCHEDULE TO THE ACT OF 1935.

LEGISLATIVE LISTS.

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LIST I.

FEDERAL LEGISLATIVE LIST

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments; any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment central intelligence bureau; preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works; local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

3. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

6. Public debt of the Federation.

7. Posts and telegraphs, including telephones, wireless,

broadcasting, and other like forms of communication; Post Office Savings Bank.

8. Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides, and, as regards property in a federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial, and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India; Federal meteorological organisations.

15. Ancient and historical monuments; archæological sites and remains.

16. Census.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom; pilgrimages to places beyond India.

18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal

charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

24. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

26. Carriage of passengers and goods by sea or by air.

27. Copyright, inventions, designs, trademarks and merchandise marks.

28. Cheques, bills of exchange, promissory notes and other like instruments.

29. Arms; firearms; ammunition.

30. Explosives.

31. Opium, so far as regards cultivation and manufacture, or sale for export.

32. Petroleum and other liquids and substances declared by Federal law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest.

35. Regulation of labour and safety in mines and oilfields.

36. Regulation of mines and oilfields and mineral

development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature; and, to such extent as is expressly authorised by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption;
(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;
(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*) of this entry.

46. Corporation tax.
47. Salt.
48. State lotteries.
49. Naturalisation.
50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.
51. Establishment of standards of weight.
52. Ranchi European Mental Hospital.
53. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.
54. Taxes on income other than agricultural income.
55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
56. Duties in respect of succession to property other than agricultural land.
57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.
58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.
59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

List II.

Provincial Legislative List.

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation

of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.

2 Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purpose of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorised by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislature.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation; hospitals and dispensaries; registration of births and deaths.

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified n List I; minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power.

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases; improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks.

27. Trade and commerce within the Province; markets and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III.

32. Relief of the poor; unemployment.

33. The incorporation, regulation, and winding-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

34. Charities and charitable institutions; charitable and religious endowments.

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition.

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(*a*) alcoholic liquors for human consumption;
(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;
(*c*) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

List III.

Concurrent Legislative List.

Part I.

1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the

date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce; infants and minors; adoption.

7. Wills, intestacy, and succession, save as regard agricultural land.

8. Transfer of property other than agricultural land; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

11. Arbitration.

12. Bankruptcy and insolvency; administrators-general and official trustees.

13. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list.

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs.

20. Mechanically propelled vehicles.

21. Boilers.

22. Prevention of cruelty to animals.

23. European vagrancy; criminal tribes.

24. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

25. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

PART II.

26. Factories.

27. Welfare of labour; conditions of labour, provident funds; employers' liability and workmen's compensation; health insurance, including invalidity pensions; old age pensions.

28. Unemployment insurance.

29. Trade unions; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this Part of this List.

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court.

APPENDIX F.

DRAFT INSTRUMENT OF ACCESSION.

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INSTRUMENT OF ACCESSION OF .....

(Insert full name and title.)

WHEREAS proposals for the establishment of a Federation of India comprising such Indian States as may accede thereto and the Provinces of British India constituted as autonomous Provinces have been discussed between representatives of His Majesty's Government of the Parliament of the United Kingdom, of British India and of the Rulers of the Indian States.

AND WHEREAS those proposals contemplated that the Federation of India should be constituted by an Act of the Parliament of the United Kingdom, and by the accession of Indian States.

AND WHEREAS provision for the Constitution of a Federation of India has now been made in the Government of India Act, 1935, but it is by that Act provided that the Federation shall not be established until such date as His Majesty may by Proclamation declare and such declaration cannot be made until the requisite number of Indian States have acceded to the Federation.

AND WHEREAS the said Act cannot apply to any of my territories save by virtue of my consent and concurrence signified by my accession to the Federation.

NOW THEREFORE

I (Insert full name and title)
Ruler of (Insert name of State)
In the exercise of my sovereignty in and over my said State
For the purpose of co-operating in furtherance of the

interests and welfare of India by uniting in a Federation under the Crown by the name of the Federation of India with the Provinces called Governors' Provinces, and with the Provinces called Chief Commissioners' Provinces, and with the Rulers of other Indian States.

Do hereby execute this my Instrument of Accession and

1. I HEREBY DECLARE that subject to His Majesty's acceptance of this Instrument, I accede to the Federation of India as established under the Government of India Act, 1935, (hereinafter referred to as "the Act") with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal Authority established for the purposes of Federation shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to the State of (hereinafter referred to as "this State") such functions as may be vested in them by or under the Act

2. I HEREBY ASSUME the obligation of ensuring that due effect is given to the provisions of the Act within this State as far as they are applicable therein by virtue of this my Instrument of Accession

3. I ACCEPT the matters specified in the First Schedule hereto as the matters with respect to which the Federal Legislature may make laws for this State, and in this Instrument and in the said First Schedule I specify the limitations to which the power of the Federal Legislature to make laws for the State, and the exercise of the executive authority of the Federation in this State, are respectively to be subject.

Where under the First Schedule hereto the power of the Federal Legislature to make laws for this State with respect to any matter specified in that Schedule is subject to a limitation, the executive authority of the Federation shall not be exercisable in this State with respect to the matter otherwise than in accordance with and subject to that limitation.

4. The particulars to enable due effect to be given to the provisions of Sections 147 and 149 of the Act are set forth in the Second Schedule hereto.

5. Reference in this Instrument to laws of the Federal Legislature include references to Ordinances promulgated, Acts enacted and laws made by the Governor-General of India under Sections 42 to 45 of the Act inclusive

6. NOTHING in this Instrument affects the continuance of my sovereignty in and over this State or, save provided by this Instrument or by any law of the Federal Legislature made in accordance with the terms thereof, the exercise of any of my powers, authority and rights in and over this State.

7. NOTHING in this Instrument shall be construed as authorising Parliament to legislate for or exercise jurisdiction over this State or its Ruler in any respect.

PROVIDED that the accession of this State to the Federation shall not be affected by any amendment of the provisions of the Act mentioned in the Second Schedule thereto, and the references in this Instrument to the Act shall be construed as references to the Act as amended by any such amendment, but no such amendment shall, unless it is accepted by the Ruler of this State in an Instrument supplementary to this Instrument, extend the functions which, by virtue of this Instrument, are exercisable by His Majesty or any Federal authority in relation to this State.

8. The Schedules hereto annexed shall form an integral part of this Instrument.

9. This Instrument shall be binding on me as from the date on which His Majesty signifies his acceptance thereof, provided that if the Federation of India is not established before the day of Nineteen hundred and , this Instrument shall, on that day, become null and void for all purposes whatsoever.

10. I HEREBY DECLARE that I execute this Instrument for myself, my heirs and successors, and that accordingly any reference in this Instrument to me or to the Ruler of this State is to be construed as including a reference to my heirs and successors.

THIS INSTRUMENT OF ACCESSION (then follows the attestation to be drawn with all due formality appropriate to the declaration of a Ruler)

Additional Paragraphs for Insertion in Proper Cases.

A. WHEREAS I am desirous that functions in relation to the administration in this State of laws of the Federal Legislature which apply therein shall be exercised by the Ruler of this State and his officers and the terms of an agreement in that behalf have been mutually agreed between me and the Governor-General of India and are set out in the Schedule hereto:

NOW therefore I hereby declare that I accede to the Federation with the assurance that the said agreement will be executed and the said agreement when executed shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

B. The provisions contained in Part VI of the Act with respect to interference with Water Supplies, being Sections 130 to 133 thereof inclusive, are not to apply in relation to this State.

C. WHEREAS NOTICE has been given to me of His Majesty's intention to declare in signifying his acceptance of this my Instrument of Accession that the following areas

are areas to which it is expedient that the provisions of sub-sections (1) of Section 294 of the Act should apply:

NOW THEREFORE I hereby declare that this Instrument is conditional upon His Majesty making such a declaration.

APPENDIX G.

List of Schedules to the Act of 1935.

First Schedule—Composition of the Federal Legislature.
Second Schedule—Provisions of the Act of 1935 which may be amended without affecting the Accession of the State.
Third Schedule—Provisions as to Governor-General and Governors of Provinces.
Fourth Schedule—Forms of Oath or Affirmations.
Fifth Schedule—Composition of Provincial Legislatures.
Sixth Schedule—Provisions as to Franchise.
Seventh Schedule—Legislative Lists.
Eighth Schedule—The Federal Railway Authority.
Ninth Schedule—Provisions of Government of India Act continued in force with Amendments until establishment of the Federation.
Tenth Schedule—Enactments repealed.

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